

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Richard S. Salzman

In the Matter of)

DUKE POWER COMPANY)

(Perkins Nuclear Station, Units 1,
2 and 3))

) Docket Nos. STN 50-488
) 50-489
) 50-490

Mr. William G. Pfefferkorn, Winston-Salem,
North Carolina, for the intervenors,
Mary Apperson Davis et al.

Mr. J. Michael McGarry, III, Washington,
D.C., for the applicant, Duke Power
Company.

Mr. Charles A. Barth for the Nuclear Regu-
latory Commission staff.

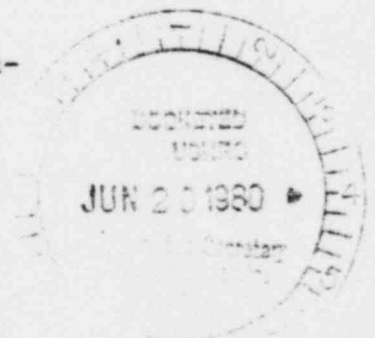
MEMORANDUM AND ORDER

June 20, 1980

(ALAB-597)

A. 1. On February 22, 1980, the Licensing Board rendered a partial initial decision in this construction permit proceeding involving the proposed Perkins nuclear facility. LBP-80-9, 11 NRC 310. That decision addressed specifically the question whether there was an alternate site for the location of the

SERVED JUN 20 1980



D502
5011

G

8006240 415

facility which was "obviously superior" to the site chosen by the applicant. On the basis of its consideration of the evidence before it, the Licensing Board expressly answered this question in the negative. Id. at 336. This ultimate conclusion rested upon, inter alia, the fruits of a comparison made by the Board between the Perkins site (situated on the Yadkin River) and an alternate site on Lake Norman in the Catawba River Basin.

Even though the partial initial decision did not authorize the issuance of a construction permit (or pave the way for the issuance of a limited work authorization),^{1/} it was nonetheless subject to immediate appeal. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Units 1 and 2), ALAB-301, 2 NRC 853, 854 (1975). We decided, however, to toll on our own initiative the running of the period prescribed by 10 CFR 2.762(a) for the filing of exceptions to the decision. Order (unpublished) of March 4, 1980. Our reason for doing so was the then pendency before the Commission of a petition for review of Rochester Gas and Electric Corp. (Sterling Power

^{1/} This was because of the other issues which still remain for Licensing Board resolution. See LBP-80-9, supra, 11 NRC at 336.

Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383 (1978). A principal issue raised by that petition was whether, in Sterling, we had properly interpreted the "obviously superior" standard previously laid down by the Commission for employment in the undertaking of alternate site analyses.^{2/} We thought that the Commission's resolution of that issue might have a bearing upon the correctness of the partial initial decision here, which (as just noted) dealt specifically with the question whether there is any alternate site "obviously superior" to that proposed for the Perkins facility.

On May 29, 1980, the Commission handed down its ruling in Sterling. CLI-80-23, 11 NRC _____. The following day, we issued an order (unpublished) in which we took recognition of that fact and directed that any exceptions to the partial initial decision in the case at bar be filed by June 23, 1980.

2. On April 15, 1980 -- almost two months after the partial initial decision had been rendered and some six weeks before the Commission acted in Sterling -- David Springer

^{2/} See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 526-30 (1977), affirmed sub nom. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).

filed a petition with the Licensing Board in which he sought for a second time^{3/} leave to intervene in this proceeding (as well as certain allied relief). On May 5, the NRC staff responded to that petition, urging its denial on the merits. It filed that response with us rather than the Licensing Board. Its justification was that the petition reflected that Mr. Springer, who assertedly owns property on the Yadkin River in the vicinity of the Perkins site, wishes to reopen the alternate site issue resolved in favor of the applicant in the partial initial decision.^{4/} According to the staff, the petition having been filed more than ten days after that decision had been rendered, the Licensing Board no longer had jurisdiction to consider it.

Without pausing to consider whether the staff was right in its belief that, in the circumstances, this Board alone could now pass on the merits of the Springer petition, we held that the response should have been filed with the Licensing Board. ALAB-591, 11 NRC ____ (May 7, 1980). That conclusion

^{3/} Mr. Springer's previous (and also untimely) intervention petition was denied by the Licensing Board. We affirmed that denial. ALAB-431, 6 NRC 460 (1977).

^{4/} More particularly, Mr. Springer appears to desire to press the Lake Norman alternative which the Licensing Board had found not to be obviously superior. See p. 2, supra.

was founded upon the settled principle that "[e]very tribunal -- whether judicial or administrative -- possesses the inherent right (indeed, the duty) to determine in the first instance the bounds of its own jurisdiction". Id. at ___ (slip opinion, pp. 2-3). Accordingly, we referred the response to the Board below for its consideration ab initio of the staff's jurisdictional assertions -- recording our assumption that, once the applicant's response to the Springer petition was also in hand, the Board would "take such action on the petition as appears to it appropriate". Id. at ___ (slip opinion, pp. 3-4).

On June 11, while the Licensing Board still had the petition under advisement, the already admitted intervenors (who participated in the hearings below)^{5/} moved before us for an extension until at least August 25, 1980 of the time within which to file their exceptions to the February partial initial decision. Their motion represented that they had filed a motion to reconsider that decision or to reopen the record on the strength of the Springer petition^{6/} and asserted that "these matters should be resolved" before exceptions must be filed.

^{5/} Mary Apperson Davis et al.

^{6/} We have ascertained that that motion had been filed with the Licensing Board on June 6, 1980.

On June 17, the Licensing Board entered an order (unpublished) in which it determined that it had jurisdiction to consider the Springer petition. It announced, however, that it nonetheless would "not proceed to rule on the merits of the petition until the Appeal Board has ruled on the question of jurisdiction".

B. As is evident from the foregoing discussion of the tangled procedural web in which this case has become enmeshed, there are two interrelated matters requiring our prompt attention. The first concerns the Licensing Board's election not to act on the merits of the Springer petition until after we had either ratified or overturned its conclusion that it has the jurisdiction to do so. The second is the intervenors' request that the time for the filing of their exceptions to the February 22 partial initial decision be extended to abide the event of the disposition of both the Springer petition and their own motion for reconsideration or to reopen which was based thereon.^{7/} We examine these matters seriatim.

1. It is apparent that the Licensing Board misapprehended our instructions to it in ALAB-591. It was our intent, of course, that the Board first come to grips with the question posed by the staff pertaining to its jurisdiction to

^{7/} Both the applicant and the staff oppose the request.

entertain the Springer petition on its merits. But we did not contemplate that, were the Board to resolve the question adversely to the staff's position, it would then decline to proceed further pending word from us as to whether that resolution was correct. Where a tribunal finds in favor of its jurisdiction to act upon a particular request for relief presented to it, it normally then goes ahead and rules upon the merits of the request without awaiting appellate confirmation that such jurisdiction in fact exists. In this instance, it was certainly not our purpose to require the Board below to depart from that normal practice.

In any event, we have decided that little useful purpose would be served by our intrusion into the jurisdictional dispute. Although we think the Licensing Board's analysis on the point to be questionable,^{8/} we are now persuaded that there

^{8/} Among other things, the Board directed its principal attention to whether it had lost jurisdiction over the entire construction permit proceeding (which it clearly has not). The real question, however, would appear to be whether, by reason of its disposition of the alternate site issue in the February 22 partial initial decision, the Board is now no longer empowered to entertain a new intervention petition which seeks to reopen that very issue. Apart from a reference to what transpired in another licensing proceeding years ago, that question was not treated in the June 17 order.

are substantial practical reasons why that Board -- and not we -- should undertake to decide (at least in the first instance) whether the Springer petition (and the intervenors' motion to reconsider or reopen) are meritorious. That Board is, of course, much more familiar than we are with the record already developed on the alternate site issue. It therefore is in a better position to pass initial judgment on whether, in the totality of circumstances, there is sufficient warrant to grant, in whole or in part, the relief which has been sought of it by Mr. Springer and the intervenors.

This being so, the best course is simply to put aside the jurisdictional question and to call upon the Licensing Board to decide the matters which have been put before it as soon as feasible.^{9/} In this connection, the Board below is

^{9/} Even if the Licensing Board incorrectly resolved the jurisdictional question (which we need not and do not decide), there is no question that we have the requisite authority (in the exercise of our conceded jurisdiction) to remand the cause to that Board with instructions to take that step.

In this regard, there is no substance to the staff's argument to us that the intervenors' June 6 motion must be deemed untimely because not filed within 10 days of the rendition of the partial initial decision. The ten day limitation contained in 10 CFR 2.771(a) -- upon which the staff relies -- is in terms applicable solely to final Commission decisions (i.e., those decisions rendered upon ultimate appellate review of initial decisions (see 10 CFR 2.770)).

not to await the expiration of the period allowed for Commission review of this order (see 10 CFR 2.786) before undertaking to discharge that assignment. Decisions and orders of this Board are immediately effective. Absent the issuance of a stay of our directives by either the Commission or this Board, a licensing board is both entitled and duty-bound to carry out those directives with suitable dispatch.^{10/}

2. In the circumstances, we find reasonable the intervenors' request that the time for the filing of exceptions to the February partial initial decision be extended. As they correctly observe, the need for (or the content of) exceptions on their part might well be influenced by the action taken below on the Springer petition and their motion to reconsider or reopen the record.^{11/}

^{10/} It should go without saying that, once it has ruled on the Springer petition and the intervenors' motion, the Board below will be free to take any further action with regard to the alternate site issue as may appear to it to be warranted by its ruling.

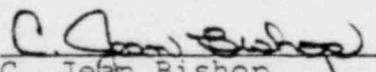
^{11/} In opposing the extension, both the applicant and the staff assert in substance that the Springer petition and the intervenors' motion below are not meritorious. Accordingly, we are told, neither pleading can serve to justify not moving forward with the appellate review of the partial initial decision at this time. As just seen, however, the Licensing Board -- rather than this Board -- will be undertaking the initial consideration of the merits of the petition and motion. In acting on the extension request, it would be obviously improper for us to attempt to forecast what result will be reached following that consideration.

Because of the present uncertainty as to when that action will be forthcoming, however, it seems desirable to refrain from now establishing another specific date for the filing of exceptions. Instead, we shall merely suspend the current deadline. At the appropriate future time, a further order will be entered which will fix the new deadline.^{12/}

The time for the filing of exceptions to the February 22, 1980 partial initial decision, LBP-80-9, 11 NRC 310, is hereby extended to await (1) Licensing Board action on the Springer petition and the intervenors' June 6, 1980 motion; and (2) further order of this Board.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Bishop
Secretary to the
Appeal Board

^{12/} We offer no assurance respecting the amount of time which that order will provide for the filing of exceptions; this likely will depend upon the disposition made by the Licensing Board of the petition and motion before it. The intervenors' counsel should, of course, already be fully familiar with the February 22 partial initial decision and have reached at least tentative conclusions respecting what portions of the decision might be the subject of exceptions (in the event that the Board below leaves it undisturbed). Our future order will also take into account the manifest desirability of achieving an early ultimate resolution of the alternate site issue. Indeed, that consideration is what has prompted the request that the Licensing Board rule expeditiously.