UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

6/26/80

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DUKE POWER COMPANY	)	Docket Nos. STN 50-488
	)	STN 50-489
(Perkins Nuclear Station	)	STN 50-490
Units 1, 2 and 3)	)	

NRC STAFF OPPOSITION TO INTERVENORS'
MOTION TO RECONSIDER OR REOPEN THE RECORD

On June 6, 1980, the Intervenors moved to reconsider the Partial Initial Decision Sites Alternative (PIDSA) issued February 22, 1980, or to re-open the record upon which the PIDSA was founded. No facts or arguments to support such a motion were advanced by Intervenors who merely incorporated by reference a late petition to intervene filed by David Springer. The NRC Staff opposes reconsideration of the PIDSA or reopening the record as the Intervenors have made no showing of legal justification pursuant to Commission regulations and decisions for so doing. At the outset, the Staff makes it clear that the Intervenors' motion should be dismissed as improper and defective upon its face. When a party seeks major administrative action, such as is sought here, something more than a one-page, one-paragraph filing which only incorporates a filing by a stranger to the proceeding is required. Intervenors must themselves conclusively make out their own case.

First, we note that where a party seeks to reopen a record, after an initial decision has been rendered, its right to do so depends on whether the matters sought to be addressed are significant, whether matters could have been presented earlier, and whether these matters might alter the result of the

proceeding. As stated in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-405, 8 NRC 9, 21-22 (1978):

> We recently have had occasion to reiterate the standards for reopening a record. Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 339 (March 7, 1978). As we there stressed, the proponent of a motion to reopen bears a heavy burden. The motion normally must be timely presented and addressed to a significant issue. Moreover, if an initial decision has already been rendered on the issue, it must appear that reopening the proceeding might alter the result in some material respect. In the case of a motion which is untimely without good cause, the movant has an even greater burden; he must demonstrate not merely that the issue is significant but, as well, that the matter is of such gravity that the public interest demands its further exploration. See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973); id., ALAB-167, 6 AEC 1151-52 (1973) . . . .

See also Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-422, 6 NRC 33, 64, n. 35 (1977).

Here these standards are not met and cannot be met. The Intervenors here seek to reopen on David Springer's allegation that the Licensing Board was misled by the NRC Staff on the position of the State of North Carolina on the possible use of a site on Lake Norman with once-through cooling in lieu of the closed cycle site on the Yadkin River for the Perkins plants. The issue involving use of a Lake Norman site with once-through cooling was directly considered by the Licensing Board. The State of North Carolina gave its position, through its Assistant Attorney General, on its staff's belief of the lack of suitability of the Lake Norman site with once-through cooling, and the acceptability of the Perkins site on the Yadkin River.

The Assistant Attorney General stated:

> Lake Norman has been raised before various state officials at various times to try to solicit v'ews. I think that it was their position without exception that the state's position on the alternative-site issue is still as it was previously on the decision that was made by the North Carolina Utilities Commission in their proceedings.
>
> And that, simply stated, was: The proposed site for the Perkins Nuclear Generating Station is considered in the public convenience and necessity and the alternative sites available most appropriate. And that was for the full panel order Utilities Commission granting certificate of public convenience and necessity, finding of fact number four.
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> * * *
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> There has been response from the staff, from the Environmental Management Commission, from the Water Quality Division of the Department of Natural Resources and Community Development, to inquiries from both the NRC staff and from the High Rock Lake Association, to the effect that in the staff's view Lake Norman is not suitable for once-through condenser cooling.
>
> So I think that that is as much of a position as the State of North Carolina can have at this time, and as much as they would have until in fact someone applies for a permit to put once-through condenser cooling on Lake Norman. And of course that has not been done. (Tr. 2956-2957, January 29, 1979.)

The NRC Staff's testimony was based on a similar opinion of the cognizant State official that thermal limitation on effluents would prevent the use of once-through cooling on any inland North Carolina waters. This prefiled Staff testimony stated (p. 8 following Tr. 3049):

> 2. The only cooling option available to the applicant at this time is closed cycle (i.e., cooling towers). This has been confirmed by staff consultation with the State of North Carolina which assures the staff that

> the State will not license once-through cooling due to its greater heat discharge into receiving State waters.1/

Assistant Attorney General William Raney of the State of North Carolina and the Intervenors were both present when this testimony was received in evidence and made no objection to its receipt. (Tr. 3032, 3049.) The Intervenors produced no evidence to dispute the validity of these representations by the NRC Staff of the position of the State of North Carolina or of the State position as presented by its Assistant Attorney General.

Based on this evidence, the Licensing Board, in its partial initial decision of February 22, 1980 on alternative sites, made the following findings:

> 39. The Staff explained its efforts in reducing the sites under consideration from 38 to 10 (Tr. 3081-82, 3238-40, 3246); . . . . The Staff maintained that the State of North Carolina's letter on which it relied to preclude present consideration of once-through cooling was consistent with EPA's current position (Tr. 3091, 3107, 3112). The Staff agreed with Applicant that a thermal study examining the interaction of various generating units on Lake Norman is needed before more plants are built. (Tr. 3108). . . .2/

1/ Letter from L. P. Benton, Chief, Environmental Operations Section, Division of Environmental Management, North Carolina Department of Natural Resources and Community Development, dated October 19, 1978 addressed to Charles A. Barth, Counsel for NRC Staff, U. S. Nuclear Regulatory Commission, Washington, D. C. 20555. (Testimony of Robert A. Gilbert and others following Tr. 3049, at p. 8 and References.) The Staff received a further letter dated November 28, 1979 from the Direc[illegible] of the Division of Environmental Management which states that [illegible] State could have a position only in regard to an actual application pending before it (for heat limitations). See page 12 of Staff filing dated May 5, 1980 which responds to David Springer's petition to intervene. The Staff hereby incorporates by reference that filing including its legal arguments.

2/ The NRC Staff analysis did not attempt to include the infinite variations and combinations of condenser cooling which could result from an exemption granted under section 316 of the FWPCA amendments of 1972 as this would only be speculation. The Staff assumed that the Perkins units, due to come on line in the late 1980's, would be required to meet the standard of "best available technology economically achievable" as set forth in § 301(b)(2)(A) of the FWPCA amendments of 1972 as further defined by EPA in 40 C.F.R. § 423.15(2)(1) and (2), i.e., not heat discharge except cold side tower or pond blowdown.

The Intervenors advanced Lake Norman as a preferred site through their own direct evidence. On the merits of the evidence of Intervenors' witness Dr. Medina, and Staff and Applicant testimony, the Licensing Board found:

> 53. Dr. Medina [Intervenors' witness] argued that the choice of a site on the Catawba River, such as Wateree or Lake Norman "E", would be far superior to the proposed site on the Yadkin. He particularly advocated locating Perkins on Lake Norman with once-through cooling. This would greatly reduce the consumptive use of water (compared with cooling towers), would eliminate the expense of cooling towers, and would reduce the terrestrial impact since no additional reservoir (such as Carter Creek) would be needed. Whether Lake Norman is adequate for an additional large generating plant in addition to those proposed is arguable. However, it is apparent that the State of North Carolina will not license once-through cooling. (State of North Carolina, Tr. 2957; Staff testimony, p. 8 following Tr. 3049. See also footnote No. 9 following paragraph 39 of the instant decision. [PIDSA.]

See also Finding 29C in the PIDSA. Thus, from an examination of the documents submitted by the NRC Staff and position of the State of North Carolina at the hearing, it is plain that the Licensing Board was not misled by the NRC Staff on the availability of once-through cooling cycle sites in the State of North Carolina, and that Lake Norman was rejected on its merits as a preferred site by the Licensing Board, just as the North Carolina Utilities Commission rejected it as a preferred site when they heard Mr. Springer's and Intervenors' same arguments.

Allegations in the Springer petition, raising issues of law, whether they concern the effects of Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976), the ability of the State or EPA to grant waivers to water quality standards, or the reach of the Clean Water Act, are issues that could have been raised before by the Intervenors in the proceeding. Similarly, the

issues of when a decision need be made of the methods to cool a plant[3/] or of the plans for other facilities on Lake Norman[4/] are matters that could have been explored during the hearing. None of these are new matters that could not have been presented before. They cannot premise a motion to reopen the hearing or to reconsider a partial initial decision. See Vermont Yankee Nuclear Power Corp., supra; Duke Power Co. (Perkin, Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462; Tennessee Valley Authority, supra, 7 NRC 343 (1978). For these reasons there is no basis to reopen the record or reconsider the PIDSA.

There is one further matter to be considered. In addition to failing to meet the threshold requirements set forth in Three Mile Island, supra, the Intervenors' motion to reconsider is not timely. 10 C.F.R. § 2.771 provides that such a motion must be filed within 10 days of the decision. Thus, Intervenors' motion which was filed approximately 106 days after the decision, and not being accompanied by a motion for leave to file out of time, is subject to dismissal. See Cincinnati Gas and Electric Co., et al. (Wm.

3/ Mr. Springer alleges that decisions on how to cool a plant need only be made four years before the plant operates. This is immaterial to the issue of when a decision on the location of a plant, which could accommodate any cooling methods then required, has to be made.

4/ Plans for possible other generating facilities on Lake Norman were particularly explored at the hearings. See Fdg. 20.

H. Zimmer Nuclear Power Station), ALAB-595 (June 9, 1980), advance sheet p. 11 and cases cited therein.[5/]

Also, we note that the Intervenors filed their motion to reconsider 106 days after entry of the PIDSA. Purely as a matter of equity and laches, there has been more than ample time for the Intervenors to have read the PIDSA issued on February 22, 1980, and to have come to a conclusion as to those matters which they assert are factual or legal errors in that decision, and to have prepared and filed their motion to reconsider or reopen in a timely manner.

5/ The Appeal Board has made it quite clear that 10 C.F.R. § 2.771, including the 10-day time requirement, applies to motions to reconsider Licensing Board decisions. In Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plants, Unit No. 2), Memorandum and Order, 4 AEC 685 (1971), the Appeal Board applied Section 2.771 and its time limitations to its own previous order, stating, "We construe 10 C.F.R. Section 2.771 to require that a petition for reconsideration must be filed within 10 days of a decision [there an Appeal Board decision]; the period of time runs from the actual date of the decision (June 14, 1971 in this case) and not from the date the decision became final . . . ." 8 AEC 687; and see Consolidated Edison Co. of N. Y. (Indian Point Station, Unit No. 2), ALAB-198, 7 AEC 475 (1978; and Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623. But see also ALAB-597 (June 20, 1980) in this proceeding for a contrary position. See also Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645 (1974), where Bechtel argued that Section 2.771 applied only to Section 2.770, i.e., that reconsideration (and its time limits) applied only to Commission review itself. The Appeal Board found otherwise, stating "in practice, however, it is established that the rule [2.771] does not preclude a party from petitioning a licensing board to reconsider its initial decision." 8 AEC at 646.

For the above reasons, the NRC Staff opposes the Intervenors' motion to reconsider the PIDSA issued on February 22, 1980 and the motion to reopen the record.

Respectfully submitted,

Charles A. Barth
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 26th day of June, 1980

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO INTERVENORS' MOTION TO RECONSIDER OR REOPEN THE RECORD" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 26th day of June, 1980.

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