



UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL PANEL
WASHINGTON, D.C. 20555

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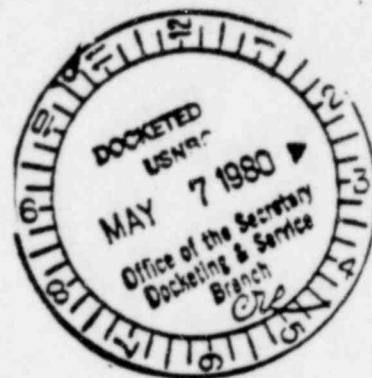
May 2, 1980

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MEMORANDUM FOR: Leonard Bickwit
General Counsel

FROM: *ASR* Alan S. Rosenthal, Chairman
Atomic Safety and Licensing
Appeal Panel

SUBJECT: ALAB-590 (ALLENS CREEK)



On April 22, 1980, an Appeal Board issued a decision (ALAB-590) on the appeal taken by F. H. Potthoff, III, from the denial by the Licensing Board of his petition to intervene in the construction permit proceeding involving the proposed Allens Creek facility. The ultimate issue on the appeal was whether, as framed, Mr. Potthoff's sixth contention should have been accepted by the Licensing Board as litigable. Resolution of this issue involved, in turn, the application of 10 CFR 2.714(b), which requires that a petitioner for intervention set forth the bases for each of his contentions "with reasonable specificity".

For the reasons set forth in our respective opinions, both Mr. Farrar and I determined that the requirements of Section 2.714(b) had been satisfied and that Mr. Potthoff's intervention petition should have been granted on the strength of the contention in question. On the other hand, for the reasons discussed in his dissenting opinion, Dr. Buck concluded that the contention was not entitled to admission to the proceeding and, consequently, the Licensing Board correctly had denied the intervention petition.

ALAB-590 was served by mail on the date of its issuance and, therefore, any petition for review of it must be filed on or before May 12, 1980. See 10 CFR 2.786(b)(1), 2.710. Whether either the applicant or the NRC staff (both of which had urged affirmance of the denial of the petition) will seek Commission review remains to be seen. In the event that they do not, the Commission can, of course, nonetheless elect to review ALAB-590 on its own motion. 10 CFR 2.786(a).

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At the conclusion of his dissenting opinion, Dr. Buck took note of the possibility of Commission review and, at least by implication, suggested that it was warranted. He has now asked that I transmit to the Commission, through your office, his formal request that such review be undertaken. While recognizing the unusual nature of a request of this kind on the part of an Appeal Board member, he believes that there exist here sufficiently extraordinary circumstances to justify it. Most particularly, as he sees it:

The decision of the Appeal Board majority is not only in error but also, because of its likely substantial precedential effect, can be expected to have a significant and intolerable impact upon the conduct of future licensing proceedings. Beyond that, the majority decision is not simply a reaffirmation and application of principles which had been laid down in prior appeal board decisions. Rather, as indicated in the dissenting opinion, ALAB-590 effects a marked extension of the holdings in those decisions. Whether or not these views were ultimately to prevail, there is every reason why the Commission itself should undertake to address the controversy on the ground that it involves an important question of law within the meaning of 10 CFR 2.786(b)(1).

It would be both presumptuous and inappropriate for the members of the Appeal Board majority to take a position regarding whether their decision should be further reviewed by the Commission. In response to the foregoing, I confine myself to noting that, although a proper reading of Section 2.714(b) undeniably is of considerable present and future importance, I do not subscribe to Dr. Buck's thinking respecting the merits of what was held in ALAB-590. In this connection, I adhere to the view that ALAB-590 does no more than to reaffirm a well-settled and sensible interpretation of Section 2.714(b) (which dates back to at least 1973). To this point, that interpretation seemingly has not, in practice, had mischievous consequences and I perceive no cause to think that it will in the future.

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I will appreciate it if copies of this memorandum are furnished to the Commission in connection with the transmission of the OGC's own recommendation respecting further review. A copy of it is being sent to the Docketing and Service Branch with the request that it be served on the parties to the proceeding and incorporated in the docket.*

* Mr. Farrar is content to rest upon what was said in ALAB-590, and thus his views are not necessarily reflected in this memorandum.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)

HOUSTON LIGHTING AND POWER)
COMPANY)

Docket No.(s) 50-466

(Allens Creek Nuclear Generating)
Station, Unit No. 1))
)
)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this

7th day of May 1970.

Samuel T. Downing
Office of the Secretary of the Commission