

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL 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 RESPONSE IN OPPOSITION TO NOTICE OF  
APPEAL AND BRIEF FILED BY DAVID SPRINGER

Charles A. Barth  
Counsel for NRC Staff

September 24, 1980

8009260251

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction . . . . .	1
II. Background and Statement of the Case . . . . .	1
III. Issue Presented . . . . .	7
IV. Argument . . . . .	8
V. Conclusion . . . . .	16
Appendix A - Applicable Chronology . . . . .	18

TABLE OF CITATIONS

<u>CASES</u>	<u>Page</u>
<u>Appalachian Power Company v. Train</u> , 545 F.2d 1351 (4th Cir., July 12, 1976) . . . . .	4, 7
 <u>NRC CASES</u>	
<u>Duke Power Company</u> (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431 and 433, 6 NRC 460 and 469 (1977) . . . . .	16
<u>Kansas City Gas and Electric Company</u> (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320 (1978) . . . . .	13
<u>Metropolitan Edison Company</u> (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612 (1977) . . . . .	8, 13
<u>Nuclear Fuel Services, Inc.</u> (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975) . . . . .	8
<u>Public Service Co. of New Hampshire</u> (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977) . . . . .	14
<u>Vermont Yankee Nuclear Power Corp.</u> (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1973) . . . . .	13, 14
 <u>STATUTES</u>	
Atomic Energy Act of 1954, 42 U.S.C. § 2201, <u>et seq.</u> . . . . .	1
Energy Reorganization Act of 1974, 42 U.S.C. § 5801, <u>et seq.</u> . . . . .	1
National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 . . . . .	2
 <u>REGULATIONS</u>	
10 C.F.R. § 2.714 . . . . .	2
10 C.F.R. § 2.714(a) . . . . .	8, 9
10 C.F.R. § 2.714(a)(1) . . . . .	7
10 C.F.R. § 2.714(a)(1)(i) . . . . .	9

TABLE OF CITATIONS (Cont.)

<u>REGULATIONS (Cont.)</u>	<u>Page</u>
10 C.F.R. § 2.714(a)(1)(ii) . . . . .	10
10 C.F.R. § 2.714(a)(1)(iv) . . . . .	10
10 C.F.R. § 2.714(a)(2)(v) . . . . .	13
10 C.F.R. § 2.715 . . . . .	2
10 C.F.R. § 2.730(c) . . . . .	13
 <u>EPA REGULATIONS</u>	
40 C.F.R. § 423.13(i) . . . . .	7
40 C.F.R. § 423.15(1) . . . . .	7
 <u>FEDERAL REGISTER</u>	
39 Fed. Reg. 26470 (July 9, 1974) . . . . .	2
39 Fed. Reg. 27339 (July 26, 1974) . . . . .	2
39 Fed. Reg. 27934 (August 2, 1974) . . . . .	2
39 Fed. Reg. 28662 (August 9, 1974) . . . . .	2

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

9/24/80

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF RESPONSE IN OPPOSITION TO NOTICE OF APPEAL  
AND BRIEF FILED BY DAVID SPRINGER

I. INTRODUCTION

On September 2, 1980, David Springer filed an appeal from an August 14, 1980 Licensing Board Order which denied his untimely petition to intervene in this construction permit proceeding. The NRC Staff opposes Mr. Springer's exceptions on appeal and urges this Board to affirm the Licensing Board's decision below.

II. BACKGROUND AND STATEMENT OF THE CASE

On May 24, 1974, pursuant to Section 103 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 et seq.), the Atomic Energy Commission<sup>1/</sup>

<sup>1/</sup> In accordance with the Energy Reorganization Act of 1974, 88 Stat. 1233, the Atomic Energy Commission has been reorganized and its regulatory responsibilities have been assumed by the Nuclear Regulatory Commission as of January 19, 1975. References herein to the Commission shall be interpreted to mean Atomic Energy Commission for events dated or occurring on or after January 19, 1975.

(Commission) docketed the application and Preliminary Safety Analysis Report (PSAR) and on July 8, 1974, docketed the Environmental Report (ER) of Duke Power Company (Applicant) to construct and operate six pressurized water reactors at sites designated as Cherokee Nuclear Station and Perkins Nuclear Station.

Notice of Receipt of Application was published in the Federal Register on July 26, 1974 (39 Fed. Reg. 27339), August 2, 1974 (39 Fed. Reg. 27934), and August 9, 1974 (39 Fed. Reg. 28652). On July 19, 1974, the Commission published a Notice of Hearing on Application for Construction Permits (39 Fed. Reg. 26470) with respect to the Application filed by the Applicant on May 24, 1974. The Notice of Hearing set forth the requirements pursuant to the Atomic Energy Act and the National Environmental Policy Act of 1969, as amended (42 U.S.C. § 4321 et seq.), (NEPA), to be met prior to the issuance of construction permits. The Notice also provided that any person whose interest might be affected by the proceeding could file a petition for leave to intervene in accordance with the requirements of 10 C.F.R. § 2.714 not later than August 19, 1974, and also further notified interested persons that they may file requests for limited appearances pursuant to the provisions of 10 C.F.R. § 2.715.

At a prehearing conference in Raleigh, North Carolina held on Monday, April 5, 1976, David Springer, a stranger to the proceeding, informed the Licensing Board that adjudication of the right to withdraw water from the Yadkin River (the source of condenser cooling water for the proposed facility) was beyond

the purview of the proceeding (Tr. 75, lines 19-23). At the evidentiary hearing on environmental matters, David Springer made a limited appearance and again raised the issue of water use (Tr. 163, April 26, 1976). At a further evidentiary hearing on environmental matters, David Springer appeared as a witness for the intervenors and testified on water rights in North Carolina and that the NRC had no jurisdiction to issue construction permits for commercial nuclear power reactors (pp. 8 and 12-14, written testimony following Tr. 1305, May 6, 1976). On July 26, 1976, David Springer filed a Petition to Intervene and a Motion to Dismiss for Lack of Jurisdiction. Mr. Springer alleged that the NRC lacked jurisdiction to issue construction permits for commercial nuclear power reactors and lacked jurisdiction to allocate North Carolina waters. The Licensing Board's Order of July 15, 1977 denied the Petition and Motion and no appeal was taken therefrom. The Licensing Board held a hearing in Mocksville, North Carolina on April 28 and 29, 1977 to permit the State of North Carolina to present evidence on need for the facility and use of water from the Yadkin River, to take evidence on certain Licensing Board questions; and to take evidence on the health effects of the coal fuel cycle. David Springer filed a Petition to Intervene dated April 22, 1977 which was not served upon the Licensing Board or parties prior to commencement of the hearing in Mocksville, North Carolina. The Licensing Board permitted Mr. Springer to present evidence and to cross-examine witnesses pending a ruling on his petition to intervene (Tr. 1494). On May 5, 1977, David Springer filed an Affidavit of Basis for the contentions alleged in his Petition dated April 22, 1977. On July 15, 1977 the

Licensing Board denied the petition to intervene dated April 22, 1977 and also denied his earlier petition to intervene dated May 6, 1976. Mr. Springer appealed this denial of Intervention.

The Notice of Appeal and its supporting Brief, construed together, allege that Appalachian Power Company v. Train, 454 F.2d 1351 (4th Cir., 1976) and the President's Message to Congress of April 20, 1977, urging energy conservation as the keystone of national policy, are new matters (Springer Petition dated April 22, 1977, paragraph numbers 3 and 6) which could not have previously been alleged, and that they require additional consideration of conservation of energy and consideration of moving the Perkins facility to Lake Norman, utilizing once-through condenser cooling. On September 8, 1977, the Appeal Board (ALAB-431, 16 NRC 469) affirmed the denial of intervention status to David Springer. In that petition to intervene, David Springer urged the use of once-through condenser cooling for the Perkins facility and urged that it be located upon Lake Norman. This is substantially the same argument Mr. Springer makes in his fourth petition to intervene, filed April 15, 1980, which is the subject of this appeal.

At the April 28, 1977 hearing in this proceeding, the State of North Carolina introduced the Order Granting Certificate of Public Convenience and Necessity (Certificate) for the Perkins facility (State Exhibit 1). The State discussed the background of the Certificate at the hearing (Tr. 1439 et seq.). Extensive state hearings were held on need for power in the state and the proper type

of plant to be built pursuant to a special state law (NCPUC Docket E-100, Sub. 22). On February 16, 1977, the State issued its Analysis and Future Plan in NCPUC Docket E-100, Sub. 22, and subsequent thereto the NCPUC concluded its hearings on Duke Power Company's request for a Certificate of Convenience and Necessity for the Perkins facility. At these state hearings on the Certificate, David Springer appeared and presented evidence and argument for moving the proposed Perkins facility to Lake Norman and requiring once-through-cooling. The NCPUC found, premised upon the special study of future state power needs and how to best fulfill them, and premised upon the hearing held upon Duke Power Company's request for a Certificate of Convenience and Necessity, inter alia:

4. That the proposed site for the Perkins Nuclear Generating Station is, considering the public convenience and necessity and the alternative sites available, the most appropriate.
5. That the proposed Perkins Nuclear Station is, considering the public convenience and necessity and the alternative types of generation available, the most appropriate, and the Commission approves the estimated construction cost of \$3,343,388,000 and finds that such construction will be consistent with the Commission's plan for the expansion of electric generating capacity.
6. That the proposed cooling facilities at the Perkins Nuclear Station are, considering the public convenience and necessity, the most appropriate.
7. That the proposed Perkins Nuclear Generating Station is in view of the economic and social needs and the public convenience and necessity, the most appropriate.
8. That the proposed Perkins Nuclear Generating Station is, considering the public convenience and necessity and the total environmental impact, the most appropriate. (State Ex. 1, p. 6, Tr. 1455)

The State, when it issued its Certificate of Convenience and Necessity, partly set forth immediately above, had before it David Springer's evidence and arguments for a once-through cooling plant to be located at Lake Norman and rejected his arguments totally (see para. 4 of Certificate of Convenience and Necessity set forth above). Although State findings are not dispositive upon NRC, they are entitled to considerable weight. The NCPUC conclusions were reached only after permitting David Springer to present his case before the Commission.

The North Carolina Environmental Management Commission (NCEMC) held extensive public hearings on whether to declare the Yadkin River Basin a capacity use area. At the NRC hearings held April 28, 1977, the State introduced the Resolution of its Environmental Management Commission regarding the Yadkin River (State Ex. 2 fol. Tr. 1456) and the accompanying State hearing record. On pages 10 and 14 of the State hearing record (October 27, 1976), David Springer presented his evidence and arguments for moving the Perkins facility to Lake Norman utilizing once-through cooling and failed to get the NCEMC to agree with him.

In the instant proceeding, although not a party or counsel for a party, Mr. Springer was again permitted to present arguments for moving the Perkins facility to Lake Norman with once-through cooling (Tr. 1444, April 28, 1977), and to cross-examine witnesses at the hearing session where the State presented its evidence on water use (Tr. 1493).

On April 15, 1980, David Springer filed his fourth petition to intervene (petition) again urging moving Perkins from the Yadkin River to Lake Norman. Mr. Springer's stated reasons for intervening now are basically that the NRC Staff misrepresented the North Carolina position on once-through condenser cooling to the Licensing Board, that the Licensing Board is not informed as to the State's position on water use for condenser cooling, and that Lake Norman is a preferred site. Mr. Springer's petition also reiterated his previous Appalachian Power argument, i.e., that Appalachian permits once-through cooling at Lake Norman.<sup>2/</sup> The petition did not address the Commission's requirements for late filed petitions to intervene (10 C.F.R. § 2.714(a)(1)).

The Licensing Board considered Mr. Springer's petition of April 15, 1980, his Affidavit dated May 21, 1980, and two filings dated May 12 and 23, 1980 and, on August 14, 1980, issued its Order (L.B. Order) denying this fourth petition to intervene by Mr. Springer.

### III. ISSUE PRESENTED

Whether the Licensing Board below correctly denied an intervention petition which was extremely late and which did not comply in form or substance to the Commission's rules.

<sup>2/</sup> In his petition to intervene of April 22, 1977 (denied by the Licensing and Appeal Boards) his rationale was that Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. July 12, 1976) changed the EPA requirements on heat discharge. However, that decision did not disturb 40 C.F.R. § 423.13(i) and 423.15(1) which then and now required cold side tower flow down heat discharge only.

#### IV. ARGUMENT

Under the Commission's Rules of Practice, an untimely intervention petition such as Mr. Springer's, now some 5-1/2 years late, may not be entertained in the absence of a determination by the Licensing Board "that the petitioner has made a substantial showing of good cause for failure to file on time." 10 C.F.R. 2.714(a) and consideration of the five factors enumerated immediately thereafter. It is settled that the "good cause" determination is to be made on the basis of a consideration of both (1) the substantiality of the justification offered for the late filing and (2) the four factors specifically enumerated in Section 2.714(a).<sup>3/</sup> See e.g. Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612, 615 (1977). Further, in circumstances where no good excuse is tendered for the tardiness, the petitioner's demonstration on the other factors must be particularly strong. Ibid.

3/ Those factors are:

- (1) The availability of other means whereby the petitioner's interest will be protected.
- (2) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (3) The extent to which petitioner's interest will be represented by existing parties.
- (4) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The April 15, 1980 Petition and supporting documents of Mr. Springer completely fails to address the good cause requirement of 10 C.F.R. § 2.714(a) or the other factors set forth therein. The Commission's regulations regarding late petitions are quite clear. David Springer is an attorney experienced with NRC requirements, and his failure to comply with 10 C.F.R. § 2.714(a), and to address the factors required to be considered in evaluating late petitions to intervene should be grounds summarily to dismiss his fourth petition to intervene. Mr. Springer's petition was correctly denied by the Licensing Board and the denial should be upheld on this appeal.

The Licensing Board (LB Order pages 6 and 7) notes David Springer's failure to address the requirements of 10 C.F.R. § 2.714(a), but does not itself address those requirements.<sup>4/</sup>

10 C.F.R. § 2.714(a)(1)(i) provides for consideration of "good cause" for late filing of a petition to intervene. Here, David Springer does not address the good cause requirement. The Staff's review of his petition and all other papers filed by him fails to make out any good cause argument. Some newly discovered evidence or altered circumstances which could substantially effect the result could constitute good cause. Here there are no changed circumstances and no newly discovered evidence which could change the partial initial decision. David Springer alleges, essentially, that the position of the State of North Carolina on water use was not known to the

<sup>4/</sup> Under the circumstances, there would not appear to be a need to address the requirements of 10 C.F.R. § 2.714(a). However, in an abundance of excess caution, the Staff will briefly address those requirements.

Licensing Board. However, the record (Tr. 2956-57) and the Licensing Board's order of August 14, 1980, page 8, make it quite clear that the State of North Carolina itself presented its position on use of water for condenser cooling to the Licensing Board at the evidentiary hearings. Nothing in the record, and no paper filed at any time by David Springer, indicates any change in the North Carolina State position. Although not dispositive, but certainly of influence, is the fact that the state has received the partial initial decision on alternative sites and copies of Mr. Springer's papers, yet has not appealed or otherwise noted or called to the attention of the Licensing or Appeal Boards or to the NRC Staff any misconception of the State's position. Surely if the PID misstated the State position the State would have noted and called attention to the misconception. Although here silence is not consent, it nevertheless is very significant. It is the Staff's view that no "good cause" argument has been advanced by Mr. Springer.

10 C.F.R. § 2.714(a)(1)(ii) and (iv) require consideration of the availability of other means whereby Mr. Springer's interests will be protected and the extent to which Mr. Springer's interest will be represented by existing parties. To begin with, the present participants in the proceeding include Mary Apperson Davis and the Yadkin River Committee. That committee, of which Ms. Davis is chairman, is comprised of, inter alia, landowners near or adjacent to the Yadkins River (Ms. Davis herself owns riparian property downstream from the Perkins site as does Mr. Springer). Its concern, in common with that of the present petitioner, Mr. Springer, embraces the effect that water withdrawal from the Yadkin would have upon the riparian

rights of committee members and other similarly situated persons. That concern manifested itself in extensive cross-examination by counsel for Ms. Davis and the committee of the applicant's witnesses during evidentiary hearings in April 1976. See Tr. 526-84; 893-997.

Thus, David Springer does not seek to advance an interest totally foreign to those which have already been asserted by existing parties to the proceeding. It nonetheless may be that because Ms. Davis and the Yadkins River Committee did not advance and press the precise contentions that his belated petition would raise, Mr. Springer's interests in precluding water withdrawal from the river have not been fully represented by them. The Staff will further assume, for purposes of this argument, that petitioner was not able to protect those interests adequately through his participation in the hearings last Fall before the North Carolina Environmental Management Commission--in which he presented evidence with regard to the Lake Norman once-through cooling alternative.

But thereby according him the benefit of the doubt on the first and third factors does not aid Mr. Springer's overall position. For the second and fourth factors manifestly cut against allowing him to intervene at this late date.

The Licensing Board concluded, in its Order dated July 15, 1977 relating to Mr. Springer's petitions to intervene dated May 6, 1976 and April 22, 1977 advocating Lake Norman as a site superior to Perkins on the Yadkin River,

That Mr. Springer, who is a lawyer by profession, had made no showing that he possesses "any expertise or information that would be of help in developing the record" (Order at 11). The Appeal Board's independent examination of the record gives it no cause to quarrel with that appraisal. Nor did Mr. Springer provide such cause in his appellate brief at that time which simply made note of the fact that he is a lawyer with expertise in discovery and cross-examination of witnesses. The record, including the various papers filed by Mr. Springer, is devoid of any information which would lead to the conclusion that Mr. Springer has gained expertise in the intervening three years which would assist this proceeding.

Indeed, a consideration of this factor alone precludes granting the petition to intervene. On April 28, 1977 in Mocksville Mr. Springer, pro se, appeared at a session of the evidentiary hearings, presented his arguments for the Lake Norman site, was present when the Assistant Attorney General of North Carolina informed the Licensing Board as to the state's position on water use and was permitted to cross-examine (Tr. pp. 1421-1504). At further hearings held specifically on alternative sites (January and February 1979) Mr. Springer appeared as counsel for the Intervenors who put on two witnesses who advocated Lake Norman as a preferred site. The record is devoid of any indication that Mr. Springer has anything more to offer in September 1980 than he offered in 1977 and 1979. The Licensing Board has already had the benefit of Mr. Springer's participation.

The fifth factor (10 C.F.R. 2.714(a)(2)(v)) requires consideration of the extent to which Mr. Springer's participation would broaden the issues or delay the proceeding. Mr. Springer's petition argues not only that he be permitted to intervene, and thereby be a party to the proceeding, but that the record be reopened for receipt of further evidence. In January and February 1979 extensive hearings were held on alternative sites (Tr. pp. 2820-3758). The Licensing Board then issued its partial initial decision on alternative sites on February 22, 1980. Only parties may move to reopen the record (10 C.F.R. § 2.730(c), ((2.771 for reconsideration)), and Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station, ALAB-124, 6 AEC 358, 363 (1973)). David Springer is now not a party to this proceeding and has no standing to move to reopen the record or move for the Licensing Board to reconsider its partial initial decision. Therefore, this aspect of his petition is improper at this time. However, passing over Mr. Springer's lack of standing for the moment to move to reopen or reconsider after an initial decision has been rendered, a party's 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-486, 8 NRC 9, 21-22 (1978):

We recently have had occasion to reiterate the standards for reopening a record. Kansas City 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 cannot be met. The petition here seeks to reopen on the ground 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. See Petition, paras. 5 and 6. The substance of Mr. Springer's argument is that the Licensing Board was not informed as to the position of North Carolina on water use for condenser cooling and that the Licensing Board's lack of information resulted from NRC Staff misrepresenting to the Licensing Board the position of the state, petition paragraph 6, petition affidavit paragraph 3, petition brief paragraphs A1.(b), notice of appeal paragraph C, and appeal brief last paragraph page 4. It is possible to understand that David Springer does not want the Perkins facility built on the Yadkin River upstream of his property. However, it is not possible to understand Mr. Springer's repeated allegations of Licensing Board ignorance due to NRC Staff misrepresentation when the State itself presented its position on condenser cooling and water use. Mr. Springer's allegation is without citation to facts, the evidence, or to the record

itself. It is not even supported by affidavit beyond Mr. Springer's self serviced declaration. As we have emphasized, the State of North Carolina by and through William Raney, Esq., Assistant Attorney General, was present at the January-February 1979 hearings, and present on Tuesday, January 30, 1979, when the NRC Staff testimony was received as evidence (Tr. 3049). Assistant Attorney General Raney had seen the Staff evidence and made no objection to its admission (Tr. 3032). The State in its opening remarks reflected the opinion of the Staff of the State Department of Natural Resources and Community Development that Lake Norman was not a suitable site with once-through cooling (Tr. 2955-2957). In these opening remarks Mr. Raney at the invitation of the Chairman set forth fully the state's position on water use. The Licensing Board's Order of August 14, 1980 states, inter alia,

The Board was fully aware from the statement of the Assistant Attorney General, William A. Ramey, Jr., Esq., at the hearing that there would not be an "official" position of the State of North Carolina until an application was filed for once-through cooling on Lake Norman (Tr. 2956-2957). He further stated that the North Carolina Utilities Commission granted a certificate of convenience and necessity for the Perkins' site. He also stated that it was the opinion of the staffs of the Environmental Management Commission and the Water Quality Division of the Department of Natural Resources and Community Development that Lake Norman is not suitable for once-through condenser cooling.

We were, therefore, well aware that until there is an application for a permit to construct once-through cooling on Lake Norman, there will be no "official" State position but we did have before us the best evidence available reflecting the determination of North Carolina Utilities Commission and the opinion of the staffs of the relevant agencies. We based our decision on the only information available, furnished by a credible source. We were not misled into believing an "official" position existed on the part of the State of North Carolina. (Order, page 8).

Mr. Springer was present with counsel for the Intervenors when the Assistant Attorney General set forth the State's position and was present when the Staff introduced its evidence. At these hearings no allegation of misstatements by the NRC Staff witnesses was made--nor was any such allegation made in any proposed findings by the Intervenors or by any person.

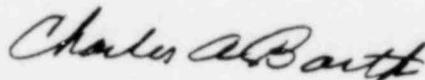
Having the benefit of Mr. Springer's April 15, 1980 petition and supporting papers which set out his arguments, the Licensing Board found no new circumstance which would warrant reopening the record. It is intuitively clear that: (1) the State of North Carolina itself presented its own position on water use, (2) the Licensing Board was cognizant of that position and not misled, and (3) granting Mr. Springer's fourth petition to intervene and reopening the record would substantially broaden the issue, delay the proceeding, and cause no different conclusion to be reached. Thus an evaluation of 10 C.F.R. § 2.714(a)(1)(v) requires denying the petition to intervene. In addition, an examination of the record and the Licensing Board's Order of August 14, 1980 makes it clear that upon the merits there is no substance at all to Mr. Springer's arguments.<sup>5/</sup>

<sup>5/</sup> In light of the Appeal Board's directive to the Licensing Board in Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-597, 11 NRC 870 (1980) to decide in the first instance "whether the Springer petition . . . [is] meritorious" (*id.* at 874), and the Appeal Board's further conclusion that it had "the requisite authority (in the exercise of [its] conceded jurisdiction) to remand the cause to that Board with instructions to take that step" (*ibid.*), the Staff has not addressed the Licensing Board's finding that it lacked jurisdiction in this matter. L.B. Order at 5. Mr. Springer did not raise the question of jurisdiction in his present appeal.

V. CONCLUSION

For all of the above reasons and arguments, the Staff recommends that the Licensing Board's Order Relative To The Petition of David Springer and Intervenor's [sic] Motion of June 6, 1980, insofar as it relates to intervention by David Springer, be affirmed and that the petition to intervene be denied.

Respectfully submitted,



Charles A. Barth  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 24th day of September , 1980

APPENDIX A

Applicable Chronology

May 3, 1974	Duke Power Company filed an application with the North Carolina Public Utilities Commission for a Certificate of Convenience and Necessity (certificate) for the proposed Perkins facility.
May 24, 1974	Duke Power Company filed its application with AEC for the proposed Cherokee-Perkins stations.
July 19, 1974	AEC Notice of Hearing published in Federal Register
August 19, 1974	Deadline for filing Petitions to Intervene
September 17, 1975	David Springer intervened in NCPUC certificate proceeding
October 20, 1975	North Carolina Public Utility Commission (NCPUC) issued Order for Hearing on special study of need for power pursuant to N.C.G.S. 62-110.1
November 21, 1975	Licensing Board Order admitting intervenors and a contention on energy conservation
January 19, 1976	David Springer presented his evidence at the NCPUC certificate proceedings
October 27, 1976	David Springer presented his evidence at the NC Environmental Management Commission hearings
April 5, 1976	David Springer appeared at prehearing conference and raised water use issue
April 26, 1976	David Springer made a limited appearance at the environmental hearings and raised water use issue
May 6, 1976	David Springer testified for intervenors on the water use issue and filed a Petition to Intervene
July 26, 1976	David Springer filed Petition to Intervene: (1) NRC lacks jurisdiction to issue construction permits and (2) NRC cannot adjudicate title to North Carolina water

January 13, 1977 North Carolina Environmental Management Commission issued its Resolution declining to declare the Yadkin River Basin a capacity use area - David Springer presented his evidence in that proceeding

April 22, 1977 David Springer filed a Petition to Intervene alleging need to reconsider energy conservation and to consider moving the Perkins facility to Lake Norman utilizing once-through cooling

April 28 & 29, 1977 Evidentiary hearings in Mocksville, North Carolina. David Springer permitted to participate and present his argument on water use and once-through-cooling, arguing for Lake Norman as a preferred site. Also present when the North Carolina Assistant Attorney General presented the State's position on once-through cooling. Tr. 1439.

May 5, 1977 David Springer filed a Brief in Support of his Petition dated April 22, 1977

July 15, 1977 Licensing Board issued Order denying David Springer's Petitions to Intervene dated May 6, 1976 and April 22, 1977

July 26, 1977 David Springer moved to dismiss the construction permit proceedings

July 30, 1977 David Springer filed a Notice of Appeal

September 6, 1977 Licensing Board denied David Springer's July 26, 1977 motion to dismiss the proceedings (ALAB-431)

September 8, 1977 Appeal Board affirmed (ALAB-431) the July 15, 1977 Licensing Board Order denying David Springer's petition to intervene

September 16, 1977 Appeal Board affirmed (ALAB-433) the Licensing Board's Order of September 6, 1977 declining to dismiss the proceeding

January 29, 1979 David Springer appeared as counsel for intervenors at the evidentiary hearing on alternative sites (Tr. 2823)

April 15, 1980 David Springer filed a fourth petition to intervene alleging the NRC Staff misrepresented the NC position on water use and an inadequate record on alternative sites

August 14, 1980 Licensing Board denied David Springer's April 15, 1980 petition to intervene

November 2 [sic], 1980 David Springer filed a Notice of Appeal and Brief  
from the August 14, 1980 Licensing Board order

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO NOTICE OF APPEAL AND BRIEF FILED BY DAVID SPRINGER" 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 24th day of September, 1980:

Alan S. Rosenthal, Esq., Chairman\*  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dr. John H. Buck \*  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mr. Thomas S. Moore \*  
Atomic Safety and Licensing  
Appeal Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Elizabeth S. Bowers, Esq., Chairman\*  
Atomic Safety and Licensing  
Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dr. Donald P. deSylva  
Associate Professor of Marine  
Science  
Rosenstiel School of Marine  
and Atmospheric Science  
University of Miami  
Miami, Florida 33149

Dr. Walter H. Jordan  
881 W. Outer Drive  
Oak Ridge, Tennessee 37830

J. Michael McGarry, III, Esq.  
Debevoise and Liberman  
1200 Seventeenth Street, N.W.  
Washington, DC 20036

William A. Raney, Jr., Esq.  
Special Deputy Attorney General  
P. O. Box 629  
Raleigh, North Carolina 27602

William L. Porter, Esq.  
Associate General Counsel  
Duke Power Company  
422 South Church Street  
Charlotte, North Carolina 28242

Mrs. Mary Davis  
Route 4, Box 261  
Mocksville, North Carolina 27028

William G. Pfefferkorn, Esq.  
P. O. Box 43  
Winston-Salem, North Carolina 27102

Quinten Lawson, Esq.  
Federal Energy Regulatory Commission  
Room F611  
885 North Capitol, N.E.  
Washington, D.C. 20426

Mr. David Springer  
The Point Farms  
Route 4  
Mocksville, North Carolina 27028

Atomic Safety and Licensing  
Board Panel\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Atomic Safety and Licensing  
Appeal Board\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Docketing and Service Section\*  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

  
Charles A. Barth  
Counsel for NRC Staff