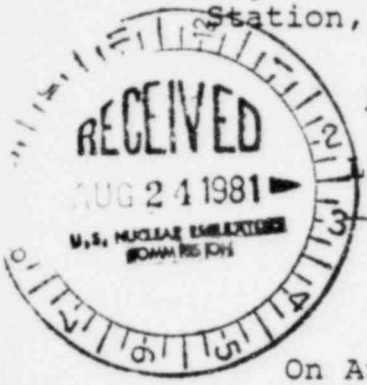
Date: August 21, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of:

SOUTH CAROLINA ELECTRIC & GAS COMPANY, et al.	)	Docket No. 50-395-OL
(Virgil C. Summer Nuclear Station, Unit 1)	)	



APPLICANTS' RESPONSE TO STAFF MOTION FOR DIRECTED CERTIFICATION OF LICENSING BOARD ACTION REGARDING RETENTION OF INDEPENDENT CONSULTANTS

I. Introduction

On August 7, 1981, the NRC Staff filed its motion for directed certification of the Licensing Board's action in seeking to retain independent consultants to report to the Licensing Board and act as its witnesses on certain seismic matters raised by the Licensing Board. On August 10, 1981, the Appeal Board issued a Memorandum requesting the Licensing Board to provide a full explanation of the reasons why that Board believed it necessary to invoke the assistance of independent consultant/witnesses on the seismic issues in this proceeding.

On August 13, 1981, the Licensing Board issued its memorandum responding to the Appeal Board memorandum of August 10, 1981. Essentially, the Board stated that its position had been fully discussed on the record at the July 17, 1981 session of the hearings and it was memorialized at transcript pages 3790-3817. The Licensing Board referred those pages to the

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Appeal Board as the requested full explanation; the Licensing Board noted that its discussion on those pages is "as complete as we feel proper taking into account the intermediate stage of the proceeding and the Board's obligation to maintain a position of impartiality and objectivity." The Board also referred the Appeal Board to certain transcript pages concerning Applicant and Staff testimony on seismic issues.

The Licensing Board went on to point out that whatever inadequacies the Board may have seen in the evidence at this stage of the proceeding related to the Staff's review as disclosed by the testimony, a matter which, in the Licensing Board's words, "does not lend itself to correction merely by further Staff testimony." Continuing, the Licensing Board reported that the choices it faced at that point were

1. To close the record on the evidence already received,
2. To schedule a further hearing involving only the witnesses previously heard, or
3. To attempt to arrange for independent consultants and further hearings with all deliberate speed.

As to the first alternative, the inference is that such record would not be fully adequate to support a decision, or even that it would fall short of supporting one or more findings the Board is called upon to make. That inference is difficult to square with 10 C.F.R. §2.760a, however, and our view of the

evidence is, of course, that it is adequate. Faced with a choice between a record which will satisfy the Board and a record which the Board perceives as inadequate (and thus may lead to an adverse decision), however, we obviously prefer the fuller record and the improved prospects for a favorable decision.

As to the second alternative, the Board pointed out that it could already foresee that further testimony by the witnesses already heard would still leave the record inadequate, necessitating a further delay at that later point to retain independent consultants. This is consistent with the Board's disatisfaction with the Staff review and the assumptions that (1) the reviews already performed have been communicated to and understood by the Board and (2) no additional reviews are conducted. Finally, the Board explained that the ACRS consultants were not being compelled to testify by subpoena or threat of subpoena, nor were they being asked to testify in their role as ACRS consultants.[1/] While we have some difficulty understanding why these individuals were selected if not because of their role as ACRS consultants, we must, at this stage, take this as given.

1/ This represents our interpretation of the Board's words "nor are they being asked to testify because of any input into ACRS recommendations."

Another observation by the Licensing Board was that the ACRS consultants were "being retained as additional independent experts on a voluntary basis to offer further critical analyses on the seismology issues." (emphasis added). Finally, as to the ACRS consultants, the Board indicated that their testimony would be given no greater weight than any other expert testimony by virtue of their having been retained by the Board.

Finally, the Board explained (1) that prospective witness Dr. Fletcher of the USGS would be to some extent a fact witness as well as an expert witness, referencing Dr. Fletcher's stress drop calculations; and (2) that either Dr. Boore or Dr. Joyner would testify as an expert on the derivation of "g" values from different magnitude events and to critique the Applicant and Staff modeling methods and data about which the Board expressed some concern.

By Order also dated August 13, 1981, the Appeal Board directed us to respond to the Staff's motion by August 21, 1981, and permitted the Staff to supplement its pending motion by the same date.

II. Discussion

In a sense, Applicants are faced with a dilemma. On the one hand, our inclination (which is both principled and pragmatic) is toward deference to the Licensing Board and the Board's discretion to carry out its responsibilities as it

sees fit within the ambit of applicable precedent. On the other hand, we acknowledge the Staff's duty to protect its own role and its concept of the proper administration of the hearing process. We agree in principle with the thrust of the Staff's argument. The role of the Licensing Board in an operating license proceeding is primarily to resolve the issues raised by the parties and pursue sua sponte only those egregious safety questions which it cannot in conscience overlook, while the role of the Staff is to review and make findings on matters not in dispute on the record. Our reticence to raise the matter ourselves has been largely a matter of the above-mentioned mixture of principle and pragmatism. We had understood the Licensing Board to be telling us on the record what they recently confirmed in their August 13, 1981, Memorandum, that is, that it would be a futile exercise to go through the motions of hearing further testimony from the same witnesses about the same reviews, since, after some time had been lost in that effort, the Board would take the step already known to them as probable: the calling of additional witnesses as they have already done.

We, like any Applicant faced with a tight schedule, want to avoid expensive delay and get our needed power plant tested and on the line. But we are not so singleminded as to sweep a responsibly raised issue aside or give the appearance of doing so, even though in our view all requirements have been met. While we would obviously prefer that uncontroverted matters be

handled outside the hearing process, we must and do recognize that the Board has a responsible and weighty task and has sua sponte questions which, to its thinking, cannot otherwise be resolved. (We think there is an acceptable alternative, as discussed later.) But if the Board can pursue its present course and is as determined to do so as we perceive to be the case, we prefer to skip the futile preliminaries and proceed to the "main event". That was the tenor of our response on the record before the Licensing Board: if the Board has questions which are troubling it, then it is our job to answer them. This is so even though our understanding of the contention and evidence in this case and the role of a licensing board in an operating license proceeding, given the issues and the evidence in this particular case, is in line with that of the Staff. -The difficulty with pursuing the matter exactly as proposed by the Staff is that such course seems to carry with it the risk of an adverse decision or a delay associated with the decision, appeals, stays, remands and the like.

We would opt for any result which allows the Board: (1) to have before it that decisional record which it needs at a minimum in order to fairly decide the issues; and (2) to compile that record in the briefest time feasible. (Precisely what that result is depends on whether the Board can raise the issues it is pursuing and whether it can pursue them as it now intends or should proceed some other way.) As already suggested, the precise relief requested by the Staff does not

meet those result criteria. The Staff requests the Appeal Board to instruct the Licensing Board to first attempt to elicit needed information from the parties, and then, and only then, decide whether to obtain outside consultants, presumably upon the finding suggested by the Staff in the body of their motion (see, e.g., "compelling reasons" at p. 12). Such a stepwise approach will likely set back the process a couple of months, as may be seen from the Board's August 17 Memorandum. Obviously, the Staff is not seeking delay, the Staff has acted properly in raising the matter, and the Staff perhaps did not view the Board as quite so determined as we do.

The Licensing Board tells us at page 2 of their memorandum that in all likelihood further testimony will not close the inadequacies the Board already sees in the Staff review, necessitating a further delay while independent consultants are retained, conduct their reviews, prepare their reports and testify at yet another reconvened session of the hearing.

This brings us to the issues. In the time available and in the circumstances, we have not larded this response with authorities and instead have tried to give context to our positions. Can and should the Appeal Board review such a matter at this interlocutory stage? (Yes). Does the Licensing Board have discretion to call its own witnesses in some circumstances? (Yes). Does it have such discretion on essentially sua sponte issues (Order of May 13, 1981 at 4-6 and April 7-8, 1981 Prehearing Conference Tr. 480-5060), where,

as here, there is no material conflict in the evidence[2/] or, stated another way, is exercise of discretion appropriate in all of the circumstances of this case? (No, although we are not sure the previous decisions reflect that interlocutory review is appropriate.)

The Appeal Board can direct certification in cases where novel or very unusual problems crop up and there is the potential to remedy a problem if addressed now which cannot be satisfactorily remedied later. Given the novelty of the precise issues, the need for guidance in this and other proceedings, interagency and intra-agency implications, and the time and cost which will be irrevocably committed if the matter is not reviewed, we would argue that this is such a case. The prior decisions also indicate, however, that a licensing board can raise issues sua sponte, and the Commission in the past has endorsed that practice, the operation of which is now being scrutinized. Likewise, the prior decisions cited by the Staff make clear that in some circumstances, the Board can call its own witnesses. What we might seem to come down to then is the uncomfortable subject of whether this is a case for the exercise of discretion which will not be disturbed on interlocutory or final appeal, or is outside the bounds of discretion,

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2/ The differing professional opinion of Dr. Andrew Murphy reflected in the SER and in his testimony was not the view of the Staff and, even if he were correct, the Applicant showed, and the Staff agreed, that the plant design was more than adequate to account for local (reservoir induced) seismicity.

i.e., whether the discretion has been abused. The Appeal Board certainly has the power to inquire into such matters. But perhaps the problem is not that the Licensing Board has abused its discretion, but that it has misconceived its responsibilities under 10 C.F.R. §2.760a, given the state of the record. We do not suggest that the Appeal Board delve deeply into the record at this stage to make its own assessment of the areas where the Licensing Board wants more evidence to see if that is a reasonable request. But the Appeal Board can accept the representation of the Staff, not contradicted by the Licensing Board or us, that there is no material conflict in the evidence. Intervenor has adduced no evidence which raises any material issue for decision. It appears to us that the Appeal Board could rule that it is not appropriate where there is no real conflict in the evidence or as to the satisfaction of the regulations for a licensing board to pursue sua sponte issues to the extent of calling its own witnesses. But if the Appeal Board so rules, it may still be necessary to devise an alternate procedure.

In other words, a result which would preclude the retention of Board consultants/witnesses would presumably still leave the Board with concerns as to the adequacy of the Staff review, unless it need not make such a finding or resolve the technically contested but uncontroverted seismicity matter. (While adequacy of Staff review is a necessary finding in an uncontested construction permit case and perhaps as to NEPA issues in all cases, it is not a necessary finding in an operating license case.) Failing that, and assuming the Board can still

raise its concerns sua sponte, it will feel compelled to do so, we surmise, and the Board would want some guidance on how it should proceed to resolve those concerns without risk of reversal.

Conclusion

If the Board itself can or must resolve its own concerns (as opposed to leaving them with the Staff and ACRS), but cannot call its own witnesses, then its best course may be to advise the Applicants and Staff not only of the areas in which it requires supplementation of the record (which it has already done in general terms), but also the specific matters needed in order to provide a sound basis for a decision. That would then leave the parties with the duty, or the option, as the case may be, to perform further work and present additional evidence, whether through the same witnesses as previously heard or additional ones or both. Such a course leaves us with additional effort and expense, but it is not an unprecedented one. It has the added advantages that it minimizes delay, minimizes impact on interagency and intra-agency relationships, and leads to a fuller record -- hopefully an adequate one in the Board's eyes.

Respectfully submitted,

Joseph B. Knotts, Jr.
Attorney for Applicants

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to Staff Motion for Directed Certification of Licensing Board Action Regarding Retention of Independent Consultants" in the above captioned matter, were served upon the following persons by deposit in the United States mail, first class postage prepaid or by hand delivery as indicated by an asterisk this 21st day of August, 1981.

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

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

* Christine N. Kohl
Member, Atomic Safety and
Licensing Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Herbert Grossman, Esq.
Chairman, Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Frank F. Hooper
School of Natural Resources
University of Michigan
Ann Arbor, Michigan 48109

Gustave A. Linenberger
Member, Atomic Safety and
Licensing Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

George Fischer, Esq.
Vice President and Group
Executive - Legal Affairs
South Carolina Electric and
Gas Company
Post Office Box 764
Columbia, South Carolina 29202

Steven C. Goldberg, Esq.
Office of the Executive Legal
Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Brett Allen Bursey
Route 1, Box 93-C
Little Mountain, South Carolina 29076

Chase R. Stephens
Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Richard P. Wilson, Esq.
Assistant Attorney General
South Carolina Attorney
General's Office
Post Office Box 11549
Columbia, South Carolina 29211

John C. Ruoff
Post Office Box 96
Jenkinsville, South Carolina 29065

Robert Guild, Esq.
314 Pall Mall
Columbia, South Carolina 29201

Joseph B. Knotts, Jr.