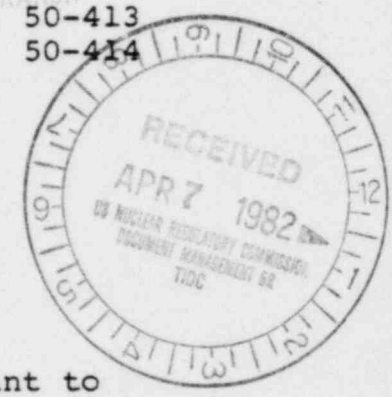
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DUKE POWER COMPANY, et al.	)	Docket Nos. 50-413
	)	50-414
(Catawba Nuclear Station, Units 1 and 2)	)	



APPLICANTS' MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE FOR CERTIFICATION

Duke Power Company, et al. (Applicants), pursuant to the provisions of 10 C.F.R. 2.751a(d), move this Atomic Safety and Licensing Board (Licensing Board or Board) to reconsider and revise, in the manner set out below, its March 5, 1982 Memorandum and Order (Order) in this proceeding. Should the Board determine that, in its view, such revision is not warranted, then in the alternative Applicants request that, pursuant to 10 C.F.R. §§2.751a(d) and 2.718(i), this Board certify its ruling to the Atomic Safety and Licensing Appeal Board for its review.

I. Board Rulings Requiring Reconsideration Or In The Alternative Certification

The Licensing Board's Order of March 5 ruled on the contentions submitted by Intervenors. Therein, the Board held the requirement of specificity set forth in 10 CFR §2.714 to be reasonable only "so long as the factual information necessary for specificity is available to

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an intervenor." (Order, p. 5). In the Board's view, Intervenors should not be required to file contentions which meet the requirements of 10 CFR §2.714 until the Staff's Draft Environmental Impact Statement, the Staff's Safety Evaluation Report, the report of the Advisory Committee on Reactor Safeguards, and Applicants' final documents demonstrating compliance with the Commission's various regulatory requirements are available to it. (Order, pp. 5-6).

Pursuant to the above interpretation of the Commission's rules, the Board admitted one contention (Palmetto Alliance Contention No. 27). 1/ The remainder of the rulings on the contentions can be divided into three categories:

(1) The Board has admitted 10 contentions conditionally, 2/ requiring no showing of specificity at this

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1/ Applicants do not complain of, and will not address, any ruling made with respect to the contentions filed by the Charlotte-Mecklenburg Environmental Coalition, to which Applicants stipulated.

2/ The following contentions come within this category: Palmetto Alliance Contentions Nos. 1-4, 10, 22, and 26; CESG Contentions Nos. 8, 9, and 16. Though the Licensing Board admitted conditionally Palmetto Alliance's Contentions Nos. 15 and 16, those contentions are subject to revision by the Licensing Board following receipt of information it has requested from Applicants and Staff. Thus at this juncture Applicants do not seek reconsideration of the Board's ruling with respect to those contentions.

time, on the basis of the unavailability of documentation. Intervenors are required to provide the necessary specificity only after receipt of such documents. Moreover, the Board has determined that, with respect to any such contentions, the standards applicable to late-filed contentions (See 10 CFR §2.714(a)(1)(i)-(v)) will not apply. (Order, p. 7).

(2) The Board has admitted six contentions conditionally, 3/ subject to the requisite specificity following discovery. The Board acknowledges four of them (Palmetto Alliance Contentions Nos. 6, 7, 18 and CESG No. 13) are "only marginally acceptable from the standpoint of specificity" and recognizes that the Intervenors, at the time of the prehearing conference "could have made some further specification" of those contentions. (Order, pp. 17, 26). Nevertheless, the Board believes that these four contentions (three of which relate to quality assurance, and one of which relates to diesel generators), should be admitted conditionally because they treat issues which the Licensing Board believes "are at the core of our responsibilities as an operating license board." (Order, p. 17). The Board,

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3/ Palmetto Alliance Contention No. 25 will not be addressed here, as the Commission's recently adopted rule precludes its consideration (as well as Palmetto Alliance Contention 24) in this proceeding. See pp. 47-50, infra.

acknowledging that the fifth such contention (CESG No. 17) lacks specificity, has admitted it conditionally because "Applicants do not refer in their pleading to any discussion of Corbicula in their FSAR or ER." (Order, p. 27). In the Board's view, the requisite specificity for each of these contentions can be provided following discovery, the Board stating that the discovery process will allow Intervenors to "learn additional factual details about their areas of concern," and further that as "the principal functional purpose of contentions at this juncture is to place some reasonable limits on discovery." (Order, p. 13).

(3) The Licensing Board has rejected a number of Intervenors' contentions on the grounds of lack of specificity and bases, but the rejection is not unconditional. While the Board correctly observed that should a document containing "new information or analysis on the subject become available later," Intervenors may file a revised contention based upon that new information. Nevertheless, it held that it would not view such a contention to be a late contention within the meaning of 10 CFR §2.714(b). Specifically, the Board held that the criteria of 10 CFR §2.714(a)(1)(i)-(v) will not apply in such a situation. Moreover, the Board stated that,

"[d]ebatable questions about whether information or analysis is 'new' will generally be resolved in the Intervenor's favor." (Order, pp. 12-13).

In addition to its holdings regarding specificity, the Licensing Board made additional rulings which warrant re-examination. With regard to the security plan for the facility (which is of course protected from public disclosure (10 CFR §2.790)), the Board determined that, absent examination, Palmetto Alliance could not be expected to advance contentions on that plan which meet the specificity and bases requirement of 10 CFR §2.714. The Board concludes that "because Palmetto has expressed a formal interest in the Catawba [security] plan" it could at this juncture order Applicants to grant Palmetto Alliance access to the plan by finding that disclosure of the plan is necessary to a proper decision in the proceeding. (Order, p. 38).

With regard to financial qualification contentions, the Board admitted Palmetto Alliance Contentions Nos. 24 and 25, finding that such were a proper subject in NRC proceedings. (Order, p. 24).

Lastly, the Board ruled that "henceforth the Intervenors be served with copies of all relevant documents generated by the Applicants and Staff in connection with this operating license proceeding." (Order, p. 39).

II. Grounds for Relief Requested

Applicants believe that this Board has issued an Order which in some respects is directly contrary to years of Commission practice, is in direct opposition to Commission regulations, in many respects is directly contrary to the Commission's "Statement of Policy on Conduct of Licensing Proceedings" (13 NRC 452), and is not in compliance with the Commission's regulations, instructions and guidance to licensing boards regarding the exercise by those boards of their sua sponte authority.

Should the Licensing Board's March 5 Order stand, its effect on this proceeding will be direct and substantial. Stated simply, the Board has removed from the Commission's regulations and case law the requirement that Intervenors' contentions be plead at the outset with specificity and bases. Thus, the Board has removed from Intervenors their rightful burden to justify their contentions in order to have them admitted as issues in the proceeding. Instead, contentions have been admitted, not on a threshold showing of specificity and basis, but rather on a bare expression of interest by Intervenors in a particular subject.

Because the Board does not require a showing of adequate specificity as a prerequisite for admission of many of Intervenors' contentions, as demonstrated below, other aspects of

its Order will have a significant adverse effect on the remainder of the proceeding.

III. Argument

A. The Licensing Board's Ruling Regarding Specificity Is Contrary To Commission Regulations And Case Law

The Licensing Board has held that the specificity requirement of 10 CFR §2.714 is "a perfectly reasonable one, so long as the factual information necessary for specificity is available to an intervenor." (Order, p. 5). However, in situations wherein in its view documentation is not yet available 4/ the Licensing Board states that Intervenors need not comply with the specificity requirement of 10 CFR §2.714; 5/ rather, "[t]he most [an Intervenor] should be required to do at this point is express an interest in the subject." (Order, p. 17). In the Board's view, contentions can be admitted conditionally at the first prehearing conference based merely on such an expression of interest,

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4/ As will be discussed infra at pp. 22-24, Applicants maintain that the Licensing Board's Memorandum and Order mistakenly views that, aside from the Final Safety Analysis Report and Environmental Report, there is a paucity of information, thereby relieving Intervenors of the specificity requirements of 10 CFR §2.714.

5/ The Licensing Board has held that contentions which relate to documents not yet available "will, if they are otherwise acceptable [i.e., do not constitute an attack on Commission regulations], be admitted conditionally despite a present lack of specificity." (Order, p. 12).

subject to a later demonstration of the requisite specificity after all final documents, e.g., the final submittals of Applicants demonstrating compliance with applicable regulatory requirements, the NRC Staff's Safety Evaluation Report and the Draft Environmental Impact Statement and the ACRS letter. (Order, pp. 7. 11-12).

Both Applicants and Staff had argued that such a standard was unwarranted, inasmuch as it was incumbent upon Intervenors at this stage of the proceeding to set forth all their contentions consistent with the specificity requirement of 10 CFR §2.714(a). 6/ The Licensing Board has found that the Applicants and Staff's position is (1) not required by the rules as written or by prior decisions, (2) unreasonable, and (3) probably in conflict with governing statutes. (Order, p. 7). Applicants request that this ruling be reconsidered because it believes that the Board's ruling in this respect is contrary to Commission regulations and case law.

With respect to the rules, the Licensing Board holds that specificity in the instant situation is not required at the initial stages, inasmuch as the regulations "do not

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6/ Applicants acknowledged that additional contentions could be subsequently raised provided that the late filed contentions requirement of 10 CFR §2.714(a)(1) had been complied with.

explicitly require that all contentions be filed before the first prehearing conference subject only to a highly restricted right to file a 'late' contention later." (Order, p. 7). The Licensing Board's position appears to be that because the rules do not require all contentions to be plead at this stage, it is proper to admit contentions now which do not meet the specificity requirements, because they can be amended at a later date to meet the specificity requirements of 10 CFR §2.714. The Board further holds that the late contention requirements of 10 CFR §2.714(a)(1) will not be applied to any such amended contention. (Order, p. 12).

Applicants respectfully disagree with the Licensing Board's interpretation of the Commission's regulations. Nothing in the plain language of the regulations supports the Licensing Board's holding that a petitioner need not file all the contentions prior to the first prehearing conference. Rather, Section 2.714(a)(2) specifically provides that a petition to intervene "shall" set forth "the specific aspect or aspects of the subject matter of the proceeding as to which petitions wish to intervene." (emphasis added). With respect to the contentions advanced as issues in the proceeding, §2.714(b) is even more explicit, stating that a petitioner, 15 days prior to the special Section 2.751a

prehearing conference, "shall file a supplement to his petition to intervene which must include a list of the contentions which petitioner seeks to have litigated in the matter and the basis for each contention set forth with reasonable specificity." (emphasis added).

An examination of the Commission's 1978 amendment to its regulations regarding intervention and contentions lends further support to Applicants' position that the Commission's regulations mean precisely what they say. The 1978 amendments were promulgated to provide petitioners additional time to frame the issues which they wished to litigate in this proceeding, thereby emphasizing the fact that the Commission expected all contentions to be filed prior to the special Section 2.751a prehearing conference. See 43 Fed. Reg. 17798 (April 26, 1978). Specifically the Commission stated:

> The present rule, §2.714, requires that petitions for leave to intervene include...the petitioners contentions...Current practice has generally provided 30 days...for filing of timely petitions for leave to intervene.
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> Experience has indicated that 30 days is often insufficient for potential petitioners to frame and support adequate contentions...Accordingly, the rules are amended to permit the filing of contentions until shortly before the special prehearing conference. [Id.] (emphasis added).

Underscoring the Commission's intent that all contentions be filed 15 days prior to the special prehearing conference, is its position regarding late-filed contentions. The Commission's Statement of Considerations accompanying the amendment specifically recognized that "contentions are frequently expanded or amended because of new information which comes too late after petitions have been admitted, such as information in the Commission's Staff Safety Evaluation or Environmental Impact Statement." (Id.) (emphasis added). The Statement is explicit in stating that, in such an instance, Section 2.714

> is revised to specifically provide that late filed contentions (a contention or amended contention which is filed after 15 days prior to the special prehearing conference, or where there is no special prehearing conference, which is filed after 15 days prior to the first prehearing conference) will be considered for admission under the clarified criteria set forth in subparagraph (a)(1). [Id.] (emphasis added).

Indeed, the Licensing Board acknowledges in footnote 7 of the Order that a "literal reading" of Section 2.714(b) requires the application of the lateness standard to any contentions filed after 15 days prior to the Section 2.715a prehearing conference. 7/ (Order, p. 7).

7/ Despite its recognition of the application of the lateness standard to contentions filed after 15 days prior to the Section 2.751a prehearing conference, the Licensing Board holds that "compelling considerations" warrant that it not be applied under the circumstances under discussion (i.e., topic areas wherein it believes that information sufficient to frame a proper contention is yet to be submitted). (Order, p. 7).

In sum, the requirements of the regulations are clear, and are directly contrary to the Licensing Board's interpretation.

In addition to the plain language of the regulations and the unequivocal expression of the Commission's intent in the Statement of Consideration, the applicable case law does not support the Licensing Board's position with respect to specificity. See, e.g., Wisconsin Electric Power Co. et al. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928 (1974); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188 (1973), aff'd, CLI-73-12, 6 AEC 241 (1973), aff'd BPI v. AEC, 502 F.2d 424 (1974). Nowhere in any of these decisions is it even suggested that a petitioner may await filing of contentions beyond the time specified in the Commission's Notice of Hearing. In fact, these decisions conclude the opposite, holding that a petitioner must present, at the outset, and with specificity, the contentions it seeks to have litigated in the matter.

In Koshkonong, a petitioner claimed that contentions need not be filed at the early stages of the proceeding, or if so required, that the contentions could be general non-specific statements of interest which could be specified after completion of discovery. Faced with this assertion, the Commission stated that

> [p]etitic..ers' theory is contrary to the general thrust of judicial, as well as administrative practice whereby parties file their basic pleadings before they complete discovery. See BPI, supra, at p. 428, favorably noting a report which compared AEC's 'contentions' requirement to pleadings in civil cases. [8 AEC at 929].

Continuing, the Commission, again underscoring the need for timely filed contentions, emphasized that those contentions not filed at the proper time would be subjected to the late contention criterion. Specifically, the Commission stated:

> Insofar as petitioners may be precluded from adding to their original contentions should an unforeseen issue present itself further on in the proceedings, we can only answer that a petition for intervention, like any other pleading in modern practice, is not etched in stone. Leave to amend petitions for intervention will be granted where a petitioner shows that good cause exists for the belated assertion and where such amendment will assist the Board in resolving the issues before it without undue delay. Cf. also 10 CFR 2.752(a)(2). [Id.]

In concluding, the Commission held that

> In any event, in view of the extensive material available to petitioners, the Commission is unpersuaded that its early notice of hearing denied petitioners an adequate opportunity to prepare specific contentions in support of a request for intervention. [Id.] (emphasis added).

In Prairie Island, the Appeal Board was faced with a petitioner's claim

> that the Commission exceeded its statutory authority in requiring in Section 2.714(a) that they both identify the specific aspect or aspects of the subject matter of the proceedings as to which intervention is sought and set forth with particularity the basis for their contentions with regard thereto. [6 AEC at 191].

The Appeal Board held

> We find no abuse of that rule-making authority here. Section 2.714(a) reflects the administrative conclusion that the effectuation of the purposes of the Atomic Energy Act requires that the request for a hearing (in the form of a petition for intervention) include an identification of the contentions which the petitioner seeks to have litigated in the matter. To our mind, there is nothing unreasonable about this conclusion. It certainly would not further -- but indeed would impede -- the orderly carrying out of the adjudicatory process to accord an individual the status of a party to a proceeding in the absence of any indication that he seeks to raise concrete issues which are appropriate for adjudication in the proceeding. This is particularly so on the operating license level where, by virtue of Section 189a. of the Act itself, there is no mandatory hearing requirement; i.e., the license may be issued without a hearing in the absence of a proper request therefor. It is difficult for us to perceive any rational basis for triggering the hearing mechanism without regard to whether there are, in fact, any questions which even possibly might warrant resolution in an adjudicatory proceeding. Cf. Citizens for Allegan County, Inc. v. EPC, 414 F.2d 1125 (D.C. Cir. 1969); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 594-595 (D.C. Cir. 1971). [footnote omitted] [6 AEC at 191-192]. (emphasis added).

Continuing the Appeal Board stated

> We are unimpressed with petitioners' suggestion (Br. pp. 2-3) that it is not possible for them to state specific contentions until after they have been permitted to intervene and to avail themselves of discovery procedures. [6 AEC at 192].

In affirming Prairie Island, the Court in BPI v. AEC, held

> Under its procedural regulations it is not unreasonable for the Commission to require that the prospective intervenor first specify the basis for his request for a hearing. [502 F.2d at 428].

Further, the Court stated

> [Petitioners] contend rather that the interested person need not articulate the issues until after having been admitted as a party to the proceeding, with consequent access to discovery. Section 189(a) does not seem to the court so to provide. The court considers it amenable to a construction which, when considered with section 161(p) of the Act and the nature of intervention, permits the Commission to require the party to inform it of the issues on which he wishes to be heard, or, as held by the Commission, the contentions to be advanced and the basis therefor. [502 F.2d at 429]. (emphasis added).

The Licensing Board attempts to distinguish these cases by finding that such decisions support the proposition that only some contentions need be raised at this time. (Order, p. 7). Again, the plain language of the decisions by the Commission and the court does not support the Licensing Board's position regarding specificity. Quite simply, those cases do not use the words "some issues" or "some contentions." Rather, they explicitly state "the issues," or "the contentions." Each case was decided in the context of whether the issues sought to advanced (i.e., all contentions), need be advanced in response to the notice of hearing. As noted above, the cases hold that the regulation requiring such a result (§2.714) is valid. (Koshkonong, supra, 8 AEC at

929, Prairie Island, supra, 6 AEC at 191, BPI v. AEC, supra, 502 F.2d at 429).

The Licensing Board also attempts to distinguish the application of the cited cases on the basis of what it views to be the facts of the instant proceeding. The Board maintains that such cases were premised upon the existance of a wealth of information upon which a petitioner could rely, and infers that in this case such information does not exist. (Order, pp. 7-8). The Board in this instance apparently believes that the only information now available to Intervenors to frame their contentions is Applicants' FSAR "(or at least most of it)" and ER. (Order, p. 5). But the Commission, and the court, realize (as the Board apparently does not in this matter) that there is a wealth of information available to an intervenor beyond that set out in those documents. See, for example, Prairie Island, supra, 6 AEC 192, in which the Appeal Board takes notice of the availability of information to intervenors through the Freedom of Information Act and the Commission's regulations implementing that Act. In addition, Applicants pleadings in response to intervention requests make reference to applicable Commission regulations, regulatory guides and documents, many of which are cited in the FSAR and ER. It is the sum total of information that is available to a

petitioner at the notice of hearing stage that justifies the Commission's requirement that all contentions should be filed in accordance with the date set out in the Notice of Hearing and that any later filed contentions be subject to the lateness standard of 10 CFR §2.714(a)(1).

In an effort to counterbalance the impact of the cited cases, the Licensing Board makes reference to three decisions - two by Licensing Boards and one by a divided Appeal Board - wherein vague contentions were admitted conditionally, subject to later specification, or wherein rulings thereon were deferred until necessary documentation became available. (Order, p. 8). Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), LBP-80-30, 12 NRC 683 (1980); Commonwealth Edison Co. (Quad Cities Station, Units 1 and 2), LBP-81-53, 14 NRC 912 (1981); Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-664, ___ NRC ___ (January 6, 1982). Applicants respectfully suggest that these decisions are not controlling in the instant case.

In Quad Cities, the Licensing Board, relying upon the Appeal Board's decision in Consumers Power Company (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981) held that it was appropriate to defer a ruling on a contention in a spent fuel pool expansion case until the Staff's environmental

review was complete. The Quad Cities Licensing Board depicted Big Rock Point as providing "explicit direction that the Board should" so defer its ruling. (14 NRC at 915). An examination of Big Rock Point reveals that the main focus of the decision was not directed toward the admissibility of contentions as a general rule. 8/ Rather, of primary concern to the Appeal Board was whether the Licensing Board was correct in its ruling that an impact statement should be prepared for a spent fuel pool modification application. (13 NRC 329-331). As to this narrow question, the Appeal Board directed the Licensing Board to reconsider its decision. The Appeal Board advised the Licensing Board that, inasmuch as a determination of whether an impact statement was required must be based on "the record," on reconsideration it should await the Staff's environmental evaluation. Accordingly, because Big Rock Point does not speak to deferral of contentions as a whole, but rather addresses the narrow question of the necessity of an impact statement in a spent fuel pool modification (a question not in issue herein), it does not serve as support for Quad Cities. It follows that

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8/ Indeed, an examination of the Big Rock Point Licensing Board's ruling on contentions, reveals that the contention at issue was admitted. (13 NRC at 317, n.5).

Quad Cities does not support the Licensing Board's broad ruling in the instant case.

The Licensing Board's reliance upon Byron is understandable although in Applicants' view such case is contrary to the Commission's regulations and relevant case law. Therein the Licensing Board permitted contentions which plead the inadequacies of documents or responses which have not yet been made available to the parties. An examination of the three contentions at issue in Byron reveals that they are as lacking in specificity and basis as those contentions Applicants challenge herein. For convenience these contentions are noted below. 9/ Applicants respectfully maintain for

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9/ 17. C.E.'s Environmental Report is grossly inadequate, not only for the reasons stated above but also because it omits even the minimum necessary information to permit an independent evaluation of the environmental impact of the proposed plant. Among the information omitted, for example, are responses to the scores of questions the Staff directed to C.E.--many of which questions indicate that the proposed facility will not be operated in accordance with the Atomic Energy Act, as amended, NRC Regulations, or C.E.'s own application.

120. C.E.'s Environmental Report and the cost benefit analysis for the Byron project completely fail to take into account or adequately discuss any of the facts set forth in the Contentions herein, and were illegally and invalidly prepared to serve as an ex post facto justification for building the plant rather than as an aid to responsible decision-making. As a result, there does not exist a valid cost benefit analysis or environmental report as required by 10 C.F.R. §§51.20(b) and 52.21.

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the reasons discussed in the instant pleading that the Licensing Board in Byron was also in error in admitting the subject contentions.

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143. C.E. has failed to consider in its environmental submissions any information or substantial information in each of the following areas. The failure to have analyzed and considered issues in such areas results in an insufficient environmental analysis of the operation of Byron:

(a) Social and philosophical effects of the displacement of people;

(b) Wildlife aesthetics;

(c) Population projections;

(d) Effects of synergism between radiation and other pollutants;

(e) Effects on fish and other organisms as a result of the operation of intake structures;

(f) Decrease in property values as a result of each cost considered or failed to be considered;

(g) Effects of the operation of transmission lines, including but not limited to, effects in the following areas: (i) visual aesthetics; (ii) displacement of land; and (iii) effects on bird migration; and

(h) TMI type psychological fear.

While this issue may have been considered at the construction phase, that hearing was a sham and in any event new facts since the construction phase call into serious question that decision. As a result the applicable findings required by the Act, NEPA, and the Regs, cannot be made herein.

Browns Ferry is another radioactive waste solution case, similar to Big Rock Point. Therein the Appeal Board recognized that waste solution cases, such as Browns Ferry and Big Rock Point were unique. Specifically the Appeal Board stated

> While we agree with the dissent that we need not in the ordinary case defer ruling on an intervention petition until after a staff environmental analysis is prepared, the petitioners' right to intervene in this case may turn on the conclusions reached in the staff analysis [slip op at p. 16].

Applicants maintain that the instant Catawba case is the "ordinary case" referred to by the Appeal Board and accordingly Browns Ferry cannot serve as precedent for the Board's decision in this case. 10/

10/ The issue in Browns Ferry involved the petitioners' basic right to intervene, not an issue herein. In Browns Ferry, TVA sought permission for onsite storage of low level radioactive waste for a five year period. Petitioners petitioned to intervene claiming that such was but the first step in an overall plan by TVA; that incineration was to follow. The Licensing Board denied the petitions on the basis that the five year plan had "immediate utility," independent of any decision TVA might reach with regard to incineration. (Id. slip op. at pp. 2-3). The Appeal Board held that the denial was premature and that a definitive ruling on petitioners' request must await the filing by the Staff of its environmental assessment. (Id. slip op. at p. 3). Thereafter, the Licensing Board was directed to rule on the petition. The basis for the Appeal Board's action was their determination that the issue of independent utility "cannot be decided in advance of receipt of the Staff's environmental assessment which

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The Licensing Board also argues that Applicants' and Staff's position requiring identification of all contentions with specificity at this stage is unreasonable. In support, the Licensing Board uses as an example the fact that offsite emergency plans are, in accordance with Commission regulations, not yet available. The Board maintains that it is unreasonable to require Intervenors to file contentions on those plans until such time as the plans are available. Applicants maintain that, while it is true that the offsite emergency plan has not yet been submitted by the State of South Carolina, more than enough pertinent information is available to allow Intervenors to state their concerns in their contentions in compliance with 10 CFR §2.714. Such information includes, among other things, the Commission's regulations and

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will evaluate the options available to TVA at the end of the five year term of the license." (Id. slip op. at pp. 8-9). The Appeal Board was concerned that if no safe place for offsite permanent storage is likely to be available by the end of the five year term of the license amendments, the requested activity might not have independent utility. (Id. slip op. at p. 14). If such is the conclusion of the Staff, then petitioners contentions and hence its petition may well be the proper subject of the proceeding. However, as noted this determination must await Staff's environmental assessment.

regulatory guides which serve to inform Intervenors of the requirements which the plans must meet, as well as the responsibility to be assumed by the local jurisdictions implementing those plans. 11/ Indeed, Palmetto Alliance Contentions Nos. 3 and 4 make specific reference to the regulations and various guidance documents pertaining to emergency plans. Furthermore, the generic state plans for both North and South Carolina (which will comprise an important part of the offsite emergency plan) have been publicly available for some time, and specific plans for Duke's McGuire plant, as well as South Carolina Electric & Gas' Summer plant, are also publicly available. These documents are available at the NRC Public Document Room in Charlotte, N.C., and/or Columbia, S.C., the locales of the two Intervenors

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11/ See 10 CFR §50.47 and Appendix E to 10 CFR Part 50. See also, e.g., NUREG-0396, "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in support of Light Water Nuclear Power Plants," (December 1978); NUREG-0654, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," (January 1980) and the Revision thereto.

pressing this issue. Given these facts it is not enough for Intervenors simply to "express an interest in the subject" (Order, p. 17) of emergency plans. Rather, Applicants maintain it is reasonable to require that Intervenors specify, on the basis of, inter alia, the above information, why they believe that adequate emergency plans for Catawba cannot be prepared, thereby focusing the scope of their emergency plans concerns. 12/ As BPI v. AEC points out,

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12/ In this pleading, Applicants have specifically addressed the issue of emergency plans, showing that substantial information exists upon which Intervenors could file contentions now. Applicants did so because the Licensing Board chose emergency plans as an example to illustrate "the unreasonableness of the Applicants'...position" respecting the filing of contentions. However, Applicants do not wish there to be an inference that for the remainder of those contentions not dealing with emergency plans that were admitted conditionally pending subsequent availability of documents, there is a lack of information inhibiting Intervenors ability to file specific contentions at this time. For example, in its ruling on Palmetto Alliance Contention No. 1, the Board recognizes that more specificity is necessary and that such could be provided at this time, i.e., "the respects in which the BEIR III report and the Commission's food claim analyses [which is set forth in the Catawba FES-CP stage at Section 5-4]] are allegedly deficient." (Order, p. 15). There is absolutely no reason that such additional specificity should have to await publication of the Staff's Draft Environmental Impact Statement. Similar information exists for the remainder of the contentions for which Applicants seek reconsideration. In this regard, see Applicants' December 30, 1981 Responses to intervention petitions wherein reference to examples of such information is set forth.

"[t]he individual who [wishes to intervene] has to state his specific contentions, what he is concerned about, and why he wants to appear in the proceeding as a party." (502 F.2d at 428).

Finally, the Licensing Board maintains that Applicants' and Staff's position is in conflict with the Atomic Energy Act and the National Environmental Policy Act (NEPA). (Order, p. 10). Applicants disagree. With respect to the Atomic Energy Act, the Court in BPI v. AEC addressed the section relied upon by the Licensing Board (Section 189(a)), and found that the requirement that contentions be plead with specificity at the early stages of the proceeding was not in conflict with the Act. The Licensing Board acknowledges BPI v. AEC, but maintains that the Court did not have before it a situation such as it maintains exists here, viz., where "much of the information is not yet available." (Order at p. 10). However, as discussed above, the Appeal Board decision in Prairie Island, the decision which gave raise to BPI v. AEC, not only relies upon the availability of the utility's Application, FSAR and ER, but also upon the Freedom of Information Act and the Commission's implementing regulations as information upon which contentions can be founded. Applicants have also referenced additional information. See pp. 22-24, supra. It is the availability of this additional

information which negates the Licensing Board's distinction of BPI v. AEC.

The Licensing Board also appears to argue that Section 189(a) would require an opportunity for hearing not only at the time the notice of hearing is published, but also at the time "pertinent" information (as represented by the SER, the DES, and the ACRS letter, etc.) becomes available. Again BPI v. AEC provides the answer. Therein the Court instructed that petitioners should have filed environmental contentions at the early stages of the proceeding, notwithstanding the fact that the FES had yet to be published. (502 F.2d at 429). Thus it is clear that contentions are to be filed at the time set forth in the Notice of Hearing, not upon publication of documents subsequent to that date.

It appears that underlying the Licensing Board's ruling is its view that Intervenors are prejudiced in this matter by having to pursue, subject to the requirements of 10 CFR §2.714(a)(1)(i)-(v), contentions filed after the date set out in the Notice of Hearing, based upon documents published after that date. However, that is a judgment for the Commission, not an individual Licensing Board, to make. And, as shown above, (pp. 10-11, supra), the Commission specifically considered and rejected that view when it amended its regulations in 1978. Moreover, the Commission had such a question before it in Nuclear Fuel Services, Inc.

et al. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975), and concluded that the timeliness requirement of 10 CFR §2.714(a), is reasonable:

> Obviously, an important policy consideration underlying the rule is the public interest in the timely and orderly conduct of our proceedings. As the Commission has recognized, 'fairness to all parties...and the obligation of administrative agencies to conduct their functions with efficiency and economy, require that Commission adjudications be conducted without unnecessary delays.' 10 CFR Part 2, Appendix A. [1 NRC at 275].

With respect to NEPA the Board maintains that "a 'rule' requiring the pleading of all NEPA contentions before the Staff s impact statement is even written is ...impermissible." (Order, p. 11). BPI v. AEC and Koshkonong specifically held to the contrary, recognizing that while the FES has yet to be published, sufficient information exists upon which intervenors should be held to file contentions.

For all of the reasons discussed above, Applicants respectfully submit that the Licensing Board's ruling admitting conditionally contentions "despite the present lack of specificity" (Order, p. 12) must be reversed.

Aside from addressing the points raised by the Licensing Board, Applicants would add the following as support for their reconsideration request. The case law pertaining to intervention and specificity is extensive and well known.

Reference is made to Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980); Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974); Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633 (1973); Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973); Duquesne Light Company, et al. (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 243, 244-245 (1973); Wisconsin Electric Power Company, et al. (Point Beach Nuclear Plant, Unit 2), ALAB-93, 6 AEC 21, 23 (1973). The thrust of these decisions is that with respect to specificity, petitioners must not only advance contentions but must provide a reason why those contentions warrant further consideration. See e.g., Allens Creek, 11 NRC at 548. Simply put, it is not enough for a petitioner to state, for example, that it is concerned about offsite emergency plans; rather a petitioner must provide a reason why its concern respecting offsite emergency plans warrants further consideration. It is this critical point that Intervenors have failed to address and which the Licensing Board's decision permits to remain unanswered. The practical effect is that Applicants and Staff are left with amorphous subjects upon which

the burden now shifts to them to ferret out the substance. Discovery becomes a useless exercise from Applicants perspective inasmuch as Intervenors are permitted to hide behind the vagueness of their admitted contentions until such time as the Intervenors determine that they can more specifically define their concerns. In particular, the Licensing Board has failed to realize that while the specific offsite emergency plan for Catawba is not yet in existence, the Commission's regulations and guidance documents as well as generic state plans and specific plans for other nearby units clearly alert Intervenors as to the nature of such plans. Accordingly, it is reasonable to expect Intervenors to provide specific contentions on such matters at this time.

In sum, the Licensing Board's ruling permits Applicants and Staff to be unapprised of what they will have to defend or oppose. Such is contrary to the law. Peach Bottom, supra, 8 AEC at 20-21.

B. The Licensing Board's Rulings Regarding The Application Of The Timeliness Requirement Of 10 CFR §2.714(a)(1) Is Erroneous

The Licensing Board's Order of March 5 made three rulings regarding contentions which are filed-late. First, with respect to those contentions which were admitted conditionally subject to greater specificity, the Board found that where

information is furnished in a document published subsequent to the special Section 2.751a prehearing conference "the additional criteria normally applied to late contentions under 10 CFR §2.714(a)(1)(i)-(v) will not be applied..." (Order, p. 12). Second, with respect to those contentions which were rejected, the Board held

> ...should a document containing new information or analysis on the subject become available later, the Intervenor may within 30 days file a revised contention based upon it. Again, the criteria 10 CFR 2.714(a)(1)(i)-(v) will not be applied to such a contention. [Order, pp. 12-13].

Finally, with respect to both categories of contentions the Board held that "[d]ebatable questions about whether information is 'new' will generally be resolved in the Intervenor's favor." 13/ (Order, p. 13).

Applicants maintain that the law in this area is specific and directly contrary to the Licensing Board's Order. As stated in Section III.A. supra, the Commission's Statement of Considerations accompanying its 1972 amendment to the intervention regulations clearly states that such section

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13/ Read literally, this statement applies only to those contentions rejected now which Intervenors seek to raise later, revised on the basis of new information. However, given the Board's ruling with respect to contentions admitted subject to greater specificity, it is inevitable that a debate will arise over whether "new information" (and thus "good cause") justifies amending the contention, and that such debate will be resolved by the Board in the same manner.

> ...is revised to specifically provide that late filed contentions (a contention or amended contention which is filed after 15 days prior to the special prehearing conference, or where there is no special prehearing conference, which is filed after 15 days prior to the first prehearing conference) will be considered for admission under the clarified criteria set forth in subparagraph (a)(1). [Id.]. 14/

Accordingly, it was improper for the Licensing Board not only to write this regulatory requirement entirely out of this proceeding but also to adopt a general rule resolving

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14/ The criteria set out in §2.714(a)(1) are as follows:

(i) Good cause, if any for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Although §2.714(a)(1) does not speak directly to the issue of new information, case law addresses it under the good cause requirement of §2.714(a)(1)(i). See Koshkonong, supra, 8 AEC at 929; Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), LPB-73-31, 6 AEC 717 (1973) appeal dismissed as interlocutory, ALAB-168, 6 AEC 1155)1973), and Indiana and Michigan Electric Company (Donald C. Cook Nuclear Plant, Units 1 and 2), CLI-72-75, 5 AEC 13 (1972). Good cause requires more than new information coming into being after the filing of the original contentions; it requires that the petitioner show that such information was unavailable to him when the original petition was filed and that, if it had been available, the scope of the original contentions would have been broader. See Waterford, supra at 717.

all debatable questions in this area in favor of Intervenors. 15/

It should be noted that the practical effect of the Board's ruling is to preclude Applicants and Staff from inquiring why a subsequent contention could not have been raised at an earlier date. 16/ Given the wealth of information in existence at present (i.e., FSAR, ER, Commission regulations, regulatory guides, NUREGS, etc.) such an inquiry is clearly legitimate. Any claim that "compelling considerations" (Order, p. 7, n.7) warrant a different result is answered in the negative by the discussion in Section III.A. supra.

15/ We cannot help but wonder what the reaction would have been had the Board stated: "Debatable questions about whether information or analysis is 'new' will generally be resolved in the Applicants' favor."

16/ Applicants draw the Board's attention to the language in Waterford, supra, wherein the Board addressed the practical effect of positions similar to that taken by the Board in this case:

> The staff asserts that, aside from the contentions dealing with the emergency core cooling system and low level radiation, sixteen new contentions should be admitted on the ground that there was new information in previously unavailable documents which "might be" the basis for a finding of good cause for late filing. This argument rests on the common ground that, with respect to each of them, there was some significant development which occurred after Head's petition had been filed. But its position rests implicitly on the premise that, no matter how narrow may be the grounds on which a petition for intervention is framed, amendment of the petition is to be allowed to cover any subject on which there may

(Footnote continued on next page.)

C. The Licensing Board May Not Determine, In Ruling On Contentions, That Other Factors Overrule The Requirements Of 10 CFR §2.714(a)

The Licensing Board admitted six contentions in this proceeding, even though it recognized that those contentions did not meet the requirements for specificity and basis, because in its judgment other factors compelled

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> later be significant developments, without any other showing of 'good cause,' and whether or not within the scope of the areas of concern expressed in the original petition. Particularly in the case of this complex and rapidly developing technology, the Staff's position would mean that the issues in a case would often not be completely defined until the proceeding is concluded. 'Good cause' means more than that. If these arguments were accepted, they could open the door to the belated allegation of any contention on any subject.
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> This position of the Staff is contrary to the basic concept of the discretionary character of the allowance of late intervention, as embodied in Section 2.714. The Staff's view would impose on this licensing board the obligation of affirmatively justifying its finding that the petitioner had not shown good cause. We do not believe the Appeal Board would turn inside out the concept of the burden of proof by requiring the Board to demonstrate where, in the record, there is an absence of facts showing good cause, and thus transferring the burden of proof from the moving party to the Board itself. [6 AEC at 719-729] (emphasis added).

Applicants maintain that the Board's Order in the instant case has the similar effect of burden shifting.

it to disregard those requirements. 17/ Applicants maintain for the reasons set forth below, that such action is erroneous and requires revision.

(1) It Was Error For The Licensing Board To Admit Inadequate Contentions On The Basis Of Its Perceived Responsibility Regarding "Core" Public Health And Safety Contentions

Palmetto Alliance Contentions Nos. 6 and 7 and CESG Contention No. 13 relate to quality of construction at Catawba. 18/ These contentions were admitted by the Board,

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17/ These contentions are: Palmetto Alliance Contentions 6 and 7, relating to quality assurance; 18, relating to Catawba's diesel generators; and 25, relating to Applicants' ability to fund the safe decommissioning of Catawba; CESG contention 13, relating to welding at Catawba, and 17, relating to the effects of Corbicula on the performance of the cooling tower system. As noted, pp. 47-50, supra, a recently-adopted Commission rule precludes consideration of Palmetto Alliance Contention No. 25 in this proceeding and thus the matter will not be discussed further.

18/ Palmetto Alliance Contention No. 18 was also admitted by the Licensing Board. That contention was admitted by the Licensing Board in this general class, e.g., as being "marginally specific" but admissible because it related to the Board's "core responsibility" in this proceeding. However, Applicants cannot reconcile the admission of that contention with the Licensing Board's affirmative statements with respect to the standards by which it will judge contentions, viz., "If substantial relevant information exists and is referenced in Applicants' pleading, the contention will be judged for specificity now..." (Order, p. 12). Leaving aside the legal correctness of that standard (see pp. 37-38, infra), Applicants would note that in

(Footnote continued on next page.)

even though the Board realized that the contentions were only "marginally specific," because the Board believes that they go to issues which it perceives as the "core of our responsibilities as an operating license board." The Board made this finding in spite of the fact that it recognized, and acknowledged, that Intervenors had the ability to provide additional specificity at that point if they had so chosen. (Order, p. 12).

Applicants request that the Roard reconsider its rulings on these contentions because it applied an incorrect standard, viz., the "core responsibility" standard.

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response to Palmetto Alliance's Contention 18, which in sum alleged no more than that Applicants had not documented compliance of Catawba's diesel generators with applicable NRC requirements, Applicants pointed out that the FSAR contains 10 pages which, among other things, demonstres compliance with Commission regulations. Palmetto Alliance made no response to that information, but instead its counsel stated at the prehearing conference that "an anonymous source, now deceased," but one which Palmetto alleges was familiar with Duke facilities, had told members of Palmetto that there was a problem with Catawba's diesel generators. Tr. 174-177. Palmetto acknowledged that this was the extent of its information, but that the concern was raised to the board, and the bases were as stated. Tr. 177. Plainly, then, under the standards which the Board establishes in its Order, this contention should not have been admitted. In Applicants' view, the Board should reconsider its ruling and reject this contention as lacking specificity and basis.

Applicants maintain that it is basic NRC law that the admissibility of the subject contentions must be determined on the basis of the requirements of 10 CFR §2.714 alone. See cases cited on p. 28, supra. The Licensing Board has not applied this standard. Rather, it has admitted contentions which are "at best only marginally acceptable because of the Licensing Board's perceived core responsibilities regarding "actual safety of construction and operation of the Catawba plant." (Order, p. 17). This error warrants revision of the March 5 Order and denial of the subject contentions.

With respect to the Licensing Board's reliance upon its core responsibilities, such reasoning should not be permitted to cure otherwise defective contentions. The Commission has provided guidance in this regard. Texas Utilities Generating Company, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC ___ (December 29, 1981). Therein the Commission, recognizing that "all an intervenor need do to support admission of a contention is set forth the basis for the contention with reasonable specificity" (slip op. at p. 4), held that a Licensing Board's consideration of core responsibility (i.e., sua sponte) issues only comes into play when such

Board has made the requisite affirmative finding that "a serious safety, environmental or "common defense security matter exists." (Id. slip op. at pp. 4-5). The Licensing Board herein has made no such finding and Applicants maintain there is no basis for such finding. Accordingly the contentions at issue must be resolved pursuant to 10 CFR §2.714 and such resolution requires their denial.

(2) The Licensing Board Has Improperly Shifted The Burden Respecting A Showing Of Specificity

CESG Contention No. 17 alleges that the effects of Corbicula on the performance of the cooling tower system at Catawba have not been considered. In its March 5 order the Board rules as follows on this contention:

> This contention lacks specificity in that it fails to state how an infestation of the Asiatic clam Corbicula might affect the performance of the cooling tower system and why such an effect should be of health and safety concern or impact the environment. The potential for Corbicula infestation was brought out in the FES (p. 2-36) at the construction permit stage. However, the Applicants do not refer in their pleading to any discussion of Corbicula in their FSAR or ER. In these circumstances, we admit this contention conditionally, subject to clarification of the issue and much greater specificity following discovery. (Order, p. 27)

Applicants maintain that the regulations require Intervenors to provide the necessary specificity, not Applicants or Staff. See 10 CFR §2.714(a). The burden is on Intervenors

to provide a contention with a factual basis set forth with sufficient specificity to justify its admission as an issue in the proceeding. See, e.g., Grand Gulf, supra, 6 AEC 423; Allens Creek, supra, 11 NRC 542. To admit a contention which the Board acknowledges "lacks specificity" because "Applicants do not refer in their pleading" to the subject matter puts the obligation on Applicants to specify and is the ultimate in burden shifting. It should not be condoned. 19/ Accordingly, Applicants request that the Board reconsider its ruling in this regard and deny the contention.

(3) The Discovery Process Cannot Be Used To Cure Defective Contentions

In ruling on each of the contentions discussed above, the Board specifically held that, even though it recognized and acknowledged that the contentions must be made more specific, and that the Intervenors in fact could have at the time of the prehering conference provided greater

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19/ In fact, Section 9.2.1.6 (p. 9.2-1) of the FSAR does discuss Corbicula in relation to the Nuclear Service Water System. However, that discussion relates to a safety-related system. The contention on its face refers only to the "cooling tower system" which is a nonsafety-related system. Thus, assuming there is some legal obligation for Applicants to provide a reference from its own documents in response to each of Intervenors' contention which it challenges on the grounds that it lacks the requisite specificity, there certainly was, in this instance, no obligation to reference a discussion relevant only to a safety-related system.

specificity, 20/ the requisite specificity could be provided after Intervenors had an opportunity to complete discovery. (Order, pp. 17, 26). In the Licensing Board's view, the level of specificity required at the initial stage of the proceeding is directly affected by the availability of discovery, which will enable Intervenors to learn additional factual details "about their areas of concern." The Board flatly states that "[t]he principal functional purpose of contentions at this juncture is to place some reasonable limits on discovery." (Order, p. 13). The Board's view is that, even if the contentions as plead are deficient, the final prehearing conference is the time finally to frame adequate contentions, based on the results of discovery among the parties.

As discussed in III.A. supra, this position is contrary to the requirements of 10 CFR §2.714 wherein the petitioners have the burden of providing specificity for their contentions at the outset of the proceeding. The Board cannot

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20/ Indeed, at the prehearing conference counsel for Palmetto Alliance identified by name the two former Duke Power Company employees who have raised allegations with respect to quality assurance matters. (Tr. 117-120, 125, 126). Surely, it would not have been an undue burden on Palmetto Alliance for the Board to have required counsel for that organization to specify the bases for their allegations, particularly in light of the fact that each was in attendance at the prehearing conference.

allow unrestricted discovery as a means to cure §2.714 defects in Intervenors contentions. See Koshkonong, supra, wherein the Commission stated:

> Petitioners also argue that without the benefit of discovery they could not have 'basic scientific information' and could not prepare adequately their request for intervention. This claim may be resolved under BPI, et al. v. AEC, et al., 502 F.2d 424, 428 (C.A.D.C. 1974), rejecting the argument that the Atomic Energy Act should be so construed 'that the interested person need not articulate the issues until after having been admitted as a party to the proceeding, with consequent access to discovery.' [8 AEC at 929].

See also, Appendix A to Part 2 of 10 CFR wherein it is stated that "[i]n no event should the parties be permitted to use discovery procedures to conduct a 'fishing expedition' or to delay the proceeding."

Further, Applicants maintain that the practical effect of the Board's ruling with respect to the discovery will be to delay this proceeding, a result contrary to the thrust of the Commission's "Statement of Policy on Conduct of Licensing Proceedings" (13 NRC 452). Under the Board's ruling, discovery is to commence immediately. Had Intervenors been made to specify the bases for their concerns, then their discovery requests could be properly framed and, more importantly, Applicants' responses could be directed to those concerns. As it now stands, however, Intervenors are likely to submit broadly-framed discovery requests, not limited in any respect to matters relevant to the factual

bases for their contentions, since they were not made to specify those bases. In order to respond in a responsible manner, Applicants will be required first to submit requests to and receive responses from Intervenors in order to determine the factual bases for their contentions. To do otherwise would be to stand the process on its head, for it would require Applicants to produce information not relevant to Intervenors' specific concerns. 21/ Such a result is contrary to law. (Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977). Thus, the outcome of the Board's rulings on these contentions is that Intervenors will be allowed virtually unrestricted access to Applicants' files and records on discovery, while Applicants' rights to discovery of facts in Intervenors' possession will be severely restricted. Such an outcome should not be countenanced and thus the subject contentions should be denied.

Applicants wish to emphasize that they recognize the purpose of the Commission's rules on discovery, e.g., that parties to a proceeding be allowed to discover materials

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21/ A simple example will illustrate the problem. Should the bases for Palmetto's concern be that concrete was placed while it was raining, there is no reason why Palmetto Alliance should be allowed access to Applicants' quality assurance records with respect to installation of electric cable.

relevant to the admitted contentions to enable them to ascertain the facts in the litigation, refine the issues to be litigated in the proceeding, and prepare adequately for a more expeditious hearing. Barnwell, supra, 5 NRC at 492; Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-7B-20. 7 NRC 1038 (1978); Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317 (1980). The Commission's rules, however, assume that the parties had--and were able to demonstrate affirmatively that they had--specific factual bases for their contentions. Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579 585 (1975). And had the Board in this case limited discovery to its proper use, and limited the admitted contentions to those for which Intervenors had made an adequate showing, Applicants would not complain. However, as discussed above, this is not the case.

D. Other Rulings Of The Licensing Board Require Reconsideration

In addition to the above arguments seeking reconsideration on the matters related to the Licensing Board's rulings on specificity, Applicants wish to advance three

additional matters: (1) security, 22/ (2) financial qualifications, and (3) service of documents.

1. The Licensing Board's Statements Regarding Palmetto Alliance's Security Plan Contention Require Clarification

With respect to Palmetto Alliance's Contention 23 and access to Applicants' security plan for Catawba, the Licensing Board makes the following statement:

> Because an intervenor cannot reasonably be required to advance specific contentions about a security plan he has never seen, and because Palmetto has expressed a formal interest in the Catawba plan, we believe we could at this juncture order the Applicants to grant Palmetto access to that plan. (Order, p. 38). (emphasis added).

The Licensing Board goes on to narrow its authority somewhat, first, by citing the 10 CFR ¶2.744(e) requirement of a finding by the Board that disclosure of a plan is necessary to a proper decision in the proceeding and, second, by reference to some of the access requirements set out in Pacific Gas & Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 139B (1977), e.g., the need for

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22/ Applicants recognize that the Licensing Board has requested an additional filing from Palmetto Alliance with respect to the matter of its security contention, and that Applicants will have an opportunity to respond to that filing. In this regard, Applicants request that their response be filed on April 16, 1982. The point of addressing the security contention at this point is to make clear Applicants position that the Board cannot at this time order that Intervenors be given access (even under an appropriate order) to Applicants' entire security plan.

Palmetto Alliance to have a qualified security plan expert and the applicability of conditions as to time, place, notetaking, etc., with respect to the security plan. The Licensing Board also attaches a copy of the protective order entered in Diablo Canyon as illustrative of the restrictions on access.

The Licensing Board is correct in its assessment of the limitations on access to security plans insofar as it goes. However, it stops short by failing to take into account the guidelines set out in ALAB-410 which govern the disclosure of security plans to intervenors. Under those guidelines Palmetto Alliance is entitled to see only a "sanitized" version of those portions of the Catawba security plan which are both relevant to, and necessary for, the litigation of Palmetto Alliance's contentions. Further, limited access is to be granted to Palmetto Alliance only under the requirements of 10 CFR §2.790 and then only under protective order.

In ALAB-410, the Appeal Board established the framework within which such relevancy must be established, and by whom. It stated:

> The plan's 'relevancy' must be demonstrated by the party requesting access to the plan. In the context of a request by an intervenor for access to a security plan, we read that provision as contemplating that only those portions of a plan which an intervenor can demonstrate are relevant to its contention should be released to it. All

> the parties appear to agree that a plan involves not only different subject areas but also different levels of detail, and that all the 'gory details' (to use intervenor's terminology) may not be necessary to litigate a particular contention. Using the contention requirement of 10 CFR §2.714(a) as a guide, a mere conclusory statement of relevance will not suffice; one seeking to examine a portion of a security plan must show a relationship between his contentions and the specific portions of the plan he wishes to view. In that connection, an intervenor obviously must be allowed sufficient information about the plan to ascertain which if any particular portions of it bear on his contentions. (emphasis added) [5 NRC at 1404]

Clearly, under the standard set by ALAB-410, the Licensing Board does not have authority to order the disclosure of Applicants' security plan to Palmetto Alliance based on Palmetto Alliance's expression of "a formal interest" in the plan." The most the Board can do within the guidelines established by ALAB-410 is to authorize access to a "sanitized" version of those parts of Applicants' security plan relevant to Intervenors' contention. 23/ And then only

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23/ Although 10 CFR §2.744(e) was not in effect at the time ALAB-410 was handed down by the Appeal Board, nothing in §2.744(e) disturbs the standards set forth therein. Indeed, in deferring the issuance of further guidance or rules for licensing boards writing protective orders, the Commission cites ALAB-410 as providing the necessary guidance. The Statement of Considerations to §2.744(e) states:

> At this time, the Commission believes that its opinion and those of the Boards provide adequate guidance. See, Pacific Gas & Electric Co. [Diablo Canyon Nuclear Power Plant, Units 1 and 2], CLI-80-24, 11 NRC 775 (1980), ALAB 410, 5 NRC 1398 (1972); ALAB 580, 11 NRC 227 (1980); ALAB 592, 11 NRC 744 (1980); and ALAB 609, 12 NRC 3 (1980). [46 Fed. Reg. 51720 (October 1981)].

on a proper showing in the first instance by Palmetto Alliance. The Appeal Board clearly contemplates that, before an intervenor can see any portion of a security plan, notwithstanding the availability of appropriate protective orders, its contentions must be specific enough to enable a determination to be made regarding which "sanitized" parts of the plan it is entitled to view.

Applicants respectfully suggest that the Licensing Board's failure to address the "sanitized plan" portion of ALAB-410 points up a critical problem in the "expression of interest" test adopted by the Board for the purpose of admitting contentions. By admitting a broadly proposed contention that merely "expressed a formal interest" in the security plan area, the Board has created an untenable situation. It is impossible under such a test for the Board to determine what portions of the security plan are in fact relevant to Palmetto Alliance's contentions where there are no specifics in the contentions to make the comparison. Without the ability to make the proper determination, the Board is forced into the position of attempting to order the release of the entire security plan rather than just "sanitized" versions of those parts of the security plan relevant to Palmetto Alliance's contention. Such a result is in contravention of the standards set by ALAB-410 and in violation of its protected status under 10 CFR §2.790.

Based on the foregoing, Applicants request this Board to reconsider its ruling with respect to Palmetto Alliance's Contention No. 23 and reject that contention.

2. The Licensing Board Should Summarily Dismiss Palmetto Alliance's Contentions Nos. 24 And 25

On March 31, 1982, the Commission published in the Federal Register a final rule which, inter alia, eliminates the financial qualifications review of electric utility applicants for power reactor operating licenses. 24/ The rule, which is effective upon publication in the Federal Register, 25/ amends 10 CFR §50.33(f) to provide that

> no information on financial qualifications... is required in any application, nor shall any financial review be conducted, if the applicant is an electric utility applicant for a license to...operate a protection or utilization facility...[NEW 10 CFR §50.33(f) (emphasis added)]. 26/

In adopting this rule, the Commission affirmed its prior conclusion in Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1 (1978), that there is no "demonstratable link between public health and safety concerns and a utility's ability to make a requisite financial showing." 27/

24/ 47 Fed. Reg. 13750 (March 31, 1982).

25/ Id.

26/ Id. at 13754.

27/ Id. at 13751.

Further, the new rule amends the Commission's regulations to eliminate any consideration of decommissioning funding for electric utility applicants for power reactor operating licenses. 28/ Specifically, the new rule eliminates 10 C.F.R. Part 50, Appendix C and exempts electric utility applicants from demonstrating their ability to obtain funds to cover the costs of permanently shutting the facility down and maintaining it in a safe condition (i.e., decommissioning). 29/

The scope of the new rule encompasses all electric utility Applicants. "Electric utility" is defined therein as

> any entity that generates or distributes electricity and which recovers the costs of this electricity either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities, including generation or distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and state and federal agencies, including associations of any of the foregoing, are included within the meaning of "electric utility". [NEW 10 C.F.R. § 50.2(x)].

In addition, the Commission made it clear that the new rule applies to all electric utility applicants, whether co-applicants on the original application or new co-owners

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28/ Id.

29/ NEW 10 CFR §50.33(f)(1)(ii).

which later purchase an interest in the facility. 30/

Palmetto Alliance Contention Nos. 24 and 25 raise precisely the issues which the Commission's new financial qualifications rule eliminates from NRC licensing proceedings. Accordingly, the Board should summarily dismiss those Contentions from this proceeding.

Contention 24 concerns the ability of the small owners of the facility to produce the funds necessary to operate it safely. (Order, p. 24). In support of this Contention, Palmetto contends that municipal power authorities and rural electric cooperatives which have or will become co-owners lack the financial qualifications necessary to operate and decommission the plant. As discussed above, the new rule is applicable to all electric utility applicants, including municipals and cooperatives, regardless of when they become co-owners, and thus co-applicants. 31/ Further, Palmetto Alliance's reliance on the experience of the Washington Public Power Supply System experience in support of this Contention is misplaced. The Commission stated, in response to comments on the proposed rule, that "citing WPPSS' experience is not convincing, because WPPSS' response ..has been

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30/ 47 Fed. Reg. 13752.

31/ See NEW 10 C.F.R. §50.2(x) supra, and 47 Fed. Reg. at 13752.

to postpone or cancel their plants, actions clearly not inimical to public health and safety...." 32/

Palmetto Alliance Contention 25 alleges that Applicants have made no plans to ensure the availability of funds to decommission the Catawba facility. As discussed above, 10 CFR §50.33(f)(1), as amended, exempts electric utility applicants from the requirement that the Commission make findings as to the ability of any electric utility applicant to assure that funds will be available for decommissioning. Accordingly, as with Contention 24, this Contention raises an issue which is expressly eliminated from NRC licensing proceedings by the new rule.

For the foregoing reasons the Board should summarily dismiss Palmetto Alliance Contentions 24 and 25.

3. The Board's Ruling Concerning Service Of Documents Is Contrary To NRC Practice And Unnecessary

The Board granted Palmetto Alliance's motion (Tr. 219-224) that Intervenors be served with copies of "all relevant documents" (that is, "most significantly amendments to the FSAR, other formal technical exchanges between the Applicants and Staff, emergency plans generated by state and local authorities..."), generated by the Applicants and the Staff in connection with this operating license proceeding. The

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32/ See 47 Fed. Reg. at 13751.

Board further stated that providing such service of documents did not significantly burden either Applicants or Staff. (Order, p. 39). Applicants believe that they are obligated only to serve Intervenors with copies of the legal documents, and appropriate attachments, filed with the Licensing Board in this proceeding. Cf., 10 CFR §2.712. Thus, Applicants respectfully suggest that this procedure is contrary to NRC practice. Moreover, because of the existence of the local Public Document Room and other factors, this procedure is unnecessary as well.

Aside from the legal pleadings filed in the proceeding, Intervenors' entitlement to documents filed by Applicants with the Commission in this proceeding is limited to documents furnished in accordance with the Commission's discovery rules. 10 CFR §2.741. The Board Order in this respect goes well beyond what, under NRC practice and procedure, Applicants are obligated to provide under the discovery rules pursuant to a discovery request. During discovery, Applicants are required only to "produce and permit the party making the request...to inspect and copy any designated documents" which are within the scope of 10 CFR §2.740(b). See 10 CFR §2.741(a)(1); Pennsylvania Power and Light Co., et al. (Susquehanna Steam Electric Station,

Units 1 and 2), ALAB-613, 12 NRC 317 (1980). Applicants are not required to supply those documents at no cost to the Intervenors. Thus, the practice established by the Board here imposes binding obligations on the Applicants not authorized by the NRC Rules of Practice and potentially more demanding than those incidental even to formal discovery. 33/

Further, to provide Intervenors with personal copies of all "relevant" documents at no cost to them is inconsistent with Section 502 of the Energy and Water Development Appropriations Act for FY 1981, Pub. L. 96-367, 34/

33/ In Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 183-185 (1974), the Appeal Board held that an Intervenor should continue to receive all Applicant-Staff correspondence relating to the facility for which the operating license was in dispute, a practice established during the Licensing Board proceeding. It did so in large measure because the matter was then under judicial review and as such was not concluded. Importantly, the Appeal Board did not address in any detail the legal basis for initiating the practice in the first instance. In addition, the Appeal Board was not then constrained by Section 502 of the Energy and Water Development Appropriations Act, discussed herein. See note 34 and accompanying text.

34/ Section 502 provides that FY 1981 funds not "be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings...."

and the December 3, 1980 legal opinion of the Comptroller General interpreting that Section. Such opinion stated that Section 502 prohibits NRC from paying for "litigation expenses that would inevitably have been paid by the non-applicant party." 46 Fed. Reg. 13681 (1981). As a result of that Act and opinion, NRC suspended its program for providing free transcripts to and copying and service of written submissions of non-applicant parties. Id. See also Houston Lighting & Power Co. (Allen's Creek Nuclear Generating Station, Unit No. 1), ALAB-625, 13 NRC 13, 14 (1981). Applicants submit that just as NRC is prohibited by that Act from supplying free transcripts and other documents associated with licensing proceedings to Intervenors, so the Board is precluded here from ordering Applicants and the Staff to serve free copies of documents to Intervenors as a matter of course.

In addition, to the extent it may be argued that Intervenors may face a burden if they are not served with all generated documents, that burden is incidental to those imposed on any responsible participant in any adjudicatory proceeding and does not in itself provide a basis for the Board's Order. Indeed this burden of intervention was expressly recognized by then Judge Burger when he wrote in Office of Communication

of United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966):

> The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome.

Furthermore, any right which Intervenors have with respect to access to Applicants or Staff documents, such as the FSAR, the ER, the SER or the FES is satisfied by availability in the local Public Document Room. On this basis, Applicants question whether Intervenors will in fact have any difficulty in obtaining access to needed materials and whether such service is necessary. In any event, with respect to Intervenors located in Charlotte, North Carolina, both the FSAR and the ER, including any amendments thereto, are already compiled and readily accessible in Applicants' offices in Charlotte. And, with respect to Palmetto Alliance, the affidavits submitted by its members to establish the standing necessary to support intervention demonstrate that a number of its members live in the vicinity of Rock Hill, S.C., the location of the Public Document Room established by the NRC for this proceeding. Therefore, it is doubtful

Intervenors will in fact face any hardship gaining access to the needed documents already available in that Public Document Room.

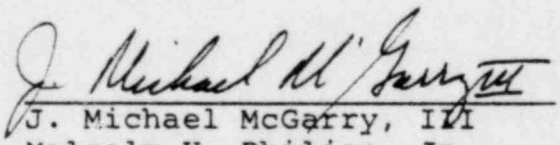
In sum, just as the Staff need not supply documents already accessible in Public Document Rooms, so here the Board should not require gratuitous service of documents where those documents are accessible otherwise. Susquehanna, supra, 12 NRC at 323 (1980); (Allens Creek, supra, 13 NRC 15. Accordingly, Applicants urge the Board to follow well-settled NRC practice and reconsider its decision granting Palmetto Alliance's motion for service of documents.

IV. Conclusion

In Applicants' view, certain rulings set forth in the Board's March 5 Order which are discussed in detail above, are particularly suited for reconsideration by this Board. The Board's Order squarely presents significant policy questions which go to the very heart of how the Commission conducts its proceedings. If the Board, on reconsideration, determines that the rulings should not be changed, Applicants' rights in this proceeding will be significantly affected with an immediate and serious irreparable impact which cannot be alleviated on appeal. Moreover, the Board's Order will affect this proceeding in a pervasive and unusual manner. Consequently, under these circumstances, Applicants

believe that Board certification of its Order under the provisions of 10 CFR §2.751a(d) and 2.718(i) is an appropriate action and so moves. Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478 (1975); Toledo Edison Company, et al. (Davis-Besse Nuclear Power Station), ALAB-297, 2 NRC 727 (1975); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977); Public Service Company of Oklahoma, Associated Electric Company Cooperative, Inc. (Black Fox Station, Units 1 and 2), LBP-76-38, 4 NRC 435, 437 (1976).

Respectfully submitted,



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March 31, 1982