STAFF 4/28/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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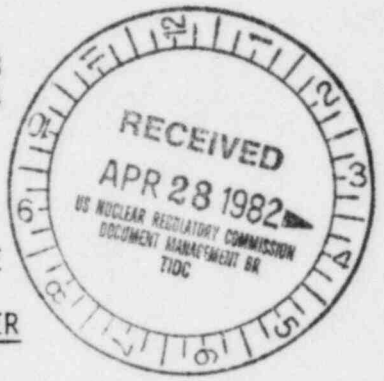
| DUKE POWER COMPANY, ET AL. | ) | Docket Nos. 50-413 |
| | ) | 50-414 |
| (Catawba Nuclear Station, Units 1 and 2) | ) | |




NRC STAFF'S RESPONSE TO INTERVENORS PALMETTO ALLIANCE AND CESG JOINT REQUEST FOR CERTIFICATION OF CERTAIN RULINGS IN LICENSING BOARD'S PREHEARING CONFERENCE ORDER

## I. INTRODUCTION

Pursuant to 10 C.F.R. Section 2.730(c), the NRC Staff hereby responds to "Palmetto Alliance and Carolina Environmental Study Group Responses and Objections to Order Following Prehearing Conference" served March 31, 1982[1/] (Joint Response) insofar as it requests the Licensing Board to certify to the Atomic Safety and Licensing Appeal Board or the Commission certain rulings contained in the Memorandum and Order (Reflecting Decisions Made Following Prehearing Conference), dated March 5, 1982 (March 5, 1982 Order). The remainder of the Joint Response constitutes objections filed pursuant to the March 5, 1982

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1/ As indicated by Intervenors' certificate of service, the NRC Staff was not served a copy of the Joint Response on this date. Although no certificate of service was furnished with the copy subsequently served, the Staff understands its copy to have been mailed on April 8, 1982. The time for response has been computed from that date. As a result, the Staff response is required to be served no later than April 28, 1982.



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Order, and 10 C.F.R. Section 2.751a(d), as to which no reply is permitted absent direction by the Board.

Palmetto Alliance and Carolina Environmental Study Group ("CESG") (jointly referred to as "Intervenors") request certification to the Appeal Board or the Commission of six rulings of the Licensing Board. Those rulings are:

(1) Rejection of Palmetto Alliance contentions 5, 9, 31 and CESG Contention 2 on the risk of serious accidents at Catawba, based on lack of specificity. (Joint Response at 5)

(2) Rejection of Palmetto Alliance Contentions 30, 33, and 39 and CESG Contentions 1, 5, and 12, relating to need for power and alternative energy sources, based upon the Commission's final rule of March 26, 1982 barring the litigation of these issues in operating license proceedings. (Joint Response at 15)[2/]

(3) Rejection of Palmetto Alliance Contention 17 relating to safe storage of spent fuel at Catawba after expiration of its license, as beyond the scope of this proceeding and a collateral attack on the pending waste confidence rulemaking. (Joint Response at 17)

(4) Rejection of Palmetto Alliance Contention 35 and CESG Contention 8 insofar as they assert a 30-mile radius should be the basis for emergency planning, as an impermissible attack on the Commission's emergency planning regulations. (Joint Response at 24)

(5) Rejection of Palmetto Alliance Contention 37 and CESG Contention 10 asserting the need for a "crisis relocation plan" for

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2/ Intervenor's Joint Response is unclear on whether it also seeks certification of the Board's rulings on Palmetto Alliance contentions 11, 12, 13 and 34, and CESG Contention 6, which Intervenors claim relate to the cost-benefit balance for Catawba but were rejected by the Board as falling outside the scope of this proceeding. (See Joint Response at 13, 15). In any event, the same considerations discussed with respect to the need for power contentions apply to these contentions as well.

permanent relocation of persons, as beyond the Commission's emergency planning requirements (Joint Response at 24); and

(6) Rejection of Palmetto Alliance Contention 41 and CESG Contention 15 on the possible effects of an electromagnetic pulse on Catawba, as an impermissible challenge to 10 C.F.R. §50.13, which relieves license applicants from having to provide for the effects of such an event. (Joint Response at 24-25)

The NRC Staff's response to Intervenors' requests for certification follows. As set forth more fully below, because Intervenors have not demonstrated sufficient cause for certification, (see Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449, 450 (1979), the Staff opposes their requests for certification.

## II. DISCUSSION

### A. Standards for Certification of Licensing Board Rulings

The rulings as to which Intervenors seek certification -- all of which were Board dismissals of contentions as being beyond the scope of this licensing proceeding, an impermissible attack on Commission regulations, or non-specific -- are manifestly interlocutory in nature.[3/] Thus, they are not subject to immediate review unless, in the judgment of the presiding officer, referral of the rulings for appellate review pursuant to 10 C.F.R. § 2.730(f) is warranted to prevent detriment to the public interest or unusual expense or delay, or the presiding officer otherwise determines in his discretion to certify such rulings pursuant

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3/ See, e.g., Boston Edison Company, et al. (Pilgrim Nuclear Generating Station, Unit 2), ALAB-269, 1 NRC 411, 413 (1975).

to 10 C.F.R. § 2.718(i). In ruling on objections to a special prehearing conference order,

> [t]he board may revise the order in consideration of the objections presented and, as permitted by § 2.718(i), may certify for determination to the Commission or the Atomic Safety and Licensing Appeal Board, as appropriate, such matters raised in the objections as it deems appropriate.

10 C.F.R. § 2.751a(d). While the Licensing Board may, pursuant to Intervenors' request, certify its rulings to the Appeal Board or the Commission for review, requests for certification will only be entertained where the public interest so requires. Public Service Company of New Hampshire, et al. (Seabrook Station), ALAB-271, 1 NRC 478, 483 (1975). In accordance with this principle that interlocutory appeals, whether by referral or certification, will be entertained only where the public interest requires, the Appeal Board has consistently indicated that:

> [a]lmost without exception in recent times, [it has] undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.

Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310[4/], quoting directly from Public

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4/ In Allens Creek, intervenors filed a motion with the Licensing Board for "Interlocutory Appeal per 2.730(f) and Certification of Question per 2.718(i)" and a motion to the Appeal Board for directed certification. The Licensing Board denied the motion addressed to it in an unpublished Memorandum and Order, dated March 2, 1981, and the Appeal Board refused to direct certification in ALAB-635.

Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-405, 5 NRC 1190, 1192 (1977).[5/]

These standards for undertaking discretionary interlocutory review of actions or rulings by the Licensing Board were recently affirmed in South Carolina Electric and Gas Co. et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC ___ (December 14, 1981), Slip Op. at 43, wherein the Appeal Board again quoted directly from Marble Hill. While these cases are cast in terms of the Appeal Board's exercise of its discretionary review function, we believe that they articulate the appropriate standards for the Licensing Board to use in its determination of whether referral or certification of rulings to the Appeal Board for interlocutory review is warranted. In view of these standards, certification to the Appeal Board for review pursuant to Intervenors' request would be appropriate only where the ruling or issue was shown to

(1) threaten the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or

(2) affect the basic structure of the proceeding in a pervasive or unusual manner.

B. Intervenors' Failure to Demonstrate Any Basis for Immediate Appellate Review Precludes Certification of the Board's Rulings In This Case

Sections 2.714a and 2.730(f) of the Commission's Rules of Practice, as well as the case law, leave no doubt that a licensing

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5/ In Marble Hill, the Licensing Board referred a ruling to the Appeal Board. The Appeal Board refused to accept the referral.

board's ruling dismissing a contention is not an appealable order where the party's status as an intervenor is unaffected. Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-286, 2 NRC 213, 214 (1975); Pilgrim, supra, ALAB-269, 1 NRC at 413. Thus, in Pilgrim, the Appeal Board stated:

> The Licensing Board's rejection of the Cleetons' Contention F did not end their participation in the proceedings below. They remain intervenors and the Board will consider a number of their other contentions. The order in question is therefore interlocutory, undoubtedly but one of many such rulings the Licensing Board will be called upon to make during the course of the proceeding. Interlocutory rulings, including ones dealing with proposed contentions, are not exempt from appellate review. It has been long determined, all things considered, that proceedings can be conducted most efficiently if the right to obtain appellate review of interlocutory orders is deferred to an appeal at the end of the case. The Commission's Rules of Practice so provide and we must follow them.

Id. at 413. (Citations omitted). As noted above, the Appeal Board will depart from this rule only where it is shown that "the ruling below either (1) threaten[s] the party adversely affected by it with immediate and serious impact or (2) affect[s] the basic structure of the proceeding in a pervasive or unusual manner." Allens Creek, supra, 13 NRC at 310. Where, as here, there is an absence of a strong showing by an aggrieved party that the impact of the order upon that party or upon the public interest is indeed unusual, under the criteria enumerated in Allens Creek, the Appeal Board has uniformly declined to undertake interlocutory review of Licensing Board rulings. See e.g., Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-438, 6 NRC 638 (1977).

The case law is replete with rulings by the Appeal Board denying interlocutory appeals based upon what amounted to mere assertion of error. See, e.g., Pennsylvania Power & Light Co. (Susquehanna Steam

Electric Station, Units 1 & 2), ALAB-641, 13 NRC 550 (1981); id., ALAB-563, 10 NRC 449. In such circumstances, the Appeal Board has noted:

> ...it has not been satisfactorily explained why appellate scrutiny of the ruling cannot abide the event of the initial decision and (if dissatisfied with the result reached in that decision) [intervenors'] appeal from it. To be sure, if the ruling were found erroneous on such an appeal, the consequences might well be a vacation of the initial decision and a remand to the Board below. But the same possibility exists with respect to all interlocutory determinations made by licensing boards on matters which have a potential bearing upon the outcome of the proceeding. If, standing alone, that consideration were enough to justify interlocutory review, it would perforce follow that virtually every significant licensing board ruling during the course of a proceeding would be a fit candidate for immediate appellate examination. It is scarcely necessary to expound at length upon why a drastic alteration of existing practice to accommodate that thesis would be intolerable -- as well as in derogation of the Commission's explicit policy disfavoring interlocutory review. 10 C.F.R. §2.730(f).

Allens Creek, supra, 13 NRC at 310-11 (footnote omitted). Thus, the prejudice ordinarily suffered by a party receiving an adverse interlocutory ruling, even if it is assumed that the ruling is erroneous, will not justify interlocutory review under the Commission's Rules of Practice. See also, Toledo Edison Company (Davis-Besse Nuclear Power Station, Unit 1), Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 2 and 3), ALAB-314, 3 NRC 98, 99-100 (1976). Therein, the Appeal Board explained:

> In the last analysis, the potential for an appellate reversal is always present whenever a licensing board (or any other trial body) decides significant procedural questions adversely to the claims of one of the parties. The Commission must be presumed to have been aware of that fact when it chose to proscribe interlocutory appeals (10 C.F.R. 2.730(f)). That proscription thus may be taken as an at least implicit Commission judgment that, all factors considered, there is warrant to assume the risks which attend a deferral to the time of initial decision of the appellate review of procedural rulings made during the course of trial. Since a like practice obtains in the federal judicial system, that judgment can scarcely be deemed irrational.

Id. at 100. See also, Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973).

In the instant case, there is indeed nothing at all unusual about the rulings of the Licensing Board, or the consequences thereof. With respect to the serious accident contentions, which the Licensing Board has rejected (Palmetto Alliance contentions 5, 9, 31; CESG Contention 2), Intervenors have failed to allege a specific, serious, and credible accident scenario relating particularly to the Catawba facility. The putative revisions offered in Intervenors' Joint Response[6/] merely describe imaginary scenarios having no relation to the Catawba facility as such, and Intervenors do not even attempt to provide reasons why immediate review of these contentions is warranted. Nor is there any unusual harm to them or the public interest which would arise from delaying appellate review of the Board's dismissal of these contentions, even if it were assumed that the rulings are erroneous. The most that could be said is that were the Appeal Board to later rule on appeal "that the Licensing Board had erred, some further proceedings might be required. But there is nothing at all unusual about such an eventuality." Zion, ALAB-116, supra, 6 AEC at 259.

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6/ These revisions to contentions offered by Intervenors in themselves constitute amendments to contentions previously filed by Intervenors and rejected by the Licensing Board. Such amendments, offered nearly four months after the time within which contentions were to be filed in this proceeding, should be considered as not timely filed under 10 CFR § 2.714. Intervenors have offered no justification for their timing in amending these contentions and have not addressed the criteria for late filing in Section 2.714(a). Intervenors' failure to affirmatively demonstrate any justification for their nontimely revision to contentions is fatal to their request for admission of such revised contentions. Cf. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 &3), ALAB-615, 12 NRC 350, 352 (1980).

The Licensing Board's rejection of contentions dealing with need for power/alternative energy sources (as well as cost-benefit issues), provision for safe long-term waste storage, the size of the emergency planning zone, crisis relocation planning, and effects of an electromagnetic pulse, is mandated on the ground that they are either beyond the scope of this proceeding or contrary to Commission regulations or policy. None of these rulings affects the basic structure of this proceeding in a pervasive or unusual manner or results in an immediate or serious impact on Intervenors or the public. For example, the Licensing Board has rejected Intervenors' contentions seeking to restrike the cost-benefit balance based on factors which, under Commission regulations and precedent, are outside the narrow scope of cost-benefit analysis at the operating license stage. These factors included costs of construction already expended or committed (Palmetto 11, 34, CESG 6), the impact of nuclear plants on the economy generally (Palmetto 12), and the relative number of jobs created by the Catawba facility compared to conservation investments (Palmetto 13). Rejection of these contentions will not affect the manner in which the remainder of this proceeding is conducted, and does not unalterably change the legal or equitable relations of the parties in a manner which could not be rectified on later appeal. Rather, rejection of contentions by a Licensing Board is an ordinary but essential function of the pre-hearing process by which those issues not suitable for adjudication in individual licensing proceedings are eliminated, and which has no impacts not ordinarily attendant to adverse interlocutory rulings. In the highly

unlikely event that, on appeal, any of these rulings is determined to be erroneous, the impact would only be to require remand for further proceedings. Such a risk "is one which must be assumed by [the] board and the parties to the proceeding." Zion, supra, ALAB-116, 6 AEC at 259. Under the well-settled criteria for interlocutory review, such an impact cannot justify certification. As a result, Intervenors' request for certification of the six rulings referred to above should be summarily denied.7/

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7/ Intervenors' assertions that cost-benefit and need for power considerations warrant "dismissal of the operating license application and immediate cessation of construction," and that the cost-benefit contentions must "be taken up now before additional 'sunk' costs are incurred...," although not argued as grounds for certification, are not impacts which, in any event, could meet the standards for certification. This Licensing Board is not considering whether the Catawba facility is to be constructed. A construction permit has been issued, and Applicants presently have the authority to complete such construction. This Licensing Board has not been granted jurisdiction to reconsider that determination. As a result, the impact which Intervenors seek to avoid, construction of the Catawba facility, cannot be affected one way or the other by the Licensing Board's admission or denial of either the cost-benefit, or need for power contentions, and thus dismissal of these contentions has no serious impact on Intervenors. Nor can the impact of the ruling on these proceedings be said to be unusual. Further, to the extent Intervenors seek reversal of the Board's rulings on these contentions "so that the necessity for litigation of all remaining issues can be avoided," such an impact -- the burden of litigating a case despite adverse interlocutory rulings -- is an impact no different from the impact of any other ruling which has "a potential bearing upon the outcome of the proceeding." Allens Creek, supra, 13 NRC at 310. Such an impact clearly cannot serve as a basis for interlocutory review. To hold otherwise would require the Appeal Board to take immediate review of every dismissal of a contention which, if ultimately proven, might prevent the authorization of an operating license. Such a result is clearly not contemplated by the regulations or the controlling case law discussed above.

## III. CONCLUSION

In summary, Intervenors have made no showing of exceptional circumstances which would warrant interlocutory review by the Appeal Board or the Commission of the Licensing Board's rulings dismissing the following contentions:

(1) Palmetto Alliance 5, 9 and 31; CESG 2 (on the risk of serious accidents at Catawba);

(2) Palmetto Alliance 30, 33 and 39; CESG 1, 5, and 12 (on need for power and alternative energy sources), as well as Palmetto Alliance 11, 12, 13 and 34; CESG 6 (on restriking the cost-benefit balance);

(3) Palmetto Alliance 17 (on storage of spent fuel after expiration of the Catawba license);

(4) Palmetto Alliance 35, CESG 8 (on the size of the emergency planning zone);

(5) Palmetto Alliance 37, CESG [illegible]ne need for "crisis relocation" planning); and

(6) Palmetto Alliance 41; CESG 15 (on the effects of an electromagnetic pulse).

The dismissal of these contentions does not threaten Intervenors with serious irreparable impact which cannot be alleviated upon later appeal nor does it affect the basic structure of the proceeding in a pervasive or unusual manner. As a result, Intervenors' request for certification of such rulings should be denied.

Respectfully submitted,

George E. Johnson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 28th day of April, 1982.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENORS PALMETTO ALLIANCE AND CESG JOINT REQUEST FOR CERTIFICATION OF CERTAIN RULINGS IN LICENSING BOARD'S PREHEARING CONFERENCE ORDER" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 28th day of April, 1982:

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