

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

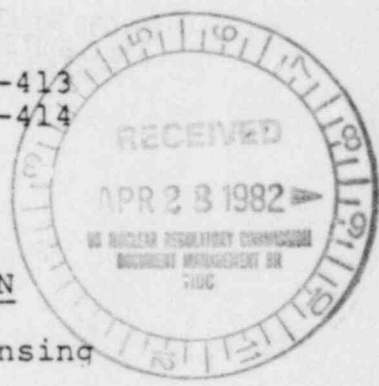
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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)
DUKE POWER COMPANY, et al.)
(Catawba Nuclear Station,)
Units 1 and 2))

Docket Nos. 50-413
50-414



APPLICANTS' RENEWED MOTION FOR CERTIFICATION

On April 13, 1982, the Atomic Safety and Licensing Board ("Licensing Board") issued an Order in the captioned proceeding wherein it informed the parties that, given the "other adjudicatory responsibilities" of the Board, it would be unable to "consider and decide" the objections raised by the parties in Motions for Reconsideration of the Board's Memorandum and Order of March 5, 1982 "until late May or early June." 1/

Given the importance of the issues involved 2/ and the direct effect on the conduct of the remainder of this proceeding, Duke Power Company, et al. ("Applicants") respectfully request that the Licensing Board certify at this time the following issues to the Atomic Safety and Licensing

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- 1/ Applicants note that they did not receive a copy of the Board's Order until April 19, 1982.
 - 2/ Applicants note that the Commission has recently determined that similar issues raised in the TVA, Browns Ferry case were significant enough to warrant their sua sponte review (Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), Docket Nos. 50-259, 260, 296-OLA, Commission Order, ___ NRC ___ (April 19, 1982).

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Appeal Board ("Appeal Board"):

- (1) The Board's conditional admission of 10 contentions lacking the specificity required by 10 CFR §2.714, based on the unavailability of Staff or Applicants documents. These contentions were admitted subject to the provision of the requisite specification after pertinent documents become available.
- (2) The Board's conditional admission of six contentions (presently lacking specificity) on the basis that requisite specificity can be achieved through discovery.
- (3) The Board's waiver of application of the late-filing criteria for revised or new contentions that may be submitted after new information or analyses become available.
- (4) The Board's holding that Intervenor Palmetto Alliance need not plead specific contentions on the facility security plan in order to obtain access to the plan.
- (5) The Board's admission of Palmetto Alliance contentions 24 and 25 on financial qualifications as proper subjects for litigation.
- (6) The Board's direction that, henceforth, intervenors be served with copies of all relevant documents generated by Applicants and Staff in this proceeding. 3/

3/ Applicants would note that the Staff in its pleading of April 5, 1982, supports Applicants' request for certification with respect to five of the six issues raised. Applicants would also note that the fifth issue above (financial qualifications) involves consideration of new information not before the Board at the time it rendered its March 5, 1982 Memorandum and Order. See Applicants pleading of March 31, 1982.

Without question, the Licensing Board's March 5, 1982 Memorandum and Order raises significant policy matters that, if left unchallenged, would have a pervasive impact upon the proceeding. The challenged rulings go to the very heart of how the Commission conducts its proceedings and are, in Applicants' view, contrary to controlling regulation. Furthermore, the Memorandum and Order has placed Applicants under the disadvantage of remaining without knowledge as to the specific nature of Intervenors' contentions and yet being required to engage in discovery. 4/ Such a result works an immediate and serious irreparable impact upon Applicants which cannot be alleviated by a

4/ The practical effect of the Memorandum and Order on the proceeding is already making itself felt. In ~~its April 13, 1982 Order~~ the Board directed discovery to continue upon contentions which Applicants urge certification is warranted. Applicants are aware of the Board's early ruling procedure set forth in its April 13, 1982 Order; however the Board ruled such procedure is not applicable to "the specificity of contentions question," the central matter upon which Applicants seek certification. Further, with respect to the contentions not involving "the specificity of contentions question" (i.e., contentions which are to be made specific through discovery), the Board ruled that only objections on the grounds of undue burden would be entertained. To answer discovery requests regarding contentions which are totally lacking in specificity prejudices Applicants' ability to object on matters such as relevancy.

later appeal. 5/ Under such a circumstance immediate certification is appropriate. See 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); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981).

5/ Applicants are of the view that, given the nature of the issues sought to be certified, the discovery process should be suspended pending resolution of the certification questions. In the alternative, Applicants request a stay of discovery pursuant to 10 CFR §2.788. With regard to the four-factor test established to rule on requests for stays, Applicants maintain that such factors favor the granting Applicants' motion. Specifically, Applicants' March 5, 1982 Motion for Reconsideration presents a strong possibility of Applicants' success on the merits of the issues (Factor 1). While Applicants may not be irreparably injured if the stay is not granted, proceeding with discovery on those contentions that are not yet defined would be extremely burdensome and would result in a substantial and unwarranted commitment of resources (Factor 2). If Applicants do not prevail on the merits, staying discovery on undefined contentions will not harm intervenors in this proceeding (Factor 3). Clearly the public interest lies in granting the stay which may prevent an unwarranted broadening of the issues and an unwarranted expenditure of resources (Factor 4).

The Commission has provided guidance with respect to the matter at hand. See the Commission's Statement of Policy regarding this matter wherein it states:

The licensing boards should issue timely rulings on all matters. In particular, rulings should be issued on crucial or potentially dispositive issues at the earliest practicable juncture in the proceeding. Such rulings may eliminate the need to adjudicate one or more subsidiary issues. Any ruling which would affect the scope of an evidentiary presentation should be rendered well before the presentation in question. Rulings on procedural matters to regulate the course of the hearing should also be rendered early.

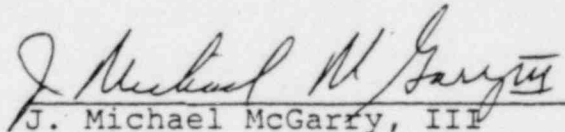
If a significant legal or policy question is presented on which Commission guidance is needed, a board should promptly refer or certify the matter to the Atomic Safety and Licensing Appeal Board or the Commission. A board should exercise its best judgment to try to anticipate crucial issues which may require such guidance so that the reference or certification can be made and the response received without holding up the proceeding. [Statement of Policy on Conduct of Licensing Proceedings, CLI-86-8, 13 NRC 452, 456-7 (1981)].

While Applicants have requested reconsideration of the Board's March 5, 1982 Memorandum and Order, action on such is not a necessary prerequisite to certification. Rather, Applicants maintain that their positions, and those of the Board, are sufficiently set forth in the March 31, 1982 pleading and March 5, 1982 Memorandum and Order, respectively, such that the issues are in a posture

ripe for Appeal Board review. 6/

Entitlement to timely resolution coupled with the significance of the issues, argue for grant of the instant Renewed Motion for Certification.

Respectfully submitted,



J. Michael McGarry, III
Malcolm H. Philips, Jr.
DEBEVOISE & LIBERMAN
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9800

William L. Porter
Albert V. Carr, Jr.
Ellen T. Ruff
DUKE POWER COMPANY
P.O. Box 33189
Charlotte, North Carolina 28242

Attorneys for Duke Power
Company, et al.

April 26, 1982

6/ Applicants are cognizant of Appeal Board decisions emphasizing the need for articulation of the reasoning for Licensing Board decisions including the bases for decisions on certification. (See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-504, 8 NRC 406, 410-11 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB 422, 6 NRC 33, 41 (1977), aff'd., CLI-78-1, 7 NRC 1 (1978), aff'd. sub nom. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 NRC 8, 10-11 (1976). Applicants maintain such case law is satisfied by virtue of the thorough articulation of the Licensing Board in its March 5, 1982 Memorandum and Order.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Renewed Motion For Certification" in the above captioned matter, has been served upon the following by deposit in the United States mail this 26th day of April, 1982.

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

George E. Johnson, Esq.
Office of the Executive Legal
Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. A. Dixon Callihan
Union Carbide Corporation
P.O. Box Y
Oak Ridge, Tennessee 37830

William L. Porter, Esq.
Albert V. Carr, Jr., Esq.
Ellen T. Ruff, Esq.
Duke Power Company
P.O. Box 33189
Charlotte, North Carolina 28242

Dr. Richard F. Foster
P.O. Box 4263
Sunriver, Oregon 97701

Richard P. Wilson, Esq.
Assistant Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

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

Robert Guild, Esq.
Attorney-at-Law
314 Pall Mall
Columbia, South Carolina 29201

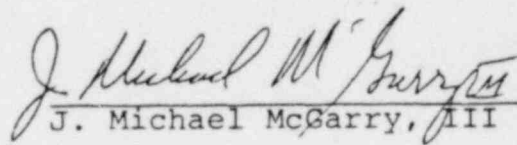
Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Palmetto Alliance
2135 1/2 Devine Street
Columbia, South Carolina 29205

Jesse L. Riley
854 Henley Place
Charlotte, North Carolina 28207

Henry A. Presler
Charlotte-Mecklenburg
Environmental Coalition
943 Henley Place
Charlotte, North Carolina 28207

Scott Stucky
Docketing and Service Station
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555



J. Michael McGarry, III