UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANTS' MEMORANDUM FAVORING INTERLOCUTORY REVIEW

J. Michael McGarry, III
Malcolm H. Philips, Jr.
DEBEVOISE & LIBERMAN
1200 Seventeenth Street, N.W.
Washinton, D.C. 20036
(202) 857-9833

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.

July 16, 1982

D503

TABLE OF CONTENTS

TABLE OF CITATIONS

AEC AND NRC ADJUDICATIONS (Con't.) Page

AEC AND NRC ADJUDICATIONS (Con't.) — Page

MISCELLANEOUS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANTS' MEMORANDUM FAVORING INTERLOCUTORY REVIEW

Introduction

On July 1, 1982, the Atomic Safety and Licensing Appeal Board ("Appeal Board") issued a Memorandum and Order ("July 1 Order") regarding the Atomic Safety and Licensing Board's ("Licensing Board") June 30, 1982 Memorandum and Order ("June 30 Order") which referred three rulings to the Appeal Board.[1] Therein, the Appeal Board

---

[1] The referred rulings are:

(1) The Board's conditional admission, absent the specificity required by 10 CFR §2.714, of 10 contentions based on the unavailability of Staff or Applicant documents which might allow the further particularization of the contentions. These contentions were admitted subject to further specification after pertinent documents become available, but the Board ruled that the late-filing criteria of 10 CFR §2.714(a) would not be applied.

(2) The Board's conditional admission of six relatively vague contentions, subject to the provision of greater specificity after completion of discovery.

(3) The Board's ruling that the late-filing criteria
(footnote continued)

provided "parties favoring interlocutory review an opportunity to be heard." (July 1 Order, p. 2). Duke Power Company, et al. ("Applicants")[2] favor interlocutory review. Accordingly, Applicants file the instant Memorandum.[3]

(footnote continued from previous page)
of 10 CFR 2.714(a) do not apply to contentions based on information or analysis in documents not previously available and filed promptly after such documents are issued.

2 "Applicants" refers to Duke Power Company, North Carolina Municipal Power Agency Number 1, North Carolina Electric Membership Corporation and Saluda River Electric Cooperative, Inc.

3 Applicants had also requested that the Licensing Board certify three additional rulings to the Appeal Board. See "Applicants' Renewed Motion For Certification," April 26, 1982, p. 2. In its June 30 Order the Licensing Board indicated that it would rule on Applicants' remaining requests for certification at a later time. (June 30 Order, p. 2). On July 8, 1982, the Board issued a Memorandum and Order (July 8 Order) in which it addressed, among other things, the three remaining issues on which Applicants had sought certification. Applicants have no quarrel with respect to two of those issues (one related to contentions on financial qualifications and the other to service of documents). With respect to the third issue (dealing with the security plan for the facility) however, Applicants seek Appeal Board guidance.

The Licensing Board has ruled that

> Because an intervenor cannot reasonably be required to advance specific contentions about a security plan he has never seen, and 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. We could now find that disclosure of the plans is 'necessary to a proper decision in the proceeding. 10 CFR

(footnote continued)

Argument

The Appeal Board has directed that the instant Memorandum address "both (1) the existance of extraordinary cause for acceptance for the referral; and (2) the merits of the referred ruling." (emphasis in original). This

---

(footnote continued from previous page)
2.714(e). (March 5 Order at 38).

Applicants disagree with that conclusion and have set forth in detail the bases for that disagreement. See, "Applicants' Motion For Reconsideration In The Alternative For Certification," March 31, 1982, pp. 43-47; "Applicants' Response To 'Palmetto Alliance Response To Board Questions And Motion Regarding Security Contention No. 23' And Motion To Dismiss Contention," June 11, 1982, pp. 9-11. It is Applicants' position that a mere "expression of interest" is an insufficient basis for the Licensing Board to find that disclosure of the security plan is "necessary to a proper decision in the proceeding." Therefore Applicants asked that the Licensing Board reconsider its ruling in this regard or certify the issue to the Appeal Board.

In its July 8 Order the Licensing Board did not address Applicants' request for reconsideration or certification of this issue. Instead it found, on the basis of pleadings before it, that because Palmetto Alliance had not identified a qualified security plan witness and had refused both to execute an affidavit of non-disclosure and honor a protective order, it would not order disclosure of the security plan to it. In the Licensing Board's view Palmetto Alliance cannot draft a specific contention without access to the plan. Therefore the Licensing Board dismissed the contention.

Applicants believe this ruling presents a problem. It appears that if Palmetto Alliance does obtain the services of a qualified expert and does execute an affidavit of non-disclosure, the Licensing Board will order it be given access to the plan. As noted above, Applicants believe that the Licensing Board's ruling, in this regard is in error, but because the contention was dismissed on different grounds there

(footnote continued)

Memorandum addresses these points seriatim. At the outset, however, Applicants wish to make some general observations with respect to the issues as to which Applicants believe the Appeal Board should take review. The issues for which review is sought do not involve specific subject-matter objections to admission of contentions as issues in the proceeding. Instead these issues focus upon fundamental Commission policies regarding the conduct of the instant licensing proceeding, as well as other cases pending before the Commission. Put briefly, the Licensing Board has announced its dissatisfaction, in certain respects, with the Commission's licensing process which requires intervenors, at the outset of a proceeding, to plead with specificity and bases the contentions which they seek to have admitted as issues in the proceeding. Therefore, the Licensing Board has instituted a procedure whereby it accepted conditionally numerous non-specific contentions[4]

(footnote continued from previous page)
does not appear to be an issue to bring before the Appeal Board. Nevertheless, at least an unresolved, if latent, controversy exists.

Applicants believe the Board's ruling on the security plan issue, as set forth in its March 5 Order, is significant enough to warrant Appeal Board review. It is closely related to the issues referred to the Appeal Board by the Licensing Board. Judicial economy would suggest that these issues be considered together. Should the Appeal Board agree, Applicants would be prepared to file a brief in support of their

4 The Licensing Board's rulings led to the conditional acceptance of sixteen of the twenty-two contentions. (footnote continued)

on the basis of a mere "expression of interest" by Intervenors in a particular subject. March 5, 1982 Memorandum and Order ("March 5 Order"), p. 17. The Licensing Board ruled that the requisite specificity and basis for the contentions may be provided either after the NRC Staff (or other government agencies) have completed their reviews of the application or after Intervenors have had full opportunity to conduct discovery on those subjects. Further, the Licensing Board held that neither the subsequently reconstituted contentions, nor any other later-filed contentions arising out of such circumstance, will be held to the late-filing criteria of 10 CFR §2.714(a).

To reach these results, the Licensing Board considered fully the relevant case law and Commission regulations. Following that consideration, the Licensing Board decided that the applicable cases decided by the Commission, the Appeal Board, and the courts do not apply and that the clear language of the Commission's regulations and the statement of considerations accompanying those regulations is invalid because the Commission could not have meant to make the regulations applicable to the situation facing the Licensing Board. (June 30 Order, pp. 7-9)

(footnote continued from previous page)
admitted pursuant to the Licensing Board's March 5 Order.

In light of the fact that this Licensing Board's rulings are clearly at variance with Commission policy, and in light of the fact that such rulings affect the Licensing Board's action with respect to sixteen of the admitted twenty-two contentions, it is incumbent upon the Appeal Board to consider the questions referred to it by the Licensing Board and to provide, in the first instance, a reaffirmance of the Commission's policy on the issues presented. Indeed, to do otherwise is to ignore the Commission's explicit directive to its licensing boards to certify to the Appeal Board "significant legal or policy question[s]...on which Commission guidance is needed."[5]

A. EXISTENCE OF EXTRAORDINARY CAUSE FOR ACCEPTANCE OF THE REFERRAL[6]

---

5 Statement of Policy On Conduct Of Licensing Proceedings, CLI-81-8, (Section F. "Timely Rulings on Prehearing Matters"), 13 NRC 452, 456 (1981). (Hereinafter cited as "Policy Statement").

6 The Licensing Board addressed the extraordinary nature of its rulings in its June 30 Order. Therein it stated:

> We believe that the issues involved here meet these standards. They concern not merely isolated rulings on particular contentions, but raise generic issues affecting most of the contentions thus far admitted into the case. If the Board's rulings are ultimately determined after hearing and on appeal to be incorrect, very substantial delay and expense may have been unnecessarily incurred. Perhaps more significantly, these issues seem bound to affect the admission of contentions in other upcoming cases. At the present time, there is no clear guidance on these issues from the Appeal Board or the Commission.

(footnote continued)

Applicants' discussion of "extraordinary cause" begins with a definition of terms. The Appeal Board has informed the parties that "[t]he mere fact that interlocutory review might obviate the need to litigate the conditionally admitted contentions does not constitute [extraordinary] cause." (July 1 Order, p. 2, n.1). Such argument does not form the basis of Applicants' position favoring interlocutory review. Rather, in Applicants' view, the instant situation comports fully with the Appeal Board's "extraordinary cause" standard established with respect to interlocutory review in Marble Hill[7] where it stated:

> Almost without exception in recent times, we have 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. [5 NRC at 1192][8]

(footnote continued from previous page)
In Applicants' view the Licensing Board correctly, albeit succinctly, explained why "extraordinary cause" exists in this matter. In the discussion which follows, Applicants expand upon the Licensing Board's statement and show how the Licensing Board's order will have such effect.

7 Public Service Co. of Indiana (Marble Hill Units 1 and 2), ALAB-405, 5 NRC 1190 (1977).

8 Applicants are cognizant of Appeal Board rulings which found that this standard was not met. (See, e.g., Marble Hill, supra, n.3, 1191). In those cases the issues involved were narrow ones related to the propriety of the admission or rejection of specific contentions. Such is not the case herein. Appli-
(footnote continued)

Applicants believe that the referred rulings affect the basic structure of the proceeding in a pervasive and unusual manner. Stated simply, the Licensing Board has removed from the Commission's regulations and case law the requirement that Intervenors' contentions be plead at the outset of a proceeding with specificity and bases. Thus, the Licensing 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 which is to be made specific either after completion of the review process or the completion of discovery. Given the fact that sixteen out of the twenty-two admitted contentions are affected by these rulings, it is reasonable to conclude that the rulings will have a pervasive impact upon the proceeding.

(footnote continued from previous page)
cants are not seeking Appeal Board reversal of a specific contention; rather we seek Appeal Board instruction to the Licensing Board that its policy rulings regarding specificity and basis, as well as late-filed contentions, are in error. It will be left to the Licensing Board to take the appropriate action. So postured, Applicants maintain this case falls within those cases wherein interlocutory review has been granted. See, e.g., Marble Hill, supra, n.7, 1192; Puget Sound Power and Light Co. (Skagit Nuclear Power Plant Units 1 and 2), ALAB-572, 10 NRC 693, 695, n.5 (1979).

Further, tying specificity and basis to completion of the review process makes the hearing process wholly dependent on such review. Depending upon the status of the review of various issues, a very real propsect of severe impact upon the timely completion of the licensing proceeding arises.

Moreover, the Licensing Board's reliance upon discovery to cure the lack of specificity and basis in contentions will create an atmosphere of confusion and uncertainty and will result in voluminous discovery which would be otherwise unnecessary.[9]

Lastly, the Licensing Board's rulings regarding the inapplicability of the late-filed criteria of 10 CFR §2.714(a), which are also contrary to the regulations, create the potential for acceptance of contentions at any stage of the proceeding without requiring Intervenors either to justify the lateness of their filing or to explain why their late contentions should be admitted in light of the inevitable adverse impact on the proceeding.

If the Commission's clear regulations regarding specificity, basis and late-filed contentions, and the numerous cases interpreting those regulations, are to have any meaning whatsoever it is necessary for this Appeal Board to accept the referred rulings and reverse them.

---

[9] As will be discussed (pp. 21-23, 52-55, infra.) the Licensing Board's ruling has already led to considerable confusion and evasiveness in the discovery process.

In sum, the Licensing Board's rulings have the very real potential for delay, confusion and uncertainty in the proceeding, contrary to the expressed position of the Commission,[10] the public interest, and Applicants' interests. The hearing process presents a myriad of potential problems and, in and of itself, is difficult to consummate. The Commission has recognized this fact and has given explicit instructions to licensing boards to take all steps necessary, consistent with a fair and sound decision, to streamline the process. Policy Statement, 13 NRC at 452. The Licensing Board's March 5 Order in this proceeding will have precisely the opposite effect, making even more unwieldly and cumbersome the hearing process. Give this fact, and the clear-cut nature of the issues presented, this Appeal Board should review the matter and reverse the Licensing Board.

There are five specific grounds which warrant this Appeal Board's exercise of discretionary interlocutory review:

1. The Licensing Board's rulings are directly contrary to the requirements of 10 CFR §2.714, and the cases interpreting that section, and therefore bring into play a critical question of Commission policy that pertains not only to the conduct of this proceeding as a whole, but also to the conduct of numerous other proceedings now pending before this Commission.

---

10 Policy Statement, 13 NRC at 453.

2. The Licensing Board asserts that the rulings address matters wherein no clear guidance has been provided by the Appeal Board or Commission.

3. The Licensing Board's rulings are not isolated to one or a few contentions but rather pervade the entire proceeding.

4. The reliance upon discovery to cure the defects in contentions which do not meet the Commission's rules will result in needless and voluminous discovery, to include vigorous contest over disputes arising from such discovery. Moreover, the Licensing Board's reliance on such discovery removes from Applicants their right to raise valid and proper objections to improper discovery requests.

5. The Licensing Board's ruling regarding the status of late filed contentions based on future documents will result in open-ended and unrestricted admission of contentions without addressing the factors set forth in 10 CFR §2.714(a).

Each of these items is discussed below. In this regard Applicants note the Appeal Board's instruction in Perry[11] to explain "how" the Licensing Board's rulings affect the basic structure of the proceeding. (Id., slip op., p. 11). Applicants have also borne in mind Perry's teaching that Applicants in this case must show that "the error fundamentally alters the very shape of the ongoing adjudication." (Id., slip op., p. 15).

1. Significant Legal/Policy Questions. The Commission has stated that if significant legal/policy questions are presented, the Licensing Board should promptly refer or certify the matter to the Appeal Board or to the Com-

---

11 Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, __ NRC __ (May 17, 1982).

mission.[12] Significant legal and policy questions have been presented in this proceeding and have been referred to the Appeal Board by the Licensing Board.

These questions are (a) whether contentions which admittedly do not meet the Commission's requirements (10 CFR §2.714) can be admitted based upon a mere statement of interest, with the requisite specificity and basis to be provided only upon completion of review of the application and availability of pertinent documents documenting such completion; (b) whether contentions admittedly lacking in specificity can be admitted solely on the basis that they deal with issues which the Licensing Board determines, without more, are at the "core" of its responsibilities; (c) whether contentions admittedly lacking in specificity can be admitted based upon an expression of interest by an intervenor with the requisite specificity to be cured by discovery, and (d) whether the late-filing criteria of 10 CFR §2.714(a) is applicable to any subsequently reconstituted contention arising out of the challenged rulings or applicable to any later filed contention relating back to matters raised in the original contentions filed by Intervenors (be they denied or admitted) which are premised upon new information.[13]

---

12 Policy Statement, 13 NRC at 456-457.

13 In this regard the Licensing Board stated that "[d]ebatable questions about whether information (footnote continued)

Applicants maintain that these issues are of the requisite significance so as to warrant Appeal Board review.[14]

Applicants discuss below the pervasive nature of the Licensing Board's rulings on this proceeding. However, it must be emphasized that the effects of these rulings are not limited to this case alone, but will also affect other cases now pending before this Commission. For example, the Catawba Licensing Board Chairman has indicated in the Shearon Harris case[15] (of which he is also Chairman) that the issues involved in the instant rulings "will probably arise in the Shearon Harris prehearing conference." See Shearon Harris, Order, June 4, 1982.[16]

(footnote continued from previous page)
or analysis is 'new' will generally be resolved in Intervenor's favor." (March 5 Order, p. 13).

14 The merits of these questions are discussed in Section B, infra.

15 Carolina Power & Light Company, et al. (Shearon Harris Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-400 OL, 50-401 OL.

16 The pertinent portion of the June 4, 1982 Shearon Harris Order is:

> Specificity in Contentions and Available Information. We discussed on the telephone the question whether a petitioner for intevention is required to put forward all of his contentions at this prehearing conference stage, including the "bases for each contention set forth with reasonable specificity" referred to in section 2.714(b) of the NRC Rules of Practice. The issue becomes significant where certain Staff and Applicant documents -- such as emergency plans -- are not yet available. This issue is currently being litigated in the Catawba proceeding, where the Board held

(footnote continued)

See also, Shearon Harris, Memorandum For The Parties, July 1, 1982.[17]

2. Need for Guidance. Applicants and Staff are of the view that the language of the Commission's regulations is clear, and that the Appeal Board, the Commission, and the courts have resolved the issues at hand. See

---

(footnote continued from previous page)
that specific contentions do not have to be advanced before the relevant documents are available. The Catawba Board further held that when such documents do become available, contentions put forward by an intervenor promptly thereafter would not be subject to the admissibility criteria otherwise applicable to late contentions.

Both the Applicants and the Staff in Catawba disagree with these Licensing Board rulings; they have sought reconsideration by the Board and, failing that, certification to the Appeal Board. The issue will probably be certified to the Appeal Board in the near future. We mention the matter here because the same issue will probably arise in the Shearon Harris prehearing conference. In order to give the Petitioners a grasp of this problem -- whatever the ultimate resolution of it may be -- we are placing in the Public Document Rooms in Raleigh and Chapel Hill copies of the Catawba Board's decision and the Applicants' and Staff's pending requests for reconsideration.

17 The one paragraph Memorandum For The Parties is:

The Board's Order of June 4, 1982 [above] discussed the subject of 'Specificity in Contentions and Available Information' and referred to certain issues under consideration in the Catawba proceeding. On June 30, 1982, the Catawba Board expressed some additional views on this subject and referred the basic specificity issues to the Appeal Board. That Board made reference in footnote 5 to certain positions being taken in this case. A copy of the Catawba Board's Memorandum and Order is enclosed for your information.

discussion in Section B infra. Both Applicants and Staff have extensively briefed the questions causing the Licensing Board to acknowledge that

> It seems safe to assume that every NRC adjudicatory decision having even a remote bearing on these matters has now been brought to our attention. (June 30 Order, p. 3).

However, the Licensing Board was not swayed by such argument. Rather, it views its referred rulings as filling a void which requires Appeal Board or Commission guidance. Specifically, the Licensing Board stated that

> The case law provides no clear answers to these questions. About all one can say with confidence is that neither the Commission nor the Appeal Board has ever taken a clearly articulated position on them. (June 30 Order, p. 3).

With respect to the Commission's regulations, the Licensing Board acknowledges that both the specific language of the regulations ("a literal reading of the last sentence of 10 CFR 2.714(b) arguably leads to [the conclusion that all of intervenors' contentions be filed before the first prehearing conference, with any filed thereafter to be subject to the late filing requirements of 10 CFR 2.714(b)]" (March 5 Order p. 7, n.7)) and the Statement of Considerations relating to those regulations ("The Applicants and the Staff have brought to our attention a fragment of the 'legislative history' of the pertinent rule which appears to favor their position and of

which we were previously unaware" (June 30 Order, p. 7) are at odds with the position which it has taken. However, the Licensing Board concluded that these considerations "are [not] entitled to much weight in the circumstances of this case" (June 30 Order p. 8) and that "compelling considerations require a different result" (March 5 Order, p. 7, n.7). Accordingly, the Licensing Board ignored the regulations and case law.

Applicants maintain that there is nothing unique about Catawba; the status of the application and stage of review is consistent with all other operating license proceedings. Certainly the Licensing Board has not attempted to make any contrary showing. As such, it is incumbent upon a licensing board to adhere to applicable regulations and established precedent. See Licensing Board Memorandum and Order in Consolidated Edison Company of New York, et al. (Indian Point, Units 2 and 3, Docket Nos. 50-247SP and 50-286SP citing Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 465 (1980). See also South Carolina Electric and Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1149-50 (1981) stating that

> [l]icensing boards--in common with trial courts -- have not been given the function of passing their own judgment on the soundness or propriety of the rulings and instructions of a reviewing appellate tribunal, let alone the power, in effect, to nullify them if not to the board's liking.

However, the instant Licensing Board has attempted to fashion new procedures consistent with its own view as to how the process should work. Such is not the role of a licensing board. Id. It should be noted that the Licensing Board itself recognizes the novelity of its position and accordingly asks for Appeal Board guidance.[18]

3. Pervasive Nature of Rulings. The Licensing Board's rulings will have a pervasive effect on the entire conduct of this proceeding and thus Appeal Board review is required. The Licensing Board's rulings and Applicants' objections in this case are not focused simply upon one or several contentions. Indeed, the referral does not focus upon specific rulings on contentions. Rather, it addresses the underlying policy that gave rise to such rulings, viz., the need for a party to plead with specificity if certain information is not yet available; the need for a party to plead with specificity if the concern raised addresses public health and safety matters; the use of discovery to cure defective contentions; discarding of the late-filing criteria of 10 CFR §2.714(a), as to any contentions raised in the petition (be they accepted or rejected), provided such new contentions are based on subsequently issued documents.

---

18 The Licensing Board has stated that "at the present time there is no clear guidance on these issues from the Appeal Board or Commission." (June 30 Order, p. 15).

As noted, the Licensing Board's March 5 Order admitted twenty-two contentions as issues in the proceeding. Ten of them are affected by the Licensing Board's ruling regarding specificity and basis; six affected by its ruling regarding the role of discovery. In addition, an as-yet unknown number of contentions could be affected by its ruling on late-filed contentions. Clearly, it can be said that the Licensing Board's policy rulings affect the overwhelming number of contentions admitted to the proceeding and thus can be said to pervade the proceeding in such a fashion as to warrant Appeal Board review.

Further, the practical effect of the Licensing Board's rulings is that Applicants and Staff are left with amorphous subjects upon which the burden now shifts to them to ferret out the substance. The Commission's regulations do not contemplate such a result. If indeed the Commission's regulations are to have any meaning whatsoever this Appeal Board must exercise its discretion review the rulings, and reverse the Appeal Board.

4. The Role of Discovery. The Licensing Board has admitted six admittedly vague contentions because Intervenors expressed an interest in a particular subject. In ruling on those contentions, the Board specifically held that, even though it recognized and acknowledged that they must be made more specific, and that the Intervenors in

fact could have at the time of the prehearing conference provided such specificity,[19] the requisite specificity need not be provided until after Intervenors have an opportunity to complete discovery. (March 5 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 believes that "[t]he principal functional purpose of contentions at this juncture is to place some reasonable limits on discovery." (March 5 Order, p. 13). As the Licensing Board would have it even if the contentions are not adequate at the initial stage of the proceeding, they can be admitted, subject to being adequately framed at the final prehearing conference, thereby taking into account the results of discovery among the parties.[20] In

---

19 Indeed, at the prehearing conference counsel for Palmetto Alliance identified by name the two former Duke Power Company employees who raised allegations with respect to quality assurance matters to support Palmetto Alliance' Contentions 6 and 7. (Tr. 117-120, 125, 126). Surely, it would not have been an undue burden on Palmetto Alliance for the Licensing 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.

20 The Licensing Board believes that such a procedure is justified because "most preparation for hearing takes (footnote continued)

its June 30 Order (p. 12) the Licensing Board provided some additional insight on this point, stating

> we believe that a relatively lenient standard is appropriate at least for some contentions at this early stage of the proceedings. See Southern California Edison Co. (San Onofre Station), Partial Initial Decision at 221a, n.94 (1982).[21]

Applicants maintain that the Licensing Board ruling has placed the cart before the horse, to wit, intervention, discovery, specific contention. Rather, the rules call for an intervention, specific contention, and then discovery. This ruling will have a substantial and pervasive impact on the course and conduct of this proceeding.

The practical effect of the Board's ruling with respect to discovery will be to delay and complicate unduly this proceeding, a result directly contrary to the thrust of the Commission's Policy Statement (13 NRC 452, 455-456).[22]

(footnote continued from previous page)
place after the final prehearing conference." (March 5 Order, p. 5) Without going into detail, Applicants will simply state that the Licensing Board's view of the hearing preparation process is incorrect.

21 The San Onofre Licensing Board chairman is also the chairman of the Catawba and Shearon Harris Licensing Boards.

22 The Licensing Board recognized the negative impact its decision might give rise to, stating

> It is true that nonspecific contentions tend to exacerbate discovery problems, particularly by
(footnote continued)

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. However, 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 is to stand the process on its head, for it requires Applicants to produce information not relevant to Intervenors' specific concerns.[23] Such a result is contrary to law. (Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977)).

Actual experience points up the fundamental error of the Licensing Board in this regard. This matter will be discussed in detail in Part B, infra. However, to demonstrate "extraordinary cause" some discussion is warranted at this point. In anticipation of Intervenor interrogatories, Applicants served interrogatories seeking to determine Intervenors' concerns, and the bases for

---

(footnote continued from previous page)
increasing the volume of interrogatories [June 30 Order, p. 12]

23 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.

their concerns, as set forth in their contentions. Indeed, Applicants interrogatories were limited to the four corners of the contentions themselves, asking for explanations of the precise language used by Intervenors. In approximately half of the responses to these specific inquiries, Intervenors Palmetto Alliance stated that they were without specific knowledge and would require information from Applicants and Staff, in the first instance, before a response could be provided.[24]

Upon receipt of Applicants' interrogatories, and prior to responding to such requests, Intervenor Palmetto Alliance filed its first set of interrogatories. As expected, these interrogatories were extremely broad in scope, essentially seeking all information possessed by Applicants on a general subject - indeed, in some instances seeking all information possessed by the industry on a general subject. These are precisely the type of broad "fishing expedition" type interrogatories prohibited by Commission rules (see Appendix A to Part 2, IV(a)) and condemned by the Commission in its Policy Statement. 13 NRC at 455-456. Moreover, because Applicants are not yet aware of the nature of the contention, despite having sought such in discovery, they have been placed in a position of being forced to respond without

---

24 See Palmetto Alliance Responses to Applicants' First Set of Interrogatories and Requests to Produce, April 28, 1982.

recourse to the protections of the process viz., given the fact that Applicants are without knowledge of Intervenors' specific concerns, Applicants cannot object to such on the basis of e.g., relevancy. Thus, the outcome of the Licensing 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 is severely restricted and indeed prejudiced by its inability to know if it can raise legitimate objections. Such an outcome should not be countenanced, and the Appeal Board should reverse the Licensing Board's ruling on this point.[25]

---

25 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 discovery materials 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-78-20. 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 (Pilgraim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 585 (1975)). And had the Licensing 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.

5. Late Filed Contentions. The Licensing Board has ruled that with respect to (1) non-specific contentions conditionally admitted on the basis of unavailability of specific documents currently in the review process, and (2) any contention contained in the petitions before it, whether accepted or rejected, if information later becomes available, the late filing criteria of §2.714(a) will not be applied to any such reconstituted or newly filed contention related thereto. (March 5 Order, pp. 12-13). Further, the Licensing Board has stated that debatable questions as to whether the information is new will generally be resolved in the Intervenor's favor. (March 5 Order, p. 13).) Applicants maintain that, aside from being contrary to the regulations, such rulings create the prospect whereby voluminous additional contentions can be filed without any regard to their impact on a proceeding. It is precisely this point that gave rise to the late filing requirements in §2.714(a).[26] Such a result has the very real prospect of prolonging the proceeding.

---

26 The purpose of 2.714(a) was to establish appropriate criteria for the disposition of untimely petitions in considering the circumstances of individual cases. Nuclear Fuel Services, Inc., and New York State Atomic and Space Development Authority, 1 NRC 273 (1975). As amended essentially to codify the decision of West Valley, 2.714(a) still properly places a "substantial" burden on late petitioners in justifying their tardiness. As stated by the Commission, "an important policy consideration underlying the rule is the public interest in the timely and orderly conduct of our proceedings. Id. at 275.

Furthermore, such rulings are prejudicial to Applicants in that they will be prohibited from raising arguments provided by the regulations and in that it prejudges Board determination of close questions. Thus,these rulings will impact the proceeding in a pervasive matter and should be reviewed by the Appeal Board at this time.[27]

---

27 The Licensing Board did measure some of intervenors' contentions for specificity ("[i]f substantial relevant information has been supplied and referenced in the Applicants' opposition pleading") and rejected some of those it found unduly vague. (March 5 Order, p. 12). However, the Licensing Board noted that if a document containing "new information" on a subject raised in the rejected contentions later becomes available, Intervenors could file a new contention based upon that "new" information. The Board stated that the late-filed contention criteria of 10 CFR 2.714 will not apply to any such contentions, and moreover that "Debatable questions about whether information...is 'new' will generally be resolved in the Intervenor's favor." (March 5 Order, pp. 12-13).

Applicants are deeply concerned about the implications for the conduct of this proceeding inherent in the expressed prejudgment of that issue. We cannot help but wonder what would have occurred had the Licensing Board on March 5, 1982 stated that "Debatable questions about whether information or analysis is 'new' will generally be resolved in the Applicants favor."

B. MERITS OF THE REFERRED RULING[28]

The three referred rulings of the Licensing Board can be broken down into four issues, as follows:

1. Can contentions lacking the required specificity and basis be conditionally admitted when such contentions deal with subjects for which review is not complete?

2. Can vague contentions be conditionally admitted on the basis that such contentions raise concerns which the Licensing Board, without more, feels go to its "core responsibility, i.e., raise public health and safety issues.

3. Can discovery be utilized to cure defective contentions?

4. Can the late-filing criteria of 10 CFR §2.714(a) be disregarded with respect to contentions which are based on subsequently published information or analyses?

Each of these issues is discussed in detail below.

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

The Licensing Board, in its March 5 Order, held that the specificity requirement of 10 CFR §2.714 is "a perfectly reasonable one, so long as the factual

---

28 Applicants have addressed the merits of the referred rulings in their "Motion for Reconsideration Or In The Alternative For Certification," dated March 31, 1982, pp. 7-47. The Licensing Board in its June 30 Order (p. 15, n.8) transmitted this pleading to the Appeal Board. However, given the Appeal Board's desire to be apprised in memorandum form of the merits of the referred rulings, Applicants essentially repeat the arguments set forth in their March 31, 1982 pleading. In addition, the instant memorandum addresses points raised by the Licensing Board in its June 30 Order.

information necessary for specificity is available to an intervenor." (March 5 Order, p. 5). However, in situations wherein in its view such factual information is not yet available[29] the Licensing Board stated that Intervenors need not comply with the specificity requirement of 10 CFR §2.714;[30] rather, "[t]he most [an Intervenor] should be required to do at this point is express an interest in the subject." (March 5 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, 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) have been completed. (March 5 Order, pp. 7, 11-12).

---

29 As will be discussed infra at pp. 36, 41-45, Applicants maintain that the Licensing Board's March 5 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.

30 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." (March 5 Order, p. 12).

Both Applicants and Staff had argued in initial pleadings and the January 1982 Prehearing Conference that such a standard was not correct, inasmuch as it is incumbent upon Intervenors at the prehearing stage of the proceeding to set forth all their contentions consistent with the requirements of 10 CFR §2.714(a).[31] The Licensing Board found that the Applicants' and Staff's position is (i) not required by the rules as written or by prior decisions, (ii) unreasonable, and (iii) probably in conflict with governing statutes. (March 5 Order, p. 7).

i. The Commission's Rules And Case Law. With respect to the rules, the Licensing Board held that specificity in the instant situation is not required at the initial stages, inasmuch as the regulations "do not 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." (March 5 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

---

31 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.

holds that the late contention requirements of 10 CFR §2.714(a)(1) will not be applied to any such amended contention. (March 5 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 peti-

tioners additional time to frame the issues which they wished to litigate in Commission proceedings, 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. 1779 (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.
>
> * * * *
>
> 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 prehear-

> ing 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).

The Licensing Board specifically recognizes that a "literal reading" of Section 2.714(b) and the Statement of Considerations requires application of the lateness standard to any contentions filed later than 15 days prior to the special prehearing conference. (March 5 Order, p. 7, n.7; June 30 Order, pp. 7-9). However, the Licensing Board chose not to follow the plain language of the Commission's regulations because, on the one hand "compelling circumstances" warrant that those regulations not be applied in a situation in which the Licensing Board believes information to frame a proper contention does not exist (March 5 Order, p. 7), and on the other it does not believe that the Commission "intentionally adopt[ed] a rule having such Draconian effects." (June 30 Order, p. 8).[32] Notwithstanding the Licensing Board's belief, the

---

32 The Licensing Board appears to be confused about what the Commission intended to accomplish when it amended its rules. It has determined that apparently the Commission did not address the amendments in an open meeting and thus concludes that this provision of the rule went by the Commission unnoted. (June 30 Order, pp. 8-9). However, the Licensing Board ignores the fact that the Commission intended to amend its rules regarding the filing of contentions and the "lateness" provision is simply one part of that whole. The Licensing Board has no support whatsoever, other than its own speculation, for its conclusion that the Commission unintentionally adopted the rule.

requirements of the regulations are clear, are directly contrary to the Licensing Board's interpretation and this Licensing Board is bound by them. See Summer, supra, 14 NRC at 1149-50.

In addition to the plain language of the regulations and the unequivocal expression of the Commission's intent in the Statement of Considerations 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, 8 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

nonspecific statements of interest which could be specified after completion of discovery. Faced with this assertion, the Commission stated that

> [p]etitioners' 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 (Tr. 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. (March 5 Order, p. 7). Again, the plain language of the decisions of 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 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. (March 5 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. (March 5 Order, p. 5). But the Commission, and the court, realize 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 the Intervenors' contentions make reference to applicable Commission regulations, regulatory guides and documents, many of which are cited in the FSAR and ER.[33] 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).

---

33 See also the discussion at pp. 41-45, infra.

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. (March 5 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, 15 NRC 1 (1982). Applicants respectfully suggest that these decisions are not controlling in the instant case.

The Quad Cities Licensing Board[34] relied upon the Appeal Board's decision in Consumers Power Company (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981) to hold 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

---

34 The Quad Cities Licensing Board Chairman is the same as the San Onofre, Shearon Harris, and Catawba Licensing Board Chairman.

directed toward the admissibility of contentions as a general rule.[35] 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 then that 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 as contrary to the Commission's regulations and relevant case law as the instant proceeding.[36] Therein the Licensing

---

35 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).

36 If other Licensing Boards are in fact following (footnote continued)

Board permitted contentions as lacking in specificity and basis as those contentions Applicants challenge herein, which plead the inadequacies of documents or responses which have not yet been made available to the parties.

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 [15 NRC 10].

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.[37]

(footnote continued from previous page)
procedures similar to those followed by this Licensing Board, this is even more reason why Appeal Board guidance is necessary on these issues.

37 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, and 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
(footnote continued)

In its Memorandum and Order of June 30, 1982, the Licensing Board made reference to the above discussion of the Commission's case law and Applicants' analysis of the cases cited by the Licensing Board in support of its rulings as follows:

> Both the Applicants and the Staff have responded with detailed analyses of [Koshkonong and BPI] and some related cases in efforts to demonstrate the correctness of their position. Applicants' Motion at 12-28; Staff Objections at 6-10. It seems safe to assume that every NRC adjudicatory decision having

---

(footnote continued from previous page)
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 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.

> On April 16, 1982, the Commission issued an order in which it stated that, in its view ALAB-664 "presents an important issue involving [its] commitment to a fair, balanced and efficient hearing process," and the "significant policy and procedural questions" involved warranted its review of
>
> > whether the Appeal Board correctly determined that a ruling on the petitions for intervention in this proceeding must await the filing by the NRC Staff of its environmental assessment and the opportunity for petitioners and TVA to comment on the assessment.

> even a remote bearing on these matters has now been brought to our attention. These analyses only serve to reinforce our conclusion that the case law provides no clear answers to these questions. About all one can say with confidence is that neither the Commission nor the Appeal Board has ever taken a clearly articulated position on them.

Applicants respectfully disagree with the Licensing Board in this regard, maintaining that Commission regulations and guidance and Commission and Appeal Board decisions clearly warrant a reversal of the Licensing Board's position.

ii. Reasonableness

The Licensing Board also argues that Appliants' 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 Licensing 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 express their concerns in properly-framed contentions in compliance with 10 CFR §2.714.

Such information includes, among other things, the Commission's regulations and 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.[38] 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 pressing this issue. Given these facts, it is not enough for Intervenors simply to "express an interest in the subject" (Maarch 5 Order, p. 17) of emergency plans. Rather, Applicants maintain it is reasonable to require that Intervenors specify, on the basis of, inter alia, the

---

38 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 suppor 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 (November 1980).

above information, why they believe that adequate emergency plans for Catawba cannot be prepared, thereby focusing the scope of their emergency plans concerns.[39] As BPI v. AEC points out, "[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).

The Licensing Board, in its June 30 Order (pp. 3-6) rejected the above argument stating

> that If any further proof were needed that the Applicants' position is unsound, this portion of Applicants' motion supplies it. (June 30 Order, p. 6).

---

39 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 chain analyses [which is set forth in the Catawba FES-CP stage at Section 5-4]] are allegedly deficient." (March 5 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 given the existence of the BEIR III report and the Catawba FES-CP stage and similar information. Similar information exists for the remainder of the contentions for which Applicants seek reconsideration.

With respect to NUREG-0654 the Licensing Board stated:

> While the applicable Staff document, the NUREG-0654 Criteria for Preparation of Radiological Emergency Plans, contains more detailed guidance, it still leaves much to the choice of local officials.

With respect to State plans the Licensing Board was of the view that "[b]y its very nature, however, emergency planning requires a substantial degree of involvement of local officials." (Id). Finally, with respect to existing emergency plans for other near-by nuclear facilities, the Licensing Board's position was that such

> do not give a Catawba Intervenor the kind of detailed information he needs concerning the still-to-be-drafted Catawba plans. Emergency plans are largely site-specific, focusing on the 10-mile plume emergency planning zone around the reactor. (Id. at p. 5).

Applicants maintain that the Licensing Board has failed to recognize the point at issue. Applicants were not, and are not, arguing that the information contained in the referenced documents suffices for the required off-site emergency plan. Rather, the information contained in such documents is sufficient to alert intervenors to the areas and types of information that will be contained in the Catawba off-site emergency plan. For example, local fire departments will be called upon to take certain actions set forth in NUREG-0654 and state and local plans. Such being the case, intervenors are alerted to the need for a capable fire department and the requirements to be met by that department. They already know

which localities are proximate to the plant and will be called upon to respond. They are thus in a position to assure themselves if such organizations have the capability to respond properly. If not, they can set forth a contention.

Simply put, if something has caused Intervenors raise emergency plans as an issue in this proceeding, it perforce follows that there must be some specific concerns that they have. They should be required to specify these concerns at this time so that the issue can be properly developed. If they do not have specific concerns at this time, no contention should be admitted, for to do so presumes the existence of a deficiency which does not exist. Rather, when the off-site plan is presented intervenors can seek to frame contentions at that time, if they have a concern cognizable in the proceeding which can be justified under the late-filing criteria of 10 CFR §2.714(a).

In sum, to require Intervenors at this time to delineate their concerns and state the bases for those concerns cannot be characterized as "unreasonable."

iii. Controlling Statutes

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). (March 5 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." (March 5 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. 36, 41-45, 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, which are based upon documents published after that date. However, that is a judgment for the Commission, not an individual Licensing Board, to make. (Summer, supra, 14 NRC 1149-50). And, as shown above, (pp. 29-31, supra), the Commission specifically considered and rejected that view when it amended its regulations in 1978.

With respect to NEPA the Licensing Board maintained that "a 'rule' requiring the pleading of all NEPA contentions before the Staff's impact statement is even written is...impermissible." (March 5 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 are to base their contentions.

For the reasons discussed above, Applicants respectfully submit that the Licensing Board's ruling admitting conditionally contentions "despite the present lack of specificity" (March 5 Order, p. 12) must be reversed.

2. 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.[40] These contentions were admitted by the Board,

---

40 Palmetto Alliance Contention No. 18 was also admitted by the Licensing Board in this general class, e.g., as a contetion which is "marginally specific," but admissible because it related to the Board's "core responsibility" in this proceeding. The defects in specificity and bases are to be cured by resorts to discovery. 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, Applicants would note that in 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, among other things, demonstrates 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

(footnote continued)

even though the Board realized that the contentions were only "marginally specific," in that the Board believe that they go to issues which it perceives as the "core of our responsibilities as an operating license board." (March 5 Order, p. 17). 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. (March 5 Order, p. 12).

Applicants maintain that the Board applied an incorrect standard, viz., the "core responsibility" standard.

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. , supra. The Licensing Board has not applied this standard. Rather, it has admitted contentions which are "at best only marginally acceptable from the standpoint of specificity" because of the Licensing Board's perceived

---

(footnote continued from previous page)
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 have reconsidered its ruling and rejected this contention as lacking specificity and basis. However, the Board's June 30 and July 8 Orders are silent as to this contention.

Subsequent events (see pp. 52-55, infra.) have confirmed the correctness of Applicants' position.

core responsibilities regarding "actual safety of construction and operation of the Catawba plant." (March 5 Order, p. 17).

With respect to the Licensing Board's reliance upon its core responsibilites, 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 1111 (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," 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., at 1114). 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.

3. The Discovery Process Cannot Be Used To Cure Defective Contentions

The Licensing Board's ruling on the use of discovery is directly 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 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].

The Commission has expressed its concern with the impacts of unrestricted discovery on its proceedings. Policy Statement, 13 NRC 455-456. Further, as noted, the Licensing Board has acknowledged that its ruling on discovery will have an impact on the proceeding, stating:

> It is true that nonspecific contentions tend to exacerbate discovery problems, particularly by increasing the volume of interrogatories. (June 30 Order, p. 12).[41]

---

41 Applicants take small comfort in the Licensing Board's statement that it has means to control discovery. (June 30 Order, p. 12) Discovery is to be controlled at the outset through admission of issues, viz., a determination that the issues are specific enough, so that the discovery process can work. Such requires a clear explanation of Intervenors'

(footnote continued)

In light of the above, the Licensing Boarjd's ruling in this regard must be viewed as erroneous. To hold otherwise will give rise to an untenable, and in Applicants regard, prejudical result. An examination of the discovery process as it relates to Palmetto Alliance Contention No. 18, dealing with Catawba's diesel generator, is illustrative.

By way of background, Intervenor Palmetto Alliance's contention 18 reads as follows:

> 18. The Applicants have failed to demonstrate that the diesel generators which are critical to the safe shutdown and control of the reactor in the event of loss of off-site power are designed, constructed and operated at standards sufficiently high that they may be relied upon to reasonably assure that the health and safety of the public will not be endangered.
>
> The FSAR does not give adequate information or assurance that all regulatory requirements have been or will be met prior to operation. See FSAR 8.3.
>
> Petitioner Palmetto Alliance is informed that Applicant Duke Power Company installed used generators in its McGuire Nuclear Station.

The FSAR contains, in Section 8.3.1.1.3, ten pages of description of the diesel generators. That description includes an explanation of how and why the diesel gener-

---

(footnote continued from previous page)
concerns, and the basis for those concerns at the outset, which of course has not occurred in this case. In addition, this Licensing Board, has in Applicants view, demon-strated, in certain instances, a disregard for pre-cedent and regulations, and has shown a tendency to prejudge important issues. (See e.g., pp. 24-25, supra.) Such is cause for concern.

ators meet all applicable regulatory requirements. Applicants, in their response to Palmetto Alliance's contentions, maintained that it was the duty of Palmetto Alliance to explain, with specific reference to the information set out in the FSAR, as well as the applicable regulatory requirements, why it believes Applicants' diesel generators do not meet those requirements. At the January 1982 Prehearing Conference Palmetto Alliance provided no further specificity. With respect to the basis for its concern, counsel simply stated that its contention stemmed from information "from an anonymous source, now deceased..." (Tr. 174). The Chairman of the Licensing Board, speaking for himself, stated "I find this not sufficiently specific." (Tr. 177).

The Licensing Board's March 5 Order admitted the diesel generator contention conditionally on the basis that it concerns "the actual safety of construction and operation of the Catawba plant, issues that are at the core of our responsibilities as an operating license board." (Id, p. 17). (See discussion at pp. 21-23, 48-50, supra.) Thereafter, on April 9, 1982, Applicant', in an effort to ascertain both Palmetto Alliance's specific concerns with respect to its diesel generator contention, and the bases therefore, filed fifty-eight interrogatories upon Palmetto Alliance. In response thereto Palmetto Alliance provided essentially no information, stating specifically on

twenty-six occasions that "Intervenor at present lacks sufficient knowledge to answer and is awaiting responses to its Interrogatories and Requests to Produce..."[42] Indeed, such response was provided with respect to the following fundamental questions directed to the specific language of Palmetto Alliance's contention:

- In what way do you contend the diesel generators-... are "critical to the safe shutdown and control of the reactor in the event of loss of off-site power?
- What do you mean by "in the event of loss of off-site power"?
- Do you contend that the designer of the diesel generators improperly designed those generators?
- Do you contend that the construction of the diesel generator was inadequate?
- Do you contend that Applicants' procedures and associated systems for operating the diesel generators are inadequate?...If so please specify....
- What do you mean by "the FSAR does not give adequate information?"
- Do you contend that the...McGuire diesel generators are inadequate?

As such, discovery has not provided any assistance to Applicants; indeed, the Licensing Board's ruling admitting nonspecific contentions has prejudiced Applicants discovery rights by permitting Palmetto Alliance to hide behind a "lacks sufficient knowledge" response.

---

42 See Palmetto Alliance Responsjes to Applicants' First Set of Interrogatories and Requests to Produce, dated April 28, 1982.

Palmetto Alliance, on April 20, 1982, filed interrogatories upon Applicants and Staff on several contentions, including the diesel generator. Even a cursory examination of those interrogatories show their wide-ranging nature.[43] Under the Licensing Board's discovery ruling, Applicants are at the disadvantage of remaining without knowledge as to the specific nature of Intervenors' contentions and yet being required to engage in discovery. Such a result permits Intervenors to frame discovery requests based upon contentions totally lacking in specificity thereby seriously prejudicing Applicants' ability to object on matters such as relevancy. Such a process, which effects the very structure of the proceeding, requires Appeal Board reversal.

Before passing to the next topic, Applicants raise a matter arising out of the Licensing Board's discovery ruling. In its above-cited reference to the fact that non-specific contentions will complicate discovery (June 30 Order, p. 12) the Licensing Board provided some additional comments that warrant a response. Specifically, the Licensing Board stated that the exacerbation of discovery problems

---

43 For example, Palmetto Alliance seeks information from Applicants with respect to experience at "operating nuclear power plants, plants under construction, and other plants, at which diesel generators (including all their components) of the same or similar design are employed." Palmetto Alliance Interrogatory 7 relating to Contention 18.

> is not the fault of the Intervenors for filing vague contentions. It is the fault of the other parties, or the system, for forcing Intervenors to plead without the necessary information. In any event, the discovery problems are manageable. Notwithstanding some vague contentions, the Board has devices to control discovery within reasonable bounds. Id.

Applicants wish to make two points with respect to this statement.

First, the implication that Applicants somehow are at fault because Intervenors filed vague contentions is wrong.[44] Applicants view that statment by the Board as an outgrowth of its earlier statement (March 5 Order, pp. 9-10) to the effect that:

> From its quite different perspective, the applicant may have no incentive to facilitate the early completion of all emergency plans. This is so because, under the Applicants' and Staff's theory we are rejecting, if emergency planning or any other aspect of a nuclear power plant application is simply delayed until after the first prehearing conference, defects may be effectively insulated from scrutiny in the hearing process. [See also pp. 7 and 12 of the March 5 Order].

The implication of these two quotes is that the Licensing Board apparently holds the view that Applicants may well act in a nefarious fashion, delaying submittal of licensing information in an attempt to take advantage of the Commission's rules, if it does not step in and grant the

---

44 Intervenors are responsible for their contentions, not Applicants. The Appeal Board should note that at the January 13 Prhearing Conference Palmetto Alliance's counsel took the position that the only burden on intervenors at this stage was to express "general concern" in a subject. Tr. 208. See also Tr. 92-93.

non-specific contentions. Applicants resent this implication. Applicants' interest is in providing information in a timely fashion so as to assure that they will be in receipt of an operating license well before it is required to load fuel. To suggest that Applicants are engaging in gamesmanship to avoid the hearing process is ludicrous, for if indeed Applicants withhold information all an intervenor need do is explain, pursuant to 10 CFR §2.714(a) why good cause exists for exploring the content of such withheld information when it becomes available. Moreover, professional responsibilities mandate otherwise.

Second, to suggest that Intervenors have been forced to plead "without necessary information" is erroneous. Applicants have discussed this point in some detail above. (See pp. 41-45, supra.) Moreover, with respect to some of the contentions that the Licensing Board conditionally admitted subject to further specificity upon completion of discovery, (and which the Licensing Board now says were framed "without necessary information") it should be doted that the Licensing Board itself acknowledged that "[t]here were indications that at the prehearing conference that some further specification of these contentions could be made now." (March 5 Order, p. 17).

4. The Licensing Board's Rulings Regarding The Application Of The Timeliness Requirement Of 10 CFR §2.714(a) 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 are 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..." (March 5 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. (March 5 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."[45] (March 5 Order, p. 13).

---

45 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.

Applicants maintain that the law in this area is specific and directly contrary to the Licensing Board's Order. As stated in Section A, supra, the Commission's Statement of Considerations accompanying its 1978 amendment to the intervention regulations clearly states that such section

> ...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.].

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 all debatable questions in this area in favor of Intervenors. The Licensing Board in its June 30, 1982 Order acknowledged that the Commission's Statement of Consideration

> seem to weigh against our conclusions that contetions based on new information, if raised promptly after the information becomes available and otherwise satisfactory, are not to be tested against the criteria for late petitions and contentions.

However, the Licensing Board, without any reference to the regulations or case law went on to say, that the clear language of the regulations and the "legislative history" are [not] entitled to much weight in the circumstances of this case. The Licensing Board's position is not based

upon any concrete fact, rather it consists of total speculation as to what the Licensing Board thinks might have been in the minds of the Commissioners when they passed (unanimously) upon the 1978 amendments, amendments which on their face even the Licensing Board acknowledges favor Applicants' position. (see June 30 Order, pp. 8-9). While it is black-letter law that the plain meaning of words yields to evidence of legislative intent,[46] the Licensing Board's speculation as to what the Commission may or may not have intended without any supporting reference cannot be said to form such "evidence." Thus, the Licensing Board's position in this regard should be reversed.

It should be noted that the practical effect of the Board's ruling is to preclude Applicants and Staff from inquiring as to the factors set forth in 10 CFR §2.714(a). For example, Applicants would be prevented from inquiring as to why a subsequent contention could not have been raised at an earlier date.[47] Given the wealth of infor-

---

46 Marble Hill, ALAB-322, 3 NRC 328, 335-36 (1976).

47 Applicants draw the Board's attention to the language in Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), LBP-73-31, 6 AEC 717 (1973). 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
>
> (footnote continued)

mation 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" (March 5 Order, p. 7, n.7) warrant a different result is answered in the negative by the discussion in Section __, supra.

(footnote continued from previous page)

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 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 completley 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.

This position of the Staff is contrary to the basic concept of the discretionary character of the allowance of late intevention, 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]

(footnote continued)

Conclusion

For the above-stated reasons this Appeal Board should entertain discretionary interlocutory review of the referred rulings and should reverse such rulings which seek to rewrite aspects of the Commission's regulatory process. Such function is not to be performed by licensing boards. See North Anna, supra, 11 NRC at 465. Further, Applicants respectfully request that this Appeal Board order the Licensing Board to reconsider its rulings on affected contentions in light of such reversal.

Respectfully submitted,

J. Michael McGarry, III
Malcolm H. Philips, Jr.
DEBEVOISE & LIBERMAN
1200 Seventeenth Street, N.W.
Washinton, D.C. 20036
(202) 857-9833

(footnote continued from previous page)
(emphasis added).

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

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.

July 16, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Memorandum Favoring Interlocutory Review" in the above captioned matter, has been served upon the following by deposit in the United States mail this 16th day of July, 1982.

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

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

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

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

Chairman
Atomic Safety and Licensing Appeal Board
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

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

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

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

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