

IN RE: Duke Power Co.

April 19, 1982



SECY-82-167

ADJUDICATORY ISSUE
(Information)

For: The Commissioners

From: James A. Fitzgerald
Assistant General Counsel

Subject: REVIEW OF ALAB-668 (IN THE MATTER OF
DUKE POWER COMPANY)

Facility: Perkins Nuclear Station, Units 1,
2 and 3

Petitions
For Review: 90-466,467,490
None.

Purpose: To inform the Commission of an Appeal
Board decision which, in our opinion, EX-5

Review Time
Expires: May 4, 1982.

Discussion: ALAB-668 is concerned with Duke Power
Company's motions before the Licensing
and Appeal Boards for this proceeding
to: (1) withdraw without prejudice its
application for construction permits for
the Perkins facility; and (2) terminate
as moot the proceedings on that

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Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions 5
FOIA- 92-436

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application. The NRC staff has not opposed the motion. However, intervenors 2/ insisted that termination of the proceeding should be with prejudice and that Duke Power should pay intervenors costs including attorney's fees.

In ALAB-668, the Appeal Board determined that Duke's motion should be considered initially by the Licensing Board before whom portions of this proceeding are still pending. The Appeal Board also vacated as moot three previously rendered partial initial decisions which have not achieved finality. 3/

In our view,

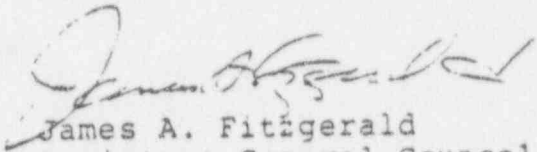
EX.5

2/ Mary Apperson Davis and the Yadkin River Committee.

3/ LBP-78-25, 8 NRC 87 (1978); LBP-76-34, 8 NRC 470 (1978); and LBP-80-9, 11 NRC 310 (1980).

EX 5

Recommendation:



James A. Fitzgerald
Assistant General Counsel

Attachment:
ALAB-668

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The sought relief is not opposed by the NRC staff. For their part, however, intervenors Mary Apperson Davis and Yadkin River Committee insist that the termination of the proceeding should be with prejudice. Additionally, they maintain that, irrespective of the basis of the termination, the applicant should "be required to pay all of the costs in this matter including the reasonable attorney's fees and costs of the Intervenor¹s".^{1/}

As the staff correctly notes, it is for the Licensing Board, before whom portions of this proceeding remain, to pass upon the motion in the first instance. In doing so, it will have to address the claims made by the intervenors in their response. With regard to the question whether the termination of the proceeding should be with prejudice, the Board is to apply the guidance provided by us in Philadelphia Electric Co. (Fulton Generating Station, Units 1 and 2), ALAB-657, 14 NRC 967 (1981), and Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC ____ (December 7, 1981).^{2/}

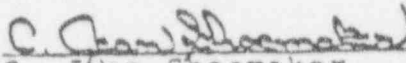
^{1/} Response to Motion to Withdraw, dated March 11, 1982, at p. 1.

^{2/} In North Coast, we explicitly left open the question whether "conditioning withdrawal of an application upon payment of the opposing parties' expenses might be within the Commission's powers and otherwise appropriate where the expenses incurred were substantial and intervenors developed information which cast doubt upon the merits of the application". 14 NRC at ____, fn. 11. We likewise do not intimate any opinion on the question here, believing that it should be first considered by the Board below.

Our own required action at this juncture is confined to three previously rendered partial initial decisions which have not achieved finality: LBP-78-25, 8 NRC 87 (1978); LBP-78-34, 8 NRC 470 (1978); and LBP-80-9, 11 NRC 310 (1980). Each of those decisions is hereby vacated on the ground of mootness. See Boston Edison Co. (Pilgrim Nuclear Power Station, Unit 1), ALAB-656, 14 NRC 965, 966 (1981), and cases there cited.^{3/}

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

^{3/} Although stripping the partial initial decisions of any precedential effect, this action does not similarly serve to vitiate the testimony and other evidence contained in the record on the issue of the environmental effects associated with the release of radioactive radon gas (radon-222) to the atmosphere as a result of the mining and milling of uranium for reactor fuel. We need stress the point because that record provided a portion of the basis for our decision in Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-640, 13 NRC 487 (1981). It may also be employed in connection with any future decisions in Peach Bottom on the radon issue. See, in this connection, ALAB-654, 14 NRC 632, 634-35 (1981).

With regard to the now-vacated partial initial decision which dealt with the radon issue (LBP-78-25, supra), suffice it to say that none of the conclusions later reached by us in ALAB-640 depended for its vitality upon any determination of the Licensing Board in that decision. Rather, as is clearly reflected therein, ALAB-640 represents the fruits of our own independent analysis of the content of the Perkins record on radon releases taken in conjunction with additional evidence which was adduced in Peach Bottom.