August 26, 1982

DESIGNATED ORIGINAL

Certified By Diane Hunt 2507

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

Mr. Glenn O. Bright
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. James H. Carpenter
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

In the Matter of
Carolina Power and Light Company
(Shearon Harris Nuclear Power Plant,
Units 1 and 2)
Docket Nos. 50-400 and 50-401

Dear Administrative Judges:

Enclosed for your consideration is the Appeal Board's slip opinion in Duke Power Company, et al.(Catawba Nuclear Station, Units 1 and 2) ALAB 687, Docket Nos. 50-414 and 414, 15 NRC___ August 19, 1982. Our reading of the opinion indicates that the Staff position in the Shearon Harris proceeding that contentions are not to be "conditionally" or provisionally admitted subject to discovery or development of future papers is basically in agreement with the ruling of the Appeal Board in the Catawba case.

Sincerely,

Charles A. Barth
Counsel for NRC Staff

cc: Service List

OFC	:OELD	:OEL	:	:	:	:	:
NAME	:CABarth/jh	:SATreby	:	:	:	:	:
DATE	:08/26/82	:08/ /82	:	:	:	:	:

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

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

Messrs. J. Michael McGarry, III, and Malcolm H. Philips, Jr., Washington, D.C., and William L. Porter and Albert V. Carr, Jr., and Ms. Ellen T. Ruff, Charlotte, North Carolina, for the applicants, Duke Power Company, et al.

Mr. Robert Guild, Columbia, South Carolina, for the intervenor, Palmetto Alliance.

Mr. George E. Johnson for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

August 19, 1982

(ALAB-687)

In its June 30, 1982 order in this operating license proceeding,[1/] the Licensing Board referred to us, under 10 CFR 2.730(f), three rulings it had earlier made in acting upon the petitions for leave to intervene filed by the Carolina Environmental Study Group (CESG), the Palmetto

1/ LBP-82-50, 15 NRC ___.

Alliance (Palmetto) and the Charlotte-Mecklenburg Environmental Coalition.[2/] Those rulings conditionally admitted to the proceeding certain contentions advanced in the CESG and Palmetto petitions, notwithstanding the Board's determination that the contentions did not satisfy the specificity requirements of 10 CFR 2.714(b). Specifically, we are asked to pass interlocutory judgment upon: [3/]

(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.

2/ LBP-82-16, 15 NRC ___ (March 5, 1982).

3/ LBP-82-50, supra, 15 NRC at ___ (slip opinion, p. 14).

(3) The Board's ruling that the late-filing criteria 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. 4/

Acting upon our invitation to all parties, the applicants, NRC staff and one of the intervenors (Palmetto) have filed memoranda addressed to both (1) whether the referral should be accepted; and (2) how the referred rulings should be resolved on the merits. The applicants and staff press for examination and reversal of the rulings at this time. On the other hand, Palmetto opposes interlocutory review; in the alternative, it urges affirmance.

I

A. It is well-settled that we are empowered to decline the acceptance of a Licensing Board referral. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1191 (1977) and cases there cited; Consumers Power Co. (Midland Plant,

---

4/ The total of sixteen contentions alluded to in the referred questions are, as we understand it, those identified at pp. 2-4 of the applicants' March 31, 1982 motion for reconsideration or certification, in which the staff joined. In an earlier filing, however, the staff identified two additional contentions to which the referred questions also might possibly relate. As will be seen, the precise number of contentions involved is of no present moment.

Units 1 and 2), ALAB-634, 13 NRC 96 (1981). And, as stressed in ALAB-634, it is equally established that

> [i]nterlocutory appeals are not favored in Commission any more than in judicial practice. Whether review should be undertaken on "certification" or by referral before the end of the case turns on whether a failure to address the issue would seriously harm the public interest, result in unusual delay or expense, or affect the basic structure of the proceeding in some pervasive or unusual manner.

13 NRC at 99 (footnotes omitted).[5/]

A ruling that does no more than admit a contention to a proceeding -- whether absolutely or conditionally -- has a low potential for meeting that standard. To be sure, interlocutory review of such a ruling might obviate litigation of the contention and, consequently, accelerate the progress of the hearing.[6/] This same consideration is

---

5/ 10 CFR 2.730(f) itself makes specific reference to the prevention of "detriment to the public interest or unusual delay or expense".

6/ Of course, in the instance of a contention admitted conditionally (whether permissibly or not), there is no assurance that it will be litigated; the Licensing Board may later decide to withdraw its admission. Further, even an unconditionally admitted contention is subject to pretrial summary disposition under 10 CFR 2.749.

present, however, whenever contentions are admitted over objection; thus, it cannot be said that the avoidance of unusual delay is involved. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC ___, ___ (May 17, 1982) (slip opinion, pp. 15-16). 7/ In this connection, it is noteworthy that the Rules of Practice permit an appeal from an order granting an intervention petition only on a claim that the petition "should have been wholly denied." 10 CFR 2.714a(c). Thus, the Commission has explicitly declined to provide an entitlement to obtain interlocutory appellate relief in circumstances where (as here) the complaint is that some, but not all, of the admitted contentions should have been rejected. 8/

7/ Many other types of interlocutory orders likewise may slow somewhat the progress of a proceeding. Accordingly, were the potential for some delay sufficient in itself to justify immediate appellate review, little would be left of the general proscription in 10 CFR 2.730(f) against interlocutory appeals.

8/ In order to be allowed intervention, a petitioner must advance at least one acceptable contention. 10 CFR 2.714(b). See p. 8, infra.

Nor is there much latitude for a serious claim that the acceptance of a particular contention will have a pervasive effect on the basic structure of the proceeding. To the contrary, it is difficult to see how such a step -- no matter how improvident it might be -- could affect that structure in any material way. This is especially so where the asserted vice of the contention lies simply in its lack of precision.

B. For the foregoing reasons, we are disinclined at this stage of the proceeding to examine each of the contentions in issue here and to make individual determinations on their admissibility. It is our understanding, however, that the Licensing Board has not called upon us to pursue that course. Rather, although arising in the context of specific contentions, the referred rulings appear to pose generic questions. As their formulation by the Board below reflects (see pp. 2-3, supra), these questions go to the circumstances, if any, in which a licensing board may allow the conditional admission of a contention that it has found to fall short of the degree of specificity mandated by 10 CFR 2.714(b). And, as we have been told without contradiction, they have immediate recurring importance but, for practical reasons, will escape appellate scrutiny once the initial decision has issued.

In partial justification of the referral, the Licensing Board alluded [9/] to the Commission's Statement of Policy on Conduct of Licensing Proceedings issued last year. That statement exhorts licensing boards to refer or certify promptly to us or the Commission "significant legal or policy question[s] *** on which Commission guidance is needed". CLI-81-8, 13 NRC 452, 456 (1981). The questions at hand are legal in character and, to repeat, have generic implications. Further, insofar as we can determine, they have not previously been squarely addressed on an appellate level.

Because of these considerations, we have decided to accept the referral. This is not to be taken, however, as a repudiation of our general policy disfavoring interlocutory review of licensing board action on specific contentions. That policy remains intact. Indeed, as will be seen, we confine ourselves in this opinion to an interpretation of the governing Rules of Practice. The application of that interpretation to the contentions in issue is left to the Licensing Board.

II

A. Central to our consideration of the referred rulings is 10 CFR 2.714(b), the provision in the Rules of

---

9/ LBP-82-50, supra, 15 NRC at ___ (slip opinion, p. 14).

Practice that is directly concerned with the filing and admission of contentions. That Section reads as follows:

> Not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to §2.751a, or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner 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 bases for each contention set forth with reasonable specificity. A petitioner who fails to file such a supplement which satisfies the requirements of this paragraph with respect to at least one contention will not be permitted to participate as a party. Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section.

The factors mentioned in the last sentence are the five that govern the grant or denial of untimely intervention petitions:

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

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

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

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

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

Nothing in the terms of Section 2.714(b) explicitly vests a licensing board with the power to admit an unacceptably vague or imprecise contention conditionally, subject to later revision upon receipt of additional information. Rather, as we read it, the Section conveys the clear message that, in order to be admitted, the contention must meet the "requirements of this [Section]"; i.e., it must set forth its bases "with reasonable specificity". Moreover, the administrative history of the Section precludes any suggestion that the Commission intended an implicit exception to the specificity requirements in circumstances where, because of a lack of available information, it is not possible for the petitioner to meet those requirements at the time its contentions are due.

Prior to 1978, intervention petitions had to set forth both the petitioner's interest and the contentions that it proposed to litigate. 10 CFR 2.714(a),(b) (1978 ed.). Effective May 26, 1978, Section 2.714 was amended to allow the petitioner to defer the filing of contentions until a later date. Under the now prevailing practice, an intervention petition submitted in response to a notice of hearing or opportunity for hearing need only establish the petitioner's interest. 10 CFR 2.714(a)(2). As we have seen, its contentions are to be advanced in a supplement to

the petition, due at least fifteen days prior to the holding of either the special or first prehearing conference. 10/

In the accompanying Statement of Consideration, the Commission explained that the primary consideration underlying the 1978 amendment was that "[e]xperience has indicated that 30 days is often insufficient for potential petitioners to frame and support adequate contentions". 43 Fed. Reg. 17798, 17799 (April 26, 1978). 11/ It further explicitly acknowledged that, as "new information * * * comes to light after petitioners have been admitted, such as information in the Commission Staff's safety evaluation or environmental impact statements", there may be occasion to expand or amend contentions. Ibid. On this score, the Statement of Consideration noted that the Commission was "clarifying the requirements in regard to both late filings of petitions and amending, expanding and deleting

---

10/ In an operating license proceeding, a special prehearing conference is mandatory. 10 CFR 2.751a.

11/ The reference to that time period was in recognition of the fact that "[c]urrent practice has generally provided 30 days between the date a notice of hearing or notice of proposed action on an application for a nuclear power plant construction permit or operating license is published in the FEDERAL REGISTER and the last day for filing of timely petitions for leave to intervene". 43 Fed. Reg. at 17799.

contentions" by making the acceptability of such action subject to a balancing of the five Section 2.714(a) factors. Ibid.

Given the terms and history of Section 2.714(a), we are compelled to the conclusion that a licensing board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting the specificity requirements. The Commission might, of course, have chosen to confer such authority to accommodate an existing lack of sufficient available information to enable the petitioner to fulfill those requirements. Instead, the Commission opted for a different procedure. Whether or not in agreement with that election, the adjudicatory boards must respect and abide by it.

B. It does not follow from the foregoing that Section 2.714(b) can serve to bar the later assertion of a new contention founded upon information not in existence or publicly available 15 days prior to the special prehearing conference, but which is nonetheless an essential element of the license application or the staff's prehearing review. Indeed, if so interpreted, the Section would sanction an unfair result in contravention of hearing rights conferred by Section 189a. of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239(a).

1. In Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC

188 (1973), affirmed CLI-73-12, 6 AEC 241 (1973), affirmed sub. nom. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974), we rejected the petitioners' challenge to the legality of the contentions requirement in light of Section 189a. of the Act. One of the prongs of the challenge was that it was not possible for petitioners "to state specific contentions until after they have been permitted to intervene and to avail themselves of discovery procedures".[12/] Our principal response was that "there is abundant information respecting the particular facility available to the public at the time of the publication of the notice of hearing or of an opportunity for hearing -- including at least the applicant's detailed safety analysis and environmental reports". 6 AEC at 192. [13/]

12/ At that time, intervention petitions had to set forth contentions as well as establish the petitioner's standing. See p. 9, supra. In addition, then as now, discovery on the subject matter of a contention could be obtained only after the contention had been admitted to the proceeding. 10 CFR 2.740; Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit No. 2), ALAB-31, 4 AEC 689, 690-91 (1971).

13/ In an accompanying footnote, we elaborated upon this point (with particular reference to the content of the central (Washington, D.C.) and local public document rooms).

Implicit in this observation was the belief that an intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the Act nor Section 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff. Nothing that has transpired since Prairie Island was decided prompts us to reconsider that view. To the contrary, the fact that, in the interim, the Commission has seen fit to put off the filing of contentions until the virtual eve of the prehearing conference lends additional support to what we there concluded.

But equally implicit in the Prairie Island treatment of the specificity requirements was the assumption that, prior to the special prehearing conference, the documentation necessary to fashion an adequately particularized contention both has come into existence and is available to a potential intervenor upon diligent search. For a petitioner can scarcely be expected to forecast the content of documents that it has not examined and cannot examine because they have not yet surfaced. In short, in order to put forth a specific contention respecting, for example, the adequacy of

an environmental impact statement or an emergency plan, one must have had the opportunity to examine the statement or plan. Indeed, without that opportunity, it is not possible for a petitioner even to determine whether there is warrant for a contention on the subject -- i.e., whether the impact statement or emergency plan is open to a claim of insufficiency on some colorable ground. 14/

2. With these considerations in mind, we turn to the question of precisely how a licensing board is to deal with the circumstance that, at the time of the special prehearing conference, one or more documents bearing directly upon the licensing action in issue have not as yet come into existence or become publicly available.

14/ In this connection, we summarily reject the suggestion in the applicants' memorandum to us (at pp. 41-42) that a sufficiently specific contention regarding emergency planning for Catawba can be founded upon (1) the Commission's regulations and regulatory guides; (2) already available generic North and South Carolina state plans; and (3) existing emergency plans for other facilities in those two States. There is likewise no merit to the staff's similar argument (at p. 18 of its submission) that an intervenor can ascertain whether the staff has properly fulfilled its role in the discharge of this agency's responsibilities under the National Environmental Policy Act by examining the applicants' environmental report. (We do not, of course, reach the question whether the availability of the environmental report or other materials might trigger an obligation to file environmental contentions not directed to the adequacy of the staff's performance of its NEPA responsibilities.)

At the outset, we note a possible inconsistency between Section 2.714(b) as written and the underlying Statement of Consideration with respect to when a licensing board is to make its determination on allowing new contentions grounded upon previously unavailable information. For its part, the Section authorizes the board to grant "[a]dditional time for filing the supplement" based upon a balancing of the Section 2.714(a) factors. This language means that, prior to the deadline for the supplement, on an adequately supported motion the board may extend that deadline either as to certain or all possible contention subjects. Thus, for example, a petitioner might be required to file a timely supplement setting forth those contentions as to which sufficient information already existed but given leave to await the subsequent release of the emergency plan before putting in (by way of further supplement) any contentions it might have with regard to the plan. 15/ On the other hand, the Statement of Consideration seems to suggest a Commission contemplation that, instead of granting additional time in advance, the board will take no action until the new contention is actually filed and then will look to the

---

15/ If the petitioner represented to the board that the only matters it might wish to put into controversy related to the as yet unavailable emergency plan, then the obligation to file any supplement might be deferred pending the plan's release.

Section 2.714(a) factors in deciding whether to entertain it. See 43 Fed. Reg. at 17799.

Obviously, the wording of a regulation generally takes precedence over any contradictory suggestion in its administrative history. In any event, as we see it, irrespective of when a licensing board is called upon to act, as a matter of law a contention cannot be rejected as untimely if it (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination.

We perceive no conflict between this conclusion and the Commission's direction in Section 2.714(b) that there be a balancing of the five Section 2.714(a) factors. Of necessity, the Commission intended that balancing to be performed in obedience to the proviso in Section 189a. of the Atomic Energy Act that, in proceedings of this type, it "shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." True enough, the statutory mandate "does not confer the automatic right of intervention upon anyone"; rather, the Commission may condition the exercise of that right upon the meeting of reasonable procedural requirements. BPI v. AEC, supra, 502

F.2d at 428. But no procedural requirement can lawfully operate to preclude from the very outset a hearing on an issue both within the scope of the petitioner's interest and germane to the outcome of the proceeding. If it had that effect, the requirement would not merely be patently unreasonable but, as well, would render nugatory Section 189a. hearing rights. Cf. Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134-35 (1936); United Mine Workers v. Kleppe, 561 F.2d 1258, 1263 (7th Cir. 1977).

In sum, in the instance of a contention that was susceptible of filing within the period prescribed by the Rules of Practice, the determination whether to accept it on a untimely basis involves a consideration of all five Section 2.714(a) factors -- and not just the reason (substantial or not as the case may be) why the petitioner did not meet the deadline. See Statement of Consideration accompanying amended Section 2.714(b), supra, 43 Fed. Reg. at 17799, citing Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975). Where, however, the nonexistence or public unavailability of relevant documents made it impossible for a sufficiently specific contention to have been asserted at an earlier date, that factor must be deemed controlling; it is not amenable to being overridden by other factors such as that relating to the broadening of the issues. As scarcely requires further extended discussion, any different result

would countenance placing the petitioner in a classic "catch-22" situation [16/] -- which, once again, the statute forbids and our regulations cannot be thought to have authorized.[17/]

16/ The Licensing Board itself noted this fact. See LBP-82-16, supra, 15 NRC at ___ (slip opinion, p. 6). The Board further, and correctly, pointed out that a rule allowing the rejection on untimeliness grounds of a contention that could not have been earlier filed because of the nonavailability of applicant-sponsored documents would encourage applicants to delay the completion of those documents. Id. at ___ (slip opinion, pp. 9-10). The same might be said with regard to staff documents such as the environmental impact statement.

17/ To avoid possible misunderstanding, we stress anew that both the Licensing Board's rulings and the above discussion are in the context of the unavailability of documents associated with the license application and the staff's prehearing review thereof (e.g., the applicant's emergency plan and the staff's environmental impact statement). An intervenor's endeavor to inject a belated contention grounded upon newly acquired information not so associated (such as a just-executed affidavit asserting for the first time quality assurance deficiencies during the construction of the facility) is an entirely different matter.

It is also worthy of reemphasis that the referred rulings likewise do not embrace any Licensing Board determination respecting (1) whether a particular submitted contention was specific enough to satisfy the Section 2.714(a) requirements; or (2) whether there was sufficient publicly available information to enable the formulation prior to the prehearing conference of an adequate contention on a particular subject. In any event, as previously observed, determinations of that stripe are not suitable candidates for an interlocutory appellate review.

The referral is accepted and the cause is remanded to the Licensing Board for reconsideration of LBP-82-16 and LBP-82-50 in light of the views expressed in the foregoing opinion.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board