January 17, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO PALMETTO ALLIANCE AND CAROLINA ENVIRONMENTAL STUDY GROUP MOTION FOR REFERRAL OR CERTIFICATION ON THE ALAB-687 TIMELINESS STANDARD

I. INTRODUCTION

On December 20, 1982, "Palmetto Alliance and Carolina Environmental Study Group Objections to December 1, 1982 Board Order and Motion for Reconsideration or in the Alternative for Certification" ("Intervenors' Motion") was served, out-of-time, upon the parties to this proceeding.[1/] Intervenor's pleading contained objections to the Licensing Board's rulings dismissing (1) upon reconsideration, certain contentions which had been the subject of the Licensing Board's first special prehearing conference order of March 5, 1982, and the subsequent ruling by the Appeal Board in ALAB-687, 16 NRC ___ (August 19, 1982), (2) most of Intervenors' proposed Draft Environmental Statement contentions discussed at the second special

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1/ According to 10 CFR Section 2.751a(d), objections to a special prehearing conference order are to be filed within five days after service of the order. Allowing five days for service of the prehearing conference order by mail, Intervenors' Motion was due on December 13, 1982. The copy received by the Staff, however, was missing several pages. By letter of December 27, 1982, the Staff requested a complete copy. Based on re-service of the complete document by mail on December 28, 1982, the Staff reply is due on or before January 17, 1983.

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prehearing conference of October 7 and 8, 1982, and (3) certain other contentions on serious accidents.

While Intervenors have objected to those rulings, the Staff does not herein respond to that portion of Intervenors' Motion, since parties may not file replies to such objections unless so directed by the Board. 10 CFR Section 2.751a(d). The Staff restricts itself to replying to Intervenors' alternative request for certification or referral of the Licensing Board's ruling that seven of Intervenors' proposed DES contentions, DES-2, -3, -5, -14, -16, -20, and -21,[2/] were untimely. As shown below, these specific rulings on particular contentions are not appropriate subjects for interlocutory review, and Intervenors' Motion, made in the alternative, for referral or certification should be denied.

II. DISCUSSION

A. Intervenors' Grounds for Certification/Referral

In ALAB-687, the Appeal Board set forth a standard for licensing board consideration of late-filed contentions based on information contained in previously unavailable Staff or Applicant documents. The Appeal Board stated that

> 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.

2/ DES-21 was rejected based on lack of specificity rather than untimeliness. Board Order of December 1, 1982, at 22.

ALAB-687, 16 NRC ___, slip op. at 16, August 19, 1982. Applying this standard, the Licensing Board in its December 1, 1982 Order ruled that contention DES-16 was not "wholly dependent" or to any lesser degree dependent on the previously unavailable DES, because "[a] contention with exactly the same factual allegations might have been based on the FSAR and proffered long ago. But this contention is clearly untimely now." Board Order, December 1, 1982, at 20-21. It is this basic ruling, made with respect to six of the Intervenors' DES contentions, which appears to form the basis for Intervenors' motion. Intervenors' Motion, at 5. Intervenors take a contrary view, that "[a] contention which challenges the analysis of the DES must be viewed as 'wholly dependent' on the DES if imposition of such a 'catch-22 situation' (i.e., requiring intervenors to plead specific contentions on documents not yet available) is to be rejected." Id. at 6. Thus, Intervenors appear to take the position that so long as the contention challenges the analysis in the previously unavailable document, it does not matter that the facts asserted in the contention were previously available. Having adopted a different interpretation of "wholly dependent" than that applied by the Licensing Board, Intervenors request

> that the Board certify or refer the question of interpretation of the timeliness standard and the meaning of the term "wholly dependent" as employed in ALAB-687 for determination by the Appeal Board or Commission, as appropriate.

Id. at 6.

In support of this request, Intervenors argue, relying on language contained in ALAB-687, slip op. at 7, that interlocutory review is justified on the grounds that the proper interpretation of ALAB-687 is a legal question having generic implications, and that the Board's specific rulings on

timeliness of the late-filed contentions affect the "basic structure of the proceeding in a pervasive or unusual manner." Intervenors' Motion, at 6.

B. The Licensing Board's Application of the "Wholly Dependent" Standard Was Correct

The legal error as to which Intervenors seek certification or referral is the Licensing Board's determination that where the facts forming the basis of an environmental contention are contained in sources such as the FSAR or ER, which were available at the time established for filing timely contentions, a late-filed contention challenging the adequacy of the Staff's environmental analysis in the DES is not "wholly dependent" upon the DES, and therefore untimely. Intervenors have not explained why they are in a "catch -22 situation," and the circumstances forming the basis of the Licensing Board's decisions in its December 1, 1982 order (i.e., the availability of the necessary factual basis for a reasonably specific contention) are clearly different from the circumstances addressed in its March 5, 1982 order (in which the Board assumed that information at that time unavailable might subsequently become available in Staff or Applicant documents and form the basis for a specific contention).

While it is true that the Staff's environmental analysis is not available until publication of the DES, in the case of the DES contentions whose rejection is here contested, the bases for stating the specific environmental concerns raised in the contentions were present even in the absence of the Staff's evaluation. Thus Intervenors' allega-

tions as to the deposition of sulfuric acid (DES-2), chlorine gas (DES-3), reduced capacity factor (DES-5 and -20), proper methods of calculating dose commitments (DES-14), hazards presented by aircraft (DES-16), and the health effects of given levels of radiation (DES-21) all depend upon facts which were available from Applicants' FSAR and ER prior to the time established for filing contentions. Although the Staff's evaluation of that information was not available prior to publication of the DES, nothing prevented Intervenors from fulfilling their "ironclad" obligation to review these applicant documents containing the pertinent information, asserting that these facts have a negative environmental impact which weighs against operation of the plant, and then litigating these assertions in light of the Staff evaluations thereof in the DES. As a result, it is unreasonable to assert that these contentions are "wholly dependent" upon the DES or "could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of the document." ALAB-687, slip op. at 16. Thus Intervenors have not shown that the Licensing Board made an erroneous ruling warranting correction, must less warranting interlocutory review.

C. Intervenors Have Failed to Satisfy the Requirements for Interlocutory Review

In their Motion, Intervenors have attempted to make a showing only as to one of the possible bases for interlocutory review: that the Board's rulings affect the "basic structure of the proceeding in a pervasive or unusual manner." See, Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96 (1981), cited in ALAB-687, slip op. at 3-4, (August 19,

1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977). Other possible bases for obtaining interlocutory review were stated in ALAB-687, where the Appeal Board indicated that:

> Whether review should be undertaken on "certification" or by referral before the end of a 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.

Intervenors, however, have not addressed either the "public interest" or "unusual delay or expense" aspects of the standard for interlocutory review. Similarly, Intervenors have not addressed the "immediate and serious irreparable impact" standard for interlocutory review set forth in the Appeal Board's prior formulations of the standard for interlocutory review. See, South Carolina Electric and Gas Co. et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1162 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-635, 13 NRC 309, 310 (1981). and Marble Hill, supra, 5 NRC at 1192. Thus, Intervenors' justification for interlocutory review rests exclusively upon its claim that "rejecting of these contentions affects the 'basic structure of the proceeding in a pervasive or unusual manner' and will bear on the course of many other Commission proceedings now or yet to be underway." Intervenors' Motion at 6.

There are two major reasons why the Licensing Board's rulings cannot have the pervasive or unusual impact on the basic structure of the proceeding asserted by Intervenors. First, as shown above, the Licensing Board clearly has committed no error. Its interpretation of the Appeal Board's test not only does not depart from the guidance in

ALAB-687, but would not have been inconsistent with a lesser standard of dependency than "wholly dependent." As we have seen, the rejected contentions were not at all dependent upon the DES, since all the facts contained therein were previously available in the FSAR or ER. Where a contention is not dependent upon a subsequently published document, it can only follow that it is not "wholly dependent" upon it. Thus, the Licensing Board's rulings, being wholly correct, should have no impact at all on the "basic structure" of this proceeding.

Second, even if it were to be assumed, for the sake of argument, that the Licensing Board had misapplied the "wholly dependent" standard in ALAB-687, the only result is the dismissal of contentions. Intervenors have offered not a single reason why, if they happened to be correct, an appeal at the end of this proceeding would not afford them the same opportunity, in the event the Appeal Board agreed with them, to have these contentions admitted and litigated. The Appeal Board has on more than one occasion ruled that the delay and expense of waiting until the end of the proceeding, and the possiblility that upon finding error, further proceedings need be held, is not unusual, and does not warrant interlocutory review. As the Appeal Board stated in Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973):

> in the absence (as here) of a potential of truly exceptional delay or expense, the risk that a licensing board's interlocutory ruling may be found to have been erroneous, and that because of the error further proceedings may have to be held, is one which must be assumed by that board and the parties to the proceeding.

That an erroneous ruling on the admissibility of a contention does not, by itself, affect the basic structure of the proceeding was directly addressed in Cleveland Electric Illuminating Company, et al. (Perry

Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1112-1114 (1982), wherein the Appeal Board stated:

> Our conclusion here comports well with those reached in similar cases. See, e.g., Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981); Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-637, 13 NRC 367, 372-373 (1981); Salem, supra, 11 NRC at 536; Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693, 695-696 (1979). In each instance, a party sought directed certification of a ruling that was assertedly in conflict with Commission case law, policy, or regulations and that effectively expanded the scope or length of a licensing proceeding. We denied directed certification, however, finding no pervasive or unusual effect on the basic structure of each proceeding. In sum, a licensing board may well be in error but, unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication, appellate review must await the issuance of a "final" licensing board decision. [Footnote omitted.]

Intervenors have failed to show how the rejection of these contentions "alters the very shape" of this proceeding. As previously indicated, the Licensing Board's rulings rejecting some but not all of Intervenors' proffered contentions are rulings of a type which the Appeal Board typically and consistently declines to review on an interlocutory basis. Cf. Duke Power Company et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, slip op. at 4-6, 18 at n.17. There being no showing that the basic structure of the proceeding will be affected by the Licensing Board ruling or that interlocutory review is justified on any other grounds, Intervenors' motion for certification or referral should be denied.

D. The Commission's Decision to Review the Meaning of the "Wholly Dependent" Standard in ALAB-687 Makes Certification Unnecessary

By Order of December 23, 1982, the Commission has determined to review the Appeal Board's ruling that a contention cannot be rejected as untimely where the contention is "wholly dependent" upon licensing review documents which were unavailable and without which a specific

contention could not have been advanced prior to its public availability. Specifically, the Commission has asked for the views of the parties to this proceeding on the following issues:

1. Does section 189a. of the Atomic Energy Act of 1954, as amended, require an Atomic Safety and Licensing Board to give controlling weight to the good cause factor in 10 CFR 2.714(a)(1)(i) in determining whether to admit a late-filed contention that could not be filed in a timely manner because the "institutional unavailability" of licensing-related documents precluded the timely formulation of that contention with the requisite specificity?

2. Is there "good cause" for filing a late contention when the reason given for late filing is the previous "institutional unavailability" of an agency document, e.g. the FES, but the information relied on was available early enough to provide the basis for a timely filed contention, e.g. in an applicant's environmental report?

The first issue addresses the appropriateness of considering only the good cause factor, and ignoring the other timeliness factors contained in 10 CFR Section 2.714(a)(1), as the Licensing Board said it would do in its March 5, 1982 order, with the Appeal Board's approval in ALAB-687.

The second issue, however, raises in substance the matter of which Intervenors generally complain in their motion -- that is, whether good cause may be found for a late contention based on facts contained in the previously unavailable DES where the facts relied upon and contained in the contention where available to Intervenors in other documents which were available. Thus, while the Commission does not specifically refer to the Licensing Board's particular rulings which are the subject of Intervenors' complaint here, the Commission will address the standard applied by the Licensing Board in the context of reviewing ALAB-687. As a result, Intervenors have an opportunity to address to the Commission any arguments they may have concerning their proposition that so long as

a contention asserts the inadequacy of a previously unavailable licensing review document, such as the DES, the Licensing Board must find the contention to be "wholly dependent" on the DES, and thus not untimely, notwithstanding the prior availability in other documents of the information relied upon. In the event that the Commission were to rule (on issue 2) that "good cause" for late-filing exists in such circumstances, the Licensing Board might then be required to reconsider the subject rulings. On the other hand, if the Commission rules that there is not good cause where the facts but not the document are available, there will be no need for certification, referral, or further consideration by the Appeal Board of the specific Licensing Board rulings the Intervenors object to. Therefore, the Licensing Board should deny Intervenors' alternative request for referral or certification as unnecessary.

III. CONCLUSION

Intervenors have failed to make the necessary showing to support certification or referral of the Licensing Board's specific rulings on late contentions to the Appeal Board, and, in any event, certification or referral is unnecessary in light of the Commission's determination to review ALAB-687 which review may result in the Licensing Board's reconsideration of the specific rulings objected to here. Therefore, Intervenors' Motion for referral or certification should be denied.

Respectfully submitted,

George E. Johnson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 17th day of January, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PALMETTO ALLIANCE AND CAROLINA ENVIRONMENTAL STUDY GROUP MOTION FOR REFERRAL OR CERTIFICATION ON THE ALAB-687 TIMELINESS STANDARD" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 17th day of January, 1983:

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

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

Dr. Richard F. Foster
Administrative Judge
P. O. Box 4263
Sunriver, Oregon 97702

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

Michael McGarry, III, Esq.
Debevoise and Liberman
1200 17th Street, NW
Washington, DC 20036

Robert Guild, Esq.
Attorney for the Palmetto Alliance
P. O. Box 12097
Charleston, South Carolina 29412

Palmetto Alliance
2135½ Devine Street
Columbia, South Carolina 29205

Henry Presler, Chairman
Charlotte-Mecklenberg Environmental Coalition
942 Henley Place
Charlotte, North Carolina 28207

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

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

*Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

*Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

George E. Johnson
Counsel for NRC Staff