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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

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AMICUS CURIAE BRIEF  
OF  
THE LAWYERS COMMITTEE STEERING GROUP  
OF THE ATOMIC INDUSTRIAL FORUM, INC.

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Barton Z. Cowan, Esq.  
Chairman, AIF Lawyers Committee

Of Counsel:

John R. Kenrick, Esq.  
Eckert, Seamans, Cherin & Mellott  
42nd Floor, 600 Grant Street  
Pittsburgh, Pennsylvania 15219  
(412) 566-6000

Dated: February 11, 1983

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OF THE ATOMIC INDUSTRIAL FORUM, INC.

Introduction

The Lawyers Committee Steering Group of the Atomic Industrial Forum, Inc. ("Lawyers Committee") files this brief as amicus curiae in response to the invitation of the Commission contained in the Commission Order dated December 23, 1982 ("Commission Order"), in the above-captioned case inviting interested persons to submit amicus briefs on the following two 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 questions posed in the Commission Order arise from Commission review of the Atomic Safety and Licensing Appeal Board decision in Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC \_\_\_\_\_ (August 19, 1982) ("ALAB-687"), in which the Appeal Board ruled on certain matters relating to the standard to be applied in determining whether to admit non-timely filed contentions under the provisions of 10 C.F.R. § 2.714. In ALAB-687 the Appeal Board concluded that a licensing board is not authorized to admit conditionally for any reason a contention which falls short of the requisite specificity required by regulations and Commission decisions. However, the Appeal Board went on to hold that § 2.714(b) of Commission regulations cannot "bar the later assertion of a new contention founded upon information not in existence or publicly available [at the time when such contention would otherwise have had been filed] . . . but which is nonetheless an essential element of the license application or the staff's prehearing review" (ALAB-687, slip op. at p. 11). In such a situation, where one or more licensing documents which bear directly upon a licensing action was not available to an intervenor at the time when contentions would otherwise have been due, the Appeal Board established a three-part test to be applied in determining whether to admit a late-filed contention, ruling:

" . . . 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."  
(ALAB-687, slip op. at p. 16)

Because the Appeal Board decision and the questions posed by the Commission in its Order have broad consequences in nuclear regulatory practice and are of significance to the bar, amicus files this brief.

Amicus believes that with respect to the first issue posed by the Commission, Section 189a. of the Atomic Energy Act of 1954, as amended, does not require an Atomic Safety and Licensing Board to give controlling weight to the good cause factor in 10 C.F.R. § 2.714(a)(1) in determining whether to admit a late-filed contention under the circumstances posed in the question. Rather, amicus believes that the broad responsibility and authority reposed in the Commission under the Atomic Energy Act permits the Commission to establish various appropriate factors and the weight to be accorded to each in determining whether a late-filed contention should be admitted in a proceeding. In the exercise of its judgment and authority under the Atomic Energy Act, the Commission may, of course, determine that a licensing

board should give controlling weight to the good cause factor in determining whether to admit such late-filed contention, but it is not compelled to do so by Section 189a. of the Atomic Energy Act.

With respect to the second issue posed by the Commission, amicus believes that where information relied on was available early enough to provide the basis for a timely-filed contention, no "good cause" exists for filing a late contention because of alleged previous "institutional unavailability" of an agency document.

#### Interest of Amicus

The Atomic Industrial Forum, Inc. ("Forum") is an association of over 600 domestic and overseas organizations interested in the development of peaceful uses of nuclear energy. Its members include electric utilities, manufacturers, architect-engineers, consulting firms, law firms, mining and milling companies, and others who design, build, operate and service facilities for the production of nuclear fuel and the generation of nuclear power. Duke Power Company is a member of the Forum. The Lawyers Committee is a standing committee of the Forum whose membership comprises a wide spectrum of lawyers with extensive experience in the law relating

to nuclear regulation and practice. Many members are actively engaged in practice before the Nuclear Regulatory Commission and its licensing and appeal boards.

### Discussion

- I. Under the Atomic Energy Act the Commission Has Authority to Determine What Factors Should Be Given Controlling Weight in Deciding Whether to Admit Late-Filed Contentions.
  - A. Section 189 does not mandate that controlling weight be given to the good cause factor.

Section 189 of the Atomic Energy Act of 1954, as amended, does not require an Atomic Safety and Licensing Board to give controlling weight to the good cause factor set forth in 10 C.F.R. § 2.714(a)(1)(i) in determining whether to admit a late-filed contention that could not have been filed in a timely manner because of institutional unavailability of a license-related document precluding such timely formulation with requisite specificity. Rather, the Atomic Energy Act provides the Commission with broad authority to determine what factors to consider and the weight to be given to such factors in connection with admissibility of late-filed contentions. Under this authority the Commission could give controlling weight to the good cause factor but is not mandated to do so.



Section 189 of the Atomic Energy Act provides in part: "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." As stated by the United States Court of Appeals for the District of Columbia Circuit in BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974), Section 189 does not confer an automatic right of intervention on anyone. In that case, the Court sustained a denial of a petition to intervene in a Commission licensing proceeding where such denial was based upon a failure to identify specific contentions with the requisite particularity as required by Commission regulations. In upholding the Commission regulations the Court noted the unique and broad responsibility granted to the Commission to determine how it should proceed to achieve its statutory objective and concluded that this broad mandate authorized the Commission to regulate the conditions under which intervention will be allowed. See also Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968).<sup>1</sup>

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<sup>1</sup>The question of the validity of Commission regulations relating to intervention also was considered by the Court in Easton Utility Company v. Atomic Energy Commission, 424 F.2d 847 (D.C. Cir. 1970), where the Court denied a late petition for intervention in the face of an argument that the intervenor had been relying on another participant to protect its interests and had decided to intervene only when such other participant determined not to carry forward [footnote continued on next page]

The rationale of the Court of Appeals decision in BPI v. Atomic Energy Commission, supra, supports the view that the Commission may proscribe such standards as it deems appropriate with respect to admissibility of late-filed contentions, and the weight to be given to each such standard. There is no language in Section 189a. of the Atomic Energy Act which addresses the question of late-filed contentions or the standard to be applied when determining whether such late-filed contentions are to be admitted. Accordingly, although the Commission has the authority to adopt a standard requiring a licensing board to give controlling weight related to the good cause factor, there is no mandate in Section 189 (or anywhere else in the Atomic Energy Act) that it do so.<sup>2</sup>

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Footnote 1 continued.

its opposition to the plant which was the subject of the license application. In that case the Court, after citing the broad power granted to the Commission to adopt rules to carry out the purposes of the Atomic Energy Act, found nothing in the record which challenged the reasonableness, necessity or propriety of the 1968 version of 10 C.F.R. § 2.714, which contained the time limitations and a "good cause" standard for exceptions thereto.

<sup>2</sup>Current Commission regulations provide for a balancing of five factors when ruling on a late-filed petition, 10 C.F.R. § 2.714(a)(1)(i-v), the good cause factor being the first mentioned. The other four factors listed in the regulation, however, also are important to a sound administrative process. Depending on the particular facts of a case, one or more of those four factors may have substantial significance, and may even be controlling. As noted in the NRC [footnote continued on next page]

- B. The test developed by the Appeal Board is appropriate for determining whether "good cause" exists for the admission of late-filed contentions in the context of institutional unavailability of a license-related document.

The Appeal Board held in ALAB-687 that when a late-filed contention is submitted and a claim is made that it is based upon a license-related document previously unavailable, it cannot be rejected as untimely if the contention "(1) is wholly dependent on the content of the particular document; (2) could not therefore have been 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" (ALAB-687, slip op. at p. 16). Inherent in the issues raised by the Commission Order is the question of the appropriateness of this three-pronged test established

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Footnote 2 continued.

Staff Brief (p. 13), no reported case has been identified in which a late-filed safety contention was rejected as untimely where good cause was shown. Hence, as the Staff also noted, as a practical matter the use of the good cause standard as interpreted by the Appeal Board in ALAB-687 may, as a practical matter, provide the same result as application of the five factors in § 2.714(a)(1). However, the Commission may want to preserve the option of allowing a balancing of the five factors for the unusual case where the factor of good cause is outweighed by the other factors.

by the Appeal Board. Amicus believes that the factors set forth by the Appeal Board are an appropriate formulation of the requirements which should be imposed for the establishment of "good cause" for the late filing of contentions due to institutional unavailability of license-related documents. Inherent in the statement that a late-filed contention could not have been advanced with any degree of specificity (if at all) at a prior time is the concept that the institutionally unavailable document contains new information not previously available. If information relied upon in a late-filed contention was available earlier, the unavailability of a licensing document should not provide any basis for not having filed a contention at an earlier time. See, infra, pp. 10-12. Accordingly, in connection with the application of the good cause factor in 10 C.F.R. § 2.714(a)(1) when determining whether to admit a late-filed contention allegedly based on new information in an "institutionally unavailable" licensing document, the Commission should approve the three-part test set forth in ALAB-687 which defines how good cause will be ascertained.

II. No "Good Cause" Exists for Filing a Late  
Contention When There Is Previous Institu-  
tional Unavailability of an Agency Document  
If the Information Relied on Was Available  
Earlier.

Where information relied upon to formulate a contention was available early enough to provide the basis for a timely-filed contention, no good cause exists for filing a late contention based on previous "institutional unavailability" of an agency document. Any other rule would enable a party to defer filing of contentions until a very late stage in a licensing proceeding, thereby defeating the desirable goal of early identification of issues to be decided in a proceeding. In most cases the overwhelming majority of factual information becomes available through lengthy documents filed by the applicant and through drafts of documents prepared and issued by the Staff far in advance of issuance of final licensing-related documents such as the Final Environmental Statement or Final Staff Safety Evaluation. These documents normally provide more than sufficient information for a party to formulate contentions with the requisite degree of specificity. Nothing is to be gained in Commission practice to allow deferral of the filing of such contentions until after a licensing document has been

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issued where the licensing document contains or is based upon this previously available information.<sup>3</sup>

### Conclusion

Amicus believes that the requirement for timely filing of contentions is fundamental to an administratively sound hearing process. Exceptions which permit late-filed contentions should be carefully and narrowly drawn and construed. Nothing in the Atomic Energy Act of 1954 requires the Commission to adopt any particular formulation of standards for late filing of contentions or to limit or give controlling weight to any particular factor, whether or not the reason asserted for such late filing is an alleged "institutional unavailability" of a licensing-related document.

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<sup>3</sup> Amicus notes that in connection with safety issues the applicant carries the burden of proof and the adequacy of the Staff's evaluation is not the issue for decision. Accordingly, allowing late-filed contentions based upon the previous unavailability of the Staff Safety Evaluation Report where such contentions seek to challenge the adequacy of the Staff review would be totally inappropriate. Although the situation is somewhat different with respect to environmental issues where the ultimate question is the adequacy of the Commission's Environmental Impact Statement, contentions seeking to raise the adequacy of the Staff environmental review also are inappropriate. Hearings before the Atomic Safety and Licensing Boards are not intended to serve the function of providing a check on the adequacy of reviews and evaluations performed by the NRC Staff, although in some instances they may incidentally accomplish that purpose. Hearings are designed primarily to resolve factual disputes and [footnote continued on next page]

Further, with respect to the "good cause" standard, nothing in the Atomic Energy Act of 1954 requires the Commission to accept a contention which would otherwise be untimely merely because a licensing-related document was previously institutionally unavailable if the underlying information relied on for the contention was otherwise previously available.

Respectfully submitted,



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Barton Z. Cowan, Esq.  
Chairman, AIF Lawyers Committee

Of Counsel:

John R. Kenrick, Esq.  
Eckert, Seamans, Cherin & Mellott  
42nd Floor, 600 Grant Street  
Pittsburgh, Pennsylvania 15219

Dated: February 11, 1983

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Footnote 3 continued.

to determine whether with respect to safety issues the burden of proof on the applicant has been met and whether with regard to environmental issues the Environmental Impact Statement is adequate. In this regard it is noteworthy that the Commission's Environmental Impact Statement is deemed modified by whatever actions may be taken by the Licensing Board, the Appeal Board and the Commission in connection with their decisional process on license applications. This decisional process focuses on the substantive environmental issues themselves, where properly raised, and not on adequacy of the Staff review.



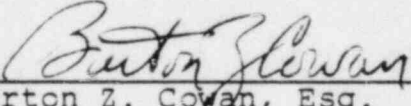
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DUKE POWER COMPANY, et al. :  
(Catawba Nuclear Station, Units 1 : Docket Nos. 50-413  
and 2) : 50-414

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Amicus Curiae Brief of the Lawyers Committee Steering Group of the Atomic Industrial Forum, Inc." were served upon the persons listed on Attachment 1 to this Certificate of Service by deposit in the United States Mail (First Class), postage prepaid, this 11th day of February, 1983.

  
\_\_\_\_\_  
Barton Z. Cowan, Esq.  
Chairman, AIF Lawyers Committee

Service List

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

Commissioner Nunzio J. Palladino  
Chairman  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Commissioner Victor Gilinsky  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Commissioner John F. Ahearne  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Commissioner Thomas M. Roberts  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Commissioner James K. Asseltine  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

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

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

Howard A. Wilber  
Atomic Safety and Licensing Appeal Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

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 97702

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

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

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

Albert V. Carr, Jr., 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.  
P.O. Box 12097  
Charleston, South Carolina 29412

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 Section  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

J. Michael McGarry, III, Esq.  
DeBevoise & Liberman  
1200 Seventeenth Street, N.W.  
Washington, D.C. 20036