UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	
SOUTH CAROLINA ELECTRIC & GAS COMPANY, et al.	)	Docket No. 50-395-OL
	)	
(Virgil C. Summer Nuclear Station, Unit 1)	)	

LICENSEE'S RESPONSE IN OPPOSITION TO INTERVENOR'S REQUESTS TO REOPEN THE RECORD AND CONDUCT FURTHER PROCEEDINGS AND FOR A STAY

I. Background

On July 20, 1982, the Licensing Board issued the first part of its initial decision herein in the form of a Partial Initial Decision (Seismic Issues). On August 4, 1982, the Board issued the balance of its initial decision herein as a Supplemental Partial Initial Decision. On August 6, 1982, the Director of Nuclear Reactor Regulation duly issued an operating license (No. NPF-12).[1] There followed a series of events regarding Intervenor's requests for a stay and/or reopening of the record, which were recounted in the Board's August 17, 1982 Memorandum, in pertinent part, as follows:

> At approximately 7 p.m. on Friday, August 6, 1982, Intervenor Bursey called the Board Chairman at his home to notify him of alleged safety concerns involving vertical welds of reinforcement bars in the Summer containment. On the following Monday morning, August 9, 1982, he called the Board chairman at his office to move orally for a stay of the Board's initial decision of August 4, 1982 authorizing the issuance of an operating license, pursuant to 10 C.F.R.

[1] Authorization to operate at levels in excess of 5% of full power is subject to the Commission's immediate effectiveness review under 10 C.F.R. §2.764(f).

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§2.788(g).[2] Mr. Bursey indicated that a former cadwelder at the V.C. Summer Nuclear Station had come forward a few days previously to raise allegations concerning defective welds in containment rebar ... .

The Board chairman arranged a conference call for noon of the same day ... . Intervenor indicated that he would submit the former cadwelder's affidavit to Applicants that day,[3] ... . The Board chairman arranged a further conference call for Thursday afternoon, August 12, 1982.

At the conference call on August 12, 1982, ... Mr. Bursey indicated that his need for an immediate stay was premised on the prospect of fuel loading and criticality being achieved in the next few days. The Director had issued a license on August 6, 1982 authorizing fuel loading and operation at 5% of full power. We were told that fuel loading had commenced on August 10, 1982. Applicants' counsel indicated that it was his understanding that criticality would not be reached for at least 6 more weeks, i.e., on or about September 21, 1982.[4] Applicants offered to notify the parties and the Board at least ten days before criticality would be reached if the 6 weeks estimate were shortened. Under those circumstances, Mr. Bursey indicated that he did not require an immediate ruling by the Board on his request for stay.

At the Board's suggestion, the parties agreed to a briefing schedule that would permit adequate time for Intervenor to submit a full presentation, and for Applicants and Staff to make full response. The parties agreed, and the Board ordered, that Intervenor submit his full presentation in support of his motion for stay and to reopen the proceedings on the cadwelding allegations by August 26, 1982, and handcarry a copy to Applicants on that date.[5] ...

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2 As to the literal applicability of 10 C.F.R. §2.788, see note 10, infra. Contrary to 10 C.F.R. §2.788(g), Mr. Bursey did not advise either Applicants or Staff in advance of this stay request, nor did he advise of the noon conference call or the subject thereof until a few minutes before noon.

3 Mr. Bursey did not do so; Applicants were furnished a copy by the news media, which Mr. Bursey confirmed was the "affidavit" in question. Quotation marks are used because the paper received by Applicants was not under oath or affirmation.

4 Criticality is now estimated by SCE&G for the beginning of October, 1982.

5 Intervenor's presentation was delivered to Applicants on August 27, 1982, after Mr. Mahan telephoned Mr. Bursey's colleague, Ms. Bowman, to inquire after the papers.

> Applicants and Staff are to submit their responses on or before September 10, 1982. ... [footnotes added].

As a result of the foregoing, there are, or may be, pending before this Board [6] both (a) a request for a stay [7] and (b) a motion to reopen the record and to conduct further proceedings, along with various supporting papers. The pleadings and other papers submitted by Mr. Bursey are as follows.

On August 12, Mr. Bursey served "Intervenor's Motion to Reopen the Record and Conduct Further Proceedings and Request for a Stay" dated August 10, 1982, confirming his oral motion of August 9, 1982 seeking to stay the Board's initial decision authorizing issuance of an operating license and to reopen the hearing to consider Mr. Jennings' allegations. Intervenor contended, on the strength of Mr. Jennings' statements (contained in the unsworn "affidavit" referred to at note 3, supra), that the alleged defective cadwelds pose a significant safety problem warranting a stay and further discovery and evidentiary hearings. Intervenor's Motion, August 10, 1982, at 1-2.

On August 27, Licensees received copies of "Intervenor's Supplemental Filing on Motion to Reopen the Record and Conduct Further Hearings", "Intervenor's Affidavit in Support of Motion to Reopen the Record and Request For A Stay", both dated August 26, 1982, and a sworn statement by Harold L. Jennings signed on August 12, 1982. In these supplemental pleadings, Mr. Bursey makes no further reference to a stay, but seeks to have the record reopened

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6 See page 4, infra.

7 Exactly what, if anything, it is which the Intervenor now seeks to have stayed is unclear. See page 6, infra.

to consider alleged inadequacies in SCE&G's QA/QC program related to cadwelds. Intervenor contends that the deficiencies alleged contradict the Board's finding on Contention 9 concerning quality control.

II. Jurisdiction

At the outset, we must briefly address the question of jurisdiction of the Licensing Board to consider the matters herein. Once an appeal has been taken from an initial decision, the Appeal Board is the appropriate tribunal to look into any supervening developments. See Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-383, 5 NRC 609, 610 (1977). On the other hand, there is authority for the proposition that stays should normally be brought initially to the attention of the Licensing Board. See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB 404, 5 NRC 1185, 1186 (1977); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), 4 NRC 10, 12 (1976). Our appeal was taken by the filing of Exceptions to the Initial Decision on August 20, 1982; however, the briefing schedule has been suspended. The initial requests for reopening were pending when the appeal was filed; the supplemental pleadings were not filed until after the appeal was filed. Accordingly, there is doubt whether the Licensing Board has jurisdiction to consider some or all of the matters raised by Mr. Bursey; jurisdiction may rest properly (as to some or all of these matters) with the Appeal Board. Irrespective of which body has jurisdiction, we address the merits in accordance with the

briefing schedule previously agreed to and confirmed in the Licensing Board's Memorandum of August 17, 1982.

III. Summary

The Affidavits, and attachments thereto, submitted herewith provide the basis for denial of Intervenor's application for a stay and further provide the grounds for denial of reopening through a summary disposition-type procedure on the pleadings as set forth by the Appeal Board in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). As is shown in the discussion which follows, the Intervenor has failed to satisfy the requirements for a stay, the standards for reopening, or the factors applicable to admission of late-filed contentions.

IV. Request For A Stay

An initial decision will be stayed only upon a showing similar to that required for a preliminary injunction in federal court. Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-81, WASH 1281 (Supp. 1) 546 (1972). The purpose of a stay is to preserve the status quo pending resolution of the matter contested. In the present instance, the status quo is a duly issued operating license authorizing fuel loading and low power testing pending Commission review for higher power levels. Licensees began loading fuel at the V.C. Summer Station pursuant to License No. NPF-12 on August 10 and expect to achieve initial criticality at the beginning of October. Thus, at least as to fuel loading and low-power testing up to 5% of full power, there is nothing to stay. The NRC Staff or the Commission can, of course, in a proper

case, suspend or revoke a license, or order cessation of an activity authorized thereunder, by virtue of the enforcement provisions of the rules, [8] but suspension or revocation, or orders to cease an activity, are not functions of an ASLB unless delegated explicit power in an enforcement proceeding.

Intervenor failed to make the requisite showing for granting a "temporary" (emergency) stay pursuant to an oral request under 10 C.F.R. §2.788(g),[9] and in effect withdrew such request during the August 12, 1982 conference call, when he indicated he sought to have the matter resolved prior to initial criticality. Since criticality is authorized under an outstanding license, what was sought amounted to suspension or revocation.

Mr. Bursey's subsequent written filings shed no light on what, if any, relief he seeks by way of a stay. It can be concluded that no request for a stay is pending given Mr. Bursey's apparent abaondonment of his initial request, as modified during the conference call of August 12, 1982. If any such request is pending, and if it can be entertained, it must satisfy the requirements of Section 2.788(e); the Intervenor has failed to make the requisite showing. Whether the proper showing has been

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8 See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-3389, 4 NRC 10, 11 n.1 (1976).

9 Section 2.788(a) literally applies to an application for a stay pending appeal, (See Portland General Electric Co.) (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 68-69 (1979)) not to a request for a stay pending reopening. Mr. Bursey does not seek a stay pending appeal; he did not file exceptions to the initial decision. Recognizing that 2.788(a) is not literally applicable to the present situation, we nonetheless apply the standards therein set forth, since they are the same as applied in the federal courts.

made requires examination of four factors originally set forth in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)[10], now codified as 10 C.F.R. §2.788(e):

1. Has the movant made a strong showing that he is likely to prevail on the merits;

2. Has the movant shown that absent the requested relief, he will be irreparably injured;

3. Would issuance of a stay substantially harm other parties interested in the proceeding; and,

4. Where does the public interest lie?

The burden of persuasion to show compliance with the regulations is upon the moving party. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978). Intervenor has failed to show that he is likely to prevail on the merits and has failed to show that he will be irreparably injured in the absence of a stay. On the other hand, we show that granting a stay under these circumstances would be prejudicial to the Licensees and that the public interest supports denial of the Intervenor's request for a stay.

No one of the four factors in 10 C.F.R. §2.788(e) is dispositive of an application for stay. Rather, the strength or weakness of the movant's showing on a particular factor determines how strong a showing will be required on the other factors to justify the relief sought. Public Service Company of New

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10 See Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1978); Public Service Co. of Indiana (Marble Hill Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 270 (1978); Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 13 (1976).

Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 14 (1976).[11]

1. Intervenor Fails To Make A Strong Showing That He Is Likely To Prevail On The Merits. The level or degree of possibility of success on the merits necessary to justify a stay varies according to the Board's assessment of the other three factors in determining whether a stay is warranted. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977). When there is no showing of irreparable injury absent a stay and the other factors do not favor the movant, an "overwhelming" showing of likelihood of success on the merits is required to grant a stay. Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit 2), ALAB-404, 5 NRC 1185, 1186-89 (1977).

The Intervenor makes two principal arguments. First, he contends that improperly performed cadwelds adversely affect the capacity of the reactor containment structure to withstand design loads and thus pose a safety hazard; and second, he argues that because of deficiencies in the QA/QC program, the extent of such alleged defective cadwelds cannot be determined.

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11 There must be more than the possibility of legal error by the Licensing Board to warrant a stay. Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-221, 8 AEC 95, 96 (1974). The establishment of grounds for appeal is not sufficient; there must be a strong probability that no ground will remain upon which the Licensing Board's action could be based. Toledo Edison Company (Davis-Besse Nuclear Power Station, Units 1, 2 & 3), ALAB-385, 5 NRC 621, 634 (1977). A movant must do more than list possible grounds for reversal to make a strong showing of likelihood of success on the merits. Id.

Intervenor contends that the alleged improper cadwelds constitute "systematic defects of the gravest safety significance." Intervenor's Motion, August 10, 1982, at 2. Yet neither his August 10 filing nor his supplemental filings on August 26 provide any support for his assumptions that improperly performed cadwelds in the vertical walls of the containment adversely affect safety or that cadwelds are essential to the capacity of the structure to withstand design basis accident loads or tangential shear forces.[12] Despite the Board's admonition during the August 12 conference call that he should obtain expert opinion as to the safety significance of the allegations, he provided none. Mr. Bursey admits in his August 26 Supplemental Filing, at page 2, that he lacks the technical expertise to present facts which may be essential to his Motion. He further states in his August 26 Affidavit, at page 3, that he is unable to obtain expert testimony as to the safety significance of systematic code violations in rebar. While Mr. Bursey states that he believes he has made the requisite strong showing, the facts, as established in the affidavits of D.A. Nauman and J.F. Fulton, do not bear out that assertion. To the contrary, they conclusively refute the allegations made by Mr. Jennings and Mr. Bursey.

a. Structural Analysis of Containment Capacity. An evaluation of the ability of the V.C. Summer reactor building containment structure to resist load combinations which control the containment design was performed by Gilbert Associates, Inc. (GAI). A full description of the results of the evaluation is

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12 Mr. Bursey' and Mr. Jennings' qualifications are discussed at page 24, infra.

contained in the Affidavit of J.F. Fulton; the GAI report is attached thereto as Attachment B. The evaluation was performed as a calculation of the capability of the containment to resist controlling design loads based on worst case assumptions. Mr. Fulton concludes:

> In conclusion, based on the discussion above and the evaluation in the report, it is our opinion that the containment would have sufficient capacity to resist the design loads even if the extreme assumption were made that all the Cadwelds on the vertical reinforcing bars were not effective. [Fulton Affidavit, at 3]

b. QA/QC Programs Related to Cadwelding. Licensees fully address each of Mr. Bursey's allegations of inadequacies in the QA/QC program relating to cadwelding in the Affidavit of D.A. Nauman, attached hereto. Intervenor raises the following issues: Nonconformance Notices, Deficiency Notices, a letter from Wielkoplski to Babb, alleged Gilbert concern over inadequate splices, the structural acceptance test, surveillance reports, Jennings' cadwelds, cadwelder training, alleged falsification of QC documents and cadweld testing.

(1) Nonconformance Notices. Mr. Bursey attempts to imply that SCE&G quality control was inadequate by stating that only two Nonconformance Notices were issued regarding cadwelding during the entire construction process. Intervenor's Affidavit, August 26, 1982, at 1. Mr. Bursey's statement is incorrect. During the period when cadwelding was being conducted, there were 45 Deficiency Notices and 12 Nonconformance Notices issued on cadwelding. Nauman Affidavit, at 3. The two NCNs identified by Mr. Bursey dealt with inadequate cadwelder performance, not QC inspector

performance, and they do not adversely reflect on either the QC or QA programs. Id. at 3-5.

(2) Deficiency Notices. Mr. Bursey asserts the existence of a Deficiency Notice (DN) dated April 3, 1976, which supposedly cited QC for not properly marking rejected splices. Intervenor's Affidavit, August 26, 1982, at 1. There is no DN of that date, but two DNs were issued around that time documenting a failure to spray with red paint rejected cadweld splices. Nauman Affidavit, at 5. As explained in Mr. Nauman's Affidavit, this failure to follow procedure was not such as could lead to a hardware failure. Id. at 5-6.

(3) Wielkopolski Letter. The Intervenor references a letter from Wielkopolski (authored by J.M. Torbet, whose affidavit is attached, and signed by him with Wielkopolski) to Babb and asserts that such letter evidenced concern by Gilbert over inadequate splices being covered with concrete. Intervenor's Affidavit, August 26, 1982, at 2. The quoted language referred to by Mr. Bursey was taken out of context and misinterpreted. The letter dealt with a change in procedures for testing splices based on new ASME codes for prestressed containments which was subsequently adopted and used throughout cadwelding. The letter had nothing to do with cadwelder performance or QC inspection. Nauman Affidavit, at 6-8; Torbet Affidavit, at 2.

(4) Alleged Gilbert Concerns. Mr. Bursey intimates that "Gilbert's fears about inadequately tested splices" (an apparent reference to the Wielkopolski letter) have been borne out. Intervenor's Affidavit, August 26, 1982, at 2. Licensees are not

aware that Gilbert has any such concerns. Mr. Torbet's Affidavit states:

> I know of no inadequately tested splices being covered with concrete and have heard no information that inadequately tested splices were covered with concrete at the V.C. Summer Station. [Torbet Affidavit, at 2.]

Extensive documentation confirms that SCE&G's cadweld testing program was functional and met or exceeded industry practice at the time. Nauman Affidavit, at 8.

(5) Structural Acceptance Tests. Although the Intervenor argues to the contrary, the reactor building containment structure functioned as expected in accordance with design during the structural acceptance test program. Nauman Affidavit, at 8. Fulton Affidavit, para. 8, at 3; cf. Intervenor's Affidavit, August 26, 1982, at 2. Intervenor states that "unpredicted cracks" developed in the containment during the acceptance tests. Id. at 2. Mr. Bursey again has misinterpreted the results of that test. The containment was carefully monitored for cracks during the test. The small cracks which occurred in the containment shell were both predictable and explainable. Nauman Affidavit, at 9, Fulton Affidavit, para. 8, at 3.

(6) Surveillance Report. Intervenor refers to a surveillance report dated December 21, 1977, which he contends establishes that SCE&G was "long . . . aware of serious systematic QC problems" concerning rebar. Intervenor's Affidavit, August 26, 1982, at 3-4. Although Mr. Bursey is confused about the author of that report, there was a surveillance report dealing with cadweld inspection which established that all cadwelds in the areas

inspected were acceptable prior to pouring concrete. Nauman Affidavit, at 10. The Intervenor's inference is without merit.

(7) Jennings' Cadwelds. Mr. Jennings' first affidavit asserts that he did "over a thousand" cadwelds, his later statement claims only 400. Compare Jennings' Affidavit, undated, at 1 with Jennings' Statement, August 26, 1982, at 2. Nonetheless, Mr. Bursey persists in referring to over 1,000 cadwelds. Intervenor's Affidavit, August 26, 1982, at 4. There were slightly fewer than 5,000 cadwelds performed on site during Mr. Jennings' employment; therefore, the assertion that he performed 20% of all such cadwelds when there were 44 cadwelders during that time lacks credibility. Nauman Affidavit, at 16. We would argue that even the claim of 400 cadwelds seems unlikely, although we acknowledge that he may have worked on somewhat more than 279. The quality assurance records establish that Mr. Jennings was the responsible cadwelder on only 279 cadwelds, 111 of which were on vertical rebar, the only type of concern to Mr. Jennings. Nauman Affidavit, at 15-16. Whatever the total performed by Mr. Jennings, the Intervenor contends that only 52 were visually inspected. Intervenor's Affidavit, August 26, 1982, at 4. Mr. Bursey's statement that only 52 of Mr. Jennings' cadwelds were inspected is incorrect. One hundred percent of his splices were visually examined after the shot. Id. at 11. This is documented in the QA records. Fifty-two of Mr. Jennings' set-ups for cadwelds were inspected and documented prior to being performed. Id.

(8) Training. In his supplemental filing and motion to reopen the record and conduct further hearings, dated August 26, 1982, Intervenor implies that Mr. Jennings' training as a cadwelder was inadequate. Intervenor's Supplemental Filing, August 26, 1982, at 1. Mr. Bursey's allegation is contradicted by Mr. Jennings' own statement during an August 10, 1982 conference call in which he admitted he was properly trained. See Nauman Affidavit, at 12.

(9) Alleged Falsification of QC Documents. Mr. Bursey alludes to falsification of QC documents and widespread cadweld defects. Intervenor's Supplemental Filing, August 26, 1982, at 2. Licensees have not discovered any evidence supporting these allegations. Nauman Affidavit, at 13. The Intervenor seems to have jumped to a conclusion from the procedure by which foremen signed production tags filling in the name of the responsible cadwelder. He seems also to have confused (perhaps understandably) "production" tags and training certification tags. Nauman Affidavit, Attachment A, at 2.

(10) Cadweld Testing. As part of the process of resolving NCNs 350 and 366, SCE&G conducted a cadweld mock-up testing program in 1977 and 1978. This involved extensive testing and analysis of cadwelds intentionally voided, slagged, or loaded with foreign material. The results confirmed that tensile requirements were met in each case. Id. A further testing program has been conducted since receipt of Mr. Jennings' allegations. This involved attempts to use #9 wire and to duplicate extensive "blow by" or loss of cadweld material as described by Mr. Jennings. The

results of these tests convince the Licensees that the practices alleged by Mr. Jennings would have been difficult to accomplish (and more time-consuming than proper techniques) or would have been readily visible to inspectors. Thus, Mr. Jennings has probably exaggerated. Id. at 14. In addition, numerous interviews with former cadwelders, QC and QA personnel have failed to confirm Mr. Jennings' allegations of significant and widespread defects in cadweld splices. Id. at 14-15.

2. Intervenor Will Suffer No Irreparable Harm If A Stay is Not Granted. The factor which has been most important with regard to stays is the question of irreparable harm to the movant if the stay is not granted. Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1978); Long Island Lighting Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-481, 7 NRC 807, 808 (1978); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-437, 6 NRC 630, 632 (1977).

Intervenor has not shown that he will suffer irreparable harm if his request for a stay is not granted. He states that he and the general public "may be harmed irreparably if the plant is allowed to operate and the containment is breached in an accident due to the defective welds." Intervenor's Motion, August 10, 1982, at 3. Based on the results of the Reactor Containment Building Structural Acceptance Test and the analyses conducted by Gilbert Associates, Inc., the possibility of defective cadwelds in the vertical rebar of the walls has no adverse impact on the

structural integrity of the containment and presents no health and safety hazard. See Fulton Affidavit, at 4.

3. Licensees Will Be Harmed if A Stay is Granted. The record in this proceeding is closed, the Board has issued its initial decision, construction is complete, an operating license has been issued, and the Licensees have loaded fuel and are conducting tests prior to initial criticality. Initial criticality and testing at up to 5% of full power is (like subsequent low power and power ascension testing to authorized levels) essential to eventual commercial operation. While Licensees do not expect to encounter significant new problems requiring extended time to correct, experience at other facilities reveals that time-consuming problems can arise during testing. Low power testing permits identification of any needed corrective action. If a problem were to be identified in the several weeks of low power testing, it might be such as to warrant correction at once, or at a later time prior to full power operation (perhaps during the period when the unit will be shut down for steam generator modifications), or at some still later time, as appropriate. But if criticality and low power testing were to be postponed, any such problems could not be identified until resumption of testing, and the time for corrective action would then add unnecessary delay to the schedule. There is no good reason to put off the testing of the unit and every good reason to proceed now, when any corrective actions could be better accommodated with the least impact on the schedule for commercial operation. Any resulting delay in commercial operation would be quite expensive. The

Licensees have an investment in the V.C. Summer Nuclear Station in excess of $1.0 billion. As we have stressed on previous occasions, it cannot reasonably be controverted that carrying costs on the order of $30 million per month would be incurred if initial criticality were to be delayed and commercial operation correspondingly postponed; that both the State of South Carolina and the Federal Energy Regulatory Commission (FERC) provide for recovery of such costs from customers; and that co-owner South Carolina Public Service Authority will incur further additional costs for purchasing capacity and energy to replace Summer generation. Finally, it is reasonably ascertainable that energy from Summer will be cheaper from an incremental cost standpoint for South Carolina Electric & Gas Company than oil. The adverse impact on the rights of the Licensees and the very real consequences of delay at this point are substantial. This factor should weigh heavily against granting a stay.

4. The Public Interest Does Not Support Granting a Stay. As previously discussed, the existence of improperly performed cadwelds in the vertical walls of the containment does not affect the integrity of the structure and presents no safety hazard to the public. On the other hand, the very substantial costs (page 16, supra) that would be incurred by a delay of criticality and low power testing and consequent delay in commercial operation would adversely affect the public served by South Carolina Electric & Gas Company and South Carolina Public Service Authority. Moreover, there is an obvious public interest in early conduct of testing to permit any needed corrective action with

minimum disruption of the schedule for commercial operation, as discussed in the previous section. Thus the public interest favors continued effectiveness of outstanding authorization for criticality and low power testing of the V.C. Summer Nuclear Station.

Conclusion: No Stay Should Be Granted

Having considered the four factors set forth in 10 C.F.R. §2.788(e) pertinent to applications for a stay, we have shown that Intervenor is not likely to prevail on the merits, that he has not demonstrated that he will suffer irreparable harm, that Licensees would be substantially prejudiced if a stay were to be granted, and that the public interest favors continuation of outstanding authorizations.

V. Reopening The Record

To justify granting a motion to reopen, the moving papers must be strong enough, in light of any opposing filings, to avoid summary disposition. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520, 523 (1973). Thus, even if a matter is timely raised and even if it involves a significant safety issue (which we assert this matter does not), no reopening of the evidentiary record will be required if the affidavits submitted in response to the motion demonstrate there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the allegedly significant safety issue does not exist, has been resolved, or for some other reason would not cause a different result to be reached than if the matter had been considered prior to the initial decision.

The affidavits attached hereto demonstrate there are no unresolved issues of material fact, provide the basis for summary disposition on the pleadings as set forth by the Appeal Board in Vermont Yankee, supra, 6 AEC at 523, and show that there are no grounds for reopening the record. Below we discuss the legal requirements for reopening.

Once the record has been closed in a proceeding, the proponent of a motion to reopen bears a "heavy burden". Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 328 (1978).[13] Reopening the record is based on appraisal of three factors: (1) Is the motion timely? (2) Does it address significant safety or environmental issues? (3) Might a different result have been reached had the newly proffered material been considered initially? Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 879 (1980); see Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 804 (1979).

First, as to timeliness, the movant must show that the issue could not have been raised earlier. Vermont Yankee, supra 6 AEC at 523.[14] Second, prior to final agency action, a motion to reopen even though timely will not be granted unless the new circumstance or fact discovered gives rise to a "significant

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13 See Public Service Electric & Gas Co., et al. (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 NRC 43, 63 (1981); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619, 620 (1976).

14 See Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 374 n.4 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-75-6, 1 NRC 227, 229 (1975).

safety-related issue." Wolf Creek, supra, 4 NRC at 620.[15] Finally, in a proceeding in which a decision has been rendered, the movant must show that a "different result might have been reached" had the matter been considered earlier. Tyrone, supra, 7 NRC at 374 n.4; Wolf Creek, supra, 7 NRC at 332; North Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974).

Although Mr. Jennings last worked on the V.C. Summer project in mid-1976, he did not reveal his allegations publicly until July 1982. The question of timeliness here is not whether the NRC should investigate his allegations whenever made -- it should and has. The question is whether further litigation is warranted. In this context, the time within which the Intervenor acted on the allegations (he was not, after all, impressively prompt) should be accorded less weight[16] than the other factors, i.e., safety significance of the issue and would a different result have been reached had the matter been considered earlier.

As to safety significance, based on the results of the Reactor Containment Building Structural Acceptance Test and the analyses conducted by Gilbert Associates, Inc., the possibility of defective cadwelds in the vertical rebar of the walls has no adverse impact on the structural integrity of the containment and presents no health and safety hazard. Fulton Affidavit, at 4. Further, the NRC Region II Office of Inspection and Enforcement

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15 Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 409 (1975). Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-167, 6 AEC 1151, 1152 (1973).

16 See Catawba, ALAB-687, infra at 22.

has conducted (or perhaps is still conducting) an investigation of Mr. Jennings' allegations. The NRC Staff is assessing the safety significance of the allegations, and will no doubt report on their conclusions. The Quality Assurance organization at South Carolina Electric & Gas Company conducted a thorough search of QC and QA records and interviewed available personnel. As a result of these efforts, the Licensees and the NRC Staff have explored and evaluated the allegations raised by Mr. Jennings; Staff inquiries may continue.

For all of these reasons, and as detailed in the attached affidavits, there is no significant safety concern raised by these allegations which upon hearing, would likely result in a different outcome than reached by the Board in its Supplemental Partial Decision of August 4, 1982. Moreover, there is nothing to be gained by further hearings, as we explain in the next section, in reference to the Intervenor's ability to contribute.

VI. Late-Filed Contentions

Mr. Bursey's allegations concern new issues outside the scope of the matters considered by the Board in the evidentiary hearings. Mr. Bursey's Contention 9 on QA/QC read as follows:

> The quality control of the Summer plant is substantially below NRC standards as evidenced by consistently substandard workmanship, in several aspects, during the construction of the plant.

Mr. Bursey's evidence regarding that contention in no way touched upon cadwelds. Though there was much discussion of welding, cadwelding is not a welding process. Nauman Affidavit, at 3. Thus, Intervenor's motion to reopen may implicate the requirements

for admission of a late-filed contention. In its "Memorandum and Order (Denying Motions to Reopen the Record)" dated August 2, 1982, at 5, (relating to earlier pleadings regarding steam generators) the Board stated that it need not consider the factors for admitting a late-filed contention if the standards for reopening are not met. Though we have shown that the reopening standards have not been satisfied in the present instance, for completeness, we briefly discuss the five factors set forth at 10 C.F.R. §2.714(a)(1).[17] In deciding whether to grant or deny a late-filed contention, the Board must balance (1) good cause, if any, for failure to file on time; (2) availability of other means by which the petitioner's interests will be protected; (3) extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; (4) extent to which the petitioner's interest will be represented by existing parties; and, (5) the extent to which petitioner's participation will broaden the issues or delay the proceeding. 10 C.F.R. §2.714(a)(1)

1. Good Cause. The good cause factor involves much the same analysis as the timeliness standard for reopening. See pages 19-20, supra. With respect to good cause for admitting a new contention, the Appeal Board recently wrote:

> An Intervenor's endeavor to inject a belated contention grounded upon newly acquired information not ... associated [with the license application or the Staff's prehearing review] (such as a just-executed affidavit asserting for the

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17 Although the requirements of Section 2.714(a)(1) govern petitions for late intervention, that section has been revised to apply to late-filed contentions. 43 Fed. Reg. 17799 (1978). We refer the Board to Applicants' prior pleadings in which we discussed the authorities on the question of late contentions.

> first time quality assurance deficiencies during the construction of the facility) is an entirely different matter. [Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, slip op. at 18 n.17 (August 19, 1982).]

In the quoted language, the Appeal Board sharply distinguished the situation where a central fact is revealed for the first time in a staff review document such as the SER (or in a portion of the formal application such as a FSAR amendment) from a newly generated affidavit asserting information heretofore concealed by the third party affiant. As we discussed in connection with the timeliness factor, the question here is whether there is good cause for further hearings -- which there is not -- not whether there is good cause for the NRC Staff to investigate the allegations. An investigation has already been undertaken by the Staff. In this context, the good cause factor should not weigh in favor of the Intervenor.

2./3. Availability of Other Means Whereby Petitioner's Interest Will Be Protected/Representation By Existing Parties. Mr. Bursey's interest is adequately protected by the NRC Staff. If he is dissatisfied with the results of Staff review, he has a remedy outside the hearing process. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2) ALAB-513, 8 NRC 694, 695 (1978). Mr. Bursey requests the Board to call independent consultants "in order to reach an informed decision." Intervenor's Supplemental Filing, August 26, 1982, at 2. Aside from the fact this would amount to financial assistance, both the Licensees' QA/QC group and the NRC Region II Office of Inspection and Enforcement have conducted investigations of allegations. The parties have the matter well in hand and are satisfied that the

situation can be resolved without the need for additional hearings.

4. Ability to Contribute to Development of a Sound Record. Intervenor makes no showing that he is able to contribute to resolution of this matter. He gives no indication that he has the qualifications to make a meaningful and substantial contribution to development of a record concerning either QA/QC deficiencies or engineering considerations pertaining to cadwelds. Quite to the contrary, he admits that he lacks the resources and technical expertise to present facts essential to his motion (Intervenor's Supplemental Filing, August 26, 1982, at 2) and further admits that he is unable to obtain expert testimony to address the issues. Intervenor's Affidavit, August 26, 1982, at 2. In the same regard, Mr. Jennings' affidavit and subsequent statement fail to indicate the he has any engineering qualifications to judge whether improperly performed cadweld splices have structural or safety significance. Fulton Affidavit, at 1.

When the petitioner cannot contribute to development of the record, the fourth factor (as to protection of its interests by existing parties) should not be heavily weighed, and the second and third factors (i.e., other means by which its interest may be protected and its ability to contribute) should be weighed quite heavily. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-671, 15 NRC 508, 514 (1982). These factors weigh heavily against Intervenor here.

5. Delay. There is no question that reopening the evidentiary hearing at this juncture would result in substantial

cost to the Licensees, huge costs if any outstanding authorizations were deferred pending further proceedings. We refer the Board to our discussion of the stay request at pages 5 - 18, supra and delay at pages 16 - 17, supra. This factor should weigh heavily against the Intervenor.

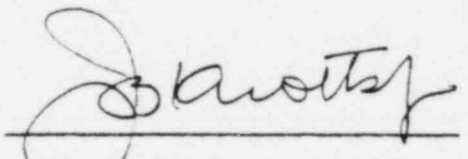
VII. Intervenor's Request For Leave to Respond

In his latest filing, Mr. Bursey requests the opportunity to respond further to the matters in this pleading and the Staff's pleading. Intervenor's Supplemental Filing, August 26, 1982, at 2. The Intervenor has already had an additional opportunity to make a supplemental filing to cure defects in his earlier papers and respond to the matters presented by the Licensee and the NRC Staff during the August 12 conference call. Despite this opportunity, Intervenor admits he is still unable to contribute to development of a record and offers no proposed expert testimony in support of his allegations. Id. at 2; Intervenor's Affidavit, August 26, 1982, at 3. As proponent of his motion, Intervenor has failed in his burden. Wolf Creek, supra, ALAB-462, 7 NRC at 328. Licensees see nothing to be gained by allowing Mr. Bursey yet a further response. We oppose Intervenor's request.

VIII. Conclusion

Intervenor has failed to make a sufficient showing to warrant a stay and further has failed to satisfy the criteria for reopening the record (or for admission of late contentions). For all of the foregoing reasons, Intervenors' request for a stay and motion to reopen the record should be denied.

Respectfully submitted,



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