UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF REPLY TO APPLICANT RESPONSE TO ORDER TO SHOW CAUSE

Steven C. Goldberg
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September 22, 1982

DESIGNATED ORIGINAL

Certified By

9/22/82

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I. INTRODUCTION

On August 20, 1982, the Applicant filed exceptions to the Licensing Board's July 20, 1982 Partial Initial Decision (PID) pertaining to seismic issues in this proceeding. The exceptions express disagreement with certain aspects of the PID. They do not challenge the ultimate result reached, or the two seismic conditions imposed, therein. Accordingly, the Appeal Board directed the Applicant to show cause by September 7, 1982 why its exceptions should not be dismissed under cited precedent prohibiting the submission of exceptions where the appellant does not seek to change the result reached below.[1/]

The Applicant responded on September 7 as ordered. The Applicant argues that despite the favorable outcome of the decision, it is entitled to an appeal because it has suffered and will continue to suffer discernible injury and prejudice as a consequence of the challenged portions of the PID which will constrain future earthquake evaluations.[2/] The most

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1/ Appeal Board Order of August 24, 1982 at 2.

2/ Applicant response at 2-3.

significant constraint is said to be a possible limitation on the future use of data, models and theories assertedly rejected in the decision.[3/]

On the current record, the Staff does not believe that the Applicant has carried the burden of demonstrating that the complained of portions of the PID will have the adverse effect it posits or that an appeal is otherwise permissible under the governing appellate review criteria.[4/] Accordingly, the exceptions seem appropriate for dismissal as preliminarily concluded by the Appeal Board in its August 24 Order.

II. DISCUSSION

The Appeal Board noted the general rule in its August 24 Order that an appeal from an initial decision is only permitted where a party is aggrieved by the action taken below and seeks to "change the result".[5/] A party may appeal a ruling only if the party can establish that, in the final analysis, some discernible injury to it in the proceeding has been sustained as a consequence of the ruling from which an appeal is taken.[6/] As the Appeal Board has succinctly stated: "an appeal lies from the

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3/ Id. at 3-4. Without the benefit of a brief in support of the exceptions, the Staff expresses no opinion on the merits of the exceptions themselves. The Staff position on the merits of exception 21 regarding the provision of records concerning an October 19, 1979 seismic event is already a matter of record. See Staff response to Applicant reconsideration motion, dated August 11, 1982. As noted in the Applicant's instant response, that motion for reconsideration was denied by Licensing Board Memorandum and Order of August 20, 1982.

4/ See Order at 2 and discussion infra at 2-3.

5/ Order at 2 citing Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978) and a string of parallel cases; See also Rochester Gas and Electric Co. (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 393 n.21 (1978).

6/ See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-252, 8 AEC 1175, 1177, aff'd, CLI-75-1, 1 NRC 1 (1975), Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973).

decision of the licensing board, not its opinion; it is the board's orders (the administrative equivalent of a judgment) which are subject to appellate review."[7/] This general rule effectively precludes an appeal from a decision in one's favor and the Appeal Board has typically dismissed exceptions by the prevailing party which sought no relief in the form of some change in the orders of the licensing board below.[8/]

The July 20 PID resolved the seismic issues in contest in the Applicant's favor subject to two conditions to which the Applicant does not except. The Applicant has not appealed the ruling in the case itself. The Applicant states that it has no objection to the license conditions which are in the process of implementation. Rather, the Applicant seeks to appeal isolated facets of the decision due to some perceived adverse future effect on its interests. The PID was followed by a supplemental decision on August 4, 1982 (LBP-82-57) resolving the remaining issues and authorizing the issuance of an operating license. The Applicant did not take exception to that supplemental decision. No other party has appealed either the PID or supplemental PID.

A party satisfied with the result reached on an issue cannot affirmatively challenge the reasoning used to reach that result unless an appeal is taken by another party.[9/] Nor is there a right to an

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7/ Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-478, 7 NRC 772, 773 (1978).

8/ See, e.g., Marble Hill, supra, 7 NRC at 203; Davis-Besse, supra, 6 AEC at 859.

9/ Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-282, 2 NRC 9, 10 n. 1 (1975); see Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 357 (1975).

administrative appeal on every factual finding[10/] or undesirable languange in a decision with which a party disagrees but which has no operative effect.[11/]

The Applicant, nonetheless, argues that, despite the favorable result of the PID, it has and will suffer "discernible injury". Such injury is asserted to flow as a consequence of the complained of findings which the Applicant claims will constrain future presentations to the agency regarding future earthquakes due to the collateral estoppel or res judicata effect of some of the assertedly erroneous findings. The Applicant thus claims it is entitled to appeal.[12/]

Apart from the questionable applicability of the collateral estoppel or res judicata principles to the situation at bar,[13/] it is evident that the Applicant does not profess some injury from the Board's ruling in the PID, as distinct from some isolated elements thereof, nor does it allege some harm to its interests in this proceeding, as distinct from some unspecific extra-proceeding context, so as to satisfy even the minimal standards for appeal.[14/]

10/ Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-467, 7 NRC 459, 461 n.5 (1978).

11/ Duke Power Co. (Cherokee Nuclear Station, Units 1, 2 and 3), ALAB-482, 7 NRC 979, 980 (1978).

12/ Applicant response at 2-3.

13/ Since the Applicant has no other license application before the NRC, it is not readily apparent that the future "submissions", which the appealed findings are alleged to unduly constrain, would be made in the context of an adjudicatory proceeding so as to even bring the principles of collateral estoprel or res judicata into play. See discussion infra at 6-7.

14/ See n.6 supra.

The gravamen of Applicant's argument is apparently that it may be precluded from taking positions advanced in the hearing and accorded little or no weight by the Board in "future submissions to the agency,"[15/] including the analyses of future reservoir-induced seismic events in the Summer vicinity submitted for the benefit of the Staff.[16/] The Applicant acknowledges that neither the complained of findings nor the Applicant positions at issue are essential to the favorable decision reached by the Board on the critical issue of seismic design adequacy so as to be of "operative significance"[17/] or "practical import" in the proceeding at bar.[18/] Exceptions 1 through 8, for example, appear to stem from a number of simple observations made by the Board regarding the numerical value of certain ground motion records. These Board observations do not appear to evince any non-recognition on the Board's part of the distinction between recorded ground motion and design ground motion as Applicant contends.[19/] Exceptions 12 and 14 through 16 concern the efficacy of certain theoretical models[20/] which, apart from the fact that they may be perfected over time, are expected to be of minimal practical significance as predictive tools in the evaluation

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15/ Applicant response at 3.

16/ See Applicant response at 6 n.7.

17/ Cherokee, supra, 7 NRC at 773.

18/ Id.

19/ Applicant response at 6. See PID, slip op. at 43 (finding 49) and 59 (finding 86).

20/ Applicant response at 8. Exception 13 is not addressed in the Applicant response.

of future seismic events at Summer for which considerable empirical data is expected to be available as a result of in-plant and free-field seismological instrumentation. Without more, the Applicant's posited injury is too remote and speculative to justify an appeal. In this instance, the alleged injury is indistinguishible from any case in which a licensing board arrives at a decision in one party's favor for a different reason than that advocated by such party.

As to Applicant's arguments regarding res judicata and collateral estoppel, these are judicial concepts which, to varying degrees, limit parties from relitigating matters previously adjudicated.[21/] These principles are applied at the Commission's discretion.[22/] Exceptions to the application of these doctrines include the later existence of "material changes in fact or law" and "overriding public policy interests".[23/] Furthermore, these concepts apply to adjudication, not to non-adjudicatory consideration of issues by the Staff which appears to be the Applicant's concern herein. Even assuming the applicability of these principles in a non-litigative context, at the hypothetical future point in time in which the Applicant seeks to assert positions which may have been questioned by the Board in the July 20 PID, any or

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21/ See most recently U.S. Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC , slip op. at 8 (August 17, 1982); See Toledo Edison Co. (Davis-Besse Nuclear Station, Units 1-3), ALAB-578, 5 NRC 557, 581 (1977); Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 215-16 (1974).

22/ Clinch River, supra.

23/ Clinch River, supra, slip op. at 8; Farley, supra, 7 AEC at 215; Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), LBP-77-20, 5 NRC 680, 682 (1977).

all of these exceptions to application of res judicata and collateral estoppel concepts may be present. This is also the situation with respect to issues decided favorably to the Applicant which it presumably expects to be given conclusive effect. As the Appeal Board has stated in this regard, "the opportunity is always available to a party to establish that the ground previously traversed has undergone alteration in some material respect with the consequence that what was decided yesterday should now be reevaluated and possibly discarded."[24/] This is particularly true where, as here, the field of reservoir-induced seismicity is so dynamic and positions which are credited today may not be in the future and vice versa.

There is some authority, furthermore, for the proposition that the doctrine of collateral estoppel extends only to facts necessary to the decision in a proceeding.[25/] Relitigation of nondeterminative facts or issues is not similarly barred. A reasonable argument can be made that the findings complained of in the exceptions were not necessary or essential to the result reached in the PID. Thus, they may not be entitled to conclusive effect and the Applicant would not be precluded from arguing their inapplicability on some future occasion.

With regard to its own review of possible future reservoir-induced events at Summer, the Staff cannot contemplate anything in those aspects of the PID which form the basis for the proffered exceptions which would

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24/ Farley, supra, 7 AEC at 216.

25/ Lombard v. Board of Ed. of City of New York, 502 F.2d 631 (2d Cir. 1974); cert. denied, 420 U.S. 976 (1974); Parker v. McKeithen, 488 F.2d 553 (4th Cir. 1974); cert. denied 419 U.S. 838 (1974); Halpern v. Schwartz, 426 F.2d 102 (2d Cir. 1970); See 1B Moore's Federal Practice, § 0.443, pp. 3901-3902 (1965); 46 Am Jur 2d, ¶¶ 423, 426 (1977).

inhibit a complete and thorough analysis of reserovir-induced events on the basis of the best information available at the time. Without some further articulation of the basis for the Applicant's perceived "injury", the Staff does not believe that the alleged injury is sufficiently concrete and non-speculative to justify the submitted exceptions.

III. CONCLUSION

On the basis of the foregoing, the Staff is of the view that the Applicant has failed to establish good cause for consideration of its August 20, 1982 exceptions.

Respectfully submitted,

Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 22nd day of September, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF REPLY TO APPLICANT RESPONSE TO ORDER TO SHOW CAUSE" 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 22nd day of September, 1982:

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