UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Christine N. Kohl
Howard A. Wilber

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

Messrs. Joseph B. Knotts, Jr., and Jeb C. Sanford, Washington, D.C., and Mr. Randolph R. Mahan, Columbia, South Carolina, for the applicants, South Carolina Electric & Gas Company, et al.

Mr. Steven C. Goldberg for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

September 28, 1982

(ALAB-694)

By our order of August 24, 1982 (unpublished), the applicants were directed to show cause why we should not dismiss their exceptions to the Licensing Board's July 20, 1982 partial initial decision in this operating license

proceeding.[1/] The basis of the order was that, although the exceptions complained about several aspects of the Licensing Board's treatment of seismic issues, applicants did not appear to challenge to any extent the ultimate result reached on those issues. Specifically, the exceptions did not seek the elimination of either of the two seismic conditions that the Board directed be imposed upon any operating license issued for the Summer facility.[2/] In this connection, we pointed (order, p. 2) to the settled rule that

> exceptions are not necessary to defend a decision in one's favor. Only where a party is aggrieved by, or dissatisfied with, the action taken below and invokes our appellate jurisdiction to change the result need exceptions be filed - or are they permitted.

Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 202 (1978) (emphasis supplied). See also Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-478,

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1/ See LBP-82-55, 16 NRC ___. That decision was confined to seismic matters and did not authorize the issuance of an operating license. In a subsequent supplemental decision, the Board conferred such authorization on the strength of its resolution of the remaining issues. LBP-82-57, 16 NRC ___ (August 4, 1982). The applicants have not filed exceptions to the supplemental decision and no other party to the proceeding has excepted to either decision.

2/ LBP-82-55, supra, 16 NRC at ___ (slip opinion, p. 74).

7 NRC 772, 773 (1978); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-282, 2 NRC 9, 10 fn. 1 (1975); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, 1177, affirmed, CLI-75-1, 1 NRC 1 (1975); Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-157, 6 AEC 858, 859 (1973).

We now have in hand the applicants' response to the show cause order and the NRC staff's reply to that response. 3/ For their part, the applicants acknowledge that they are not aggrieved by the result reached in the July 20 decision. They insist, however, that certain findings and conclusions contained in the decision might be taken by the staff as constraining applicants' "future evaluation of past and future earthquakes, including comparisons between and among events," thereby causing them "discernible injury." We are told that "[p]erhaps the most significant constraint would be limitations on use of data, models, and theories in future analyses." 4/

3/ Although likewise invited to do so, no other party to the proceeding replied to the applicants' submission.

4/ Applicants' Response to Order to Show Cause (September 7, 1982), p. 3. We note that the applicants do not contend that there are extraordinary circumstances here that justify entertaining their appeal in the absence of discernible injury to them. Id., p. 2. Cf. Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-577, 11 NRC 18, 23-25, reversed in part on other grounds, CLI-80-12, 11 NRC 514 (1980); Prairie Island, supra, 8 AEC at 1177-78.

In its reply, the staff takes issue with these claims. Among other things, it finds nothing in the portions of the July 20 decision to which applicants object that might inhibit a future "complete and thorough analysis" of seismic events "on the basis of the best information available at the time." 5/ For this reason, the staff considers the applicants' asserted injury to be "too remote and speculative" to provide the foundation of an appeal. 6/

Given the staff's position, the applicants' fears underlying their appeal may now be allayed. In any event, on full consideration of both the July 20 decision and the submissions of the parties in connection with the show cause order, we are compelled to the conclusion that applicants have not demonstrated a sufficiently concrete threat of harm to their interests to support the exceptions. More particularly, we do not take the July 20 decision as, either in intent or in effect, circumscribing the applicants' utilization of all then available "data, models and theories" should the need arise to evaluate new seismic developments. Because the staff shares this view, there

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5/ NRC Staff Reply to Applicant Response to Order to Show Cause (September 22, 1982), pp. 7-8.

6/ Id., p. 6. The staff also takes issue with the applicants' insistence that collateral estoppel or res judicata effect might be accorded the findings of fact of which they complain. Id., pp. 6-7.

appears to be no reasonable possibility that staff reviewers would reject an applicants' evaluation on the basis that it went beyond Licensing Board-imposed limitations. 7/

Accordingly, the exceptions are hereby dismissed and this Board will now undertake its review sua sponte of the two initial decisions. See Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC __, __ (September 1, 1982) (slip opinion, pp. 4-7). Pending the completion of that review and further order of this Board, neither decision shall be deemed to have achieved administrative finality. 8/

7/ Applicants' exception 21 complains of a perceived implication in the July 20 decision that the lead applicant had not timely apprised the Licensing Board of certain relevant information. The applicants deem that implication to be "unwarranted" and to reflect unfairly upon the lead applicant's "fulfillment of its obligations as a party." Response, p. 9. Whether unjust or not, an assessment made by a Licensing Board respecting the diligence of a litigant before it is not fit grist for the appellate mill in the absence, as here, of an imposed sanction to which exception is properly taken.

8/ In the course of announcing the outcome of the sua sponte review, we may have occasion to speak further to the matter of the future operative effect of the portions of the July 20 decision to which the applicants object.

It is so ORDERED. 9/

FOR THE APPEAL BOARD

Barbara A. Tompkins
Secretary to the
Appeal Board

9/ Nothing in this order bears upon the motion filed with the Licensing Board by intervenor Brett Bursey, seeking to reopen the record on a quality assurance question. That motion is still before the Licensing Board. See its September 24, 1982 memorandum and order (unpublished) in which the Board, although denying his request for a suspension pendente lite of the Summer operating license, afforded Mr. Bursey the opportunity to make a further submission on the reopening matter.