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WRITER'S DIRECT DIAL
(202)

December 28, 1984

Chairman Nunzio J. Palladino
Commissioner Thomas M. Roberts
Commissioner James K. Asselstine
Commissioner Frederick M. Bernthal
Commissioner Lando W. Zech, Jr.
United States Nuclear Regulatory Commission
Washington, D.C. 20555

Subject: Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413 and 50-414

Gentlemen:

Pursuant to 10 C.F.R. §2.764(f)(2), Duke Power Company, North Carolina Municipal Power Agency Number 1, North Carolina Electric Membership Corporation, and Saluda River Electric Cooperative, Incorporated ("Applicants") herein submit to the Commission their comments pertaining to the immediate effectiveness of the November 27, 1984 decision of the Atomic Safety and Licensing Board ("Licensing Board") authorizing full power operation of Catawba Units 1 and 2.1/

1/ The date for filing comments was extended to today's date by Commission Order of December 12, 1984.

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Section 2.764(f)(1)(i) provides for an automatic stay of effectiveness of Licensing Board decisions authorizing operation at greater than five percent power pending Commission review. In conducting its review, the Commission will stay further the decision

> if it determines that it is in the public interest to do so, based on a consideration of [1.] the gravity of the substantive issue, [2.] the likelihood that it has been resolved incorrectly below, [3.] the degree to which correct resolution of the issue would be prejudiced by operation pending review, and [4.] other relevant public interest factors.

10 C.F.R. §2.764(f)(2)(i).[2/]

Applying these criteria, Applicants submit that there is no reason to stay the effectiveness of the Licensing Board decision authorizing full power operation of Catawba. The Licensing Board authorization of full power operation issued only after a lengthy hearing process in which Palmetto Alliance and Carolina Environmental Study Group ("Intervenors") were given ample opportunity to litigate their concerns. Indeed, this operating license proceeding has consumed almost three and a half years. Sixty-five days of hearings have been held in three phases, and have resulted in three separate Partial Initial Decisions. See Duke Power Co., et al. (Catawba Nuclear Station, Units 1 & 2), LBP-84-24, 19 NRC 1418 (June 22, 1984)(resolving all safety and environmental issues except for two narrow safety issues); Duke Power Co., et al. (Catawba Nuclear Station, Units 1 & 2), LBP-

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[2/] The Commission's review pursuant to §2.764(f) is without prejudice to normal appellate review by the Appeal Board and Commission. See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), CLI-81-15, 14 NRC 1, 2 (1981).

84-37, 20 NRC ___ (Sept. 18, 1984)(resolving all emergency planning issues); Duke Power Co., et al. (Catawba Nuclear Station, Units 1 & 2), LBP-84-____, 20 NRC ____ (Nov. 27, 1984) (resolving the remaining deferred safety issue, denominated "foreman override").3/ The bulk of the hearing time was devoted to cross-examination by Intervenors of the 167 witnesses who testified, producing a hearing transcript of approximately 20,000 pages and the admission of over 395 exhibits. After considering all the evidence presented, the Licensing Board correctly resolved those issues before it.

In sum, the public interest would not be served by delaying operation of Catawba; the record in this proceeding clearly and fully supports the Licensing Board's determination that Applicants met their burden of proof with respect to the contentions raised by the Intervenors. Under such circumstances Applicants would have nothing further to add. However, Intervenors have unsuccessfully sought stays before both the Licensing Board (see Tr. 14,435-14,486) and the Appeal Board. See Appeal Board Memorandum and Order, December 4, 1984 (denying Intervenors' oral stay application); Intervenors' "Application For A Stay Pending Administrative and Judicial Review" filed with the Appeal Board on December 10, 1984; Duke Power Co., et al.

3/ The other deferred safety issue involving the diesel generators was dismissed by the Licensing Board. See discussion in Section I.B.1, infra.

(Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC ___ (Dec. 24 1984)(denying Intervenors' written stay application).[4] Therein they have raised the following matters:

A. Litigated Quality Assurance Allegations

1. The 1981 SALP Report
2. Application of the Callaway standard
3. Time allotted for discovery
4. "Foreman Override" and sensitization of welds

B. Rejected Contentions

1. Diesel generators
2. Hydrogen control
3. Control room design
4. Financial qualifications
5. Environmental impacts of severe accidents
6. Cost/benefit of facility (need for power)
7. Transshipment of spent fuel to Catawba

Additionally, persons affiliated with the Intervenors have directly contacted members of the Commission on several occasions on various issues.[5] Inasmuch as it is conceivable that the Commission might wish to have information concerning any of these matters, Applicants feel compelled to address each one.[6]

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[4] Intervenors have also indicated that they would seek stay relief in the Courts and have filed preliminary documents in Docket No. 84-1590.

[5] See, e.g., Memorandum for William C. Clements, Chief Docketing ad Services Branch, from Patricia R. Davis, Legal Assistant, Office of Commissioner Asselstine (Dec. 6, 1984); Memorandum to Files from Patricia Davis, Legal Assistant, Office of Commissioner Asselstine (Oct. 11, 1984). The Commission should be aware that Ms. Sapp provided assistance on a regular basis to Intervenors; that Ms. Duggan is an officer in CESG; and that, Ms. Welles has provided assistance to Intervenors on several occasions.

[6] In this regard, Applicants recognize that §2.764(f)(2)(ii) contemplates the submittal of "brief comments" by the parties, and that our comments may seem excessively long by this standard. However, the importance to Applicants of the (footnote continued)

I. The Intervenors have not raised any substantive issues of sufficient gravity to merit a stay; the enumerated issues were resolved correctly by the licensing board

In this section the Applicants address together the first two factors relevant to the Commission's immediate effectiveness review: 1.) "the gravity of the substantive issue"; and 2.) "the likelihood that it has been resolved incorrectly below." See 10 C.F.R. §2.764(f)(2)(i). The Intervenors' eleven allegations raised before the Appeal Board can be broken down into two categories: those that involve matters associated with litigated issues; and, those that involve rulings dismissing contentions from the proceeding. These are addressed below in the order they were raised. Applicants note that none of either category of these allegations were deemed sufficiently compelling by the Appeal Board to warrant a stay.

A. The Litigated Issues Are Not Of Sufficient Gravity To Merit A Stay And Were Properly Resolved in Applicants' Favor

With respect to those matters involving litigated issues, Applicants' comments will be brief, due to the fact that in our view these matters are either amply supported by the evidence and reflected in one of the Licensing Board's Partial Initial Decisions or were properly resolved in appropriate Licensing Board decisions. Each of these matters is discussed below.

(footnote continued from previous page)
Licensing Board's decisions in this operating license proceeding cannot be overestimated.

1. The 1981 SALP Report

The NRC's 1981 Systematic Assessment of Licensee Performance ("SALP") Report, NUREG-0834, rated Catawba "below average" based upon 1979-1980 data. The Licensing Board evaluated the SALP Report in its June 22, 1984 Partial Initial Decision, and found that it was "not entitled to very much weight." 19 NRC at 1457. Subsequent SALP reports rated Catawba substantially higher (Tr. 2510-11; Apps. Exh. 1, Owen, p. 19; Apps. Exh. 2, Grier, p. 35), and the NRC Staff "now support the Applicants' QA program without significant reservation." 19 NRC at 1457. Furthermore, the Licensing Board found, "[t]his Board and the parties, through the hearing process, have performed a far more thorough and critical review of the Catawba QA program than the Staff SALP review," and, in sum, the "evidence adverse to the Applicants fairly derivable from 1981 SALP is far outweighed by other favorable evidence in the record." Id. at 1457-58.

The Licensing Board also stated that in any attempt to compare Catawba with other plants, such as Zimmer, rated "below average" in that 1981 SALP Report, "[t]he factors bearing on such a comparison would be so diverse as to render it virtually useless." Id.

2. Application of the Callaway Standard

The standard for Licensing Boards to use in reviewing construction quality and quality assurance programs was set out by the Appeal Board in Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 345-47, pet. for reconsid. denied,

ALAB-750, 18 NRC 1205, as modified, ALAB-750A, 18 NRC 1218 (1983). Therein, the Appeal Board recognized that in the construction of a nuclear power plant: (1) there will inevitably be construction defects; (2) there is no requirement that there be "zero defect" construction; and (3) even assuming all deficiencies are detected and corrected, there must be an inquiry into whether there has been a pervasive breakdown of quality assurance procedures such as to call into question the ability of the plant to operate safely. See ALAB-740, 18 NRC at 346; see also Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1345 (1983).

A review of the record demonstrates that the Licensing Board correctly applied the Callaway standard.7/ The Licensing Board, presiding over extensive adjudicatory hearings, properly concluded that those quality assurance lapses, including harassment and retaliation, that did occur were detected, did not result in deficient work, were isolated in nature and had been corrected by Applicants; accordingly, such lapses did not call

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7/ In addition to challenging the Licensing Board's application of Callaway, Intervenors argued before the Licensing Board that since Callaway had never been subject to review, that in itself was sufficient reason for granting a stay. Contrary to Intervenors' claim, the Callaway standard is not "new." It is based upon the reasonable assurance finding articulated in the Commission's regulations, 10 C.F.R. §50.57(a)(3)(i), and concurred in by the U.S. Supreme Court in 1961 in Power Reactor Development Corp. v. International Union, 367 U.S. 396, 407 (1961). See also Citizens for Safe Power v. NRC, 524 F.2d 1291, 1298 (D.C. Cir. 1975). Under that standard, perfection in plant construction and in the quality assurance program need not be demonstrated. Diablo Canyon, 18 NRC at 1345.

into question the entire Catawba quality assurance program. See 19 NRC at 1434, 1504-05, 1519-20, 1530-3[illegible], 1572, 1583-84; 20 NRC ___, slip op. at 41-42 (Nov. 27, 1984).

3. Time Allotted for Discovery

The Licensing Board's discovery rulings were proper and provided ample time for the Intervenors to develop their case. For example, the Intervenors had already had more than eight months (over a fifteen month period) for formal discovery on their QA contention when they filed their May 1983 request for several additional months of unrestricted discovery. The Licensing Board found that the Intervenors had failed to demonstrate good cause for their request except in the area of welding. However, with respect to welding, Palmetto was allowed an extension of time from June 20 until July 15, 1983 to conduct numerous depositions. See June 13, 1983 Memorandum and Order. The Board's ruling was clearly proper -- and, under the circumstances, generous.

The Licensing Board did not grant the Intervenors' September [illegible], 1983 oral motion for a "reopening" of discovery on a document which was not within the scope of Contention 6. See In Camera Tr. 948-51. However, the Board, rather than simply dismissing the request on the basis of the pleadings, devoted an entire day of hearing time to questioning a panel of the authors of this document to provide itself with sufficient information to rule on Intervenors' request. Tr. 10,046-276. The Intervenors' suggestions as to the composition of the panel and substantive

areas of inquiry were largely accepted by the Board (Tr. 8946-48, 10045-46), and the Intervenors cross-examined the panel. Tr. 10,162-229. It is therefore clear that the Licensing Board carefully considered this discovery request and was able to make an informed decision on it.

On the day before commencement of the evidentiary hearings on the in camera issues, the Intervenors made a belated request for postponement of the hearings and formal discovery on those issues, which included the issue of "foreman override." See 19 NRC at 1431. The Board properly denied Palmetto's request for a number of reasons other than time constraints, including the extreme tardiness of the request, the availability of informal discovery, the fact that these were Board witnesses, and Palmetto's overall failure to demonstrate good cause. See 19 NRC at 1431-32; Tr. 11,217-21.

The discovery schedule during the "foreman override" hearings was also adequate. As the Licensing Board noted in its November 27, 1984 Partial Initial Decision, the Intervenors made no specific objection to the Licensing Board's proposed discovery and hearing schedule until after the foreman override hearing began. 20 NRC ___, slip op. at 3-4 (Nov. 27, 1984).[8/] Furthermore, discovery opportunities on foreman override did not begin on September 21, 1984, as Intervenors imply. On the

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8/ In a September 21, 1984 conference call (Tr. 12,845-48) the Licensing Board proposed a schedule for consideration and solicited comments from the parties in a subsequent conference call (September 25, 1984)(Tr. 12,867-905; 12,911-15). No adverse comment was made by Intervenors.

contrary, the issue was first raised on November 9, 1983 by a Board witness, Mr. Nunn, a witness who was later represented at the hearings by counsel for Palmetto; the NRC Inspection Reports on this issue were available beginning January 31, 1984; Applicants' report was distributed August 3, 1984; the Staff's report was served on August 28, 1984.

4. Foreman Override[9/] and Sensitization

When the record evidence from the "foreman override" hearings is examined, it is highly unlikely that the Licensing Board will be found to have resolved the issues incorrectly.Not one of the witnesses who testified stated that there were any bad welds at Catawba. Rather, the testimony reflects that some of the stainless steel welds in the primary coolant loop at Catawba are sensitized when evaluated in the field by ASTM A-262 Practice A. See 20 NRC ___, slip op. at 36-37 (Nov. 27 1984). The experts called by the Applicants and the NRC Staff did not link sensitization of welds in any way with improper foreman conduct, and the Licensing Board recognized that none of the isolated incidents of "foreman override" could be linked to sensitization of any welds. Id. The safety significance of the sensitization of some welds at Catawba was thus resolved as an additional independent technical concern at the hearings. Id. at 34. The Staff's and Applicants' metallurgical experts testified repeatedly, and without contradiction, that Practice A is only an

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9/ The Licensing Board defined "foreman override" as a situation where a foreman directs a craftsman, either implicitly or explicitly, to violate procedures. See 20 NRC ___, slip op. at 5-6 (Nov. 27, 1984).

acceptance standard and that failure to meet its criteria (e.g., finding sensitization) does not mean that a weld is rejectable or defective or that it will fail in service or be unsafe. Tr. 13,470, 13,505, 13,534, 13,867, 13,890, 13,898, 13,900. As explained by the NRC Staff's metallurgical expert, "there are many welds in the field that are sensitized that never fail in service, that have never failed in service and that nobody expects to fail in service." Tr. 13,898.

Sensitization is a concern to the extent it could cause a susceptibility to intergranular stress corrosion cracking ("IGSCC"). See 20 NRC ___, slip op. at 35 (Nov. 27, 1984). However, the phenomonon will lead to IGSCC only if stress and a sufficiently corrosive environment are also both present. See id. at 38-39. The record demonstrates, and the Licensing Board found, that no such environment will exist at Catawba; thus the questioned welds will not fail in service and no IGSCC will occur, regardless of the presence of sensitized welds. Id. at 39-40.10/

10/ Intervenors' unsuccessful written stay motion before the Appeal Board relied in part upon the affidavit of David A. Schlissel. Neither this affidavit nor the affiant were presented by Palmetto or CESG before the Licensing Board during the hearings on the issue in October 1984. Contrary to the speculation in Mr. Schlissel's affidavit, the Licensing Board found, based on the record evidence, that there is no indication that sensitization can be expected in any systems at Catawba where IGSCC might have a chance of occurring. See 20 NRC ___, slip op. at 39-40 (Nov. 27, 1984). Further, the Appeal Board was not persuaded by this affidavit. See, ___ NRC ___, ALAB-794 at pp. 7 and 8.

5. Conclusion

No new substantive issue of sufficient gravity to merit the Commission's staying operation of Catawba above five percent has been raised. Further, as demonstrated in the discussion above, with respect to the issues that have been raised, the Licensing Board's resolution of such issues was correct. Accordingly, neither of the factors under 10 C.F.R. §2.764(f)(2)(i) addressed in this section supports the Commission's staying full power operation of Catawba.

B. The Licensing Board's rejection of certain contentions was proper and presents no issues sufficiently grave to merit a stay

With respect to those matters which were not the subject of hearings, Applicants' comments will be more extensive, due to the fact that the record developed on each of these subjects (with the exception of diesel generators) is necessarily sparse. Each of these matters is discussed below.

1. Diesel Generators

The tortuous history of the Licensing Board's consideration of diesel generator concerns in this proceeding demonstrates that careful attention was given to this matter and that no issue of sufficient gravity remains to merit a stay.

On December 5, 1983, in response to Board notifications issued in October and November of 1983, the Intervenors orally requested that the Licensing Board either amend the existing quality assurance contention so as to encompass events relevant to the TDI generators or else accept a late-filed diesel generator contention. See Tr. 9620-26, 9659-75. On January 12, 1984 the Intervenors submitted orally a contention the text of which the Licensing Board finalized in a February 23, 1984 Order.

In a telephone conference call on February 17, 1984 the Board admitted part of this late-filed contention, involving crankshaft design adequacy. Tr. 12,541-51; See also Memorandum and Order of February 23, 1984. In compliance with the third factor of §2.714(a)(1), as interpreted in Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC

1167, 1177-78, 1180-81 (1983), the Licensing Board conditioned admission and further litigation of this contention upon the Intervenors' obtaining, by April 2, 1984, a qualified expert and their providing the substance to which the expert would testify. Tr. 12,548.

Shortly thereafter the Board also admitted its own sua sponte contention on diesel generators as a result of information provided by Applicants about certain site-specific problems with the Catawba diesels. See Memorandum and Order of February 27, 1984 at p. 2.

The Intervenors subsequently defaulted on their obligation to obtain a diesel generator expert and the Licensing Board consequently dismissed their contention on crankshaft design adequacy. See Order of April 13, 1984. The Board's sua sponte, Catawba-specific contention remained.

On June 8, 1984. the Commission, exercising its review authority of Board sua sponte contentions, dismissed the Licensing Board's contention. However, upon motion by the Intervenors, the Licensing Board subsequently re-admitted the identical contention as a contention of the Intervenors. In balancing the five factors of 10 CFR 2.714(a)(1) the Board stated:

> As we have made clear in the past, we do not believe the present Intervenors can make a substantial contribution to these technical issues unless they are prepared to present expert testimony or at least have expert assistance in their cross-examination. The Intervenors have repeatedly indicated that they will be able to produce experts; so far, however, they have not done so. Now that the Intervenors have in hand the Applicants' report on site-specific problems at

> Catawba, they should be in a position to move quickly to obtain the appropriate expert assistance. In these circumstances, our admission of this late contention is conditioned upon the Intervenors' serving by July 6, 1984 their designation of a named diesel generator expert or experts, along with a description of qualifications (resume). Failure to meet this condition will result in dismissal of this contention. Conversly, if this condition is met, Factor 3 [the Intervenors' contribution to the record] will favor admission of the contention.

LBP-84-24, 19 NRC at 1586, n.50.

On July 6, 1984, the Intervenors named a Dr. Robert Anderson as their diesel generator expert, in apparent satisfaction of the Licensing Board's condition. However, subsequent statements by the Intervenors raised doubts about the availability to Intervenors of Dr. Anderson, and the role, if any, he would play in litigation of the issue. The Licensing Board accordingly issued an order clarifying its position that the Intervenors must obtain expert assistance as a condition for continued viability of the diesel generator contention. Making clear that it expected this expert to do more than lend his name to the proceeding to serve as a vehicle for admission of the contention, the Licensing Board gave the Intervenors the alternative of either (1) certifying by August 1 that Dr. Anderson would review reports and be present to assist in cross-examination at the hearing; or 2) preparing and providing by August 20 a statement of their technical position prepared with the substantial assistance from qualified experts. See Memorandum and Order of July 20, 1984 at pp. 4-5.

On August 1, the Intervenors indicated by letter that they were unable to certify Dr. Anderson's participation. In an August 10, 1984 conference call, the Board denied Applicants' motion to dismiss the contention and instead provided Intervenors another opportunity to comply with its direction. The Board indicated that by August 16 Intervenors must either certify that they had a qualified expert who would attend the hearing and assist them or certify that they would, on August 21, file a statement of technical position prepared with substantial expert assistance. Tr. 12,813-15. The experts who participated in this effort were to be identified and their qualifications demonstrated.

On August 16 Intervenors filed a technical position document. That document and testimony, contrary to the explicit direction of the Board, did not address Catawba-specific diesel generator problems, nor was it prepared with the assistance of an expert. Instead, the document made certain assertions with respect to the Catawba diesel generators, and in support of such, simply attached testimony filed on behalf of intervenors (not affiliated with PA/CESG) in the Shoreham proceedings.11/

On August 21, 1984, the Applicants and the NRC Staff filed their pre-filed testimony on the diesel generator contention, thus fulfilling their hearing preparation obligations. On August

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11/ The Shoreham diesel generators are a different type and design than Catawba's. Memorandum and Order, September 4, 1984 at 3, n.1. In addition, the Board had specifically stated that simple reliance on Shoreham was insufficient for Intervenors to make their case at Catawba. Id. at 2-5.

22 the Licensing Board dismissed the contention based upon Intervenors' default in failing to meet the conditions properly imposed under §2.714(a)(1)(iii). See Memorandum and Order of September 4, 1984.

In light of the above, it was proper for the Licensing Board to take the action it did. It is well established that agencies are free to fashion their own rules of procedure. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543 (1978). The late-contention regulations and case law have been developed in the proper exercise of this authority. See 10 C.F.R. 2.714(a)(1); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1045 (1983); Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1181 (1983); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 & 2), ALAB-704, 16 NRC 1725, 1730 (1982). The Licensing Board's action is consistent with this precedent.

Furthermore, the diesel generators at Catawba pose no threat to the public health and safety. The NRC Staff has thoroughly reviewed the status of TDI diesel generators, including those at Catawba. The Staff has issued three SERs, two directly applicable to Catawba and one applicable to all plants. The overall conclusions of these reports indicate that the diesels at Catawba will provide a reliable standby source of onsite power. See SER Supplement 4 at 8-1.

2. Hydrogen Control

Intervenors raised two general contentions related to an explosive hydrogen-oxygen reaction within the reactor containment following a loss-of coolant accident, viz., Palmetto Contentions 9 and 31 (CESG Contention 2). The Licensing Board, citing the Appeal Board's decision in Rancho Seco,[12] properly rejected these contentions, holding that the matter was being addressed in the rulemaking process. 15 NRC 566, 584. The Licensing Board recognized that hydrogen issues could be litigated (pursuant to Commission direction[13]) if a credible accident scenario were postulated. Id.

Thereafter, Intervenors sought reconsideration of the Licensing Board's ruling, advancing four accident scenarios they maintained were credible. The Licensing Board properly disposed of one of these accident scenarios (stud bolt failure) by holding that litigation of this issue was barred by the doctrines of res judicata and collateral estoppel. 16 NRC 1791, 1807-08. As to the remaining three accident scenarios, the Licensing Board determined, in again dismissing the issue, that the then on-going rulemaking directly addressed Intervenors' hydrogen concerns.[14]

12/ Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC 799, 816 (1981).

13/ See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1980).

14/ The Licensing Board informed Intervenors that its action did not mean that they "may not have their hydrogen scenarios considered at all." 16 NRC at 1810. Rather, Intervenors were pointed to the ongoing rulemaking proceeding. In this regard, Applicants note that the proposed rule specifically

(footnote continued)

Id. at 1808-10. Therein the Licensing Board, citing the Commission's proposed rulemaking package (46 Fed. Reg. 62281), specifically held that

> [t]he technical review being conducted in the rulemaking features both depth and breadth, including 'review of the deliberate ignition systems installed at Sequoyah and McGuire . . ., a spectrum of degraded core accident scenarios . . . and several hydrogen combination phenomena.' Id. at 62282.

16 NRC at 1809-10.

On April 12, 1984 Intervenors renewed their hydrogen generation contentions, seeking "an opportunity to litigate the plainly credible accident scenarios." Again, the Licensing Board properly dismissed the contentions on the basis of the ongoing rulemaking. 19 NRC at 1425 n.3.15/

It is well established that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily within the informed discretion of the administrative agency." N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 293 (1974). In ruling out the contentions because the issue raised was being addressed in a pending rulemaking, the Licensing

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requested comment on hydrogen generation scenarios that should be considered, and provided a listing of those scenarios which the Commission was considering. 46 Fed. Reg. 62283-84 (1981). An examination of the rulemaking record indicates that Intervenors failed to comment.

15/ Intervenors' pleading challenged the Licensing Board's ruling dismissing three accident scenarios on the basis of ongoing rulemaking. Intervenors did not challenge the Board's ruling regarding the fourth scenario (stud bolts). Litigation of this issue should be viewed as waived.

Board was exercising sound discretion. See Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1086-91 (D.C. Cir. 1974); Ecology Action v. AEC, 492 F.2d 998, 1002 (2nd Cir. 1974).

The subject rulemaking was finalized by a vote of this Commission in a public session on December 10, 1984. Supplemental information supporting the final rule, and the rulemaking record, makes clear that in adopting the final rule, the Commission, consistent with the Licensing Board's decision (16 NRC at 1809-10) as well as the Appeal Board's Rancho Seco decision, found (1) that the use of distributive ignition systems in general, and the ignition system installed at McGuire (virtually identical to that installed at Catawba (Catawba SER Supplement 2, Section 6.2.5, June 1984)) in particular, was acceptable in meeting the hydrogen control requirements imposed; (see, e.g., SECY 83-357A, at 3, 8, 10; Enclosure F at 5, 13, 15-16; Enclosure G at 4, 6, 8, 9, 12-13; see particularly Enclosure G, 9, wherein it is stated that the backfit required to meet the regulations would only be applicable to the five operating plants [including McGuire] and they have already had the required modifications made [i.e., their hydrogen control systems comply with the regulation]);16/ (2) that a representative spectrum of

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16/ In this regard, the Appeal Board just recently stated:

> As a matter of fact, Catawba's ice condenser containment and associated hydrogen mitigation system are not totally unique. They are to be found, for example, at Duke Power Company's McGuire facility. In affirming the Licensing Board's authorization of operating licenses for McGuire, we discussed the hydrogen mitigation system at considerable length. See Duke Power Co. (William B.

(footnote continued)

degraded core accident scenarios were addressed; (see, e.g., SECY-84-357A at 8 wherein it is stated: "Since the Commission has already considered the PWR ice condenser plants during its deliberations on the McGuire and Sequoyah cases acceptable accident scenarios are established"; see also, Enclosure F at 15-16); (3) and that several hydrogen combination phenomena were considered. Id. In this regard, it is important to note that the cost/benefit document accompanying the Commission's hydrogen rule (SECY-83-357A, Enclosure G) focused on the distributive ignition system used in McGuire and Catawba as the basis for its cost analysis and in its benefits section realized:

> the net result of codifying these requirements into the NRC regulations will be to eliminate the need for redundant litigation of this particular hydrogen control issue in future licensing cases. [Id. at p. 13].

While Applicants maintain that the Licensing Board correctly rejected Intervenors' hydrogen control contentions based on the hydrogen control rulemaking for ice condenser plants, Applicants submit that an equally valid basis for rejecting these contentions is Intervenors' failure to provide a credible accident scenario supporting its proposed contentions.17/

(footnote continued from previous page)
McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 459-72 (1982).

17/ It is clear that in deciding whether to stay the immediate effectiveness of a Licensing Board decision, the Commission may rely on reasons not articulated below. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 492-93 (1951); Davis, 2 Administrative Law Treatise §10.04 (1958)(an "agency is clearly free to substitute its judgment for that of the examiner on any or all questions").

Applicants submit that each of Intervenors' three hydrogen generation scenarios[18/] is on its face technically incorrect, internally inconsistent, and constitutes a challenge to NRC regulations (including the single failure criterion set forth in 10 C.F.R. Part 50, Appendix A) without a showing of special circumstances. See 10 C.F.R. §2.758. Further, Applicants maintain that in each scenario the pivotal, substantive initiating condition giving rise to the scenario was previously addressed in this proceeding.[19/]

18/ The stud bolt failure scenario does not include allegations of containment breach due to hydrogen generation, and clearly is precluded from litigation due to basic precepts of collateral estoppel, res judicata and waiver.

19/ With respect to the loss of off-site power scenario several comments are appropriate:

1. The redundancy requirement of General Design Criterion 17 requires that on-site power capabilities be adequate to assure plant safety even in the event of loss of one diesel train (one half of the diesel capacity) at Catawba, as Intervenors postulated. In that Intervenors do not contest Applicants' compliance with such regulation (see FSAR Sections 8.3.1.2.1 and 8.3.1.2.2), Intervenors' scenario which postulates that operation of one half of the diesels is inadequate is either factually incorrect or challenging such regulation.

2. Intervenors' loss of off-site power scenario also constitutes a challenge to the new hydrogen control regulation, previously noted. See SECY-83-357A, Enclosure F at 16.

3. Intervenors have attempted unsuccessfully to advance contentions in this proceeding related to loss of power. The Licensing Board twice rejected such as being fatally vague. See 16 NRC 1791, 1793, 1795 (1982); 17 NRC 282, 283-84 (1983). In any event, Intervenors were permitted to litigate a diesel generator contention, which is a linchpin issue with regard to station blackout. Their default on this

(footnote continued)

Finally, if focus is placed on the operability of the igniter system, Intervenors consistently failed to provide any specificity as to why it will not perform its intended function. Accordingly, the specificity and basis requirements of 10 C.F.R. §2.714 have not been satisfied. Importantly in this regard, the

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(footnote continued from previous page)
issue, (see discussion in Section I.B.1., supra) precludes further litigation of the matter.

With regard to ATWS several comments are made:

1. Applicants first maintain that without the requisite showing of special circumstances, Intervenors' second scenario constitutes an impermissible challenge to the Commission's new regulations regarding ATWS. 49 Fed. Reg. 26036.

2. The scenario is technically flawed on its face in, among other things, (1) failing to consider the effects of the recirculation fans which are designed to recirculate the upper containment atmosphere to the lower containment thereby precluding excessive concentrations of hydrogen in the dome and providing an opportunity for controlled burning of the hydrogen by the ice condenser igniters (FSAR Section 9.4.10), (2) assuming that rupture of one cold leg pipe will render entirely inoperative the ECCS of a four loop PWR (Section G.3.3 of the Catawba FSAR sets forth descriptions and analyses of the operation of the ECCS which indicate that this assumption is erroneous), and (3) assuming that a turbine blade will become a missile penetrating the turbine casing (Section 3.5 of the Catawba FSAR sets forth a detailed analysis of why this will not occur). Applicants submit that these technical flaws not only call into question the credibility of the scenario, but also constitute a challenge to the single failure criterion set forth in 10 C.F.R. Part 50, Appendix A.

3. Further, Applicants maintain that the initiating premise set forth in the scenario (i.e., that the nil ductility temperature of the reactor vessel has increased to above 200°F) has been raised by Intervenors and litigated in this proceeding. See Palmetto Alliance Contention 44 (CESG 18). With regard to this issue, Applicants maintain that the Board's

(footnote continued)

Intervenors themselves do not challenge the adequacy of the igniters per se, rather their focus has been upon accident scenarios (EP Tr. 2454-57; see also Tr. 130, 291-294) which are embraced by the new hydrogen rule. See discussion supra.

(footnote continued from previous page)
finding that there is reasonable assurance that the nil ductility temperature will not rise above 200°F is dispositive of this scenario. 19 NRC at 1575.

4. Intervenors acknowledge that this issue will not arise until 10-15 years after reactor start-up. Accordingly, the propriety of the Licensing Board's ruling can be left to normal appellate resolution; stay relief is unnecessary.

With regard to fatigue failure, Applicants note the following:

1. Applicants maintain that the underlying assumption reflects an improper challenge to Commission regulations, viz., Appendices G and H to 10 C.F.R. Part 50 which detail requirements regarding the surveillance and modification of vessel operating parameters, such as NDT, in response to the operating history of the plant. Applicants' compliance with such regulations is set forth in Applicants' FSAR at Sections 5.3.1.5, 5.3.1.6 and 5.3.2.1. The thrust of Intervenors' arguments is not that Applicants do not meet such regulations. Rather, Intervenors apparently are of the view that such regulations are inadequate to provide reasonable assurance that thermal cycling throughout a plant's life will be adequately considered in periodically determining appropriate operating conditions, including NDT for the reactor vessel. See CESG's Response to NRC Staff's Second Set of Interrogatories and Document Production Requests, March 17, 1983, at 9-10. In that Intervenors have made no showing of special circumstances for challenging such regulations, Intervenors' scenario must fail. 10 C.F.R. §2.758.

2. This precise issue was litigated in this case. See 19 NRC at 1574-77. The premise for the accident, viz., a NDT in excess of 200°F was specifically rejected by the Licensing Board on the basis of record evidence. 19 NRC at 1575.

(footnote continued)

Thus it is apparent that the Licensing Board is not likely to have reached the wrong result; the hydrogen contentions which Intervenors sought to litigate do not raise issues of sufficent gravity to merit a stay.20/

3. Control Room Design

In originally dismissing Intervenors' contention, the Licensing Board directed that Applicants serve copies of the control room design review on the Intervenors so that if they desired, they could timely file new contentions based on that information. 16 NRC at 1795 n.2, 1795-96. Consistent with that direction, on February 28, 1983, Applicants submitted to Intervenors Duke's Control Room Design Review Plan. See letter from Hal B. Tucker to Harold R. Denton (Feb. 28, 1983)(cc: Robert Guild, CESG, and Palmetto, inter alia). In a March 31, 1983 telephone conference, counsel for Applicants advised that additional documentation concerning control room design (and emergency planning) would soon be filed, along with a cover letter alerting the Board and parties that in Duke's view any

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3. In that by Intervenors' own admission this scenario would not occur until a number of years after reactor start-up, in any event, litigation of this scenario would not be prejudiced by reactor operation. Accordingly, this scenario does not support a stay.

20/ Regardless of the Commission's view of the Licensing Board's ruling, the matter is not deserving of a stay, in that the Commission specifically found that the distributive ignition system installed at McGuire, which is essentially identical to Catawba (SER Supp. 2 at G.2.5) is adequate. SECY 83-357A, Enclosure F at p. 16, Enclosure G at p. 9. Clearly the public health and safety would not be jeopardized if the issue were resolved in the normal appellate process.

additional contentions on control room design (and emergency planning) should be filed within thirty days of receipt. See April 1, 1983 Memorandum and Order at p. 3. The Licensing Board directed that any party that believed another conference call was necessary to discuss a filing deadline for new contentions should telephone the Licensing Board promptly. Id. The Intervenors took no action.

On April 18, 1983, the Applicants filed a motion with the Licensing Board asking it to direct the Intervenors to file new contentions, if any, concerning the control room design review. Intervenor did not file a response to Applicants' motion.

On June 1, 1983, copies of the supplement to the control room design review were transmitted to the NRC, Palmetto, and CESG, among others. See letter from Hal B. Tucker to Harold R. Denton (June 1, 1983)(cc: Robert Guild, CESG, and Palmetto, inter alia). On June 8, 1983, counsel for Duke informed the Board and all of the parties of this fact in a letter. See letter from Albert V. Carr, Jr. to James L. Kelley, et al. (June 8, 1983). The Intervenors never filed any new contentions on the control room design matter (though they filed emergency planning contentions on material received at approximately the same time).

Indeed, the Intervenors did not take any action on the control room design matter until January 31, 1984, shortly before the close of the last day of hearings on the safety phase of the proceeding. See Tr. 12,404-07. At the invitation of the Board (Tr. 12,406-07), the Applicants sent to the Board and parties a

letter recounting the history of Palmetto's control room design contention, attaching copies of relevant correspondence already served on all parties. See letter from J. Michael McGarry, III to James L. Kelley, et al. (Feb. 2, 1984). In a telephone conference call, counsel for Palmetto stated to the Board that he would hate to see the control room design issue "simply go by the board as a result of, you know, what I will characterize as, you know, as my neglect." Tr. 12,564.

The Licensing Board, however, properly rejected the now untimely control room design contention once more because of the Intervenors' failure to demonstrate an ability to make a substantial contribution to the resolution of those issues. 19 NRC at 1425, n.3.

In any event, the control room design review has been resolved to the satisfaction of the NRC Staff. SER Supplement 2, Section 18, June 1984. Thus no unresolved safety issue is outstanding; the gravity of this issue in no way merits the Commission delaying operation above five percent power.

4. Financial Qualifications

The issue of whether an applicant will be able to generate sufficient funding to operate a nuclear power plant in accordance with regulatory standards does not, by its very nature, involve a substantive issue of sufficient gravity to merit a stay. As demonstrated below, there is hardly any likelihood that the Licensing Board erroneously struck this contention.

Intervenors originally submitted a financial qualifications contention in 1981. The Licensing Board, however, ruled at that time that the contention was barred by a Commission regulation which eliminated financial qualifications review for electric utility applicants. 16 NRC 167, 168 (1982). On April 12, 1984, the Intervenors filed a motion which sought to admit two late-filed contentions questioning the financial qualifications of the small municipal and cooperative owners. The basis for the motion was the recent decision in New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984). However, in a Statement of Policy issued on June 7, 1984, the Commission correctly found that the Court had not vacated the rule, and that therefore financial qualifications reviews need not be reinstated for electric utility applicants for operating licenses. 49 Fed. Reg. 24111 (1984).21/ On the basis of the Commission's Statement of Policy, the Licensing Board properly dismissed the Intervenors' proposed contentions on financial qualifications. 19 NRC at 1425, n.3.

The Commission's Statement of Policy has been buttressed by its new final rule. Certainly, the Commission's new final rule, read in light of the Court's decision in New England Coalition on Nuclear Pollution v. NRC, supra, which remanded the Commission's March 1982 rule eliminating financial qualification review of electric utilities, is valid. Therein the Court simply held that the Commission's rationale in its March 1982 rule was internally

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21/ See also 10 C.F.R. § 50.40(b).

inconsistent because it justified eliminating financial qualifications review for all classes of applicants, not just electric utilities. Significantly, the Court did not vacate the previous rule and it was for this reason that the Commission issued the June 1984 Statement of Policy indicating that financial qualifications reviews would not be reinstated for electric utility applicants for operating licenses. The Licensing Board cannot be faulted for dismissing a contention which is expressly excluded from licensing proceedings by Commission regulation and for which Intervenors did not make the showing required by 10 C.F.R. §2.758. Thus there is no basis for granting a stay on this issue.

5. The severe accident contentions were properly rejected by the Licensing Board

Intervenors filed numerous contentions on this topic (Palmetto 2, 5, 10, 31 (CESG 2), 36 (CESG 9), 37 (CESG 10), DES-1 and DES-22). Palmetto 2 and 3 (CESG 2) involve hydrogen generation and are discussed in Section I.B.2., supra. Palmetto 5 expressed a generalized concern about severe accidents at Catawba, asserting that "no reasonable assurance can be had that the facility can be operated without endangering the health and safety of the public through occurrence of a serious accident beyond design basis," questioning the use of the Reactor Safety Study and contending that severe accidents are "plainly credible" after TMI. The Board rejected this contention for lack of specificity, but added that it might accept another contention on

this issue if Palmetto were to postulate "a specific serious and credible accident scenario at Catawba." 15 NRC at 583. This invitation of the Board led to Intervenors' filing of the four accident scenarios discussed in Section I.B.2., supra.

Palmetto 10 alleged that the "economic costs of a severe accident with release of radiation to the environment (a so-called Class 9 accident) were not considered in the CP [construction permit] review for Catawba." Palmetto 36 (CESG 9) took the position that the EIS should consider "the entire spectrum of serious release accidents, including PWI-1 to PWR-9" and that consideration should recognize "that local officials and resources are not qualified to assure protection of the public wealth and safety in the event of a serious accident." As it did with Contention 2, the Licensing Board properly rejected these contentions for lack of specificity. 16 NRC at 1793-94. Palmetto 37 (CESG 10) took the position that an "adequate crisis relocation plan" should be a condition of an operating license, as "particulate releases in serious accidents, such as PWR 1" required relocation of the "affected population."22/ The Licensing Board rejected this contention as an impermissible attack on the NRC's regulations. 15 NRC at 587.

DES-1 and DES-22 challenged the reliance upon the Reactor Safety Study (WASH-1400) and the DES analysis of accidents more severe than design basis. These contentions were properly

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22/ When questioned by the Board as to what he would consider an "adequate" plan, CESG's representative responded that the plan should provide for relocation for "Oh, six centuries." Tr. 341.

rejected by the Licensing Board on several grounds including lack of specificity and the ongoing rulemaking. 16 NRC at 1796-1798.[23] Applicants assert that all of these contentions involving severe accidents were correctly rejected. Intervenors have provided no credible grounds for challenging the validity of the Licensing Board's decisions rejecting the various severe accident contentions. Thus no issue of sufficient gravity to merit a stay is presented.[24] Similarly, there is little likelihood that the Licensing Board erred in rejecting these contentions.

6. The Cost Benefit Contentions (Need for Power)

The Licensing Board did not err in rejecting the three cost/benefit contentions challenging the need for the power to be generated by Catawba. Such matters clearly are not of sufficient gravity to merit a stay. As detailed below, there is little likelihood that the Licensing Board reached the wrong result.

The Licensing Board properly rejected contentions DES-6 and 8 as challenging the need for the Catawba facility's power at the operating license stage, after the plant is approaching completion, in violation of 10 C.F.R. §51.53(c). 16 NRC at 1801.

23/ The one aspect of DES-22 admitted by the Licensing Board was subsequently dismissed. See Memorandum and Order, March 24, 1983.

24/ The Staff, in Section 5.9 of the Catawba Final Environmental Statement (NUREG-0921), dated January 1983, has considered the effects of a range of accidents, including those beyond design basis, and has concluded that no special or unique circumstances prevail at Catawba with respect to such accidents. Thus there is no basis to grant a stay.

The Commission explained in issuing the current need-for-power rule that even assuming that the facility's power is to be used to replace existing power, need for power and alternative energy issues need not be considered at the operating license stage because such reconsideration would not at that time likely tilt the cost-benefit balance against issuing the license. 47 Fed. Reg. 12940 (March 26, 1982). Accordingly, the Commission removed from operating license proceedings such as Catawba's the issue of whether substituting a new nuclear plant's power for existing, less economical means of power production results in additional costs or reduced benefits. Because that is precisely the issue raised by Contentions DES-6 and 8 (see, e.g., Tr. 501-04), these contentions were properly denied admission. In any event, it should be noted that Intervenors were explicitly directed to the provisions of 10 C.F.R. §2.758 concerning this contention (see 15 NRC at 586) and chose not to avail themselves of this avenue.

A third contention (DES-7) sought to inject fixed capital costs (including construction costs) into the NEPA cost/benefit analysis. It is well-settled in NRC practice, however, that the costs of construction are not considered in the cost/benefit analysis at the operating license stage because it simply comes too late. See, e.g., 15 NRC at 584; 16 NRC at 1801.

In sum, the Licensing Board's 1982 rejection of Contentions DES-6, 7 and 8 was correct. The Intervenors have clearly not raised a grave substantive issue, but have instead sought to improperly adjust the cost/benefit balance in violation of both

logic and the Commission's regulations. Additionally, the Licensing Board's rulings were appropriate and in conformity with established NRC practice. Thus these contentions provide no reason for the Commission to delay operation above five percent power.

7. Transshipment of Spent Fuel

Two environmental contentions dealing with transshipment of spent fuel from Duke's Oconee or McGuire Nuclear Stations to Catawba (DES-10 and 19) were rejected.25/ There is virtually no likelihood that the Licensing Board erred in issuing these rulings. The Licensing Board carefully considered the rather complex arguments which the parties raised with respect to these contentions and issued thorough and well-reasoned opinions supporting its decisons. See 17 NRC 291 (1983); 18 NRC 421 (1983). Additionally, no spent fuel transshipment is imminent, so no issue of sufficient gravity or requiring prompt resolution is presented.

Much of the discussion of DES-10 and 19 focused on whether the environmental effects or costs of shipping Oconee and McGuire spent fuel to Catawba would come within the boundaries of Table S-4 of 10 C.F.R. §51.20. The Applicants stipulated that any such shipments from other Duke Power Company facilities to Catawba would be scheduled so that their environmental impacts would not

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25/ Intervenors filed several transshipment contentions in their initial safety phase pleading. These contentions were discussed by the Licensing Board (15 NRC at 578-581, 16 NRC at 171-172, 16 NRC at 1802) and, in essence, were subsumed in the environmental contentions.

exceed the values contained in Table S-4. Accordingly, the NRC Staff concluded in the FES that no new environmental impacts would be introduced by the transportation of spent fuel from Oconee and McGuire. Moreover, since the environmental effect of transporting spent fuel away from the Oconee and McGuire facilities to a fuel reprocessing plant (including intermediate shipment to a facility such as Catawba) had already been considered and factored into the licensing of those plants, it was not necessary to count these environmental costs another time. The NRC Staff thus concluded that it was not necessary to factor any environmental costs for transport of non-Catawba spent fuel into the cost/benefit balancing for Catawba.

Because the potential transportation of spent fuel raised by these contentions was viewed as coming within the scope of Table S-4 to 10 C.F.R. §51.20, they were rejected as impermissible attacks on NRC regulations. See 17 NRC at 294. They were also rejected on the alternative basis that they lacked adequate specificity and thus failed to satisfy 10 C.F.R. §2.714(b). See 17 NRC at 295. The Board further ruled that if Intervenors believed Table S-4 should not apply and if they could identify with reasonable specificity those environmental impacts not adequately accounted for by Table S-4, they should file a petition pursuant to 10 C.F.R. §2.758 delineating those special circumstances which could justify a waiver of the rule. 17 NRC at 294. The Intervenors never did so.

Intervenors have failed to demonstrate any impropriety in the Licensing Board's decisions dismissing DES Contentions 10 and 19. It is clear that there is little likelihood that the improper result was reached by the Licensing Board. The gravity of this issue is minimal in that no immediate Commission action is warranted pending the full appeal. No spent fuel has been shipped to Catawba. Moreover, Duke does not plan to ship any spent fuel from the Oconee or McGuire Nuclear Stations to Catawba during the duration of a reasonable appellate process. Finally, even in the event that such transshipment of spent fuel becomes necessary in the future, the Licensing Board has found that the impact of such transshipment is within the limits allowed by Commission regulations. See 17 NRC at 294. Thus the Commission should not stay operation above five percent because of the rejection of the Intervenors' transshipment contentions.

8. Conclusion

It is apparent that none of the Licensing Board rulings challenged by the Intervenors before the Licensing and Appeal Boards are of sufficient gravity to justify the Commission's staying operation of Catawba above five percent power.26/ Additionally, the discussion above indicates that these issues have been resolved correctly by the Licensing Board.

26/ In pleadings before the Appeal Board, Intervenors submitted the affidavit of Dr. Michio Kaku. The Appeal Board found that the Kaku affidavit "does not aid intervenors' cause." ___ NRC ___, ALAB-794 at p. 7.

Accordingly, neither of the first two factors under 10 C.F.R. §2.764(f)(2)(i) supports the Commission's staying full power operation of Catawba.

II. Correct resolution of any Licensing Board errors would not be prejudiced by operation of Catawba pending review

The third factor to be considered by the Commission under §2.764(f)(2)(i), "the degree to which correct resolution of the issue[s] would be prejudiced by operation pending review," does not support staying operation of Catawba. If the Licensing Board should be found to have erred on any of the eleven previously discussed issues, these errors could be corrected without any prejudice to the Intervenors or the resolution of the issue.

Intervenors have suggested that sensitized welds exist in the plant and that these welds are defective and must be repaired. This position is fundamentally in error, as discussed supra in Section I.A.4. In any event, if any repairs to any aspect of the plant are necessary, they will be made. As the Commission well knows, the NRC has not been deterred from ordering modifications to plants that have been operating at full power for many years, notwithstanding the presence of large quantities of fission products in the reactor core. See, e.g., Connecticut Light & Power Co. v. NRC, 673 F.2d 525 (D.C. Cir. 1982), cert. denied, 459 U.S. 835 (1982). Even in the unlikely event that the Intervenors might prevail on appeal as to any of the issues they have raised, there is no work which would be precluded because the plant has been operating. Any repairs

would be made in compliance with the Commission's occupational exposure limits set in 10 C.F.R. Part 20. Or, more drastically, if Intervenors are ultimately successful in preventing continued operation, operation will cease. The NRC has previously withdrawn operating authority once initially granted, as, for example, in the case of Diablo Canyon Unit 1, which had its low power license issued in September of 1981, but suspended by the NRC two months later. See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit 1), CLI-81-30, 14 NRC 950 (1981); see also 10 C.F.R. §2.202.27/

With respect to the individual issues raised by Intervenors, Applicants submit the following comments:

As to those issues which were litigated, the record is so exhaustive on the matters as to give any decisionmaker a reasonable feeling that public health and safety will not be compromised during operation.

As was shown in Section I.B.1., supra, the Licensing Board did not err in rejecting the Intervenors' late-filed diesel generator contentions after several defaults. In any event, the substantive issue of the diesel generators' operability has been properly resolved outside the hearing process to the satisfaction of the NRC Staff. SER Supplement 4 at 8-1. Thus, should any

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27/ The Catawba Appeal Board specifically addressed this point in stating:

> Should those appeals be successful, we will have full authority to order a halt to operation or such other relief as might be appropriate in the totality of circumstances. [___ NRC ___, ALAB-794 at p. 9]

legal error be found on appeal, any corrective action, such as a remand for further hearings, will not be prejudiced if Catawba is allowed to operate in the interim.

As was shown in Section I.B.2, supra, Intervenors' argument that Catawba should not operate because the Licensing Board rejected its hydrogen contentions is without merit. These contentions were properly rejected. Operation of Catawba with its hydrogen igniter system pending appeal will not prejudice the Intervenors' appeal nor will it prejudice any alteration of the igniter system should the Commission eventually call for a modification. The hydrogen igniter system such as that in use at Catawba has been previously approved by the Commission for at least interim use at other facilities. See, e.g., 46 Fed. Reg. 62281 (1981) (Sequoyah 1); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), CLI-81-15, 14 NRC 1, 2, 10 (1981). The NRC Staff has likewise approved Catawba's distributive ignition system. SER Supplement 2, Section 6.2.5, June 1984; SER Supplement 3, Section 6.2.5, July 1984. Accordingly, interim use of the igniter system at Catawba pending appeal will in no way prejudice the correction on appeal of any error by the Licensing Board.

As discussed in Section I.B.3, there is nothing about the Intervenors' rejected control room design review contention which could be prejudiced by operation during appellate review. As noted, the NRC staff has approved Applicants' design. SER Supplement 2, Section 18, June 1984.

With regard to financial qualifications and need for power contentions, neither will be prejudiced if Catawba is allowed to operate pending Intervenors' full appeal. As described supra in Sections I.B.4 and 6, the Licensing Board was correct in rejecting these contentions. In any event, these contentions by their very nature do not raise matters which will be mooted or otherwise beyond appellate scrutiny and correction (should that be necessary) after the plant begins operation.

The Intervenors' argument that alleged NEPA violations (i.e., those alleged in certain rejected environmental contentions) can be, in and of themselves, the basis for staying operation of the plant prior to appellate review is invalid. First, as discussed previously, the Licensing Board's dismissal of the subject contentions was proper. See Sections I.B.5, 6, and 7, supra. Second, even if the Appeal Board or the Court of Appeals were to find that the Licensing Board had not complied with NEPA in some respect, the courts have consistently held that a violation of NEPA does not automatically lead to irreparble injury so as to justify, without more, a stay of the activities in question. In Potomac Alliance v. NRC, 682 F.2d 1030 (D.C. Cir. 1982), the D.C. Circuit declined to stay or vacate reactor operating license amendments notwithstanding the Court's finding that the NRC had failed to comply with NEPA with respect to the amendments. See also Natural Resources Defense Council, Inc. v. NRC, 606 F.2d 1261, 1272-73 (D.C. Cir. 1979)(on-going construction of nuclear waste storage facilities not enjoined

despite NEPA violation). Even the case principally relied upon below by the Intervenors in their argument on purported irreparable harm due to alleged NEPA violations, Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983), recognizes this point in stating "[t]his is not to say that a likely NEPA violation automatically calls for an injunction; the balance of harms may point the other way." Id. at 952.

In sum, none of the issues advanced by the Intervenors would be prejudiced by plant operation before the appellate process is complete.

III. The public interest favors operation of Catawba pending appellate review

The public interest favors the timely completion of licensing proceedings in a manner consistent with due process. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). As discussed supra, the record compiled in this lengthy proceeding is quite extensive. The bulk of the hearing time was devoted to cross-examination by the Intervenors, which should in and of itself serve as prima facie evidence that Intervenors have been accorded due process. The only argument advanced by the Intervenors before the Appeal Board in this regard concerns limitations on discovery and trial preparation. These limitations were properly imposed, as discussed in Section I.A.3., supra. Under the circumstances, the public interest will be served by minimizing any futher delay in an administrative process which has already run for three and a half years. Cf. ICC v. City of Jersey City, 322 U.S. 503 (1944). In that the record

evidence from these lengthy hearings amply supports the Licensing Board's finding of reasonable assurance that Catawba will operate safely, the public interest is served by the timely operation of the plant.

Utilities such as the Applicants are required by statutes enacted in the public interest by the states of North and South Carolina to provide reliable electric power to the members of the public. A delay in the start-up schedule for Catawba would delay commercial operation and interfere with providing this statutorily mandated service to the public.

For the above reasons the public interest favors allowing Catawba Unit 1 to begin operation as scheduled.

IV. Conclusion

Consideration of the four criteria listed in 10 C.F.R. §2.764(f)(2)(i) demonstrates that the Commission should allow operation of the Catawba Nuclear Station above five percent power.

Respectfully submitted,

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