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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Thomas S. Moore, Chairman
Dr. John H. Buck
Dr. W. Reed Johnson

February 25, 1985

In the Matter of	
PACIFIC GAS AND ELECTRIC COMPANY	Docket Nos. 50-275 OL 50-323 OL
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	

MEMORANDUM AND ORDER

September 6, 1984
(ALAB-782)

Dissenting Opinion of Mr. Moore:

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Dissenting Opinion of Mr. Moore:

My colleagues dismiss the joint intervenors' motion to reopen the record in this operating license proceeding finding that we lack jurisdiction to entertain it. They hold that our earlier resolution of the seismic design issue in ALAB-644[1] became final agency action on this question when the Commission declined to review that decision, thereby ousting us of jurisdiction. In the words of the majority, "when a discrete issue has been decided by an appeal board and the Commission declines to review that decision, agency action is final with respect to the issue and our jurisdiction is terminated."[2] Because the majority's holding is premised on an erroneous notion of jurisdiction and final agency action, and is in the teeth of the agency's regulations, I dissent. We clearly have jurisdiction to consider the joint intervenors' motion. I would determine, therefore, whether the reopening motion meets the established triparte test for such motions.[3]

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[1] 13 NRC 903 (1981).

[2] 20 NRC at 841.

[3] See, e.g., Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978).

I.

A. Contrary to the majority's holding, when the Commission declined to review ALAB-644 that decision did not become final agency action that deprived us of jurisdiction over the reopening motion on seismic issues. Our earlier decision was rendered upon an appeal from one of the Licensing Board's many partial initial decisions[4] and, after it was issued, numerous contested issues remained to be resolved in the still ongoing operating license proceeding. In the words of the Administrative Procedure Act, ALAB-644 was simply "preliminary . . . or intermediate agency action,"[5] not final agency action. Under the Commission's regulations, only an initial decision authorizing an operating license or denying a license can lead to final agency action which terminates our jurisdiction over the operating license proceeding.[6]

When the joint intervenors filed their reopening motion, we had pending their appeal from the Licensing Board's initial decision authorizing a full power operating license for the Diablo Canyon facility. As a consequence of

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[4] See LBP-79-26, 10 NRC 453 (1979).

[5] 5 U.S.C. § 704.

[6] See 10 CFR 2.717(a), 2.760(a).

that appeal challenging the license authorization, jurisdiction over the entire proceeding passed from the Licensing Board to us at the time the appeal was filed. Because we already had jurisdiction over the proceeding when the motion was filed, it was properly filed with us and we therefore necessarily have jurisdiction (i.e., the power or authorization to act in the operating license proceeding) to entertain a reopening motion on any issue -- including one decided on a previous appeal.

It is elementary that a prior appeal from a ruling at an earlier stage of the same proceeding has no bearing on the jurisdiction of the appellate tribunal in a subsequent appeal. The prior adjudication, whether from an interlocutory or final order, only establishes the law of the case for that appellate body and any inferior tribunal. That doctrine, however, is not jurisdictional; it is not a limitation on the power of the appellate body.[7] As the Supreme Court long ago stated in Messinger v. Anderson, 225 U.S. 436, 444 (1912) (Holmes, J.), the law of the case doctrine "as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their

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[7] See 9 Moore's Federal Practice ¶ 110.25[2] at 274-75.

power."[8] Such well established judicial precedents underlie our conclusion in Marble Hill, ALAB-493,[9] that the rule of the law of the case was fully applicable to NRC adjudicatory proceedings and that the doctrine was not jurisdictional.[10] In circumstances that mirror those presented here, the Marble Hill Board concluded, on an appeal from an initial decision authorizing a construction permit, that we have jurisdiction to reconsider (in order to take into account new matter) the identical issue we resolved on a prior appeal of a partial initial decision.[11] The Marble Hill Board explicitly held, contrary to my colleagues' assertion here, that the Commission's refusal to review our earlier decision did not "cut off our right to reconsider a question in an appeal which is still pending before us."[12] The Board

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[8] See also Signal Oil & Gas Co. v. Barge W-701, 654 F.2d 1164, 1169 (5th Cir.), cert. denied, 455 U.S. 944 (1981); Handi Investment Co. v. Mobil Oil Corp., 653 F.2d 391, 392 (9th Cir. 1981).

[9] Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 260 & n.25 (1978).

[10] ALAB-493, supra, 8 NRC at 258-60.

[11] Id. at 260.

[12] Id.

The circumstances that lead to our Marble Hill holding are somewhat involved. At issue was the geographical boundary between Kentucky and Indiana that are separated by

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then distinguished the circumstances it faced from those where an initial decision had become the final agency

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the Ohio River at the plant site. Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. § 1341(a), requires that those making discharges into navigable waters first obtain certification from the state in which the discharge originates. The applicants sought and obtained such certification from Indiana. In a partial initial decision authorizing a limited work authorization (LWA) for Marble Hill, the Licensing Board held that the applicants' certification satisfied the Water Act because the facility would be located in Indiana. LBP-77-52, 6 NRC 294, 337 (1977). On appeal, the Marble Hill Board set aside part of the lower Board's conclusion and held that the Water Act required certification from the state into whose waters the effluent would be discharged. At the same time, we rejected Kentucky's argument seeking a ruling that certification must come from it because any discharge from the facility necessarily would be into Kentucky waters which extend to the present low water mark of the Ohio River on the Indiana shore. Rather, we held controlling Supreme Court precedents placed the boundary at the low water mark on the Indiana shore at the time Kentucky was admitted to the Union in 1792. The proceeding was remanded for a determination of the 1792 boundary. ALAB-459, 7 NRC 179, 189-196 (1978). The Commission then declined to review that decision. ALAB-493, supra, 8 NRC at 255 n.1. In due course and after the Licensing Board issued another partial initial decision granting a second LWA (LBP-77-67, 6 NRC 1101 (1977)), which we then affirmed (ALAB-461, 7 NRC 313 (1978)), the lower Board issued its initial decision authorizing a construction permit and finding, inter alia, that the applicant's Indiana water certification was valid. LBP-78-12, 7 NRC 573 (1978). On appeal of the initial decision, Kentucky requested that we reconsider our prior ruling that the 1792 boundary was controlling in order to take into account a 1943 interstate compact that it claimed settled its boundary at the present low water mark of the Ohio River on the Indiana shore. Among other arguments, both the NRC staff and the applicant asserted that our prior resolution of that issue in ALAB-459 was the law of the case but they argued, in effect, that that doctrine, as well as the Commission's refusal to review ALAB-493, were jurisdictional bars to our reconsideration of the issue. As indicated, the Marble Hill Board rejected these arguments. ALAB-493, supra, 8 NRC at 259-60.

decision which would terminate its jurisdiction in the licensing proceeding.[13]

Indeed, that exact situation arose in Marble Hill some six months after we affirmed (in ALAB-493) the Licensing Board's initial decision authorizing the construction permit and the Commission then declined to review our decision. When one of the intervenors sought to reopen the proceeding the Marble Hill Board specifically applied our prior ruling in ALAB-493 that under the Commission's regulations only an initial decision authorizing or denying a license can become a final agency decision and only a final decision terminates an adjudicatory board's jurisdiction over the licensing proceeding.[14] Thus, in a second decision, ALAB-530, the Marble Hill Board denied the intervenor's reopening motion holding that, upon the Commission's refusal to review ALAB-493, the initial decision authorizing the license became final agency action that terminated our jurisdiction.[15] The majority in the case at hand do not

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[13] ALAB-493, supra, 8 NRC at 260 n.27.

[14] Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-530, 9 NRC 261, 262 (1979).

[15] Id. In a footnote, the Marble Hill Board then indicated that, after the affirmance of the initial decision, our only jurisdiction was over a matter where we expressly reserved jurisdiction and suggested that we would

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even acknowledge our prior authoritative decisions and similarly ignore the well established judicial precedents.[16] It misapprehends the fundamental concept of jurisdiction and then compounds the error with an equally erroneous notion of final agency action.

B. The scheme of the Commission's Rules of Practice for operating license proceedings calls for challenges to an

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have authority to consider a reopening motion related to such a matter. Id. at 262 n.2.

[16] The majority's position is also at odds with our holding in ALAB-781, 20 NRC 819 (1984), where we affirmed the Licensing Board's initial decision authorizing a full power operating license for Diablo Canyon, Unit 1. In their appeal of that initial decision, the joint intervenors argued, inter alia, that the Licensing Board erred in failing to consider the environmental consequences of a so-called Class 9 accident at Diablo Canyon. We unanimously held that our prior resolution of that issue in ALAB-728, 17 NRC 777, 795-96, review denied, CLI-83-32, 18 NRC 1309 (1983), which was rendered on an appeal of the Licensing Board's partial initial decision (LBP-81-21, 14 NRC 107 (1981)), was the law of the case and that we would not consider the issue again. ALAB-781, supra, 20 NRC at 825-26. As already noted, that doctrine is not a limit on authority; it is simply a rule of practice that a decision on an issue made at one stage of a proceeding, absent compelling reasons to reconsider the issue later, generally becomes binding precedent in successive stages of the same litigation. We invoked that doctrine in ALAB-781 precisely because at that point we had jurisdiction to revisit the Class 9 issue if appropriate grounds for doing so had been present. My colleagues, however, did not find in ALAB-781 that we were barred by a lack of jurisdiction from reconsidering the issue -- the only conclusion that would be consistent with their holding here that "when a discrete issue has been decided by an appeal board and the Commission declines to review that decision, agency action is final with respect to the issue and our jurisdiction is terminated." 20 NRC at 841.

operating license application to be settled in a single adjudicatory proceeding before a licensing board that, after all appeals or the expiration of the period for such appeals, ultimately culminates in a final agency decision authorizing or denying a license.[17] Accordingly, the regulations provide that after all appropriate hearings on the contested issues, the licensing board "will render an initial decision"[18] that, inter alia, "will be based on the whole record."[19] The rules then state that the "initial

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[17] See 10 CFR 2.700-2.790.

[18] 10 CFR 2.760(a) (emphasis supplied).

[19] 10 CFR 2.760(c) (emphasis supplied).

The licensing boards, like federal district courts, have broad authority to address cases in stages to aid in the logical and orderly deposition of entire proceedings. For example, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, courts may order individual trials on "any separate issue" for the sake of expedition and economy. Similarly, licensing boards may segregate issues for separate hearing under their authority to "[r]egulate the course of the hearing." 10 CFR 2.718(e). Because of the number and complexity of issues involved in operating license proceedings, licensing boards regularly hold separate hearings on individual issues and then issue partial initial decisions based on that segment of the record compiled on the individually tried issues. The partial initial decisions then are incorporated into the licensing board's initial decision authorizing or denying a license. Cf. 10 CFR 2.606(b)(2) n.3. Only the initial decision, however, is based on the whole record as required by 10 CFR 2.760(c). Thus, on an appeal from an initial decision, jurisdiction over the whole record of the proceeding passes from the licensing board to the appeal board. In contrast, on an appeal from a partial initial

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decision . . . will constitute the final action of the Commission forty-five (45) days after its date when it authorizes the issuance . . . of a license . . . or thirty (30) days after its date in any other case, unless an appeal is taken in accordance with § 2.762 or the Commission directs that the record be certified to it for final decision."[20] The regulations are then explicit that the adjudicatory boards' "jurisdiction in each proceeding will terminate upon the expiration of the period within which the Commission may direct that the record be certified to it for final decision, or when the Commission renders a final decision . . . whichever is earliest."[21] Of course, in the event of an appeal from the Licensing Board's initial decision, the time period in which the initial decision

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decision, jurisdiction over only that portion of the record encompassing the issues appealed passes from the licensing board to the appeal board at the time of the appeal. It should be noted that the appeal of a partial initial decision is a classically interlocutory one (see 10 CFR Part 2, Appendix A, § I(e) n.2) and that interlocutory appeals are proscribed by 10 CFR 2.730(f). Such appeals are permitted, however, by our indulging the fiction that partial initial decisions that decide "a major segment of the case" are sufficiently "final" for purposes of 10 CFR 2.762 to permit them to be appealed. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975).

[20] 10 CFR 2.760(a) (emphasis supplied).

[21] 10 CFR 2.717(a) (emphasis supplied). See also 10 CFR 2.770.

would otherwise become a final decision is tolled until after Appeal Board review. Thus, pursuant to these express provisions only an initial decision authorizing or denying a license that has become a final decision either by the expiration of the time for Commission review or by the Commission undertaking review can terminate an adjudicatory board's jurisdiction over a licensing proceeding. As previously noted, we had the appeal from the initial decision authorizing a full power license pending at the time the joint intervenors filed the reopening motion. Accordingly, there simply was no final agency decision capable of ousting us of jurisdiction as the majority claims.

Our decision in ALAB-644 is not "final" agency action in any sense of the word. That decision was rendered on appeal from one of the Licensing Board's partial initial decisions, not an initial decision authorizing the Diablo Canyon operating license. As already shown, after the Commission declined to review ALAB-644, the issue decided in our opinion was not immune from further agency adjudicatory consideration as would be the case of a final decision.[22]

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[22] See ALAB-493, supra, 8 NRC at 258-60; ALAB-530, supra, 9 NRC at 262.

That ALAB-644 was not final agency action that
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Additionally, although not decisive, it should be noted that neither the joint intervenors nor any other party could petition any court of appeals pursuant to 28 U.S.C. 2342(4) for review of ALAB-644 as a "final" order of the agency.[23] Only the grant or denial of licensing authorization represents such a final agency order.[24] Indeed, in the Diablo Canyon operating license proceeding, like numerous similar situations, the Commission parried judicial review of ALAB-644 because that decision did not represent final

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precluded further agency adjudicatory consideration of seismic issues is illustrated by parallel circumstances in this very proceeding. In ALAB-728, supra, 17 NRC at 792-93, 812, like ALAB-644, we affirmed one of the Licensing Board's partial initial decisions. In that decision, we held, inter alia, that the possible complicating effects of earthquakes on emergency planning should not be considered in individual licensing proceedings. Some months after declining to review ALAB-728, the Commission on its own motion again considered that identical issue in the operating license proceeding. See CLI-84-4, 19 NRC 937 (1984); CLI-84-12, 20 NRC 249 (1984). It could properly do this precisely because ALAB-728 did not represent final agency action on that issue in the operating license proceeding. As is obvious, the majority's view cannot be squared with the Commission's own actions in this proceeding.

[23] See also 42 U.S.C. § 2239(b).

[24] See, e.g., National Resources Defense Council, Inc. v. NRC, 680 F.2d 810 (D.C. Cir. 1982); Honicker v. NRC, 590 F.2d 1207 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979); Ecology Action v. AEC, 492 F.2d 998 (2d Cir. 1974); Citizens For a Safe Environment v. AEC, 489 F.2d 1018 (3rd Cir. 1973).

agency action and therefore the matter was not ripe for review.[25]

II.

The majority purports to rest its conclusion that we lack jurisdiction to entertain the joint intervenors' reopening motion on the recent decision in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-766, 19 NRC 981 (1984). In ALAB-766 -- one of many appellate decisions in the special TMI restart proceeding[26] -- another Board dismissed an intervenor's motion for "reconsideration" for want of jurisdiction. The motion was aimed at an issue it resolved in an earlier decision, ALAB-697,[27] affirming one of the Licensing Board's partial initial decisions[28] in the restart proceeding. The motion

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[25] See Brown v. NRC, No. 82-1549 (D.C. Cir. July 6, 1982) (order granting respondent's motion to hold in abeyance). See also Respondent Nuclear Regulatory Commission's Motion To Hold In Abeyance, Brown v. NRC, No. 82-1549 (D.C. Cir.) (June 23, 1982).

[26] Although the TMI restart proceeding is a unique discretionary one, the Commission ordered that it be conducted in accordance with the Rules of Practice. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-79-8, 10 NRC 141, 147 (1979). See also id., ALAB-685, 16 NRC 449, 451 (1982).

[27] 16 NRC 1265 (1982).

[28] LBP-81-59, 14 NRC 1211 (1981).

was filed while the concluding portion of the Licensing Board's initial decision[29] authorizing restart was still pending on appeal. Contrary to the holdings in Marble Hill, ALAB-493 and ALAB-530, and without mentioning those precedents, the TMI Board concluded that "once we have finally determined discrete issues in a proceeding, our jurisdiction is terminated with respect to those issues. . . ."[30] It then found that "where, as here, the Commission declines to review our decision, a final agency determination has been made resulting in the termination of our jurisdiction."[31] Simply stated, the rationale of ALAB-766 is fallacious for the same reasons the majority here erred. As spelled out in Marble Hill[32], the TMI Board's earlier decision, which it erroneously labeled final in ALAB-766, was not final agency action that deprived it of jurisdiction over the reconsideration motion. The prior decision was rendered on appeal from a partial initial decision and only established the law of the case. To repeat, that doctrine does not bear on whether the board has

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[29] LBP-82-56, 16 NRC 281 (1982).

[30] ALAB-766, supra, 19 NRC at 983.

[31] Id.

[32] ALAB-493, supra, 8 NRC at 258-60; ALAB-530, supra, 9 NRC at 262.

jurisdiction but only whether it should exercise that jurisdiction. Absent compelling reasons, the law of the case doctrine counsels that such prior decisions should not be reconsidered as a matter of sound judicial practice, but a rule of practice is a far cry from the jurisdictional bar erroneously erected by ALAB-766. Accordingly, the reasoning of ALAB-766, like that of the majority here, is fatally flawed.

Even putting to one side its erroneous rationale, ALAB-766 loses its standing as viable precedent for a more fundamental reason. Under settled principles of stare decisis the application of known principles and previously disclosed courses of reasoning in one case are to be followed in subsequent decisions in order to promote agency stability and equal treatment of litigants. Although an agency does not owe slavish adherence to precedent, the doctrine of stare decisis takes on an added dimension in administrative adjudication. This is because "[i]t is an elementary tenent of administrative law that an agency must either conform to its own precedents or explain its departure from them."[33] Thus, "'when an agency decides to reverse its course, it must provide an opinion or analysis

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[33] International Union v. NLRB, 459 F.2d 1329, 1341 (D.C. Cir. 1972).

indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.'"[34] Indeed, an agency's "[f]ailure to explain the reversal of directly controlling precedent is unlawful."[35] Therefore, the TMI Board was not free to ignore our Marble Hill holdings and reach a contrary result.[36] Its failure in ALAB-766 even to mention the Marble Hill decisions was arbitrary and capricious and robs that decision of any precedential value.[37] The holding of

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[34] Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977), quoting Columbia Broadcasting System v. FCC, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

[35] RKO General v. FCC, 670 F.2d 215, 223 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). Accord, McHenry v. Bond, 668 F.2d 1185, 1192 (11th Cir. 1982); Niedert Motor Service v. United States, 583 F.2d 954, 962 (7th Cir. 1978); NLRB v. Silver Bay Local Union, 498 F.2d 26, 29 (9th Cir. 1974).

[36] It should be noted that one appeal board does not have the unbridled authority to overrule a prior board precedent. Because the Commission's Rules of Practice do not contain procedures for en banc review by the Appeal Panel, the settled internal practice of the Panel obligates every board to adhere to our controlling precedents. In the event a board disagrees with a prior ruling, the entire Panel must be informally polled and a majority must favor overruling the precedent. If this internal procedure is not followed, the board must apply the precedent and its only course is to entreat the Commission to review its decision in order to settle the question. Cf. O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 354 (3rd Cir. 1981), cert. denied, 455 U.S. 1017 (1982).

[37] In concluding that it lacked jurisdiction, the TMI Board purported to rely on our decisions in Public Service

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the majority, therefore, lacks a proper footing on which to

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Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-513, 8 NRC 694 (1978) and Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-551, 9 NRC 704 (1979). The TMI Board, however, failed to provide any analysis of the circumstances present in each of those decisions and those cases do not support the TMI Board's holding. Nor are Seabrook and North Anna inconsistent with our Marble Hill decisions, ALAB-493 and ALAB-530. Indeed, Seabrook was decided in the short interval between the two Marble Hill decisions and it was relied upon in the second Marble Hill decision. ALAB-530, supra, 9 NRC at 262 & n.2.

In Seabrook, at the time the intervenor filed its reopening motion, the Licensing Board's initial decision authorizing a construction permit had been appealed and become final agency action and the license already had issued. Because the Commission then explicitly instructed it to conduct a further exploration of the alternative site question, the Seabrook Board concluded that the Commission's directive did not return jurisdiction over the entire proceedings to it and that it lacked jurisdiction to entertain the reopening motion. ALAB-513, supra, 8 NRC at 695-96. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-471, 7 NRC 477, 480 n.2 (1978). After Seabrook, the second Marble Hill decision was handed down. See note 15 and accompanying text. Thereafter, in North Anna, we faced the question whether we had jurisdiction to consider a new safety issue raised by a Board Notification where the Licensing Board had issued an initial decision authorizing a license and no appeal had been filed. Under the Commission's Rules of Practice, the initial decision ordinarily would have become final agency action and the adjudicatory board's jurisdiction would have terminated after the time for appeal expired. See 10 CFR 2.717(a), 2.760(a), 2.762(a). The question arose, however, because of the Appeal Board's customary sua sponte review practice -- a practice not provided for in the regulations. On sua sponte review, the North Anna Board affirmed the initial decision authorizing a license but it retained jurisdiction over several matters discovered on that review. ALAB-491, 8 NRC 245 (1978). It then received a Board Notification on yet another safety question. Not surprisingly, the North Anna Board concluded that it had

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rest.

If the majority's holding is permitted to stand, our jurisdiction in circumstances like those presented here will depend solely on the happenstance of when we review partial initial decisions. Such a result is contrary to the Commission's Rules of Practice and has little to commend it. This result also encourages the erroneous use of the label "jurisdiction" as an expedient to avoid the more time consuming task of determining whether motions to reopen meet the established triparte test for such filings. The public interest is better served by our consideration of such motions on the merits.

For the foregoing reasons, we clearly have jurisdiction to consider the joint intervenors' motion to reopen the proceeding and I would decide it on the merits. Because I am in minority on this question, my determination of whether

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jurisdiction to consider such an issue only if the new matter had a reasonable nexus to those matters over which it had retained jurisdiction. ALAB-551, supra, 9 NRC 704, 707 (1979). Thus, in both Seabrook and North Anna an initial decision authorizing a license had become a final agency action at the time the question of our jurisdiction arose. As previously shown, the Commission's regulations make this factor determinative. Both Seabrook or North Anna are consistent with our Marble Hill decisions and the TMI Board was not free to ignore the holdings of ALAB-493 and ALB-530.

the record should be reopened would be merely an academic exercise. Accordingly, I shall not undertake that task.