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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
DUKE POWER COMPANY, ET AL.	)	Docket Nos. 50-413 OL 50-414 OL
	)	
(Catawba Nuclear Station, Units 1 and 2)	)	

NRC STAFF RESPONSE TO APPEAL BOARD QUESTIONS ON ADEQUACY OF THE NOTICE OF PROPOSED USE OF CATAWBA TO STORE SPENT FUEL FROM OCONEE AND MCGUIRE

George E. Johnson
Counsel for NRC Staff

May 17, 1985

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I. INTRODUCTION

In an Order issued on April 25, 1985, the Appeal Board directed the parties to the captioned proceeding to address several questions concerning the jurisdiction of the Licensing Board in this proceeding over Duke Power Company's application for authorization to store spent fuel generated at the Oconee and McGuire facilities at Catawba Nuclear Station. Pursuant to that directive, the NRC Staff's responses to the Appeal Board's questions are set forth below.

II. NRC STAFF RESPONSES

1. Are there legal requirements for the issuance of a public notice with respect to the planned use of the Catawba facility for the receipt and storage of spent fuel generated at the Oconee and McGuire facilities? If so, what are they?

The statutory obligations of the Commission to provide public notice as to certain license applications are set out in Sections 181,

182c, and 189a of the Atomic Energy Act, as amended. Section 181 of the Atomic Energy Act provides that the provisions of the Administrative Procedure Act (5 U.S.C. §§ 551-559) apply "to all agency action" taken under the Act. However, the notice provisions of 5 U.S.C. § 554 apply only in cases where a statute requires "an adjudication . . . to be determined on the record after opportunity for an agency hearing . . ." and does not otherwise specify when notice of an opportunity for a hearing is to be given or what such notice must contain. 1/

Section 182c of the Atomic Energy Act requires public notice in the Federal Register of applications for "any license under section 103 for a utilization or producion facility for the generation of commercial power." Finally, Section 189a requires prior notice of a hearing on each application for a construction permit for a facility, prior public notice of an opportunity for a hearing on an operating license, and prior public notice of an opportunity for a hearing on an amendment to a construction permit or operating license involving a significant hazards consideration. 42 U.S.C. §§ 2231, 2232(c), 2239(a).

1/ 5 U.S.C. § 554(a). The Staff is not aware of any cases interpreting the Administrative Procedure Act, particularly 5 U.S.C. § 554-558, to prescribe the form or content of the notice of opportunity for hearing. See, 42 U.S.C. § 2239(a); 10 C.F.R. §§ 50.58(b); 50.91(a); City of West Chicago v. NRC, 701 F.2d 632, 642-643 (7th Cir. 1983). Section 554(b) of the Administrative Procedure Act describes certain items that "persons entitled to notice of an agency hearing" are to be informed of, but these provisions apply only after a person has requested a hearing and one is to be conducted. Indeed, the above introductory language of Section 554(a) does not prescribe any procedural requirements with respect to the nature of the "opportunity for any agency hearing." Cf. Seacoast Anti-Pollution League

(FOOTNOTE CONTINUED ON NEXT PAGE)

10 CFR §§ 2.104 and 2.105 implement the foregoing provisions of Sections 182c and 189a of the Act. However, the notice of hearing provision of Section 2.104 applies only where, pursuant to Section 189a, a hearing is required by the Act in the case of a construction permit application, or where a hearing has been requested after notice of opportunity for a hearing has been afforded under Section 2.105. Kerr-McGee Corp. (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 245-246 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983).

Section 2.105 specifies the categories of applications for which notice of proposed action is required to be published in the Federal Register. Among the seven categories are: a license for a facility, [2/] a license for receipt of waste radioactive material from other persons for commercial disposal, [3/] an amendment to a facility operating license, [4/] a license to receive and possess high-level radioactive waste at a geologic repository, [5/] and any other license or amendment as to which the Commission determines that an opportunity for a public hearing

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v. Costle, 572 F.2d 872, 876 (1st Cir. 1978); Marathon Oil Co. v. Environmental Protection Agency, 564 F.2d 1253, 1262 (9th Cir. 1977); U.S. Steel Corp. v. Train, 556 F.2d 822, 833 (7th Cir. 1972).

2/ 10 C.F.R. § 2.105(a)(1).

3/ 10 C.F.R. § 2.105(a)(2).

4/ 10 C.F.R. § 2.105(a)(4).

5/ 10 C.F.R. § 2.105(a)(5).

should be afforded. 6/ However, nuclear materials licenses under Parts 30, 40 and/or 70 are not subject to 10 C.F.R. § 2.105 notice requirements except as expressly provided by the Commission pursuant to 10 C.F.R. § 2.105(a)(7) or as covered by the provisions relating to commercial waste disposal 7/ and geologic high-level waste repositories. 8/

The Appeal Board recently held that neither Sections 189a or 182c of the Atomic Energy Act, as amended, nor 10 CFR § 2.104 or 2.105 requires notice of applications for materials licenses under Parts 30, 40 or 70. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 651-52, notes 9, 10 (1984). 9/ Thus, whether or not there was a legal requirement to publish notice turns on whether the application falls within one of the enumerated categories of Section 2.105, as it implements the requirements of the Atomic Energy Act. 10/

6/ 10 C.F.R. § 2.105(a)(7).

7/ 10 C.F.R. § 2.105(a)(2).

8/ 10 C.F.R. § 2.105(a)(5) & (6).

9/ The Appeal Board also observed:

> "It is not clear whether any other statutory or regulatory provision requires notice of materials license action. See Armed Forces Radiobiology Research Institute (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 157-159 (1982) (Eilperin, concurring).

Limerick, supra, ALAB-765, 19 NRC at 652.

10/ See note 9, supra.

The Duke Power Company "Applications for Licenses (Application)" submitted to the NRC by letter of March 31, 1981, and which are the subject of the June 25, 1981 Federal Register notice stating that the Commission had "received an application for facility operating licenses" (46 Fed. Reg. 32974), requests "such additional source, special nuclear and by-products material licenses as may be necessary or appropriate to the acquisition, construction, possession, and operation of the licensed facilities and for authority to store irradiated fuel from other Duke nuclear facilities." Application, at 11-12. This was, literally, a request for materials licenses, within the scope of an application seeking, inter alia, class 103 operating licenses.

Such application was consistent with NRC practice of treating applications to store spent fuel from other facilities as requests for materials licenses under Parts 30, 40 and 70 of Commission regulations, but, in addition, as relating to use of the recipient facility for the purpose of storing spent fuel from another facility. In each such case, the NRC has incorporated materials license authorization to store spent fuel produced at another facility into the receiving plant's operating license, or initially docketed the application as an application to amend the recipient facility's operating license. Thus, NPF-35, the Facility Operating License for Catawba Unit 1, issued January 17, 1985, at Section 2.B.(7), licenses Duke, pursuant to Parts 30, 40, and 70 to possess Oconee and McGuire spent fuel. Facility Operating License

NPF-35, at 3. 11/ Similarly, the amendment to Special Nuclear Materials License SNM-1773 (issued to Duke for the McGuire Nuclear Station) authorizing storage of Oconee spent fuel at McGuire, is incorporated as an amendment to McGuire's Facility Operating License, NPF-9, at Section 2.K. Authority for Carolina Power and Light Company (CP&L) to store spent fuel from its H.B. Robinson Unit 2 at CP&L's Brunswick Steam Electric Plant, Units 1 and 2, was provided by means of amendments to the respective units' facility operating licenses. See, Amendment No. 8 to License No. DPR-71; Amendment No. 30 to License No. DPR-62. The application of Commonwealth Edison Co. and Iowa-Illinois Gas & Electric Co. to permit storage of spent fuel from any of the Dresden Nuclear Power Station Units 2 and 3, or Quad Cities Nuclear Power Station, Units 1

11/ The NRC currently has pending before it an application for facility operating licenses for the Shearon Harris Nuclear Power Plant from Carolina Power & Light (CP&L) and North Carolina Municipal Power Agency Number 3 which is similar to the Catawba application. The Shearon Harris facility operating license application requests authority to store spent fuel generated at CP&L's Brunswick and H. B. Robinson facilities at the Shearon Harris facility. "Application for Licenses . . . for Shearon Harris Nuclear Power Plant," Docket Nos. 50-400, 50-401. Specifically, the application, at 6-7, seeks "authorization to store source, special nuclear, and byproduct material irradiated in the nuclear reactors licensed under DPR-23 [H. B. Robinson Unit 2], DPR-62 [Brunswick Unit 2] and DPR-71 [Brunswick Unit 1] and subsequently transported to the Shearon Harris Nuclear Power Plant site." In all pertinent respects the Federal Register notice published in connection with the Shearon Harris operating license application is identical to that issued for Catawba, except that the Shearon Harris notice refers the reader to the applicants' Final Safety Analysis Report, in addition to the application and the environmental report. Thus, there was no specific reference to the facility's use as a storage facility for spent fuel from other facilities. 47 Fed. Reg. 3898. See, note 14, infra. The Staff is unaware of any other application for a license to construct or operate a nuclear power facility in which the initial application also requested authority to receive and store spent fuel generated at another nuclear facility.

and 2 at any of the two stations, including Dresden Unit 1, was docketed as the Proposed Issuance of Amendment to Facility Operating Licenses. 43 Fed. Reg. 37245-37246 (August 22, 1978). Finally, the request submitted by Virginia Electric and Power Company for authority to store spent fuel from Surry Power Station at North Anna Power Station sought directly to amend the North Anna Facility Operating Licenses NPF-4 and NPF-7 to incorporate the requested authority. "North Anna Power Station, Units No. 1 and No. 2; Proposed Issuance of Amendments to Facility Operating Licenses," [Docket Nos. 50-338 and 50-339], 47 Fed. Reg. 41892-41893, September 22, 1982.

Thus, while, as a general matter, an application which involves only a Part 30, 40 or 70 materials license does not require notice, the storage of spent fuel requires storage at some facility. All "use" of a commercial power generating facility falling within Section 103 of the Atomic Energy Act requires license authority under Section 101 of the Act. 42 U.S.C. 2131. Since storage of spent fuel at such a facility is a "use" thereof, permission to store spent fuel, whatever its source, must be licensed under Section 103. 12/

Pursuant thereto, the Commission has applied the notice requirements of Section 2.105 to applications to store spent fuel. Thus, in enacting

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12/ On the other hand, storage of spent fuel from another facility is not "integral" to a facility operating license--i.e., it is not among the authorities ordinarily given in granting such a license--and separate authority for such activity must be provided through the appropriate materials licenses. See, Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-76-1, 3 NRC 73, 74, n.1-2; Request for Public Comment on Commission Decision; Indemnification of Spent Reactor Fuel Stored at a Reactor Site Different than the One Where It Was Generated, 44 Fed. Reg. 1751-1752.

the Part 72 governing licensing of independent spent fuel storage facilities, the Commission commented on its application of Section 189a:

> In accordance with the requirements of Sec. 189a of the Atomic Energy Act, as amended, which provides in part ". . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding . . . ," the Office of Nuclear Materials Safety and Safeguards has established the practice of publicizing proposed spent fuel storage licensing actions and holding public hearings on a request by any person whose interest my be affected. A section based on the provisions of §§ 2.104 and 2.105 of 10 CFR Part 2, has been added to the rule (See § 72.34).

45 Fed. Reg. 74693 (November 12, 1980). Where an applicant seeks authorization to store spent fuel generated at another facility as part of the use of a facility for which an operating license application has been submitted, notice of opportunity for a hearing would seem to be required by both the Atomic Energy Act and Section 2.105.

In the case at bar, Duke Power Company specifically applied for authorization to store Oconee and McGuire fuel at Catawba in its operating license application. Notice of consideration of an operating license application is required by Section 189a of the Atomic Energy Act and 10 C.F.R. § 2.105(a)(1).

2. Assuming that question 1 requires an affirmative answer, was the notice published in the Federal Register (46 Fed. Reg. 32974-75) adequate to satisfy the requirement(s)? In this connection, would or should interested members of the public have understood that the applicants' request for licenses "to possess, use, and operate the Catawba Nuclear Station" embraced a request for authority to employ that facility as a repository for spent fuel generated at other facilities? If not, was the notice nonetheless adequate because it referred the reader to the operating license application itself (which application, according to our information, did indicate that such authority was being sought)?

Section 2.105 of the Commission's Rules of Practice contain only two requirements with respect to the content of the notice of opportunity for

a hearing. First, the applicant must be apprised of its right to request a hearing. Second, the notice must state that "[a]ny person whose interest may be affected by the proceeding may file a petition for leave to intervene." 10 C.F.R. 2.105(d). It would appear that to the extent issuing the public notice commenced a "proceeding" under the Catawba operating license docket, the intent was to include the entire Duke application, including request for authorization to store Oconee and McGuire spent fuel. The application filed by the Catawba Applicants clearly requested the authorizations necessary to receive and store spent fuel from other Duke facilities at Catawba. Application, at 11-12. The Staff's major licensing review documents - the Safety Evaluation Report, the Draft Environmental Statement, and the Final Environmental Statement, all examined this request as part of the Staff's review. 13/

The scope of that "proceeding," however, is determined by the notice itself. Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90, n.6 (1979); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-171 (1976). Whether the notice included the storage of Oconee and McGuire spent fuel depends on whether the terms of the notice published

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13/ See, Safety Evaluation Report related to the operation of Catawba Nuclear Station, Units 1 and 2, NUREG-0954, February, 1983, at 1-1, 9-3, 9-4, (the application to store Oconee and McGuire spent fuel is mentioned on the very first paragraph of the SER); Draft Environmental Statement related to the operation of Catawba Nuclear Station, Units 1 and 2, NUREG-0921, August 1982, at 5-19; Appendix G; Final Environmental Statement related to the operation of Catawba Nuclear Station, Units 1 and 2, NUREG-0921, January, 1983, at 5-19; Appendix G.

on June 25, 1981 gave "any person whose interest may be affected" by the spent fuel storage application enough information regarding that application to determine whether to exercise the right to file a petition to intervene. It is the Staff's position that it did.

The Staff will be the first to concede that the portion of the applications requesting authority to receive, possess and store Oconee and McGuire spent fuel at Catawba is not described or specifically referenced in the notice and that one could not reasonably expect an interested member of the public to know from a reading of the notice alone that such authorization was being sought. However, the notice specifically directs the public to the facility operating license application, which does contain such information. See, 46 Fed. Reg. 32975. Thus, the adequacy of the published notice with respect to the planned use of Catawba to store Oconee and McGuire spent fuel rests on whether it was permissible to impute to would-be intervenors the information contained in the application itself as a result of the statement in the notice directing any interested person to the application for "further details pertinent to the matters under consideration..." 14/

14/ The notice for Catawba published in the Federal Register on June 25, 1981 (46 Fed. Reg. 32974-32975) stated that the Commission "will consider the issuance of facility operating licenses ... [which] would authorize the applicants to possess, use and operate the Catawba Nuclear Station in accordance with the provisions of the licenses and the technical specifications appended thereto.... Id. The notice also states that "[f]or further details pertinent to the matters under consideration, see the application for the facility licenses and the applicants' environmental report...." Id. at 32975.

The Commission interpreted a similar notice issued with respect to the Diablo Canyon Nuclear Power Plant [15/] to be sufficient basis for upholding the jurisdiction of the licensing board in the operating license proceeding for that facility to hear and decide issues relating to a materials license application for storage of new, unirradiated, fuel at the Diablo Canyon reactor site. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-76-1, 3 NRC 73, 74, n.1 (1976). However, the Commission did not specifically address whether any applicable notice requirements were satisfied, stating only that (1) the materials license was "integral" to the facility, (2) there appeared to be no prejudice to any interested person, and (3) because the board was familiar with the project, "it made good practical sense" for that board to hear and decide issues on the Part 70 materials license. Id. The Commission did not say that that board had jurisdiction as asserted, but, rather, ratified its prior assertion of jurisdiction. Id. Nevertheless, the Appeal Board has followed the Diablo Canyon precedent as a basis for holding, in similar circumstances, "that it was appropriate for [a licensing board] to assert jurisdiction over [the intervenor's Part 70 filings..." Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 NRC 645, 650 (1984). (Emphasis in original.) Citing "consistent agency practice...for licensing boards, already presiding at operating license hearings, to act on requests to raise Part 70 issues involving the same facility, id., at

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15/ See, 38 Fed. Reg. 29105 (October 19, 1973).

652, ALAB-765 stands for the proposition that licensing boards have jurisdiction over issues raised by an application to store new, unirradiated fuel pursuant to a Part 70 materials license, notwithstanding the lack of reference thereto on the face of the Federal Register notice, on which the licensing board's jurisdiction is based. Id., at 650-652. A petitioner is therefore deemed to be on notice of any materials license which is "integral," that is, necessary, to the operation of the facility, by virtue of the Federal Register notice of an opportunity for hearing with respect to the proposed issuance of an operating license for that facility.

The case at bar is distinguishable from both Diablo Canyon and Limerick because, while the operating license notice itself is similar, the authorization to store other facilities' (spent) fuel is not "integral" or necessary to the operation of the facility for which an operating license is sought. 16/ However, inasmuch as the underlying question is what information may be imputed to a prospective intervenor, there would not seem to be much practical difference between imputing knowledge of the legal requirements for an operating license, which is the result of Diablo Canyon, and imputing knowledge of information to which the reader of the Federal Register notice is specifically directed. In either case, the test should be whether such imputation was reason-

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16/ Unlike the case in Diablo Canyon, a Part 70 materials license to store other facility's fuel would not, absent specific application therefor, in due course, be included in the authorization granted when the facility operating license was issued. Cf. Diablo Canyon, supra, CLI-76-1, 3 NRC at 74, n.2.

able. Cf. BPI v. Atomic Energy Commission, 502 F.2d 424, 427 (D.C. Cir. 1974); 5 U.S.C. § 552(a)(1) (matter deemed published in the Federal Register when incorporated by reference and matter reasonably available to class of persons affected).

As noted above, the Commission in CLI-76-1 "confirmed" the jurisdiction of the licensing board, based on three factors: the Part 70 license was "integral," there was no apparent prejudice to any interested person, and it made good practical sense. While the Commission never specifically held the notice to be adequate, each of these factors goes to the reasonableness of deeming the notice to be a sufficient basis for jurisdiction. Diablo Canyon, supra, CLI-76-1, 3 NRC at 74, n.1.

Applying these considerations to Catawba, it is clear that the authority to store spent fuel from other facilities is not "integral" to the Catawba license. It is not an authority, as is the authority to store at Catawba fuel to be used in the Catawba reactor, which is necessary to the facility operating license, and requires no separate application. See, Diablo Canyon, supra, CLI-76-1, 3 NRC at 74, n.2. On the other hand, the authority was in fact a part of the Duke application for Catawba licenses, to which members of the public were specifically directed to determine the "matters under consideration." 46 Fed. Reg. 32975.

Second, there is evidence that the reference was in fact sufficient to apprise petitioners of the existence of the application for authority to store Oconee and McGuire spent fuel at Catawba. One petitioner raised the transport and storage of other Duke spent fuel to Catawba for storage; another raised several contentions prior to the first special

prehearing conference based on the notice so provided. 17/ Thus, there was actual notice. The contentions raised pursuant to that actual notice embodied the full range of safety and environmental issues raised by the application to recei e and store Oconee and McGuire spent fuel at Catawba, and the safety of such receipt and storage was fully litigated at hearing. Thus, while the notice could have been more explicit in referencing the request for authorization to store Oconee and McGuire spent fuel, more explicit notice would not have led to a different result. Finally, it made "good practical sense" for the Licensing Board to hear such issues arising from the application where it was fully familiar with the facility. Cf. Diablo Canyon, supra, CLI-76-1, 3 NRC at 74, n.1.

As a result, based on the facts of this case, it is entirely reasonable to find that the Federal Register notice here contained sufficient information to alert persons interested in the application to receive and store Oconee and McGuire spent fuel at Catawba to file petitions for leave to intervene. 18/ In short, although the Catawba notice did not

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17/ See, Palmetto Alliance Supplement to Petition to Intervene, dated December 9, 1981, at 11-13; Carolina Environmental Study Group, "Catawba Operating License Application--A Petition to Intervene," dated July 27, 1981, at 3.

18/ The reasonableness of such an approach is supported by Commission case law which directs prospective intervenors to the license application and supporting documents for information to determine the proper scope and contents of their contentions. See, Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), aff'd in part, rev'd in part, CLI-83-19, 17 NRC 1041, 1048 (1983); Wisconsin Electric Power Co. et al. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928,

(FOOTNOTE CONTINUED ON NEXT PAGE)

expressly state that Applicants sought authorization to store Oconee and McGuire fuel at Catawba, it was nonetheless adequate because it specifically and explicitly directed the reader to the operating license application itself for a more detailed delineation of the "matters under consideration."

3. Has there been any other notice that apprised the public of such intended use of Catawba (e.g., a notice issued in connection with the application for a construction permit, an application for a construction permit modification, or an application for the issuance of a materials license pursuant to 10 CFR Part 70)? If so, what present significance attaches to that notice?

As far as the Staff can determine, there have not been any other public notices of applications for construction permits, construction permit amendments or materials licenses which would apprise the public of the intended use of Catawba for storage of spent fuel from Oconee and McGuire.

The Commission has issued notices in the Federal Register apprising the public of the availability of the Draft Environmental Statement (DES)

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

929 (1974); Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 192 (1973), aff'd, CLI-73-12, 6 AEC 241, aff'd, BPI v. Atomic Energy Commission, 502 F.2d 424, 427 (D.C. Cir. 1974). Intervenors have been advised by the Appeal Board that they should consult the application referenced in the Federal Register notice so as to limit their contentions to "issues fairly raised by the application." Commonwealth Edison Company (Zion Station), ALAB-616, 12 NRC 419, 426 (1980), or to discover any pre-conditions to intervention. Houston Lighting and Power Company (Allen Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 10 (1980). Thus, intervenors are deemed to be on notice, as a general matter, that they will be presumed to have knowledge of matters such as the application, the safety and environmental reports, and supplemental notices.

(NUREG-0921), 47 Fed. Reg. 37009 (August 24, 1982), the Final Environmental Statement (NUREG-0921), 48 Fed. Reg. 2239 (January 18, 1983), and the Safety Evaluation Report (NUREG-0954), 48 Fed. Reg. 8365 (February 28, 1983), all pertaining to the Catawba operating license application. Each such notice referenced the availability of the pertinent document, and, with respect to the DES, solicited comments on the contents thereof. All those documents evaluated the proposed storage of Oconee and McGuire spent fuel at Catawba. In fact, the FES contains responses to Intervenors' contentions made regarding the environmental impacts of the proposal to the transship Oconee and McGuire spent to Catawba for storage. FES, at 9-8, 9-12, 9-13. However, the notices did not on their face refer to the content of the facility operating licenses sought or the content of the document which was described in the notice. In that respect, these notices stand on the same footing as the operating license notice in question--they do not directly apprise the public of the intended use of Catawba but, instead, direct the reader to documents which do discuss that intended use.

4. Assuming that question 1 requires an affirmative answer, and further that no published notice can be reasonably construed as embodying the proposal to use Catawba for the storage of spent fuel generated at other facilities, did the Licensing Board have jurisdiction to consider that proposal? (In this connection, see, e.g., Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976)). If not, on what basis could the authorization of such storage be now granted by the NRC staff?

In Trojan, supra, ALAB-534, 9 NRC 289-90, n.6, the Appeal Board interpreted its decision in Marble Hill, supra, ALAB-316, 3 NRC at

170-171, as squarely holding

> that a licensing board does not have the power to explore matters beyond those embraced by the notice of hearing for the particular proceeding . . . this was a holding of general applicability . . . .

See also, Northern Indiana Public Service Company (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980); Commonwealth Edison Company, et al. (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980). Therefore, if no published notice can reasonably be construed as embodying the proposal to use Catawba for the storage of spent fuel generated at Oconee and McGuire, 19/ under the above Commission precedents, the Licensing Board lacks jurisdiction to consider such proposal. If, as the Appeal Board requires us to assume, notice of the proposal to store Oconee and McGuire spent fuel at Catawba is required and no such notice has been given (and, in turn, the Licensing Board was not empowered to consider such proposal), the Staff perceives no basis on which it could now authorize such storage.

III. CONCLUSION

Based on the foregoing, the NRC Staff concludes that:

(1) Duke's application for authorization to store Oconee and McGuire spent fuel at Catawba was part of its application for an operating license and was legally required to be noticed pursuant to 42 U.S.C. 2232(c), 2239(a) and 10 CFR § 2.105(a)(1);

19/ As noted in answer to Question 2, the Staff believes that the public notice can be reasonably construed as embodying the application to which the public was specifically directed.

(2) While interested members of the public should not be expected to know from the face of the Catawba operating license notice that Duke sought authorization to store Oconee and McGuire spent fuel at Catawba, that notice was nonetheless adequate to so alert the public because of its explicit directive to examine the application for the details of the matters being considered;

(3) No other notice explicitly apprised the public of Duke's intent to use Catawba to store Oconee and McGuire fuel; and

(4) Assuming that notice of such intended use is legally required and that no such notice has been given, the Licensing Board would not have had jurisdiction tc consider that proposal and the Staff could not now separately grant such authorization.

Respectfully submitted,

George E. Johnson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 17th day of May, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPEAL BOARD QUESTIONS ON ADEQUACY OF THE NOTICE OF PROPOSED USE OF CATAWBA TO STORE SPENT FUEL FROM OCONEE AND MCGUIRE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 17th day of May, 1985:

*James L. Kelley, Chairman
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