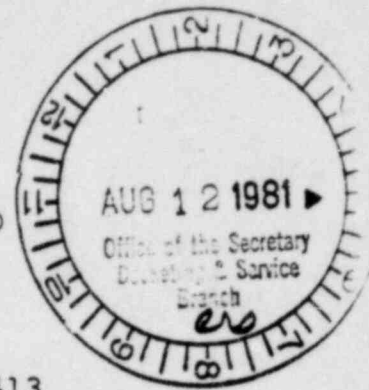


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)
DUKE POWER COMPANY, et al.)
(Catawba Nuclear Station,)
Units 1 and 2))

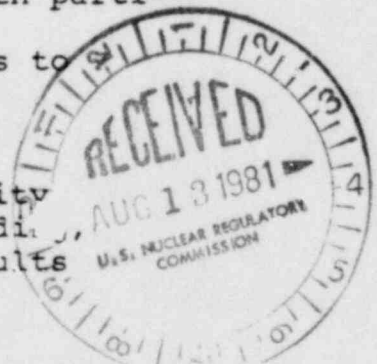
Docket No. 50-413
50-414

APPLICANTS' 1/ RESPONSE TO PALMETTO ALLIANCE
PETITION TO INTERVENE AND REQUEST FOR HEARING

On June 25, 1981, a "Notice of Receipt of Application for Facility Operating Licenses..." concerning the captioned proceeding was published in the Federal Register. (46 Fed. Reg. 32974). On July 23, 1981, Palmetto Alliance, in response to such Notice, filed a "Petition to Intervene and Request for Hearing." Pursuant to 10 CFR §2.714(c) Applicants make the following response to the Petition.

On May 26, 1978, the Nuclear Regulatory Commission amended its Rules of Practice to facilitate public participation in its license application review and hearing process. 43 Fed. Reg. 17798 (April 26, 1978). With particular reference to the standard by which petitions to intervene would be judged, the Commission stated:

The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results



1/ "Applicants" refers to Duke Power Company, North Carolina Municipal Power Agency Number 1, North Carolina Electric Membership Corporation and Saluda River Electric Cooperative, Inc.

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of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene. 10 CFR §2.714(a)(2).

In determining whether the Alliance has satisfied the intervention standard Applicants have been guided by NRC case law, principally Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 & 2), ALAB-522, 9 NRC 54 (1979). Given the fact that the submitted affidavits of members of Palmetto Alliance indicate residency, as well as business and recreational use, in close proximity to the Catawba Nuclear Station, Applicants acknowledge that pursuant to North Anna, supra, Palmetto Alliance has satisfied the intervention standard as contemplated in 10 CFR §2.714. Applicant hasten to add that their position with regard to intervenor status should in no way be viewed as a concession with respect to the subject matter of such intervention. Rather, Applicants will await the filing of contentions 2/ and will respond in the appropriate fashion.

2/ Under the amended rules, petitions for intervention need not set forth contentions. Rather, the petitioner has until 15 days before the holding of the special or first prehearing conference in which to file his contentions in the form of a supplement to the petition. 10 CFR §2.714(b); Nuclear Engineering Company, Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 n.5 (1978).

As a final matter, Applicants are of the view, based on past experience, that it is important for this Board to clearly delineate the scope of the proceeding at the outset. In this regard, Applicants request this Board to consider two issues which bear on the scope of the proceeding, viz. Palmetto Alliance's attempt to raise antitrust concerns in this proceeding and its ability to represent "other persons who are similarly situated." Each of the matters is addressed below.

1. Antitrust Jurisdiction.

In its Petition, the Alliance seeks to raise antitrust issues. Such issues cannot be heard in any proceeding ordered pursuant to the June 25, 1981 Notice, which offered an opportunity for "any person whose interest may be affected by this proceeding" to intervene and request a hearing. (46 Fed. Reg. 32975). The issues to be considered in this proceeding are limited to health, safety, and environmental issues. 3/ Should an antitrust review in connection with

3/ In determining whether an issue raised in the Alliance's Petition is within the scope of the proceeding, the Board is bound by the Commission's Notice of hearing, which sets the scope of the proceeding, and establishes the authority of this Board. Carolina Power & Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 & 4), ALAB-577, 11 NRC 18, 25 (1980); Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175 (1977).

the operating license be conducted, the Commission will order a separate proceeding. It is standard, and long-standing Commission policy to review antitrust matters raised in connection with the licensing of a facility "separately from the hearings held on matters of radiological health and safety" for the same facility. See 10 CFR Part 2, Appendix A. X(e); Duke Power Company (Oconee Nuclear Station, Units 1, 2 & 3), Memorandum and Order, 4 AEC 592 (1971); Boston Edison Company (Pilgrim Nuclear Power Station), Memorandum and Order, 4 AEC 666 (1971). In fact, the Commission's rules specifically provide that "unless the Commission determines otherwise" a hearing on the antitrust aspects of an application will be considered at a proceeding other than the one convened to hear environmental and safety matters. 10 CFR §2.104(d).

Clearly, then, in an instance such as this, where a Board is convened to rule on petitions filed in a proceeding pursuant to a notice limited to environmental, health and safety issues, it lacks jurisdiction to order consideration of antitrust issues in that proceeding. See Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976) and the authorities discussed. Accordingly, the antitrust

allegations raised in the Petition must be stricken. Id.; see also, Houston Lighting & Power Company, et al. (South Texas Project, Units Nos. 1 and 2), ALAB-381, 5 NRC 582, 589 (1977).

2. Representation of "other persons who are similarly situated."

The Alliance has filed its Petition not only on its own behalf and on the behalf of its members, but also on behalf of "other persons who are similarly situated." (Petition, p. 1, paragraph 1). NRC precedent is clear that the Alliance cannot undertake the latter representation. See Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 483-84 (1977) wherein it is stated:

It is a basic legal principle that one party may not represent another without express authority to do so. Petitioners OHILI and North Shore have not presented any evidence that they are authorized to represent persons other than their own members and in the absence of such proof their respective claims that they represent persons other than their members must be rejected. See Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 223 fn.4 (March 12, 1974); Allied-General Nuclear Service (Barnwell Fuel Receiving and Storage Station), LBP-75-60, 2 NRC 687, 690 (October 1, 1975). OHILI's claim that it acts as private attorney general must also be denied. There simply is no provision in the Commission's regulations for parties to act as private attorneys general. See Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, NRCI-76/6, 804, 806 fn.6 (June 22, 1976); cf. Allied-General Nuclear Service, supra at 690).

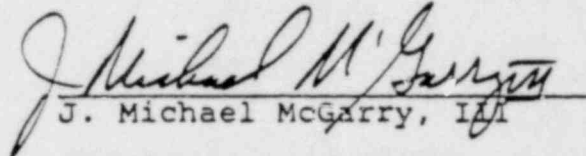
See also Allied-General Nuclear Service, et al. (Barnwell Fuel Receiving & Storage Station), LBP-75-60, 2 NRC 687, 690 (1975) wherein it is stated:

Moreover, as was held by the Atomic Safety and Licensing Board in Mississippi Power and Light Company (Grand Gulf Nuclear Station Units 1 and 2), Docket Nos. 50-416, 50-417 (Prehearing Conference Order of May 15, 1973, pp. 2-3), summarized in ALAB-130, 6 AEC 423, note 1 (June 19, 1973), class actions are not permitted under the Commission's Rules of Practice, and in any event the petitioning organization has not shown that its claims and interests are typical of the alleged class.

Manifestly, there has not been, nor can there be, any demonstration here that this Petitioner is authorized to represent the general public. See Sierra Club v. Morton, 405 U.S. 727 (1972); Nuclear Engineering Co., Inc. (Sheffield Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737 (1978); Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976). Indeed, Congress has vested the function of representing the general public in the NRC Staff and the Commission itself through the Atomic Energy Act. Accordingly, Palmetto Alliance's representation

in this proceeding should be limited to the specific organization and its members.

Respectfully submitted,


J. Michael McGarry, III

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