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
	)	50-414
(Catawba Nuclear Station, Units 1 and 2)	)	

PETITION OF DUKE POWER COMPANY, ET AL., FOR DIRECTED CERTIFICATION OF DECEMBER 30, 1983 LICENSING BOARD RULING DENYING APPLICANTS' MOTION TO RECONSIDER ORDER REVISING AND ADMITTING EMERGENCY PLANNING CONTENTION 11

I. Introduction and Background

Duke Power Company, et al. ("Applicants") request that the Appeal Board grant directed certification1/ of and reverse the December 30, 1983 ruling of the Licensing Board2/ denying Applicants' Motion for Reconsideration or Referral 3/ the Licensing Board's "Memorandum and Order (Ruling on Remaining Emergency Planning Contentions)" dated September 29, 1983 ("September 29th Order"). Applicants ask the Appeal Board to direct the Board below to dismiss its revised Contention 11 or, to the extent that further consideration of the substantive issue

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1/ Pursuant to 10 C.F.R. §§2.718(i) and 2.785(b), as explained in Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478 (1975). The standards governing directed certification are discused infra, in Section IIIA.

2/ Memorandum and Order (Denying Applicants' Motion for Reconsideration Concerning Revised Emergency Planning Contention 11) ("December 30th Order"), elaborating on an oral ruling issued December 16, 1983, transcribed at pages 11,911-13 of the hearing transcript (hereafter "tr.").

3/ Filed November 3, 1983 ("November 3d Motion").

may be warranted, to limit the Licensing Board to consideration of a plume exposure pathway Emergency Planning Zone ("plume EPZ") with boundaries "about 10 miles" -- i.e., no greater than twelve to thirteen miles -- from the plant, in conformity with the NRC's regulations and precedent. Should the Appeal Board conclude that this generic question deserves Commission consideration, or should it be inclined to provide for possible certification to the Commission by the Licensing Board under 10 C.F.R. §2.758, Applicants request that the Appeal Board itself certify this matter to the Commission4/ for prompt, definitive resolution.

In its September 29th Order the Licensing Board rejected Emergency Planning Contention 11, as drafted, as an impermissible attack on the NRC regulation5/ which sets the plume EPZ as "an area about 10 miles (16 km) in radius."6/ Contention 11, as originally drafted, would have raised the issue whether the entire City of Charlotte, North Carolina, should be included in the plume EPZ, which would have extended the radius of several sectors of the plume EPZ generally to the northeast (in the direction of Charlotte) to about 25 miles.

However, the Board went on to make its own revision to Contention 11, and admitted the revised contention,7/ which

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4/ Pursuant to 10 C.F.R. §2.785(d) and the Statement of Policy on the Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981).

5/ 10 C.F.R. §50.47(c)(2).

6/ September 29th Order at 2.

7/ The Licensing Board's revised version of Contention 11 (footnote continued)

identifies a possible boundary for an extended plume EPZ within Charlotte. This has the effect of admitting (or not precluding) the issue whether the boundary of several sectors of the plume EPZ should be extended as far as a distance in excess of seventeen miles to include part of Charlotte. See the maps attached as Exhibits B and C to the affidavit of Michael Glover which was attached to our November 3d Motion; a copy of the affidavit and attachments is attached hereto for convenient reference. In the September 29th Order, the Board did not explicitly address the question whether the revised contention should be rejected because it also constituted an attack on the "about 10 miles" standard, did not follow the procedures, apply the standards, or make the findings required by 10 C.F.R. §2.758, and did not certify the matter directly to the Commission, the

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states:

> The size and configuration of the northeast quadrant of the plume exposure pathway emergency planning zone (Plume EPZ) surrounding the Catawba facility has not been properly determined by State and local officials in relation to local emergency response needs and capabilities, as required by 10 CFR 50.47(c)(2). The boundary of that zone reaches but does not extend past the Charlotte city limit. There is a substantial resident population in the southwest part of Charlotte near the present plume EPZ boundary. Local meteorological conditions are such that a serious accident at the Catawba facility would endanger the residents of that area and make their evacuation prudent. The likely flow of evacuees from the present plume EPZ through Charlotte access routes also indicates the need for evacuation planning for southwest Charlotte. There appear to be suitable plume EPZ boundary lines inside the city limits, for example, highways 74 and 16 in southwest Charlotte. The boundary of the northeast quadrant of the plume EPZ should be reconsidered and extended to take account of these demographic, meteorological and access route conditions.

September 29th Order at 4.

only course open to it (upon satisfaction of the requisite procedural steps) if it were disposed to entertain such a challenge to the regulation.

In our November 3d Motion, Applicants asked the Board to reconsider and either (a) reject the contention as a challenge to the regulations unaccompanied by a prima facie showing of "special circumstances" peculiar to this case such that application of the regulation would not serve its intended purpose, or (b) adhere to the procedures of 10 C.F.R. §2.758, and, if it determined that a prima facie showing had been made, certify the matter to the Commission itself. Alternatively, viewing the September 29th Order as reflecting the implicit judgment that about seventeen miles was not a challenge to the standard of "about 10 miles," Applicants moved for referral of the question whether a radius of seventeen miles in one quadrant of the plume EPZ is such a significant departure from the "about 10 miles" standard as to require adherence to 10 C.F.R. §2.758.

On December 30, 1983, the Licensing Board reaffirmed its September 29th Order "in all respects."8/ The Board emphasized that it never "proposed" a seventeen mile EPZ, but had merely noted certain potential plume EPZ boundaries:

> [T]he present problem should be viewed, not in the abstract, but as a rather complex regulatory requirement in a realistic factual setting. The proof might show, for example, that population and meteorlogical factors justify an extension of the EPZ into Southwest Charlotte to distances of 12 or 13 miles from the facility--distances at least within the penumbra of "about 10 miles." But the most suitable potential EPZ boundary line beyond these points might be a highway 16 or 17 miles from the plant. Such a

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8/ December 30th Order at 2.

hypothesis could be explored at a hearing or at the summary disposition stage; it should not be discarded at the pleading stage.9/

The Licensing Board erred because 10 C.F.R. §2.758 contemplates that challenges to regulations be taken up at the pleading stage, not at the end of the proceeding, and that the proponent of the challenge bear the burden of making a prima facie showing. Yet the Licensing Board admitted Contention 11 "like any other valid contention, not pursunt to a waiver under" §2.758.10/ By not precluding Intervenors from contending that the EPZ radius should extend more than "about 10 miles" -- while specifically recognizing that this might lead to extending it in one direction to more than seventeen miles -- the Board has assumed a Commission function, has made a threshold matter a hearing or summary disposition matter, and also has reversed the burden of going forward, all in contravention of 10 C.F.R. §2.758.11/

9/ December 30th Order at 3-4.

10/ December 30th Order at 4.

11/ Applicants note that the Licensing Board has recognized the proper §2.758 procedure on several prior occasions. See Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-82-16, 15 NRC 566, 582 (1982) (quoted infra at text accompanying note 52); September 29th Order at 2 (rejecting 25-mile version); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-82-51, 16 NRC 167, 174 (1982) (30-mile version). See the argument on the merits, infra, at text accompanying note 85.

II. Issue Presented

Whether the Licensing Board may rewrite a contention so as to allow the Intervenors to raise the issue of extending the plume EPZ radius of "about 10 miles"12/ to a boundary as distant as over seventeen miles in one direction without following the procedures of 10 C.F.R. §2.758 which require a prima facie showing at the threshold and requires certification to the Commission of challenges to Commission rules in adjudicatory proceedings.13/

III. Discussion

A. Directed Certification is Warranted

Despite the general proscription of interlocutory appeals,14/ the Atomic Safety and Licensing Appeal Board, as the Commission's delegate, has the authority to direct the Licensing Board to certify matters to it for consideration pursuant to 10 C.F.R. §§2.718(i) and 2.785(b).15/ While the decision to direct certification is within the Appeal Board's discretion, and only to be granted in exceptional circumstances,16/ the issue

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12/ 10 C.F.R. §50.47(c)(2).

13/ Though precluded by 10 C.F.R. §2.714a from interlocutory appeal of the point, we also are faced with a lack of specificity as to precisely what we must prepare to meet at trial and what Duke must plan for in the event of an unfavorable outcome. These problems are only compounded by the Licensing Board's December 30th Order which introduces further uncertainty about what boundary is proposed.

14/ See 10 C.F.R. §2.730(f).

15/ Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-271, 1 NRC 478, 483 (1975).

16/ See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 464 (1982).

presented here for review is appropriate for immediate appellate consideration under the tests developed in prior NRC decisions.

The standards for determining whether directed certification should be granted were stated by the Appeal Board in Marble Hill:17/

> Almost without exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.18/

This standard has been reaffirmed subsequently and is still followed in deciding whether the interlocutory review is appropriate.19/ Applying this test to the facts presented in this case, we submit that both criteria are satisfied, justifying interlocutory review in these circumstances. Moreover, we would suppose that any clear instance of a material departure from 10 C.F.R. §2.758 ought to be deemed to satisfy the standards for directed certification in order to protect the integrity of the prerogatives retained by the Commission.

17/ Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-405, 5 NRC 1190 (1977). The Appeal Board uses the same standard in deciding whether to direct certification under §2.718(i) as it applies to determine whether to accept a referral under §2.730(f). See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-634, 13 NRC 96, 99 (1981).

18/ 5 NRC at 1192 (footnote omitted).

19/ See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-731, 17 NRC 1073, 1075 (June 20, 1983).

1. Irreparable Impact Which Cannot be Cured by Later Appeal

The distortion of the procedural scheme which the Licensing Board's ruling would produce cannot be alleviated by a later appeal. Unless the Licensing Board's ruling is reversed, Applicants will be forced to relitigate much or all of the work which went into the Commission's decision in establishing the radius of the plume EPZ at "about 10 miles." The reason the Commission established that standard in §50.47(c)(2) by rulemaking was to preclude such wasteful, repetitive litigation of essentially generic matters. The proper means to seek site-specific variation from this rule where "special circumstances" are alleged to exist, is pursuant to §2.758, which results in certification of the matter directly to the Commission.20/ The wasteful, time-consuming process at the latter stages of the hearing that is contemplated by the Licensing Board not only distorts the Commission's standard of "about 10 miles," but also violates the Commission's policy against relitigating generic matters in licensing proceedings unless it so directs.21/ After-the-fact vindication on appeal will not undo the violation of §2.758 and restore the procedural scheme intended by the Commission, especially since Duke would thus be put in the position of having to seek a partial stay of an unfavorable decision inconsistent with the regulations in order to seek a result on appeal which is consistent with the regulations!

2. Effect on the Basic Structure of the Proceeding

20/ See Applicants' argument on the merits, infra at text accompanying notes 52 through 59.

21/ See 10 C.F.R. §2.758.

The procedure contemplated by the Licensing Board will also affect the basic structure of the proceeding in an unusual and pervasive manner, by allowing the Licensing Board to assume a function reserved to the Commission and by improperly shifting the burden of going forward on the proper size of the plume EPZ. Under the procedure intended by §2.758, the Commission approves departures from specified norms in the regulations. Further, the burden is on the Intervenors to make a prima facie showing of special circumstances peculiar to this case such that application of the usual rule of "about 10 miles" would not serve its intended purpose.22/ Under the Licensing Board's procedure, however, the Applicants will be required to move for summary disposition of the revised Contention 11, or present evidence at hearing, in either event placing a burden on the Applicants which under the Rules should be on Intervenors.23/ Such an arrogation of Commission functions and an impermissible alteration of the burden of coming forward with evidence are matters which should be determined to affect "the basic structure of the proceeding" so as to merit interlocutory review under §2.718(i).

3. The Public Interest Favors Directed Certification

The Appeal Board also should consider the public interest when deciding whether to grant or deny interlocutory review pursuant to either §2.718(i) or §2.730(f).24/ Immediate

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22/ See 10 C.F.R. §2.758(c) & (d). See the discussion on the merits at text accompanying notes 52 through 59.

23/ See December 30th Order at 3-4, 4-5.

24/ See Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-634, 13 NRC 96, 99 (1981), followed in Catawba, ALAB-687, supra, 16 NRC at 464.

clarification and correction of the Licensing Board's treatment of the "about 10 miles" standard will protect the public interest from harm through this inconsistent application of §50.47(c)(2). Harmful confusion in the public's mind will result from the "special treatment" given to Catawba, which lies in the same region as the McGuire facility. McGuire and other regional power plants have plume EPZ's of essentially ten miles. As a result, the public will worry unnecessarily about the adequacy of emergency plans at McGuire and other regional facilities, or, conversely, that there is something peculiar to Catawba which requires such an extension. Further, additional steps would have to be taken by jursidictions outside the "about 10-mile" zone as exemplified in the affidavit of Michael Glover.

The public interest is likely to be harmed further through the precedent which this Licensing Board's decision will establish for other ongoing proceedings if allowed to stand. Whereas plume EPZ's have been limited to no more than two or three miles in excess of a ten-mile radius of the plant,25/ in accordance with the plain meaning of §50.47(c)(2), intervenors will now insist as a regular matter that emergency planning activities be extended over an area well in excess of that established by the Commission. The likelihood that the issue of the proper interpretation of "about 10 miles" will recur in subsequent proceedings justifies directing certification of this issue.26/ The same question has already arisen in a number of

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25/ See cases cited infra notes 63 through 77.

26/ See Public Service Co. of Indiana (Marble Hill Nuclear

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cases.27/

The Licensing Board itself recognized that its decision may well have a broad impact.28/ The proper procedure for handling such major departures from the "about 10-mile" norm should be by Commission review under 10 C.F.R. §2.758. Thus, the public interest will best be served by immediately reviewing, clarifying, and correcting the Licensing Board's ruling before it can adversely affect other proceedings where the size of the plume EPZ is a subject for litigation.

4. NRC Precedent Favors Interlocutory Review

The propriety of interlocutory review of the Licensing Board's order is demonstrated by the Offshore Power Systems29/ decision. In that case, the Appeal Board granted directed certification of whether the Licensing Board should have instructed the NRC staff to exclude consideration of "Class 9" accidents from its environmental impact statement ("EIS") for proposed floating nuclear power plants.30/ The EIS's for land-

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Generating Station, Units 1 & 2), ALAB-405, 5 NRC 1190, 1192 n.5 (1977) (certification appropriate where "the same issue is lurking in a number of other cases"); see also Catawba, ALAB-687, supra, 16 NRC at 465 (conditional admission of contentions).

27/ See cases cited infra at notes 63 through 77.

28/ See December 30th Order at 5; Tr. at 11,193 (December 16, 1983), quoted infra note 47.

29/ Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, reconsid. denied, ALAB-500, 8 NRC 323 (1978), aff'd, CLI-79-9, 10 NRC 257 (1979).

30/ The Appeal Board also considered a second certified question, not relevant here: whether the Licensing Board may fix a deadline by which the staff must prepare and file its environmental impact statement. 8 NRC at 199.

based nuclear plants had excluded consideration of "Class 9" accidents, based on published Commission guidance.31/ The Staff viewed its decision to include such accidents as not inconsistent with the Commission's guidance for land-based plants because the consequences of a "Class 9" accident at sea could be much more harmful than on land.32/ Thus, the difference between the circumstances underlying the Commission's guidance (potential accidents on land) and the circumstances surrounding the EIS for floating nuclear plants (potential accidents at sea) was viewed by the staff to be sufficient to justify following a different practice when preparing an EIS for a floating plant.33/ The applicant, Offshore Power Systems ("OPS"), argued that the staff's refusal to apply the conventional Commission guidance was in essence a challenge to the Commission's regulations in violation of 10 C.F.R. §2.758.34/ Although OPS's argument was rejected on the merits,35/ the question of failure to follow §2.758 was compelling enough to cause the Appeal Board to grant OPS's motion for directed certification.36/

31/ 8 NRC at 198.

32/ 8 NRC at 211.

33/ Id.

34/ 8 NRC at 212.

35/ See 8 NRC at 221.

36/ See 8 NRC at 199. Cf. Public Service Electric & Gas Co. (Salem Nuclear Generation Station, Unit 1), ALAB-588, 11 NRC 533 (1980) (Appeal Board refused directed certification on facts otherwise similar to Offshore Power Systems because it was convinced that the Licensing Board "deliberately stopped short of considering a Class 9 accident"; 11 NRC at 537 n.10; in the case at at bar, however, the Licensing Board below has

The facts of the proceeding at bar present a similar but more compelling case for directed certification. Whereas in Offshore Power Systems it was arguable that the Commission's regulations were not directly applicable to floating plants and hence were only challenged "in essence,"37/ the Appeal Board nonetheless granted directed certification. The order by the Licensing Board below, by contrast, allowing consideration of a plume EPZ with a boundary as great as over seventeen miles from the plant in one direction, presents an unprecedented and unequivocal challenge to the 10 C.F.R. §50.47(c)(2) standard of "about 10 miles."38/ Suppose an applicant were to maintain that three miles was "about 10 miles." Would not the departure from the regulations be manifest to anyone? In this case, where the Licensing Board has not only not precluded evidence tending to establish a boundary as distant as seventeen miles, but has identified specifically a possible boundary at that distance, directed certification is warranted.39/

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properly limited consideration of the plume EPZ size; it has allowed extension of the area for consideration as the plume EPZ further than ever before done by a Licensing Board without explicit Commission guidance; see the argument on the merits, infra at text accompanying notes 63 through 77.

37/ 8 NRC at 212.

38/ See the argument on the merits, infra at text accompanying notes 63 through 77.

39/ The Licensing Board's admission of a contention permitting litigation of a plume EPZ with a radius of over seventeen miles in one direction is an act beyond the power of that Board to undertake. See 10 C.F.R. §§2.758 and 50.47(c)(2), as well as the discussion on the merits, infra at text accompanying notes 63 through 77. The Appeal Board should not hesitate to direct certification, for the Commission

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The Susquehanna40/ decision does not support a contrary result. In Susquehanna, the Appeal Board refused to direct certification of the Licensing Board's denial of summary disposition of a portion of a contention. There the only effect of the Licensing Board's ruling was that the parties would have to litigate an issue which might later be found unnecessary on appeal. In the case at bar, by contrast, the Licensing Board is assuming a Commission function and requiring Applicants 1) to relitigate matters already resolved generically by §50.47(c)(2), and 2) to bear the burden of going forward via summary disposition which §2.758 places on the Intervenors.

Seabrook,41/ though upon first examination similar to the case at bar, is likewise distinguishable. In Seabrook, the Licensing Board admitted a contention concerning the obligation of the applicants to devise an evacuation plan for a locality outside the Low Population Zone boundary. Contrary to the Seabrook applicants' assertion, however, and thus unlike the case at bar, the Appeal Board was not convinced that any regulation or NRC decision precluded requiring such evacuation plans. No procedural irregularities were introduced by the Licensing Board.

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itself has stepped in sua sponte to reverse ultra vires acts by the Licensing Board on prior occasions. See, e.g., Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-81-36, 14 NRC 1111 (1981) (Commission reversed licensing board which had exceeded its authority to retain contentions of a dismissed intervenor under §2.760a).

40/ Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-641, 13 NRC 550 (1981).

Thus, the applicants there were consigned by the Appeal Board to the usual remedies of motions for summary disposition and appeal from a final decision. In the case at bar, however, the Licensing Board's order involves a challenge to an NRC regulation42/ without following the mandatory procedures of §2.758, which requires a prima facie showing by the intervenor.43/ The Licensing Board's order below has by-passed the mandate of §2.758 and Applicants will be placed at a disadvantage, compared to adherence with the regulations, because of the improper allocation of the burden of going forward. With this distortion of the proper procedures below, the Appeal Board should exercise its discretion to correct this error by granting directed certification and reversing the Licensing Board.

The Appeal Board in Seabrook stated that "[t]here is even greater cause to be chary about reaching down for an issue at [an interlocutory] stage where, as here, the Licensing Board has affirmatively declined upon request to refer that issue."44/ While the Licensing Board below in this proceeding did decline referral,45/ it did so in terms designed to inform the Appeal Board that appellate scrutiny might well be in order, notwithstanding that denial. The Licensing Board stated in its December 30th Order:

42/ 10 C.F.R. §50.47(c)(2).

43/ See the argument on the merits, infra, at text accompanying notes 52 through 59.

44/ 1 NRC at 483.

45/ See December 30th Order at 5; tr. at 11,911-13 (December 16, 1982).

> [W]e believe the question of referral is debatable. On the other hand, mere admission or rejection of contention is not ordinarily a basis for referral, even if the ruling may ultimately cause some delay and expense. On the other hand, this question may have ramifications for other cases such that its early definitive resolution would be desirable. In these circumstances, while we deny the request for referral, we do not wish that denial to be interpreted as active opposition to interlocutory review.46/

Thus, any concerns based upon comity between trial and appellate bodies which might militate against granting directed certification in other cases merely because the Licensing Board declined to refer the ruling are ameliorated by the Licensing Board's own recognition that review may be appropriate at this interlocutory stage.47/

Moreover, the Commission has stated in its Statement of Policy on Conduct of Licensing Proceedings48/

46/ December 30th Order at 5 (emphasis added).

47/ The Chairman of the Licensing Board explained the Board's ruling from the bench as follows:

> On the separate question of whether [the Licensing Board's ruling] should be referred . . . . [w]e find that question really kind of close.
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> . . . .
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> We are not going to refer it, but we're going to make clear that we don't feel that strongly about it; we think it's debatable.[sic], and would not want the Appeal Board to think they ought not look at this; it's just that on balance we're not going to do it on our own motion.
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> [W]e're doing it simply because it's a complicated issue; discovery isn't going anywhere so far; and if the Appeal Board is going to look at it, the sooner they look at it the better.

Tr. at 11,912-13 (December 16, 1983)(emphasis added).

48/ CLI-81-8, 13 NRC 452 (1981).

> If a significant legal or policy question is presented on which Commission guidance is needed, a board should promptly refer or certify the matter to the . . . Appeal Board or the Commission.49/

That the interpretation of 10 C.F.R. §50.47(c)(2) is a "significant legal or policy question," is demonstrated by the extent of the departure from the regulations discussed infra50/ and the fact that such a significant departure is in conflict with the rulings of other licensing boards. Those decisions have limited "about 10 miles" to ten to thirteen miles.51/ Appellate review of the Licensing Board's unprecedented Order, allowing consideration of extension of a quadrant of the plume EPZ to over seventeen miles without invoking the procedures of §2.758, is therefore appropriate. The issues involved here meet the Commission's standard. They concern not merely isolated rulings on a particular matter, but raise generic issues affecting other proceedings.

For all of the foregoing reasons, directed certification of the Licensing Board's order concerning the plume EPZ size is warranted in this instance.

B. The Licensing Board Erred in Admitting Contention 11.

The Licensing Board in this proceeding has previously recognized that a contention seeking a substantial increase in the plume EPZ must be rejected pursuant to 10 C.F.R. §2.758 unless the standards and procedures of that section warrant certification to the Commission.

49/ CLI-81-8, 13 NRC at 456.

50/ See text accompanying notes 52 through 59.

51/ See cases cited infra, notes 63 through 77.

> We read [the Intervenors' contention] to mean that the plume exposure pathway EPZ prescribed in the rule as 'about ten miles' should be expanded to 30 miles in the circumstances of this case. This is an impermissible attack on the Commission's rule (10 C.F.R. 50.47(c)(2)). Should the Intervenors wish to pursue this matter, the proper course would be to file appropriate papers seeking a waiver of the ten-mile feature of the rule, pursuant to 10 C.F.R. 2.758.52/

The same analysis should have been applied to the Licensing Board's version of Contention 11. Under §2.758, a prima facie showing by Intervenors and a determination by the Licensing Board of special circumstances justifying a waiver of or an exception to the ten-mile rule is similarly required in this instance to permit the consideration of any increase of more than one to three miles in the plume EPZ radius. Upon review by the Appeal Board, in the absence of such a showing and determination,53/ the contention must be rejected,54/ and the Licensing Board must be

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52/ Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-82-16, 15 NRC 566, 582 (March 5, 1982); see Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-82-51, 16 NRC 167, 174 (July 8, 1982). See also, Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), DD-81-1, 13 NRC 45, 58-60 (1981) (Director of Nuclear Reactor Regulation denies a §2.206 petition requesting reopening of safety hearings after the issuance of construction permits despite allegations of a need to consider "Class 9" accidents; the Director examined population distribution data around the Catawba site and found no unique circumstance meriting consideration of such accidents at that time).

53/ Applicants note that Intervenors belatedly (in the context of §2.758) supplied an affidavit of Mr. Jesse L. Riley, dated November 22, 1983, in response to Applicants' November 3d Motion. In any event, the Licensing Board did not evaluate the information contained therein, make findings, and (if the findings should warrant such) certify the matter to the Commission as directed by §2.758. See December 30th Order at 4-5. The Licensing Board proposes to consider this affidavit if and when the other parties move for summary disposition. See December 30th Order at 5.

54/ In Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power

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directed to limit the boundaries of the plume EPZ to the ten to thirteen mile range which has been approved in prior decisions construing the "about 10 miles" standard.

The Appeal Board explained the procedures under §2.758 in Diablo Canyon:55/

> Commission regulations are not subject to attack in adjudicatory proceedings. [10 C.F.R. §2.758(a).] A party may petition for a waiver or exception, however, on the ground that special circumstances in a particular proceeding are such that application of the rule or regulatory provision would not serve the purpose for which it was adopted. [§2.758(b).]

The regulations elaborate on the specific procedure:

> The petition shall be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted, and shall set forth with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response thereto, by counter-affidavit or otherwise.56/

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Plant, Units 1 & 2), ALAB-653, 16 NRC 55 (1981), the Appeal Board (which was acting in place of a licensing board) considered a §2.758 petition challenging as inadequate the physical protection requirements of 10 C.F.R. §73.1(a) in light of alleged threat of terrorist attack. The petitioner asserted that a greater number of terrorist attackers than the "several" contemplated by 10 C.F.R. §73.1(a)(1) could be expected at Diablo Canyon. 16 NRC at 71-74 (the Appeal Board concluded that the showing was insufficient to warrant certification). That security plan challenge is analogous to the Catawba intervenors' dissatisfaction with the original plume EPZ: they assert that a greater area must be covered by the EPZ, beyond that having a radius of "about 10 miles" established in §50.47(c)(2). As was the ruling in Diablo Canyon, such a substantial numerical variation is a challenge to the regulations and must be considered, if at all, pursuant to §2.758.

55/ ALAB-653, supra, 16 NRC at 71 (1981).

56/ 10 C.F.R. §2.758(b). See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-80-1, 11 NRC 37, 38-39 (1980).

Finally, as the Appeal Board continued in Diablo Canyon:

> If the petition makes a prima facie showing of grounds for a waiver or exception, the matter must be certified directly to the Commission for determination. [§2.758(d).] Otherwise, the rule applies and may not be the subject of discovery, proof, or argument. [§2.758(c).]57/

Although an affidavit has been filed by Intervenors,58/ it has not been considered by the Licensing Board, and, most important, no prima facie finding has been made by this Licensing Board. Therefore, there can be only one result under the clear language of 10 C.F.R. §2.758: "the rule [about 10 miles] applies and may not be the subject of discovery, proof, or arguments." Applicants submit that about seventeen miles -- or any distance greater than about eleven to thirteen miles -- is not "about 10 miles," any more than about three miles equates to "about 10 miles." The seventeen-mile version of Contention 11 should have been rejected (as were the thirty-mile and twenty-five-mile versions of the same contention59/) unless certification to the Commission was found warranted pursuant to 10 C.F.R. §2.758.

Since the Licensing Board has not made a prima facie finding under §2.758, the proper course, and the one followed in similar cases where significant extensions of the plume EPZ were proposed, is rejection of the contention and a direction to the Licensing Board to limit its consideration to any rational boundary in the range up to thirteen miles, absent the required

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57/ ALAB-653, supra, 16 NRC at 71.

58/ See note 53, supra.

59/ See September 29th Order at 2 (25-mile version); Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), [illegible] (30-mile version).

findings, on the present record and certification directly to the Commission pursuant to §2.758. The proposed challenge to or departure from the regulations here is significant and the Board's ruling is unprecedented. While minor adjustments to plume EPZ's have been made in other cases, major adjustments have been rejected by other licensing boards.60/ The extension proposed by the revised Contention 11 is a major one.61/

The plume EPZ contemplated by the regulations, an area with a nominal radius of 10 miles, would embrace about 314 square miles. The presently approved plume EPZ here is somewhat larger. The State and County emergency planning officials have, consistent with Applicants' recommendations, extended the plume EPZ boundary for Catawba to include any political subdivisions some substantial fraction of which would otherwise be only partially included by the nominal ten-mile boundary, so that the perimeter of the plume EPZ is somewhat irregular in shape, and includes all of York, Clover, Pineville, and Rock Hill. See map

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60/ See cases cited infra notes 63 through 77.

61/ Mr. Riley makes on behalf of Intervenors a superficially appealing argument in his November 22d Affidavit (see note 53, supra), filed in response to Applicants' November 3d Motion. He correctly notes that the total area encompassed by the current plume EPZ, plus the 67 square miles within the area described by the Licensing Board's revised Contention 11, equals the total area of a circle with a radius of 11.27 miles, which is "indeed about 10 miles." Affidavit of Jesse L. Riley at 6. This ignores, however, the NRC decisions construing §50.47(c)(2), which have spoken in terms of the actual extensions of the plume EPZ radius. Substantial increases of the radius in one direction are subject to the standard of "about 10 miles." See, e.g., Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-82-39, 15 NRC 1163, 1181 n.14 (1982). Regardless of total areas involved, no NRC decision has allowed extension of the plume EPZ radius more than two or three miles in one direction. See cases cited infra notes 63 through 77.

attached as Exhibit C to Affidavit of Michael Glover. Thus, the plume EPZ radius in some places extends two or three miles beyond the nominal ten miles, and in some places extends to about a mile less than the nominal ten miles. The area included in the approved EPZ is about 332 square miles. The city limits of Charlotte are entirely outside the approved plume EPZ. The closest point of the Charlotte city limits is 9.7 miles from the Catawba station. See Exhibit C to Affidavit of Michael Glover. The area where suburban/urban-type population densities begin in the vicinity of the Charlotte City line is outside the ten-mile boundary. See population densities on Exhibit B to Affidavit of Michael Glover.62/ Thus the plume EPZ boundary approved by state and local officials is the most natural and appropriate boundary, in light of the population densities, political boundaries, and the meaning of "about 10 miles" as interpreted by prior NRC decisions.

62/ The population densities surrounding Catawba were evaluated by the Director of Nuclear Reactor Regulation and found insufficient to justify reopened safety hearings to consider the effect of a "Class 9" accident at the plant. See Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), DD-81-1, 13 NRC 45, 58-60 (1981). The population around Catawba in no way approaches that surrounding, for example, Indian Point, for which the Commission established a special hearing board to resolve safety issues arising from the close proximity of New York City. "Indian Point has the highest population within 10, 30 and 50 miles of any nuclear power plant site in the United States. At 50 miles, the population is more than double any other plant site." Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2), CLI-81-1, 13 NRC 1, 5 (1981). Yet the Indian Point Board did not recommend expanding the plume EPZ, but only ad hoc coordination beyond the ten-mile [illegible] Recommendations to the Commission, October 24, 1983, slip op. at 303.

The effect of the revised contention, however, is to place in issue the enlargement of the northeast quadrant of the plume EPZ from its radius of about 10 miles to distances as great as about 17 miles, an addition of up to about 67 square miles to the about 43 square miles already within the northeast and east-northeast sectors. The population in the whole of the presently approved EPZ is about 93,483, while the population in the area proposed to be added is up to an additional approximately 124,000 persons, so that the total is more than doubled. See Affidavit of Michael Glover.

These comparisons point out the fact that the Board's action is significant. When it is contrasted with the rulings in other proceedings where similar matters have been raised, it is obviously unprecedented. We turn briefly to those other proceedings.

In San Onofre,63/ the plume EPZ was extended by an additional two or three miles to the northwest in order to provide coverage to 30,000 people across the San Juan Creek in the community of Dana Point and the northern half of the town of San Juan Capistrano, which would have been only partially included otherwise.64/ The Licensing Board held that this extension of two or three miles was within the bounds of §50.47(c)(2) in light of the local characteristics such as

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63/ Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), LBP-82-39, 15 NRC 1163, clarified, LBP-82-40, 15 NRC 1293, intervenors' motion for stay denied, ALAB-680, 16 NRC 127, immediate effectiveness review, CLI-82-14, 16 NRC 24 (1982).

64/ See San Onofre, LBP-82-39, 15 NRC at 1191-92.

jurisdictional boundaries, and the benefit of giving full coverage to a populated area at little additional cost. The question does not seem to have been disputed; the applicant had so recommended and the local officials agreed. The only dispute was whether sirens should be required in the extended area, and if so, by when.65/ In discussing the "about 10 miles" standard, the San Onofre Licensing Board stated that that language

> would clearly allow leeway for a mile or two in either direction, based on local factors. But it equally clearly precludes a plume EPZ radius of, say, 20 or more miles.66/

Significantly, the Board appended footnote 14 to the above-quoted sentences. That footnote offers this highly relevant observation on the procedures to be followed for establishing such an extended plume EPZ.

> There may be areas where a 20-mile radius plume EPZ in one direction, or even longer, may be appropriate, based, for example, on prevailing wind conditions. In such a case, a variance in the rule should be granted pursuant to 10 C.F.R. 2.758.67/

The need for following the procedures of §2.758 is just as great in the case of a contention allowing litigation of a plume EPZ exceeding 12 miles or so and having a radius as great as over seventeen miles, such as could be entertained pursuant to the

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65/ San Onofre, LBP-82-39, 15 NRC at 1102-84; ALAB-680, 16 NRC at 131-32. The sirens were required by the Licensing Board. They were to be installed during the first six months of operations. LBP-82-40, 15 NRC at 1293-94 (1982). Only the intervenors moved for a stay. The Appeal Board refused to order a stay pending appeal. ALAB-680, 16 NRC at 144 (1982). The Commission likewise refused to stay operation. CLI-82-14, 16 NRC 24 (1982).

66/ San Onofre, LBP-82-39, 15 NRC at 1181 (emphasis added) (Board's footnote 14 omitted).

67/ Id., 15 NRC at 1181 n.14 (emphasis added).

Licensing Board's revision of Contention 11. Yet the Licensing Board below admitted Contention 11 "like any other valid contention, not pursuant to a waiver under" §2.758.68/

The voluntary extension of the Catawba plume EPZ, approved by the state and local governments to include all of the political subdivisions which would have been substantially but only partially included in a strict ten-mile radius is consistent with San Onfore, in that, adding San Juan Capistrano and San Clemente in the San Onofre case is akin to adding all of Rock Hill and York in this case. The revised Contention 11 goes far beyond San Onofre, because when a substantial portion of Charlotte is included, the radius, area, and populations involved are significantly larger, and because the outermost limits of Charlotte come no closer than 9.7 miles to Catawba, at one relatively sparsely populated point. See Exhibits B and C to Affidavit of Michael Glover.

The Licensing Board in the Summer69/ proceeding extended the EPZ less than one mile to include three schools which were outside the original ten-mile-radius EPZ. The Board directed that the emergency evacuation plans be adjusted accordingly during the first year of the plant's operation.70/ These additions had already been agreed to between the applicants and State and local officials. Here again, the extension proposed for Catawba would be significantly greater.

68/ December 30th Order at 4.

69/ South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), LBP-82-57, 16 NRC 477 (1982).

70/ Summer, LBP-82-57, 16 NRC at 486-87.

In the Indian Point proceeding,71/ consideration of an intervenor's contention that the plume EPZ should be expanded "substantially" from the ten-mile radius was allowed in view of the particular wording of the contention72/ and only in light of the hearing board's interpretation of a special authorization direct from the Commission.73/ As the Licensing Board in Shoreham74/ stated when faced with a contention calling for a twenty-mile plume EPZ:

> If [§50.47] were construed to permit . . a case by case ad hoc analysis, the 10 and 50 mile general specifications for the respective EPZ's would be meaningless, notwithstanding the flexibility in the rule.75/

71/ Consolidated Edison Co. of N.Y. (Indian Point, Unit No. 2), LBP-82-34, 15 NRC 895 (1982).

72/ The contention read, "The plume exposure pathway EPZ should be expanded from its present 10-mile radius in order to meet local emergency response needs and capabilities." Indian Point, LBP-82-34, 15 NRC at 904.

73/ See Indian Point, LBP-82-34, 15 NRC at 904 n.2, citing Consolidated Edison Co. of N.Y. (Indian Point, Unit 2), CLI-81-1, 13 NRC 1, and CLI-81-23, 14 NRC 610 (1981) (discretionary adjudication to resolve safety issues raised by §2.206 petition by Union of Concerned Scientists). Should Commission authorization be desired for litigating such a substantial expansion of Catawba's EPZ, it has been available pursuant to 10 C.F.R. §2.758. In light of the substantial delays which would be incurred by following the §2.758 procedures now at this late date, Applicants request that if the Appeal Board entertains any doubts, the matter should be referred directly to the Commission pursuant to 10 C.F.R. §2.730(f) and its Statement of Policy on Conduct on Licensing Proceedings, CLI-81-8, 13 NRC 452, 456 (1981), quoted supra, at text accompanying note 49.

74/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-19, 15 NRC 601 (1982).

75/ Shoreham, LBP-82-19, 15 NRC at 618 (contentions dismissed as asking for a totally new probabilistic accident risk analysis to determine anew (as if §50.47 did not exist) what zones should be to established for the EPZ's; dismissal was without prejudice to submission of new contentions).

The Board in Shoreham rejected the contention based on 10 C.F.R. §2.758.

In the TMI-1 restart proceeding[76] the Licensing Board rejected intervenor's request to expand the plume EPZ to include all bisected municipalities, again based on 10 C.F.R. §2.758. The EPZ had already been extended to eleven miles from the plant at several points and the Board found that to be sufficient.[77]

In addition, admitting such a contention only invites the replowing of ground already gone over by the Commission in establishing the radius of "about 10 miles."

> Given the kind and extent of study that went into the Commission's rule, it would make little sense to attempt to replicate such studies at reactor sites around the country.[78]

Drawing the EPZ boundary at a radius of about ten miles is based on extremely conservative considerations calculated to protect the public health and safety. These considerations and worst case assumptions have resulted in a recommended radius with a wide margin of added protection. The NRC will be considering a reduction in source term which could completely obviate the need for a ten mile zone and reduce the recommended evacuation radius to five miles or less. It is at about ten miles that sheltering rather than evacuation may be preferred under existing guidance, and it would make no sense for Applicant to have to take actions which might include purchasing, installing, and periodically

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76/ Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-81-59, 14 NRC 1211 (1981).

77/ TMI-1, LBP-81-59, 14 NRC at 1555-57.

78/ San Onofre, LBP-82-39, 15 NRC at 1193.

testing and maintaining a system of sirens79/ in the proposed additional EPZ area, an arbitrarily defined portion of an entire city.

For all of these reasons, the Appeal Board should direct the Licensing Board to reject Contention 11 or recast it to preclude consideration of boundaries for the plume EPZ at distances greater than twelve to thirteen miles.

C. The Licensing Board Should Have Followed the Procedures Required by 10 C.F.R. §2.758

Even if the Licensing Board felt that Intervenors should have an opportunity to offer proof, as indicated on page 5 of its September 29th Order, under §2.758 only the Commission can make that decision and only after the Board makes threshhold findings, which it has not done. As pointed out above, distances of over about twelve miles and as great as seventeen miles are not "about 10 miles,"80/ and the only way in which a contention can be entertained that seeks to litigate a plume EPZ having a quadrant with such an unprecedented radius is by direction of the Commission itself on certification under 10 C.F.R. §2.758. Certification would follow if the Licensing Board had determined, on the basis of the Intervenors' petition and affidavit, and replies thereto, that a prima facie showing of special

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79/ See attached Affidavit of Michael Glover.

80/ The Licensing Board acknowledges this fact, as an abstract matter, in its December 30th Order at 3, but states that seventeen miles may be an appropriate plume EPZ radius in one direction when viewed in "a realistic factual setting." To us, that translates as "special circumstances." And the existence of "special circumstances" is for Intervenors to establish prima facie and for the Commission to decide.

circumstances in this case has been made such that application of the usual rule (a plume EPZ with about a ten-mile radius) will not serve the intended purpose of the regulations.

In revising and admitting this seventeen-mile plume EPZ contention, the Licensing Board explained only that Intervenors had "expressed interest" in a contention which urged including a part of all of Charlotte in the plume EPZ, and that the contention as drafted refers to factors relevant to extending the plume EPZ, viz: demography, access routes, and, debatably, meteorology.81/ Far from making a finding that Intervenors had made a prima facie showing under 10 C.F.R. §2.758, the Board stressed that

> [W]e are not now making any factual findings with reference to [the contention's] various theses. We merely determine that the Intervenors are entitled to an opportunity to prove those theses.82/

Although the Board has previously told Intervenors that they should "file appropriate papers"83/ (i.e., a petition and affidavits) if they wished to pursue the inclusion of Charlotte or a portion thereof in the plume EPZ, Intervenors had not done so. The Intervenors have now submitted an affidavit,84/ in response to Duke's November 3d Motion, but the Licensing Board has not ruled whether it makes a prima facie showing.

81/ September 29th Order at 4.

82/ September 29th Order at 5; see December 30th Order at 3-4, 4-5.

83/ Catawba, supra, LBP-82-16, 15 NRC at 582.

84/ See note 53, supra.

We note that the course contemplated by the Licensing Board is that the revised contention would be the subject of summary disposition motions85/ which might at first blush appear tantamount to the exchange of affidavits and findings contemplated by 10 C.F.R. §2.758. However, that is not the case. Such an approach circumvents and subverts §2.758, and shifts burdens improperly. Under §2.758, the burden is on the Intervenors to make a prima facie showing that there are circumstances peculiar to this case such that application of the usual rule would not serve its intended purpose. On motions for summary disposition, the initial burden is on the proponent -- here Applicant or Staff -- to show the absence of a genuine dispute of material fact, and, upon the proponent's prima facie showing to that effect, it would fall to Intervenors to come forward with enough to show that a genuine dispute remains. Most important, it is for the Commission, not the Licensing Board, to rule on the waiver or exception. The Licensing Board's role is only to make a threshhold determination and, having done so, certify to the Commission.

The Rules contemplates that the certification must be to the Commission itself, not to the Appeal Board.86/ The Commission is best equipped, being familiar with the factors which led it to establish the plume EPZ as one having a radius of "about 10 miles" in the first instance, to rule on major departures from

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85/ December 30th Order at 3-4, 4-5.

86/ Diablo Canyon, supra, ALAB-653, 13 NRC at

that norm. As we noted earlier, other boards have recognized that for the licensing boards to attempt to replicate this undertaking would make little sense.87/

Adherence to the §2.758 process from the outset would have enhanced the prospects for timely resolution of the question whether or not any portion of the City of Charlotte should be included in the plume EPZ. Early resolution would have been in everyone's interest. At this point, it is not clear that anything less than certification to the Commission under §2.785(d),88/ despite the lack of a prima facie showing, will avoid impact on Duke's schedule for operation in excess of 5% of full power. Duke expects that Catawba Unit 1 will be complete and ready to load fuel by about May 1984. Under the schedule contemplated by the Licensing Board, discovery on revised Contention 11 will take place through February 1, 1984, and the Applicants and Intervenors have informally agreed to a one-week extension. Thereafter, motions for summary disposition may be filed, and responses received. If summary disposition were granted, the matter could be resolved at the trial level in the next few months, but Duke is constrained to such an early date for trial, which may as a practical matter overtake a summary disposition

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87/ San Onofre, supra, LBP-82-39, 15 NRC at 1182. See also Shoreham, supra, LBP-82-19, 15 NRC at 618.

88/ The discussion in Part III.A of this motion supports certification to the Commission should the Appeal Board have doubts as to the proper resolution of this matter. See the Statement of Policy, supra, CLI-81-8, 13 NRC at 456, quoted at text accompanying note 49.

schedule. Appellate resolution (absent interlocutory review) would presumably be delayed until after the initial decision. That appellate process would not likely be completed until the fall of 1984. If summary disposition were not filed or denied or overtaken by the hearing (Duke seeks hearings on emergency planning to begin in March 1984), the matter would not be resolved even at the trial level until mid year or later. Appellate review of the initial decision would likely lead to final agency action on this question on the same schedule as estimated above with respect to summary disposition, i.e., in the third or fourth quarter of 1984. If the Appeal Board remanded this case without definitively precluding the Licensing Board from proceeding with belated §2.758 certification, the issue would likely not even reach the Commission until perhaps April 1984.

The ultimate agency ruling on this issue would not occur in the normal course of events until after the initial decision, whether or not it was initially ruled on by summary disposition. If we assume for the sake of the analysis that the overall decision is in favor of issuance of an operating license, but that the ultimate resolution of the plume EPZ issue is adverse to Applicant, and that the unit is completed on schedule, then Catawba Unit 1 will already be in low-power operation by the time the issue is resolved. At that point, the issue would no doubt arise whether some or all of the many steps outlined in the attached affidavit of Mr. Glover must be completed before operation in excess of five percent of full power, which Duke

expects to be ready for about August 1, 1984, or whether some deferral of such steps is warranted.89/ It obviously makes no sense for Applicants to concede and moot the issue of a departure from the regulations by taking these steps or recommending them to state or local officials prior to final resolution by NRC.

In marked contrast, certification to the Commission under §2.785(d), despite the absence of a §2.758 finding by the Licensing Board, has the strong potential for earlier and final resolution of this matter at the Commission level. Such resolution could then be had at a time such that steps could be taken toward timely compliance with a ruling adverse to Applicants. On the other hand, time consuming summary disposition or trial of unnecessary issues, or a prolonged process of remand and exchange of affidavits could be avoided if the ruling were adverse to Intervenors. One possible result of certification is that the Commission would direct further proceedings before the Licensing Board or before some other body. It seems more likely, however, given the policy and legal question of whether the Licensing Board (absent Commission direction) may permit a plume EPZ boundary to be drawn as far from the plant as seventeen miles merely for want of a convenient geographical boundary line, even if the Intervenors could only demonstrate a

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89/ Cf. San Onofre. CLI-82-14, 16 NRC 24, 26 (1982) (Commission rules that a full power operating license may issue, but that the "license is subject to the condition that for operation above 5% of rated power to continue beyond six months from the date of issuance of the full-power license, the offsite medical arrangements issue must be resolved or further operation above 5% of rated power must be justified under 10 C.F.R. §50.47(c)(1).").

need to extend the EPZ to twelve or thirteen miles,90/ that the Commission would itself rule on the merits on the basis of the record before it on certification or after itself calling for further submissions.

It would serve the interest of all concerned to obtain an early ruling on the merits at the highest levels of the agency. Even though the Licensing Board felt that Intervenors should have a chance to develop their theses in support of inclusion of a portion of Charlotte in the plume EPZ, the only course which was open to the Licensing Board is certification under 10 C.F.R. §2.758, after reviewing a petition and affidavit and the replies thereto (or some proxy for such), and after making the determination of a prima facie showing of "special circumstances" based on such submissions or some other proper basis. In view of the time-consuming nature of that process, Applicants request immediate resolution of this issue by the Appeal Board pursuant to directed certification, or by certification to the Commission.

IV. Conclusion

The Licensing Board's December 30th Order should be reversed, for it allows litigation of an extended plume EPZ in contravention of 10 C.F.R. §50.47(c)(2) without following the mandatory procedures of 10 C.F.R. §2.758. The Licensing Board's admission of Contention 11 "like any other valid contention, not pursuant to a waiver under" §2.75891/ implies that about seventeen miles qualifies as "about 10 miles." This ruling is

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90/ See December 30th Order at 3.

unprecedented, raising novel questions of law and policy regarding significant departures from the regulations and compliance with 10 C.F.R. §2.758, which warrant reversal by the Appeal Board upon directed certification pursuant to 10 C.F.R. §§2.718(1) and 2.785(b)(1). Thus, the contention should be rejected. The Licensing Board should be precluded from extending the plume EPZ to an unprecedented boundary line of over seventeen miles from the plant. In view of the generic nature of the matter, or if the Appeal Board would be inclined to remand for application of 10 C.F.R. §2.758 procedures but for the advanced stage of the proceeding, the proper and most expeditious course is to certify the matter to the Commission.

This basic fact, the size of the plume EPZ, needs to be finally determined prior to this Board's resolution of the

emergency planning issues. Otherwise, this cloud of uncertainty will hang over the entire emergency planning phase of this proceeding.

Respectfully submitted,

J. Michael McGarry, III
Joseph B. Knotts, Jr.
BISHOP, LIBERMAN, COOK, PURCELL
& REYNOLDS
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9800

Albert V. Carr, Jr.
Ronald L. Gibson
Ronald V. Shearin
DUKE POWER COMPANY
Post Office Box 33189
Charlotte, North Carolina 28242
(704) 373-2570

Counsel for Duke Power
Company, et al.

January 12, 1984

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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
	)	50-414
(Catawba Nuclear Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Petition Of Duke Power Company, et al., For Directed Certification Of December 30, 1983 Licensing Board Ruling Denying Applicants' Motion To Reconsider Order Revising And Admitting Emergency Planning Contention 11" in the above captioned matter has been served upon the following by deposit in the United States mail this 12th day of January, 1984.

Alan S. Rosenthal
Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas S. Moore
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Howard A. Wilber
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James L. Kelley
Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Paul W. Purdom
235 Columbia Drive
Decatur, Georgia 30030

Dr. Richard F. Foster
P.O. Box 4263
Sunriver, Oregon 97702

Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

George E. Johnson, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Albert V. Carr, Jr., Esq.
Duke Power Company
P.O. Box 33189
Charlotte, North Carolina 28242

Richard P. Wilson, Esq.
Assistant Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Robert Guild, Esq.
Attorney-at-Law
P.O. Box 12097
Charleston, South Carolina 29412

Palmetto Alliance
2135 1/2 Devine Street
Columbia, South Carolina 29205

Jesse L. Riley
854 Henley Place
Charlotte, North Carolina 28207

Karen E. Long, Esq.
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

Don R. Willard
Mecklenburg County
Department of Environmental
Health
1200 Blythe Boulevard
Charlotte, North Carolina 28203

*Scott Sticky
Docketing and Service Section
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

John Clewett, Esq.
236 Tenth Street, S.E.
Washington, D.C. 20003

J. Michael McGarry, III

*Designates those hand delivered.