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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

DOCKETED
MAR 26 1984
DOCKETING &
SERVICE BRANCH
SEC. 188C

In the Matter of)	
)	
DUKE POWER COMPANY, <u>et al.</u>)	Docket Nos. 50-413
)	50-414
(Catawba Nuclear Station,)	
Units 1 and 2))	

APPLICANTS' RESPONSE TO QUESTIONS
PCSED BY APPEAL BOARD

I. BACKGROUND

On February 23, 1984, the Atomic Safety and Licensing Board ("Licensing Board") in this proceeding issued a memorandum and order in which it referred to the Atomic Safety and Licensing Appeal Board ("Appeal Board") its rulings declining to admit two parts of a three-part late-filed contention on diesel generators.^{1/} Upon

^{1/} "Memorandum and Order (Referring Certain Diesel Generator Issues to the Appeal Board)," February 23, 1984 (February 23, 1984 Licensing Board Order). In this order, the Board paraphrased Intervenors' contention as follows:

The Applicants have not demonstrated a reasonable assurance that the TDI emergency diesel generators at the Catawba Nuclear Station can perform their safety function in service because of:

- (1) inadequate design of the crankshafts;
- (2) deficiencies in quality assurance at TDI;
- (3) operating performance history of TDI generators at other nuclear facilities. [Id. at p. 4]

(footnote continued)

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receipt of this referral, the Appeal Board issued an order requesting the views of the parties to this proceeding as to (1) whether the referral should be accepted and (2) assuming that the referral were accepted, how the Appeal Board should decide the issues posed. (see February 23, 1984 Appeal Board Order, at p. 1). In answering the second question, the parties were instructed by the Appeal Board to address the Licensing Board's conditional request for guidance as to whether low power license activities might be authorized prior to adjudicatory resolution of the diesel generator issues (Id. at p. 2).^{2/}

In a subsequent order extending until March 23, 1984 the deadline for submittal of views, the Appeal Board further instructed the parties to consider, in their discussion of the merits of the issues posed by the referral request, the Licensing Board's February 27, 1984 order admitting a Board contention relating to certain site-specific diesel generators. (See March 1, 1984 Appeal Board Order, at p. 1).

(footnote continued from previous page)

The Board admitted section (1) of the contention and rejected sections (2) and (3). Additional factual background relating to the Board's rulings is set forth in the order.

^{2/} The Licensing Board, in discussing low power license activities, referenced fuel loading and testing without criticality. February 23, 1984 Licensing Board Order, at p. 8. Applicants view low power license activities as encompassing up to 5% power level operation.

The response of Duke Power Company, et al. ("Applicants") to the questions of the Appeal Board is set forth below.

II. APPLICANTS' RESPONSE

A. The Board's referral request should not be accepted by the Appeal Board

The instant referral request constitutes an interlocutory appeal of a Licensing Board ruling. It is well established that the Appeal Board is empowered to decline the acceptance of such a referral. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 464 (1982); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-405, 5 NRC 1190, 1191 (1977) and cases cited therein. It is equally well established that interlocutory appeals pursuant to 10 C.F.R. §2.730(f) or §2.718(i) are not favored in Commission practice any more than in judicial practice, and are granted only in exceptional circumstances. Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-634, 13 NRC 96, 99 (1981). The Appeal Board has stressed repeatedly that such appeals must satisfy a stringent legal standard in order to be considered:

Whether review should be undertaken on 'certification' or by referral before the end of the case turns on whether a failure to address the issue would seriously harm the public interest, result in unusual delay or expense, or affect the basic structure of the proceeding in some pervasive or unusual manner. [Catawba, ALAB-687, 16 NRC at 464, citing Midland,

ALAB-634, 13 NRC at 99 (1981)].^{3/}

Applying this test to the rulings in question, Applicants submit that the Appeal Board's interlocutory review standard is not satisfied, and, therefore, that referral is not warranted.

With respect to the first factor, it is clear that a decision by the Appeal Board not to accept the referred rulings would not "seriously harm the public interest." The matter in question can appropriately be reviewed by the normal appellate process. If, during such review, the Licensing Board's decision is found to be in error (which we do not believe to be the case), this Appeal Board can rectify such error by ordering a reopening of the issue.

The fact that the Licensing Board limited Intervenor's contention should in no way be viewed as a failure to consider the public interest. On the contrary, the Board's awareness of the need to protect that interest

^{3/} A slight variation of this standard is that set forth in Marble Hill, ALAB-405, 5 NRC at 1192 (1977):

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 (footnote omitted).

The first part of the Marble Hill test is embraced by the first two parts of the Catawba standard; the second part of the Marble Hill test is identical to the third part of the Catawba test.

by allowing the adjudication of properly formulated contentions has been apparent throughout this proceeding. That awareness is equally apparent in these most recent rulings wherein the Board admitted the site-specific aspect of this contention. The Board struck the remaining issues because it determined that their inclusion in Intervenor's contention would not reasonably be expected to assist in the development of a sound record (see February 23 Licensing Board Order, at p. 6), and because their adjudication would broaden the contention and, in all likelihood, create additional delay in the proceeding. Protection of the public interest underlies both of these factors. The public interest requires that the administrative process be conducted in an efficient and expeditious manner. Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983); Commission Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981). The Board's rulings will further that goal, while at the same time producing a full record and a fair decision which will protect the public health and safety.

With respect to the second factor, Applicants submit that a refusal by the Appeal Board to accept the referred ruling will not result in the kind of "unusual delay or expense" that would warrant interlocutory review. On this point, we respectfully disagree with the Licensing Board's

conclusion that immediate review by the Appeal Board is justified because of the "usual delay and expense for the Applicants" which might result if the Board's rulings are reversed. (See February 23 Order, at p. 8). The Board suggests, correctly, that if its rulings are ultimately reversed, there could be a delay in the of operation of Catawba while the two diesel generator issues which it excluded from Intervenor's late-filed contention are resolved. Applicants appreciate this fact. However, we believe that the Licensing Board's rulings, which were reached on the basis of careful consideration and an informed view of relevant factors, are well within its discretion, and that these rulings should not be disturbed on appeal.^{4/}

^{4/} Given the current schedule for start-up of Catawba, Applicants maintain that the adjudicatory resolution of these excluded issues (viz., the adequacy of TDI's QA program and the performance history of TDI generators at other nuclear facilities) would probably result in delay and expense in this proceeding regardless of when such litigation were undertaken. As we argue below (pp. 17-19), such delay and expense are appropriately considered by licensing boards in balancing the 5 factors set forth in 10 C.F.R. §2.714(a) for the admission of late filed contentions. Indeed, in making the instant rulings, the Board found the delay factor to be compelling. (See February 23, 1984 Licensing Board Order, at p. 6). However, Applicants further submit that for purposes of gauging the appropriateness of interlocutory review, the potential for such delay in the proceeding is not considered sufficient to warrant an immediate appeal.

Applicants further note that while the possibility of eventual reversal on appeal exists, this consideration in itself is insufficient to warrant referral. This Appeal Board has stated (in denying directed certification of a ruling which declined to order the NRC Staff to prepare an FES supplement):

. . . it has not been satisfactorily explained why appellate scrutiny of the ruling cannot abide the event of the initial decision and (if dissatisfied with the result reached in that decision)[the intervenor's] appeal from it. To be sure, if the ruling were found erroneous on such an appeal, the consequence might well be a vacation of the initial decision and a remand to the Board below. But the same possibility exists with respect to all interlocutory determinations made by licensing boards on matters which have a potential bearing upon the outcome of the proceeding. If, standing alone, that consideration were enough to justify interlocutory review, it would perforce follow that virtually every significant licensing board ruling during the course of a proceeding would be a fit candidate for immediate appellate examination. It is scarcely necessary to expound at any length why a drastic alteration of existing practice to accommodate that thesis would be intolerable -- as well as in derogation of the Commission's explicit policy disfavoring interlocutory review. 10 CFR 2.730(f). [Houston Lighting & Power Company (Allen's Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310-11 (1981)].

As to the third criterion set forth in the Catawba test for interlocutory review, Applicants submit that a refusal by the Appeal Board to address this motion will not "affect the basic structure of the proceeding in a pervasive or unusual manner." The Board's decision involves a single contention which focuses only on TDI

emergency diesel generators. Certain aspects of the contention were admitted by the Board and will be adjudicated in this proceeding. The fact that certain general allegations relating to the generators will not be litigated will not alter the structure of this licensing proceeding significantly. In ruling on requests for interlocutory review of rulings involving the admissibility of contentions, the Appeal Board has recognized:

Nor is there much latitude for a serious claim that the acceptance of a particular contention will have a pervasive effect on the basic structure of the proceeding. To the contrary, it is difficult to see how such a step -- no matter how improvident it might be -- could affect that structure in any material way. [Catawba, ALAB-687, 16 NRC at 464-65].

Applicants submit that this argument should apply with equal force to rulings involving the partial rejection of contentions.

Even the fact that the Appeal Board may not concur completely with the Board's rulings does not indicate that the rulings will affect the structure of the proceeding. Licensing boards have broad discretion in ruling on the admissibility of late-filed contentions;^{5/} and the Appeal Board has stated that "a licensing board may well be in error but, unless it is shown that the error fundamentally alters the very shape of the ongoing adjudication,

^{5/} Nuclear Fuel Services, Inc., et al. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975).

appellate review must await the issuance of a 'final' licensing board decision." Cleveland Electric Illuminating Co., et al., (Perry Nuclear Power Plant, Units 1 & 2), ALAB-675, 15 NRC 1105, 1113 (1982).

The Commission's Statement of Policy on Conduct of Licensing Proceedings exhorts licensing boards to refer or certify "significant legal or policy questions . . . on which Commission guidance is needed." CLI-81-8, 13 NRC at 456 (1981). The rulings in question do not involve significant questions of law or of policy. Rather, they involve only the rejection of part of a contention. Indeed, this Appeal Board has stressed repeatedly its "general policy disfavoring interlocutory review of licensing board action on specific contentions,"^{6/} explaining:

[t]his Board has not the duty, the resources or the inclination to commence a general practice of arbitrating at the threshold disputes over what are cognizable contentions - either under Section 2.718(i) procedures or otherwise. [Offshore Power Systems (Floating Nuclear Power Plants), ALAB-517, 9 NRC 8, 11 (1979), citing Project Management Corp. (Clinch River Breeder Reactor), ALAB-326, 3 NRC 406, 407, rev'd. on other grounds, CLI-76-13, 4 NRC 67 (1976)].

In sum, the requested referral fails to meet the standard established by this Appeal Board for interlocutory review. Applicants accordingly urge that the referral be denied.

^{6/} Catawba, ALAB-687, 16 NRC at 465 (1982).

- B. If the referral is accepted, the
Licensing Board's ruling should be
affirmed on the merits

Should the Appeal Board decide to accept the referral of exclusion rulings set forth in the February 23 Licensing Board order, Applicants submit that the rulings should be affirmed. In weighing the factors of 10 C.F.R. §2.714(a)(1) and determining that only the aspect of Intervenor's proposed diesel generator contention dealing with crankshaft design should be admitted, the Board was clearly well within its discretion.

The Licensing Board has broad discretion in balancing the five factors set forth in 10 C.F.R. §2.714(a).^{7/} See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC at ___, slip op. at 14 (Sept. 29, 1983). These factors are applied not only to rule on late intervention petitions, but also to determine the admissibility of late-filed contentions, as explained

^{7/} Section 2.714(a)(1) lists these factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. §2.714(a)(1).

by the Commission in Catawba, CLI-83-19, 17 NRC 1041, 1047 (1983); see also Statement of Considerations for §2.714, 43 Fed. Reg. 17,798 (April 26, 1978). The Licensing Board, being most familiar with the issues, the record, and the parties in this proceeding, is in the best position to weigh and balance these five factors to determine the admissibility of a late-filed contention. The Appeal Board has observed: "it is quite apparent that neither this Board nor the Commission has been readily disposed to substitute its judgment for that of the Licensing Board insofar as the outcome of the balancing of the Section 2.714(a) factors is concerned." Shoreham, ALAB-743, 18 NRC at ___, slip op. at 14 (footnote omitted). A review of the Licensing Board's careful evaluation of the five factors as applied to the facts of this case makes clear that its decision to admit only the crankshaft design issue in the Intervenor's proposed contention was not an abuse of its discretion.

a. Factor One - Good Cause

The Licensing Board properly found that the first factor, "[g]ood cause, if any, for failure to file on time," had been satisfied by the Intervenor. 10 C.F.R. §2.714(a)(1)(i); February 23 Licensing Board Order, at p. 5. The Licensing Board's ruling on the first factor must be considered in light of the Commission's 1983 Catawba decision, CLI-83-19, on the relative weight to be given to

the five factors when evaluating the admissibility of late-filed contentions. The Commission explained that factor one, good cause for late filing, is not controlling, but must be weighed together with all five factors. Id., 17 NRC at 1045-47. Appropriately, this is what the Licensing Board has done to reach its decision to admit that part of Intervenor's diesel generator contention dealing with crankshaft design, but reject the last two portions dealing with TDI's QA program and the operating performance of the TDI generators at all nuclear facilities.

b. Factors Two and Four -
Other Means and Other Parties

The Licensing Board found factors two and four, the availability of other means to protect the intervenor's interest, and the extent to which the intervenor's interest will be represented by existing parties, respectively, also to weigh in favor of granting admission of the diesel generator contention, citing Washington Public Power Supply System, (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC _____, slip op. (Nov. 15, 1983). Applicants note that factors two and four have been described as generally carrying less weight than the other factors. See, e.g., Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1767 (1982).

c. Factor Three - Developing
a Sound Record

Factor three, the extent to which the Intervenor's participation may assist in developing a sound record, was properly given significant weight by the Licensing Board. See 10 C.F.R. §2.714(a)(1)(iii); February 23, 1984 Licensing Board Order, at p. 6; Tr. 12,549, Kelley 2/17/84. The Licensing Board correctly found this factor to weigh against admitting the last two portions of the diesel generator contention:

[W]e [the Licensing Board] have more confidence in [the Intervenor's] ability to come up with experts and make a case on a narrow issue like crankshaft design than we do in operational experience and QA. We are not in any sense criticizing [the Intervenor's] performance in the case; we've heard it at such great length.

What I am saying is, this looks like an area that requires a lot of expertise; and we are not certain that [the Intervenor] could come up with it--come up with enough expertise to satisfy criterion-three.

Tr. 12,549, Kelley 2/17/84.

The Licensing Board admitted the first part of the Intervenor's diesel generator contention, i.e., crankshaft design, on the condition that the Intervenor file with the Board and parties by April 2 the names of their expert witnesses, a statement of their qualifications, and a summary of their proposed testimony. Tr. 12,548, Kelley 2/17/84; February 23 Licensing Board Order, at p. 6. This

ruling was based on, and is consistent with, the Appeal Board's decision in WPPSS Nuclear Project No. 3, ALAB-747, 18 NRC ____, slip op. at 18.

A brief examination of the record to date in this proceeding makes clear that the Licensing Board did not abuse its discretion by finding that factor three weighs against admitting those aspects of the diesel generator contention which involved the TDI QA program and the operating history of TDI diesel generators at other facilities. As noted in the previously quoted language (p. 13), the Licensing Board lacked confidence that the Intervenor would be able to produce appropriate expert witnesses so as to assist in the development of a sound record on the last two parts of the diesel generator contention, as required by factor three. Tr. 12,549, Kelley 2/17/84. Applicants submit that this concern on the part of the Board was well-founded.

The Intervenor's prior performance on other technical issues clearly supports the Licensing Board's determination that factor three weighs against admitting the last two parts of the diesel generator contention, i.e., the TDI QA program and the operating history of TDI generators at all nuclear facilities. Applicants note that on Contention 16, which involved the Catawba spent fuel pool, the Intervenor presented no witnesses, conducted no substantive cross-examination of the

Applicants' and NRC Staff's witnesses, and filed no proposed findings of fact. In short, Intervenor made virtually no contribution to the record on this contention.

On the issue of reactor vessel embrittlement raised in Contention 18/44, the Intervenor's only expert witness was Mr. Jesse L. Riley, who is also the authorized representative in this proceeding of the Intervenor Carolina Environmental Study Group. The Board found Mr. Riley's lack of relevant training and experience in metallurgy to disfavor his being allowed to testify on this metallurgical issue, but decided that this lack of traditional qualifications went to the weight rather than that to the admissibility of Mr. Riley's expert testimony. Tr. 11,122, Kelley 12/12/83.

A third contention raising technical issues was DES 17, which challenged the NRC Staff's environmental assessment of the consequences of a severe accident at Catawba. Intervenor alleged that the Final Environmental Statement was fatally flawed because it did not take sufficient account of conditions of adverse meteorology. The Intervenor did present an expert witness on this issue, Mr. John Purvis, the State Climatologist for the Water Resources Commission of South Carolina (PA Exh. 133, Purvis, Attachment 1). However, Mr. Purvis could not comment on the Staff's analysis of extreme weather

conditions, which the Licensing Board recognized to be the focus of the contention. Tr. 11,661-62, Foster and Purvis 12/14/83.

A final technical issue involved in the hearings to date, first raised during an in camera session but ultimately resolved during a public session, was the presence of laminations in the rolled steel plate used at Catawba. See In Camera (IC) Tr. 487, Tr. 11,951 et seq., Kelley 12/8/83. The Intervenor proffered an expert witness on this issue, Mr. Elmo Earl Kent. Tr. 11,935, Guild 1/30/84. The Licensing Board allowed Mr. Kent to participate as an expert questioner under 10 C.F.R. §2.733, provided that he read the relevant prefiled testimony first, which he did only minutes before conducting his examination. Tr. 11,945-46, Kelley 1/30/84. However, the Licensing Board subsequently rejected the proffer of Mr. Kent as an expert witness, ruling that the proffer was untimely and that Mr. Kent, a former welder and welding inspector at various other facilities, lacked the necessary relevant expertise by education or experience in metallurgy or structural engineering. Tr. 12,263-65, Kelley and Purdom 1/31/84.

In sum, the Licensing Board's experience with the quality of Intervenor's participation on technical issues and the ability of Intervenor's expert witnesses to address such issues, supports a finding that the Licensing

Board clearly did not abuse its discretion in ruling that factor three (the ability to contribute to the development of a sound record) weighed against admitting the last two parts of Intervenor's proposed diesel generator contention.

d. Factor Five-Delay

The Licensing Board properly found the fifth factor, the extent to which the diesel generator contention will broaden the issues or delay the proceeding, to weigh very heavily against admission of the last two parts of the contention. See 10 C.F.R. §2.714(a)(1)(v). The Board stated:

Considering the pace of the Staff's investigation (Tr. 12,523-12,526), we see no practical prospect that [the last two parts of the proposed contention, dealing with the TDI quality assurance program and the operating history of TDI generators at other facilities] could be litigated and adjudicated in the next few months. The Applicants expect to be ready to load fuel in early May and this Board expects to decide the safety and environmental issues (possibly paving the way for a low-power license) in late May.

(February 23, 1984 Licensing Board Order, at p. 6).

The Board explained its rationale more completely in a telephone conference call:

[I]t seems to us that [the last two parts of the proposed diesel generator contention] portend a very substantial delay in the whole case, particularly the QA [part of the] contention. We don't see how in the world we can try a QA case on Trans-America-[sic]Delaval in a short time frame. So we think factor-[sic]five is very heavily against our taking this matter up.

Tr. 12,549, Kelley 2/17/84. The Licensing Board admitted the first part of Intervenor's proposed diesel generator contention, concerning the crankshaft design, subject to an accelerated discovery schedule and the previously mentioned further demonstration of Intervenor's ability to contribute to the development of a sound record. February 23, 1984 Licensing Board Order, at p. 6. As demonstrated below, this was not an abuse of the Licensing Board's discretion.

The fifth factor, delay to the proceeding, has particular significance at the later stages of a proceeding. As the Appeal Board explained in Greenwood in ruling on a late intervention petition:

We have previously stressed the significance which attaches to the delay factor in striking a balance on all. . .[factors]. [See Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2), ALAB-292, 2 NRC 631, 650-51 (1975); Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 394-95 (1976).] Manifestly, the later the petition, the greater the potential that the petitioner's participation will drag out the proceeding.

Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 762 (1978) (footnote included in brackets).

As the Licensing Board in this proceeding recognized, the delay factor is similarly determinative here. See February 23 Licensing Board Order, at p. 6. Under the Licensing Board's accelerated discovery schedule, the

admitted crankshaft-design portion of the proposed contention can be dealt with without significantly delaying the operation of Catawba. But the remaining two issues, involving TDI's Quality Assurance program and the operating experience of other facilities with TDI generators, could not be litigated in the next few months, particularly in light of the pace of the NRC Staff's generic investigation. Id. Thus the Board did not abuse its discretion in finding the delay factor to weigh heavily against the admission of the two rejected parts of the proposed diesel generator contention.

e. Balancing the Five Factors

In admitting only the first part of the proposed diesel generator contention, the Licensing Board was clearly within its discretion. The Licensing Board properly considered and balanced all five of the relevant factors based on its knowledge of the issues, the record, and the parties to this proceeding.^{8/} Applicants accordingly submit that the February 23 Licensing Board Order should be affirmed on the merits.^{9/}

^{8/} A showing of good cause for admission of a late-filed contention does not preclude rejection of a contention (or, as here, a partial rejection) where assessment of the other factors weighs against admissibility. See West Valley, CLI-75-4, 1 NRC at 275.

^{9/} In rejecting the latter two issues raised by Intervenor's proposed contention, the Board noted that it was also influenced by the fact that TDI QA and the operational performance issue were "generic in the sense that [they] may potentially effect [sic] some
(footnote continued)

- C. Resolution of the issues excluded by the Licensing Board should not be a prerequisite for issuance of an interim low-power license for Catawba

In its February 23, 1984 order referring the rulings in question, the Licensing Board requested guidance from the Appeal Board on whether fuel loading, testing without criticality and issuance of a temporary low-power license

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fifteen different facilities." February 23, 1984
Licensing Board Order, at p. 7. The Board went on to suggest that

consideration should be given to some procedural mechanism whereby these generic issues could be litigated in a single proceeding, by a lead-case approach, a special proceeding with multi-party participation, or possibly some other vehicle.

Id. Applicants wish to make the following points with respect to this suggestion.

First, Applicants submit that if such an approach to these questions is selected, this proceeding should not be used as the "lead case." As noted by the Licensing Board, and as discussed in connection with "factor three" of 10 C.F.R. §2.714(a)(1)(iii), supra, the Intervenor in this proceeding are not likely to contribute to the development of a sound record on these complex technical issues. See February 23, 1984 Licensing Board Order, at p. 6; Tr. 12,549, Kelley 2/17/84.

Furthermore, the excluded issues are already the subject of an extensive investigation by the NRC Staff and industry. See Board Notification Nos. 84-013, 84-018, and 84-021. See also SECY-84-34, January 25, 1984. Such notifications and/or SECY paper outline in detail the extensive program undertaken by industry under the auspices of the TDI owner's group to verify the adequacy of the TDI diesels. Applicants are deeply involved in these activities.

(footnote continued)

(which Applicants maintain embraces up to 5% power level operation) could be authorized prior to adjudicatory resolution of those issues it had excluded:

it would be helpful for us to know whether a Staff certification that the Catawba diesel generators are safe and reliable could provide a sufficient interim basis for a low-power license for Catawba, assuming that the case has been otherwise adjudicated on the record favorably to the Applicants. We recognize, of course, that Staff certifications are not, generally speaking, an adequate permanent substitute for adjudication of contested safety issues. See Consolidated Edison Company (Indian Point Station), 7 AEC 947, 951-952 (1974). However, it occurs to us that a Staff certification approach might provide an interim basis for licensing in this situation, pending adjudicatory resolution of the TDI generator issues. (Id. at p. 8).

In response to the Appeal Board's direction, Applicants herein express their views on this question.

In addressing this question, Applicants would first note that the Licensing Board's February 23, 1984 order misstates the positions taken by Applicants and the NRC Staff on the question of whether "the presence of

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However, recognizing that their licensing needs precede the above described ongoing efforts, Applicants have undertaken their own program (independent of both the NRC's investigation and that of the TDI Owners' Group) to verify the reliability of Catawba's TDI diesel generators. (A synopsis of Applicants' plan to resolve questions about its diesel generators is included as Appendix A to this pleading). We believe that the showing that Applicants will make will provide both the NRC Staff and the Licensing Board in this proceeding with sufficient evidence that Catawba's TDI generators will function properly and that their use will not compromise public health and safety.

unresolved safety issues in this case concerning the diesel generators probably would preclude issuance of a low-power license." (Id., at p. 7). The Board states on p. 7 of its order that the Applicants and the Staff agreed with this proposition. However, a review of relevant portions of the March 14, 1984 conference call transcript makes clear that this is not the case.^{10/} On the contrary, counsel for Applicants stated therein (Tr. 12,596) that "[Applicants] do not feel that the diesel generator matter need be resolved to commit us to [load] fuel and operate up to 5 percent power level." (See also Tr. 12,597-599). Moreover, when asked for his views on whether Applicants "could be licensed to low power of 5 percent while unresolved issues still exist," counsel for the NRC responded that this was "a possibility." (Tr. 12,604). Counsel for the Staff then went on to suggest a method by which Applicants might seek a low-power license under such circumstances:

MR. JOHNSON: Yes, it's a possibility. It seems to me that [Applicants] can come in with a motion or with a request to the Staff for a finding that notwithstanding applicable unresolved safety questions, that the plant is still safe for certain operations up to 5 percent, or what-have-you, to fuel load, or zero power.

I'm not saying what the Staff's determination would be.

^{10/} The relevant transcript pages from this March 14 conference call are attached to this document as Appendix B.

(See also Tr. 12,604-605). Neither the Applicants nor the Staff, therefore, take the position that the presence of unresolved safety issues in this case would necessarily preclude the issuance of a low-power license.

Applicants maintain that they are entitled to make a showing pursuant to 10 C.F.R. §50.57(c) that a low-power license should be granted. Under section 50.57(c) of the regulations, licensing boards determine on a case-by-case basis whether or not to grant an applicant's motion for the issuance of a low-power license. Applicants submit that there is nothing in the Commission's regulations to bar a licensing board's acting under this section while certain questions which may be relevant to the facility in question (but which have not been shown to affect the facility at low-power levels) are being resolved. Rather, the determinative factor should simply be whether Applicants can convince this Board that the public health and safety will be protected at such low-power levels.

Given our position that the issuance of a low-power license for Catawba need not hinge upon the ultimate resolution of the diesel generator issues, Applicants support the Board's suggestion that a Staff certification of diesel generator reliability could provide the basis for the issuance of an interim low-power license. (See the Licensing Board's February 23, 1984 Order, at p. 8). In addition, we believe that a satisfactory showing by

Applicants would in itself be sufficient to support the issuance of a low-power license. There is precedent for issuing such licenses while the resolution of certain issues is pending.^{11/} Moreover, counsel for the NRC has indicated that the Staff would consider such an approach in this proceeding (see Mr. Johnson's remarks quoted at pp. 22, supra).

Counsel for the NRC Staff has further pointed out that such an approach to resolving Applicants' need for a low-power license in the near future is not necessarily inconsistent with statements made by NRC officials^{12/} suggesting that no more operating licenses would be issued until these issues are addressed. (Tr. 12,604-05). In this regard, Applicants note that the Commission is of course not bound by the statements or recommendations of the regulatory staff. See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), CLI-75-9, 2 NRC 180, 183 (1975) (regulatory staff opposed granting exemption to ECCS Final Acceptance Criteria).

^{11/} See Duke Power Co. (McGuire Nuclear Station, Units 1 and 2), ALAB-626, 13 NRC 17, 19 (1981).

^{12/} In SECY-84-34, issued January 25, 1984, NRC Executive Director for Operations William J. Dircks stated:

The staff believes that before additional licensing action is taken to authorize the operation of a nuclear power plant with TDI engines, these issues, relating to quality assurance, operating experience, and the ability of the machines to reliably perform their intended function, must be addressed.

- D. Admission of a site-specific Board contention on the Catawba diesel generators should not affect the Appeal Board's consideration of the pending referral request

In its March 1, 1984 Order, the Appeal Board directed the parties to consider in their responses to the questions posed the fact that the Licensing Board has now admitted its own diesel generator contention in addition to part of Intervenor's contention. The Board's contention reads as follows:

Whether there is a reasonable assurance that the TDI emergency diesel generators at the Catawba Station can perform their function and provide reliable service because of the problems reported in the Applicants' letter to the Board of February 17, 1984. (February 27, 1984 Licensing Board Order, at p. 2).

This contention was admitted as a result of site-specific incidents involving failures of components on the Catawba diesel generator during test runs.^{13/} The problems observed included a cracked cylinder head, welding flaws, inadequate turbocharger lubrication and a cracked fuel oil injection pump nozzle.

The Board took into account the site-specific nature of these problems in deciding to admit the contention:

The contention we now admit is site-specific in the sense that it focuses on problems that have actually been experienced at the Catawba facility. Indeed it is because of its site-specific

^{13/} Applicants note that since their letter of February 17, 1984, additional incidents have occurred. These will be set forth in a letter to be submitted to the Board and parties within the next several days.

aspect that we felt obliged to raise this issue on our own motion, even at this late date. (Id., p. 3).

It is clear that the Board's diesel generator contention is a narrow one. As discussed above (pp. 19-21, fn. 9), Applicants are responding to these problems and will demonstrate to the Board that the Catawba diesel generators will perform satisfactorily. In particular, Applicants intend to perform their own reliability test and inspection program to verify that the Catawba diesel generators will perform their emergency function. See Appendix A.

Applicants view the relevant inquiry concerning the Board contention to be what impact such contention has on the previous Licensing Board ruling excluding TDI diesel generator quality assurance and operational history issues from the proceeding. In this regard, focus is on the delay that would be occasioned. Applicants maintain that in view of the fact that this Board contention narrowly focuses on certain specific diesel generator problems at Catawba and the fact that Applicants have already responded to the Board's concerns by undertaking a program to demonstrate the reliability of the Catawba diesel generators, no appreciable delay in the proceeding is anticipated. Accordingly, Applicants take the position

that the admission of this Board contention should not affect this Appeal Board's consideration of the pending referral request.

IV. CONCLUSION

Based upon the foregoing, Applicants submit that the instant referral request fails to satisfy the three-part test for interlocutory review established by this Appeal Board. Accordingly, the referral should be denied. In the event that the referral is accepted, Applicants urge the Appeal Board to affirm the Licensing Board's rulings in their entirety as a proper exercise of discretion by the Licensing Board.

Respectfully submitted,

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March 23, 1984

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 "Applicants' Response to Questions Posed by Appeal Board" in the above captioned matter have been served upon the following by deposit in the United States mail this 23rd day of March, 1984.

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DUKE POWER COMPANY CATAWBA NUCLEAR STATION

Transamerica Delaval

Diesel Generator

Reliability Verification Program

RELIABILITY VERIFICATION PROGRAM

OBJECTIVE

DEMONSTRATE THAT

- **D/G's can reliably perform their
intended safety function**
- **No technical reasons for not licensing**

RELIABILITY VERIFICATION PROGRAM SCOPE

- **Owners Group Participation**
- **Satisfy Regulatory Requirements**
- **Extended Operation Test And
Inspection Program**

EXTENDED OPERATION TEST AND INSPECTION PROGRAM

METHODOLOGY

- **Shake Down Engines**
- **Accumulate 10⁷ Stress Cycles**
- **Verify Previous Modifications**
- **Demonstrate Reliability**
- **Expand Data Base**

OPERATION

SCOPE

D/G 1A-1B

- **Operate 750 Hours**
- **Demonstrate Continuous Run Reliability**
- **Document Operating Experience**

INSPECTION

SCOPE

1A

- **Extensive Disassembly**
- **Extensive Examination**
- **Correct Found Deficiencies**
- **Install Recommended Modifications**

1B

- **Disassembly Based on Need**
- **Inspect Based on Experience From Other Inspections**
- **Correct Found Deficiencies**
- **Install Recommended Modifications**

INSPECTION

SELECTION CRITERIA

COMPONENT <u>TYPE</u>	<u>NUMBER</u>	OPERABILITY <u>IMPACT</u>
A	79	Failure can result in engine shutdown
B	82	Failure can result in reduced capacity or eventual failure in <u>TYPE A</u> component
C	68	Failure has little bearing on operability
TOTAL	229	

MAJOR ITEM GROUPING FOR INSPECTION PURPOSE

TURBOCHARGER AND INTERCOOLER

- TURBOCHARGER
- AIR BUTTERFLY VALVE AND ACTUATOR
- TURBOCHARGER BRACKET BOLTING AND GASKET

MAIN BEARINGS AND CAPS, CYLINDER BLOCK, BEARING PEDESTALS, WATER JACKET, CRANKCASE ASSEMBLY AND COVERS, CRANKSHAFT

- MAIN BEARING CAP
- CRANKSHAFT BEARING SHELL
- CYLINDER BLOCK
- CYLINDER BLOCK JACKET WATER MANIFOLD AND PIPING
- CYLINDER BLOCK STUDS
- CYLINDER BLOCK JACKET WATER MANIFOLD NUTS
- CRANKCASE COVERS WITH GASKETS AND BOLTING
- CRANKCASE ASSEMBLY
- MAIN BEARING STUDS AND NUTS
- CRANKSHAFT AND TURNING GEAR

LUBE OIL SYSTEM PIPING AND LUBE OIL SUMP

- LUBE OIL INTERNAL HEADERS
- LUBE OIL TUBING AND FITTING
- LUBE OIL LINE SUPPORTS
- LUBE OIL SUMP TANK - FITTINGS, GASKETS, PIPE, BOLTING AND VALVES
- LUBE OIL SUMP TANK MOUNTING HARDWARE

PISTONS, CONNECTING RODS, CYLINDER LINERS, PISTON RINGS, PISTON PINS

- CYLINDER LINER
- CONNECTING RODS AND BUSHINGS
- CONNECTING ROD BEARING SHELLS
- PISTON RINGS
- PISTON PIN ASSEMBLY
- PISTONS

FLYWHEEL, GEARCASE, CAMSHAFTS AND ASSOCIATED GEARING, PUMP
GEARING

- FLYWHEEL BOLTING
- FRONT GEAR CASE
- CAMSHAFT ASSEMBLY
- IDLER GEAR ASSEMBLY FOR CRANK TO PUMP GEAR
- IDLER GEAR ASSEMBLY
- INTAKE TAPPETS
- FUEL TAPPETS

CYLINDER HEAD, AIRSTART VALVES AND DISTRIBUTION HEADER, INTAKE
AND EXHAUST VALVES AND ASSOCIATED SPRINGS AND HARDWARE, PUSHRODS,
ROCKER ARM ASSEMBLIES

- AIR START VALVE
- CYLINDER HEAD
- INTAKE AND EXHAUST VALVES
- VALVE SPRINGS
- CYLINDER BLOCK COVER AND ASSOCIATED GASKETS AND BOLTING
- ROCKER ARM ASSEMBLY
- EXHAUST ROCKER ARM ASSEMBLY
- PUSHRODS
- CONNECTOR PUSHROD
- ROCKER ARM BOLTING
- STARTING AIR DISTRIBUTOR ASSEMBLY
- SUBCOVER ASSEMBLY

FUEL PUMP

- FUEL PUMP, LINKAGE, BEARINGS, CONTROL SHAFT

INTAKE AND EXHAUST MANIFOLDS

- INTAKE MANIFOLDS
- EXHAUST MANIFOLD BOLTING

GOVERNOR AND OVERSPEED TRIPS

- GOVERNOR AND TACH DRIVE GEAR AND SHAFT
- GOVERNOR DRIVE COUPLING
- GOVERNOR OVERSPEED TRIP
- GOVERNOR OVERSPEED TRIP AND ACCESSORY DRIVE ASSEMBLY
- OVERSPEED TRIP COUPLINGS
- GOVERNOR LINKAGE
- GOVERNOR ASSEMBLY
- GOVERNOR HEAT EXCHANGER ASSEMBLY

JACKET WATER PUMP

- JACKET WATER PUMP

CONTROL PANEL WIRING AND ELECTRICAL SYSTEM

- CONTROL PANEL WIRING

INSPECTION TECHNIQUES

VISUAL

- Wear Patterns
- Surface Distress
- Cracks
- Freedom of Motion
- Foreign Material
- Correct Fit-up
- Corrosion/Erosion
- As-Built Verification
- Lubrication
- Gasket Leaks

NONDESTRUCTIVE EXAMINATION

- Liquid Penetrant
- Magnetic Particle
- Eddy Current
- Ultrasonic
- Radiography

MATERIAL PROPERTIES

- Material Comparison
- Hardness
- Material Verification

DIMENSIONAL

- Absolute Value for Critical Dimensions
- Comparative Values for Identical Parts
- Part Verification
- Clearances
- Mating Parts

As Found Torque Values For Bolting

Torsiograph

INSPECTION

TEAM

- **Duke Power**
- **Failure Analysis Associates**
- **Stone and Webster**
- **Dominion Engineering**
- **Gustafson Associates**
- **Owners Group**

INSPECTION

DOCUMENTATION/TRACEABILITY

- **Duke Power Administrative Procedures Manual**
- **Duke Power Quality Assurance Program**
- **Owners Group Representatives**

TRANSAMERICA DELAVAL

DIESEL GENERATOR

RELIABILITY VERIFICATION PROGRAM

Conclusion

DOCUMENTED ENGINE RELIABILITY

- **D/G's can reliably perform their intended safety function.**
- **No technical reasons for not licensing.**

1 the schedule -- on the ability of the parties to get
2 everything done?

3 MR. MC GARRY: I think that has a minimal impact.
4 At Catawba we informed the Board and parties of the incident.
5 The Intervenors can ask several discrete interrogatories
6 to obtain information. The information is limited. That
7 happened and the Intervenor, I imagine, wants to know the
8 facts associated with that event. We know what they are.
9 We will be prepared to answer those interrogatories and
10 we will be prepared to put on a case and to explain precisely
11 what happened and why that does not impact public health
12 and safety.

13 We don't think that is opening a tremendously
14 new can of worms. We think it is a discrete issue that
15 shouldn't impact the schedule.

16 MR. GUILD: Judge Kelley --

17 JUDGE KELLEY: Let me ask Mr. McGarry some
18 questions and then we will get back to you, Mr. Guild.

19 Mr. McGarry, what is at stake from your stand-
20 point? Suppose we did postpone these diesel matters for a
21 couple of months or so and didn't get around to cranking
22 out discovery again until June? Is it the fact that you
23 need a favorable decision from this Board, and before that,
24 that you wouldn't be able to go low power without resolution
25 of the diesel matter?

1 MR. MC GARRY: Yes, sir. There are several issues
2 here. Let me get the overall issue. The overall issue is
3 we want to get this case over and done with, and our
4 experience has been the longer that there are loose ends
5 and matters hanging about, the prospect remains that the
6 case will continue to drag on.

7 So, from a generic point of view, we would like
8 to come to grips with this issue as soon as possible and
9 move on.

10 Now to answer your specific question --

11 MR. JOHNSON: May I just interrupt one second,
12 Mike?

13 I have asked Jay McGurren to join us, if that's
14 okay with the Board and the parties.

15 MR. MC GARRY: We do not feel that the diesel
16 gnerator matter need be resolved to commit us to low fuel
17 and operate up to 5 percent power level.

18 With respect to power level above 5 percent, I am
19 not in a position today to tell you the impact. I am now
20 going to make a surmise which lawyers are loathe to do,
21 but for the sake of answering your question:

22 We might find out that above 5 percent power
23 levels that the diesel generators do have a bearing on
24 operation. Therefore, the present schedule calls for us to
25 need power in excess of 5 percent in mid-August. If this

1 Board were to delay the diesel generator matter for several
2 months and then pick up with discovery in several months,
3 we are now halfway through March and we are talking about
4 halfway through May before we pick up discovery, and then
5 under the current schedule that you have, it is roughly a
6 couple of months associated with discovery and with filing
7 of summary disposition and what-have-you.

8 That takes us to mid-July and we haven't got a
9 Board decision on summary disposition, and if it doesn't
10 go off on summary disposition, then we go with the hearing
11 and proposed findings and what-have-you.

12 So, in our view, what we are looking at, it's
13 going to take us to mid-fall, and therefore there is a real
14 prospect that the plant could be sitting in the water
15 while we are waiting for the resolution of this matter.

16 Now let me make another point on the diesel
17 generator matters.

18 Yes, there is a lot of matter flying back and
19 forth on diesel generators; not only from Duke Power
20 Company, but from other utilities. We, though, are
21 approaching this case separately and we recognized our
22 obligations to present a case to this Board that has
23 the substance to convince this Board that we can operate
24 with these diesel generators and public health and safety
25 will be protected.

1 We do not feel that we have to wait for the
2 generic resolution of the 14 other utilities including
3 Duke. We are preparing a case to come forward to you and
4 say, "Let's look at Duke Power Company. Let's look at what
5 we have done and we will satisfy you that these diesel
6 generators can be operated."

7 So I mention that point because it is my feeling
8 that the generic matter may be resolved in the future, but
9 should not hold up Duke Power Company's case.

10 MR. RILEY: Judge Kelley?

11 JUDGE KELLEY: Just a minute, Mr. Riley. I'll
12 get back to you.

13 Mr. McGarry, I just want to make sure I understand.
14 When you said you don't think resolving the diesel issue is a
15 precondition to 5 percent power --

16 MR. MC GARRY: Yes, sir.

17 JUDGE KELLEY: -- this is, I take it, a technical
18 judgment on your part, on Duke's part, that one could go to
19 5 percent without resolution of those issues?

20 MR. MC GARRY: That is correct. And we have
21 been asked by the Appeal Board to address that issue, which
22 we will on the 23rd of this month.

23 In addition, we are now contemplating filing a
24 motion with this Board asking for fuel load and 5 percent
25 power authority. In the event we do file such a motion in

1 the near term, we would accompany that motion with the
2 appropriate affidavits to demonstrate that the diesel
3 generator would not pose a problem at those levels.

4 JUDGE KELLEY: So it happens to be based on a
5 technical judgment?

6 MR. MC GARRY: Yes, your Honor.

7 JUDGE KELLEY: Isn't it possible, then, trying
8 to figure out what the scenarios are -- what this reminds me
9 of, before we got that rule on going to 5 percent without
10 resolving the offsite emergency planning questions, that
11 issue used to get resolved case by case. People had a mini-
12 hearing. If you came in and said you can go ahead without
13 resolving this issue and you had some affidavits, you'd
14 end up holding a mini-hearing on that, could you not?

15 MR. MC GARRY: Sometimes you do, yes. In our
16 experience with the McGuire case, where we filed such a
17 motion, hearings were not held and the Board made a
18 determination on the basis of the affidavits. But I am
19 familiar with other instances where you had a mini-hearing
20 in that regard. I underscore the word "mini," your Honor.

21 MR. JOHNSON: Your Honor, can I be heard?
22 We have been talking about the big picture, about an
23 overall extension of the diesel generator matter, and I think
24 you can understand why we are opposed to it. There had
25 been, I thought, an intermediate request for an extension

1 for one week of discovery, and the Board granted at least
2 ~~until~~ this day. I understand that that request is perhaps
3 subsumed by the question we have just discussed.

4 However, I did want to go on record as saying
5 that we are a little bit deprived in that request. We
6 talked to Mr. Guild, I did, on one or two occasions and Mr.
7 Knotts on several occasions last week and Mr. Carr, and
8 that request was not mentioned to us. And we just don't
9 think that -- we think we should have been informed of that.

10 We understand that parties come up against it
11 every once in a while and the Board has leeway and has
12 in the past extended it a day or two or sometimes a week,
13 but our feeling was that this Board set a good schedule
14 and we had a lot of experience in the past with discovery
15 and the Board has taken over and said, "Here's the way we are
16 going to handle it," and we think we ought to keep on that
17 schedule, absent good cause.

18 We would be opposed for an extension of time.

19 MR. GUILD: Let me address that point, your Honor.
20 That's just not right.

21 JUDGE KELLEY: Just a minute, Mr. Guild.

22 All right, Mr. McGarry, we are here today now,
23 and I have already said to Mr. Guild -- I granted an
24 extension from Monday to today, and I also said that today
25 would be some further extension without specifying what it

1 would be.

2 MR. GUILD: I just wanted to make our position
3 clear.

4 JUDGE KELLEY: We are sitting here this
5 afternoon and Mr. Guild has already asked for next Monday.
6 Do you object to that?

7 MR. MC GARRY: I think, given the circumstances,
8 we don't. But we want -- our feeling is strong that we
9 want discovery to proceed and to come as close to the
10 schedule the Board has already established.

11 JUDGE KELLEY: Let's go next to Mr. Johnson.

12 MR. MC GARRY: We also would anticipate, since
13 we filed our interrogatories on the date of March 12th,
14 that the responses of March 26th, that date still holds
15 firm to our interrogatories.

16 MR. JOHNSON: Our position is that the ruling
17 on the bifurcation motion has bearing on this matter, and
18 the Board has already determined that we can proceed on
19 both the emergency planning issues and the diesel generator
20 safety matters at the same time with two different Boards.

21 It seems to me that the motion here would negate
22 the benefits of proceeding with two Boards.

23 Secondly, it seems to me that with respect to
24 the possibility of delay due to the availability of
25 information, either from Duke or from the Staff, that might

1 be available to Palmetto, that that request for delay or
2 suspension or stay, what-have-you, is premature. We
3 haven't had any request for information yet. We haven't
4 had any discovery filed, and there really isn't any basis
5 for saying that information won't be forthcoming or can't
6 be forthcoming that Mr. Guild may request.

7 There is an awful lot of material that is on
8 the record already. Most, if not all of the material that
9 bears on this contention, is on the record.

10 Secondly, the contentions, as Mr. McGarry
11 mentioned, are narrow. The Board rejected the broader
12 issues. The generic issues. And we are not litigating
13 those generic issues at this point.

14 And so it seems as though --

15 JUDGE KELLEY: Mr. Johnson, though, I think in
16 general your -- on the Board issue, that includes several
17 different items being -- and I believe I have seen stronger
18 heads being cracked by issues at other facilities. We had
19 a feeling, without knowing in effect, really, that the
20 aspects of that sua sponte motion might have some generic
21 implications.

22 MR. JOHNSON: That is correct, sir. The fact
23 remains, though, that the contention that the Board admitted
24 on its own motion is not as broad as the larger generic
25 questions. There is some overlap between some of the

1 matters that were identified by Duke on the subject of that
2 contention and the broader generic review that's ongoing,
3 that is correct.

4 However, we haven't reached a point where there
5 is any need to suspend or stay consideration of these
6 matters.

7 Perhaps at some further point it might be shown
8 that we can intercede because information that has been
9 requested is unavailable. We are not at that stage yet,
10 and it remains to be seen whether the Applicants will come
11 in to the Staff and make a presentation about how to --
12 or how they have fixed the problems with the diesel
13 generators and what the Staff's response to those presentat-
14 tions is going to be. That could very well be developed in
15 the next month or so.

16 I'm not prepared to say definitively one way or
17 the other, because we haven't received at this point Duke's
18 response or Duke's presentation as to how they intend to
19 respond to these matters. But we expect to hear something,
20 as Mr. Guild mentioned, through formal presentation, public
21 presentation in Bethesda on the 21st of March.

22 JUDGE KELLEY: I have a couple of questions. Mr.
23 Johnson, I think I have asked you this same thing before,
24 but I think you are going to have to address to the Appeal
25 Board next week the question of whether the utility could be

1 licensed to low power of 5 percent while unresolved
2 issues still exist, in your view?

3 MR. JOHNSON: Yes, it's a possibility. It seems
4 to me that they can come in with a motion or with a
5 request to the Staff for a finding that notwithstanding
6 applicable unresolved safety questions, that the plant is
7 still safe for certain operations up to 5 percent, or
8 what-have-you, to fuel load, or zero power.

9 I'm not saying what the Staff's determination
10 would be.

11 JUDGE KELLEY: No, I understand.

12 How does that square with Mr. Denton's statement
13 to the Owners Group that -- the message was we're not
14 going to license any more plants until these issues are
15 addressed. I would have thought that included low power
16 license. Does that still stand, that position?

17 MR. JOHNSON: I don't think that position has
18 been changed. I did discuss this matter with the Staff
19 prior to the last conference call we had on which we
20 addressed this matter, and it was -- I think I stated in
21 that call that that statement and the position, that
22 presentation could be made, that there was either sufficient
23 resolution of the diesel generator problem at Catawba, or
24 that the diesel generators were not required for a certain
25 type of licensing action is not inconsistent with what Mr.

1 Denton had said.

2 JUDGE KELLEY: In a repeat of the earlier
3 question, I think we asked you before whether you thought
4 it likely or possible that the Staff could be in a position
5 to sign off on the Catawba diesel.

6 Do you have more information on that?

7 MR. JOHNSON: Maybe I didn't hear the whole
8 question. You are asking whether we have any more
9 information about when the Staff would be prepared to sign
10 off on the Catawba diesel generators?

11 JUDGE KELLEY: Yes.

12 MR. JOHNSON: No, I don't have any further
13 information about that at this time.

14 JUDGE KELLEY: I think you indicated earlier
15 that you weren't prepared to say that they couldn't sign off
16 by May, but that was about as specific as you could be.
17 Is that still the case?

18 MR. JOHNSON: Yes, I think it's still the case.
19 I think there will have to be this distinction made between
20 resolution of all the generic issues and the possibility of
21 acceptance of some site-specific -- or Duke-specific resolu-
22 tion or interim presentation by the Staff that might
23 permit issuance of a fuel load license or something less
24 than 5 percent.

25 JUDGE KELLEY: Mr. Guild, you wanted to get back in?