UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING APPEAL BOARD

'85 JUL 26 P1 51

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

July 26, 1985
(ALAB-813)

OFFICE OF SECRETARY
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In the Matter of

DUKE POWER COMPANY, ET AL.

(Catawba Nuclear Station,
Units 1 and 2)

Docket Nos. 50-413 OL
50-414 OL

Robert Guild, Columbia, South Carolina, for the intervenor Palmetto Alliance (with whom Jesse L. Riley, Charlotte, North Carolina, was on the brief for the intervenor Carolina Environmental Study Group).

J. Michael McGarry, III, Washington, D.C. (with whom Anne W. Cottingham and Mark S. Calvert, Washington, D.C., and Albert V. Carr, Jr., Charlotte, North Carolina, were on the brief), for the applicants Duke Power Company, et al.

George E. Johnson for the Nuclear Regulatory Commission staff.

DECISION

Before us are the consolidated appeals of intervenors Palmetto Alliance and Carolina Environmental Study Group from three Licensing Board partial initial decisions issued in this operating license proceeding involving the two-unit Catawba Nuclear Station located in York County, South Carolina. To the extent here pertinent, the first of these decisions resolved in the applicants' favor numerous quality

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assurance issues raised by the intervenors.[1] In the second decision, the Licensing Board approved the applicants' emergency response plans subject to the fulfillment of certain imposed conditions within a specified time.[2] Finally, the third decision focused upon a relatively narrow quality assurance issue over which the Licensing Board had retained jurisdiction in the first decision.[3] This issue also was resolved in the applicants' favor and the third decision concluded with an authorization for the Director of Nuclear Reactor Regulation (NRR) to allow full-power operation of the Catawba facility once the applicants satisfy the conditions previously imposed by the Board.[4]

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[1] LBP-84-24, 19 NRC 1418 (1984). As employed in our decision, the term "quality assurance" encompasses "quality control" as well. See 10 CFR Part 50, Appendix B, Introduction.

[2] LBP-84-37, 20 NRC 933 (1984). While of no operative significance here, we note in passing that this decision was rendered by a different Licensing Board specially convened for the purpose of hearing and determining the emergency planning issues alone. The transcript of that hearing will be referred to in this opinion as "EP Tr.", to distinguish it from the separately numbered transcript of the hearing on all other issues ("Tr.").

[3] LBP-84-52, 20 NRC 1484 (1984). Characterized as "foreman override," the issue grew out of allegations that welders had been instructed by foremen to do their work in a manner contrary to prescribed procedures or sound welding practices.

[4] Id. at 1507. In the first decision, the Board had authorized the NRR Director to issue a license permitting

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In their brief and at oral argument, the intervenors advanced myriad claims of substantive and procedural error addressed to the three partial initial decisions and several interlocutory rulings as well.[5] Upon full consideration of these claims, we conclude that there is no warrant for upsetting the authorization of full-power Catawba operation. We leave for resolution in a separate decision, however, all questions pertaining to that part of the Licensing Board's authorization to the NRR Director permitting the receipt and storage at Catawba of spent fuel generated at the applicant Duke Power Company's Oconee and McGuire nuclear power facilities.[6]

I. QUALITY ASSURANCE

A condition precedent to the issuance of an operating license for a nuclear power facility is a finding that there is reasonable assurance that the facility has been properly constructed and can be operated without endangering the

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low-power testing (up to five percent of rated power) of Unit 1. LBP-84-24, 19 NRC at 1585.

[5] A separate timely notice of appeal was filed from each partial initial decision. On the motion of intervenors, however, all briefing was held in abeyance to await the rendition of the last decision. Thus, the intervenors, applicants and NRC staff each filed a single brief.

[6] These questions were the subject of supplemental memoranda and oral argument.

public health and safety.[7] To this end, a utility that is constructing such a facility must establish and carry out a quality assurance program designed to provide "adequate confidence" that those systems, structures and components having safety-related functions "will perform satisfactorily in service."[8]

Before the Licensing Board, the intervenors maintained that there were "systematic deficiencies in plant construction" and "company pressure to approve faulty workmanship," preventing a finding that the plant can safely operate.[9] This contention brought under scrutiny the sufficiency of the applicants' quality assurance program. That scrutiny, in turn, was governed by our Callaway decision.[10] As there observed,

> [i]n any project even remotely approaching in magnitude and complexity the erection of a nuclear power plant, there inevitably will be some construction defects tied to quality assurance lapses. It would therefore be totally unreasonable to hinge the grant of an NRC operating license upon a demonstration of error-free construction. Nor is such a result mandated by either the Atomic Energy Act of 1954,

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[7] 10 CFR 50.57(a).

[8] 10 CFR Part 50, Appendix B, Introduction. That Appendix contains the general quality assurance criteria for nuclear power plants.

[9] See LBP-82-107A, 16 NRC 1791, 1795 (1982).

[10] Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343 (1983).

> as amended, or the Commission's implementing regulations. What they require is simply a finding of reasonable assurance that, as built, the facility can and will be operated without endangering the public health and safety. 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(3)(i). Thus, in examining claims of quality assurance deficiencies, one must look to the implication of those deficiencies in terms of safe plant operation.
>
> Obviously, this inquiry necessitates careful consideration of whether all ascertained construction errors have been cured. Even if this is established to be the case, however, there may remain a question whether there has been a breakdown in quality assurance procedures of sufficient dimensions to raise legitimate doubt as to the overall integrity of the facility and its safety-related structures and components. A demonstration of a pervasive failure to carry out the quality assurance program might well stand in the way of the requisite safety finding.[11]

Applying those principles, the Licensing Board found that, although there were some quality assurance deficiencies, they did not amount to a pervasive breakdown in Catawba's quality assurance program.[12] Further, in its principal quality assurance decision, the Board found that, with very few exceptions, the applicants had taken "reasonably prompt action to correct confirmed deficiencies"

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[11] Id. at 346 (footnote omitted).

[12] LBP-84-24, 19 NRC at 1433-34, 1440.

and that all significant technical discrepancies had already been or were being corrected.[13]

On appeal, the intervenors attack the Licensing Board's substantive conclusions and also argue that, by virtue of various interlocutory rulings, they were unfairly denied the opportunity to develop fully their quality assurance claims.

A. In their brief, the intervenors maintain that "known, yet uncorrected construction defects" exist at Catawba and that there have been "systematic and willful circumventions" of quality assurance requirements.[14] These are indeed serious claims. But that is all they are -- claims. The brief does not refer us to any evidence of record that might support these broad assertions.[15] In the

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[13] Id. at 1505. In its later decision on "foreman override," the Board at least implicitly determined that no ascertained safety-significant defects had gone uncorrected. LBP-84-52, 20 NRC at 1502-06, 1507.

[14] Brief of Appellants Palmetto Alliance and Carolina Environmental Study Group (Jan. 9, 1985) [hereafter "Intervenors' Brief"] at 5, 6.

[15] At oral argument, intervenors asserted that there may be uncorrected defects in piping and other components resulting from "arc striking" (the inadvertent striking of a welding electrode against an unintended part of a component) or "cold springing" (the practice of aligning by force pipes to be joined together). App. Tr. 14-18. Their counsel failed, however, to cite any specific defects that were not properly remedied. On the contrary, he conceded that he could not "state as a matter of fact that any of those [referring to welding defects not identified in the normal course of the applicants' quality assurance program] remain uncorrected as of this date." App. Tr. 19.

circumstances, we need not, and will not, pursue them further.[16]

As for their remaining substantive quality assurance claims, the intervenors assert that, because the quality assurance inspectors at Catawba lacked sufficient independence from production and cost pressures, they could not be relied upon to assure proper plant construction and may have overlooked certain construction deficiencies. We are told that this asserted lack of independence is reflected by (1) widespread harassment against quality assurance inspectors by production workers, and retaliatory acts by construction management against those inspectors for properly carrying out their inspection functions, and (2) the organizational relationship between the quality assurance personnel and the Construction Department management.[17] Our examination of this line of argument persuades us that the intervenors have done no more than

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[16] The Commission's Rules of Practice require an appellant to identify clearly in its brief "the errors of fact or law that are the subject of the appeal. For each issue appealed, the precise portion of the record relied upon in support of the assertion of error must also be provided." 10 CFR 2.762(d)(1). Some time ago, in the construction permit proceeding involving this very facility, we pointed out that "a party's failure to submit a brief containing sufficient information and argument to allow the appellate tribunal to make an intelligent disposition of the issues [presented by its appeal] is tantamount to their abandonment." ALAB-355, 4 NRC 397, 413 (1976).

[17] Intervenors' Brief at 9-13.

rehearse claims advanced before and rejected by the Board below, without directing our attention to supporting record evidence.

1. At the hearing, the Licensing Board explored averments that construction management personnel had retaliated against welding inspectors for voicing grievances, expressing concerns to this agency, and conducting strict inspections. The Board also examined allegations that welding inspectors were harassed by craftsmen and foremen whose work they were examining.

As to the first claim, the Board found that one welding inspector (Mr. Ross) had suffered retaliation at the hands of management. He had received a low job evaluation because he and his crew had adhered strictly to quality assurance procedures and had expressed safety concerns to management.[18] But, according to the Board, this apparently was an isolated episode and Mr. Ross and his crew had not allowed it to affect their job performance.[19] Similarly, the Board determined that, considering the size and duration of the construction project, the number of significant incidents of harassment against the welding inspectors was small. Additionally, none of the inspectors had been

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[18] LBP-84-24, 19 NRC at 1441-42, 1513-20.

[19] Id. at 1518 n.27, 1519-20.

deterred from the fulfillment of their duties by such incidents.[20]

If these findings have adequate record support, it follows that the Board below was justified in concluding that the carrying out of the quality assurance program for welding activities was not seriously affected by retaliation against or harassment of diligent inspectors.[21] But in their brief, the intervenors point to no evidence demonstrating that there was a pattern of retaliation or harassment that had an intimidating effect upon the inspectors. They seemingly are content to leave it to us to conduct an independent examination of the testimony of the inspectors. Although we are under no obligation to do so,[22] our examination of the record confirms that the Licensing Board accurately summarized the testimony, with the consequence that its determination on this matter must be upheld.[23]

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[20] Id. at 1444, 1531.

[21] Id. at 1520, 1531.

[22] See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC ___, ___ (July 11, 1985) (slip opinion at 88); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-804, 21 NRC 587, 592 & n.6 (1985).

[23] See, e.g., with respect to retaliation, Tr. 5930-31 (Burr), 6343 (Rockholt); and, with respect to harassment,

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2. Historically, applicant Duke's Vice President for Engineering and Construction served also as the company's Quality Assurance Manager.[24] Some years ago, in the construction permit proceeding involving another Duke nuclear facility, we questioned whether this arrangement conformed to the requirements of Appendix B to 10 CFR Part 50.[25] As a consequence, in 1974, prior to the issuance of a construction permit for Catawba, Duke appointed a separate quality assurance manager.[26] Since that time, Duke's Construction and Quality Assurance Departments have been headed by separate independent managers, who report to a single high-level executive.[27] Until 1981, however, the quality assurance inspectors still were located "administratively" in the Construction Department, albeit subject to the "functional" control of the Quality Assurance

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Tr. 5800 (Deaton), 6883-84 (Langley), 8307-08 (Godfrey), 8428 (Crisp), 8685-86 (Reep). It should be noted that several inspectors testified that they did not believe that any other welding inspectors had been deterred from performing adequately as a result of incidents of harassment. Tr. 6314-15 (Rockholt), 6965 (Ross), 8428 (Crisp), 8308 (Godfrey).

[24] LBP-84-24, 19 NRC at 1459.

[25] See Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-128, 6 AEC 399, 410 (1973).

[26] LBP-84-24, 19 NRC at 1459.

[27] Ibid.

Manager.[28] In 1981, those inspectors were transferred to the Quality Assurance Department, which assumed control over them for all purposes.[29]

The propriety of the quality assurance organizational structure in place between 1974 and 1981 was litigated and resolved in favor of the applicants in the construction permit proceeding for the Catawba facility.[30] Nonetheless, the intervenors argued below that the quality assurance personnel did not enjoy sufficient independence vis-a-vis the Construction Department -- i.e., that the power to control the inspectors was inherent in the Construction Department's power to hire, fire, set schedules, etc. In response, the Licensing Board stated:

> As a matter of practical experience, we think there is some merit in this claim. Furthermore, we believe that the QA function at Catawba would have been performed somewhat more independently if the present organizational

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[28] Ibid. The "administrative" control by the Construction Department over the inspectors covered personnel matters such as timekeeping and payroll, the authority to hire and fire, and, apparently, at least indirect authority to schedule daily work. Id. at 1459-60. The "functional" control exercised by the Quality Assurance Manager included technical and policy direction, training and certification of inspectors, and establishment of quality assurance procedures. Id. at 1460.

[29] Id. at 1459.

[30] LBP-75-34, 1 NRC 626, 646-50 (1975). The intervenors did not include the quality assurance organization issue in their appeal from that decision. See ALAB-355, 4 NRC 397 (1976).

> structure had obtained throughout construction. We also believe, however, that the effect of the functional-administrative dichotomy on inspector performance cannot be quantified but probably was not very great. In any event, that very dichotomy had at least the implied blessing of this agency in the CP proceeding. LBP-75-34, supra, 1 NRC at 649, 650. In these circumstances, absent a showing that safety was compromised, a showing not made here, we can only regret that the dichotomy was not abolished earlier than it was.[31]

Although dissatisfied with this outcome, the intervenors call no specific record evidence to our attention that suggests that safety was compromised as a result of the historical position of the quality assurance personnel within Duke's overall organizational structure. This being so, we see no cause to disturb the Board's conclusion.

3. Criterion V in Appendix B to 10 CFR Part 50 provides that "[a]ctivities affecting quality shall be prescribed by documented instructions, procedures, or drawings, of a type appropriate to the circumstances and shall be accomplished in accordance with these instructions, procedures, or drawings." Criterion XVII specifies that "[s]ufficient records shall be maintained to furnish evidence of activities affecting quality."

To comply with these requirements, the applicants instituted a system of documentation that utilized, among

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[31] LBP-84-24, 19 NRC at 1460.

others, a Deficiency Report Form (R-2A) and a Nonconforming Item Report (NCI). The R-2A is used to document minor discrepancies where technical construction personnel prescribe the corrective action to be taken but quality assurance personnel must approve the corrected work. For its part, the NCI is employed when the discrepancy is more significant and not readily resolved by an R-2A or other method.[32]

At the hearing below, the Licensing Board considered the intervenors' charge that the practice of "verbal voiding" -- i.e., the return of an NCI to the originator quality assurance inspector with an oral explanation rather than its incorporation into permanent records -- was being utilized for the purpose of circumventing the critical document requirements reflected in the specific provisions of Duke's own quality assurance program.[33] The evidence on the matter persuaded the Board that, while there had been instances of verbal voiding, "[s]o few NCIs were handled in this manner in relation to the number originated that it could not have served to conceal faulty workmanship or

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[32] Id. at 1480.

[33] Id. at 1479-89.

significantly diminish the number of nonconformances that were documented."[34]

Beyond a sweeping assertion that the Licensing Board manifested "a disturbing casualness for strict adherence to the Commission's clear quality assurance requirements," we are not told specifically what is wrong with that analysis.[35] Nor has our independent look at the evidence provided us with cause to upset the Licensing Board's rejection of the intervenors' position on the documentation question. In this connection, apart from the relative paucity of NCIs that were verbally voided (over 17,000 NCIs were prepared by quality assurance personnel), the evidence disclosed that the NCI procedure was but one of several available means of recording discrepancies. It also showed that Duke's Quality Assurance Department (in the estimation of an NRC Resident Inspector at Catawba) had documented "thousands" of quality assurance deficiencies on several other forms.[36]

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[34] Id. at 1484-85.

[35] Intervenors' Brief at 24.

[36] Tr. 9777-79 (Van Doorn). In their appellate brief, the intervenors also mention the use by welding inspectors of "black books" (apparently a personal work diary) instead of quality assurance forms to document the surveillance of welding activities. On this score as well, the intervenors fail to explain adequately why this practice constituted a

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4. During the initial hearings below on quality assurance, a Board witness testified that there had been occasions where the foremen had ordered welders to perform work "in a manner contrary to prescribed procedures or to the welder's ideas of correct welding."[37] This testimony prompted investigations of the so-called "foreman override" practice by both the staff and (at the staff's request) the applicants. The fruits of the investigations, which in the applicants' case involved the receipt of affidavits from over 200 Duke employees, were considered in a separate hearing where a number of present and former Duke employees testified. In its November 1984 decision, the Board found that there had been only isolated instances of foreman override involving violations of quality assurance or construction procedures, and that these had not compromised plant safety.[38] In this connection, the Board pointed out that only eight of the hundreds of foremen at the site had engaged in the practice, and five of them were involved in a single incident. Moreover, the foreman involved in most of

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pervasive quality assurance breakdown. Such an explanation was plainly in order, given the NRC Resident Inspector's testimony that the failure to use the forms was not a serious violation. Tr. 9298.

[37] LBP-84-24, 19 NRC at 1562.

[38] LBP-84-52, 20 NRC at 1507.

the override incidents as well as his superior had been relieved of supervisory responsibilities at the site.[39]

We have examined the assigned bases for the intervenors' insistence that the foreman override practice was more pervasive and safety-significant than found by the Licensing Board. None of those bases is meritorious.

To begin with, the record does not support the intervenors' claim that twenty-three foremen were involved in the practice. On this score, we agree with the Licensing Board's analysis of the evidence on the matter,[40] which has not been shown by intervenors to be faulty.

Second, there is no substance to the intervenors' argument that the true extent and significance of foreman override will never be known because the staff delegated its inspection responsibility to the applicants. Prior to requesting the applicants to undertake an investigation of the foreman override concerns, the staff conducted its own extensive investigation.[41] Moreover, the staff closely monitored the applicants' investigation. Such monitoring included visits to the site to make sure that the proper atmosphere was maintained, and staff interviews of both the

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[39] Id. at 1502, 1507.

[40] Id. at 1501-02.

[41] See, e.g., Tr. 13,882-83, 13,911-12 (Uryc).

applicants' interviewers and some of the individuals from whom the applicants had obtained affidavits.[42] Staff witnesses also testified that, based on their own investigation as well as their review of the results of the applicants' investigation, foreman override was not a pervasive practice.[43]

Third, the intervenors also claim that there were serious methodological flaws in the applicants' investigation. Specifically, they allege that the applicants' interviews with only a small percentage of the power house mechanics, electricians and steel workers provide no basis for drawing any general conclusion that foreman override was not a problem. Further, according to the intervenors, the questions posed to the workers sought "high risk" information that, if supplied, might adversely affect them. For this reason, and because the questioners were employed by Duke,[44] the intervenors maintain that the reliability of the inquiry was compromised.

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[42] Tr. 13,848-50, 13,865-66 (Uryc, Blake).

[43] Tr. 13,883 (Uryc, Blake), 13,912-13 (Uryc).

[44] More particularly, it appears that they were employee relations personnel. Applicants' Exh. 116, Duke Power Company's Investigation of Issues Raised by the NRC Staff in Inspection Reports 50-413/84-31 and 50-414/84-17, (admitted at Tr. 13,144) at 10.

These arguments are not new; they were presented to and rejected by the Licensing Board.[45] The intervenors do not explicitly address the reasoning underlying that rejection. Rather, they merely refer us to the proposed findings of fact and conclusions of law submitted below.

This will not do. All that the reference tells us is that the intervenors disagree with the Licensing Board's findings; it provides no illumination as to why the proposed findings are correct, as claimed, and the Licensing Board's determination is wrong. Nonetheless, we have reviewed the record on our own initiative and are satisfied that the intervenors' attack upon the applicants' investigation is wide of the mark. Each of the intervenors' allegations was rebutted by applicants' expert witness, Dr. John E. Hunter. He testified that, based on the sample of nonwelders interviewed, the applicants properly inferred that instances of foreman override were rare outside of the welding area.[46] Dr. Hunter also stated that the questions asked were appropriately phrased so as to elicit the necessary information.[47] Further, he expressed the opinion that the reliability of the investigation was not affected by the

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[45] LBP-84-52, 20 NRC at 1490-94.

[46] Tr. 14,340-49.

[47] Tr. 14,311-12, 14,327-32.

fact that Duke personnel conducted the interviews and sought the disclosure of "high-risk" information. As he pointed out, the interviewers were not in a position of power relative to the interviewees, but were from an "external department" and in other situations had served in an "ombudsman role for worker grievances."[48] Moreover, Dr. Hunter stated that revealing an instance of foreman override would have had adverse implications only for the foreman, not the craftsman who had been simply following orders.[49]

Finally, intervenors take issue with the Licensing Board's disposition of the matter of the welding of stainless steel piping in derogation of established procedures. In order to lessen the likelihood that the heat-affected zone of stainless steel welds would become sensitized and, thus, made potentially susceptible to intergranular stress corrosion cracking, Duke procedures specify that welds should cool to 350°F between welding passes.[50] Numerous welder allegations of interpass

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[48] Applicants' Exh. 120, Testimony of Dr. John E. Hunter, (admitted at Tr. 14,295) at 4.

[49] Ibid. Dr. Hunter's testimony was corroborated by the testimony of several interviewees to the effect that they had not felt intimidated or pressured during the interviews. See, e.g., Tr. 14,042, 14,222-23 (Carpenter), 14,142-43 (McCall), 14,187-88 (Braswell).

[50] Applicants' Exh. 116, Attachment A at I-5.

temperature violations surfaced during the staff's and the applicants' investigations of foreman override concerns. The applicants thereupon undertook laboratory and field tests to determine whether welds had become sensitized as a result of these alleged violations. Although the results of these tests were inconclusive, the Board concluded that violations of interpass temperature requirements had not significantly affected the quality of construction.[51]

We find that the evidence in the record supports this conclusion. Witnesses for the applicants and the staff testified without contradiction that, in order for intergranular stress corrosion cracking to occur, sensitization of the metal alone is insufficient. Rather, there must also be stress and a sufficiently aggressive environment.[52] While sensitization and stress may be present at Catawba, these witnesses agreed that the safety-related welds that may have been exposed to high interpass temperatures are not associated with such an environment. This is because those welds are on components of the primary cooling system. That system normally handles only noncorrosive fluids and it is very unlikely that any

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[51] LBP-84-52, 20 NRC at 1506.

[52] See, e.g., Tr. 13,606 (Ferdon), 13,907 (Czajkowski).

contaminant will be introduced into the system.[53] Therefore, even if excess interpass temperatures occurred, intergranular stress corrosion cracking is not expected to result at Catawba, and there is reasonable assurance that the welds will remain safe in service.[54]

B. We now turn to the intervenors' assertions of procedural error in connection with the quality assurance issues. They maintain that the Board was unduly influenced by the applicants' projected fuel loading dates and their plans for commencement of plant operation. As a consequence, according to the intervenors, the Board improperly limited (1) their right to conduct discovery, (2) the length of time that was allotted to them for the cross-examination of witnesses, and (3) the number of witnesses that could testify on their behalf.

It does appear that, in accordance with the Commission's 1981 Statement of Policy on Conduct of

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[53] Tr. 13,609-14 (Ferdon, Kruse), 13,907-09 (Czajkowski). These witnesses testified that pressurized water reactors, such as Catawba, tend not to have stress corrosion cracking in the primary system due to oxygen suppression. They also testified that strict controls at Catawba keep contaminant levels below that at which intergranular stress corrosion cracking would occur.

[54] Tr. 13,609-14 (Ferdon, Kruse), 13,873, 13,909 (Czajkowski).

Licensing Proceedings,[55] the Licensing Board kept a watchful eye upon applicants' construction schedule.[56] At the same time, however, the intervenors have not established that, contrary to the further directive in that Policy Statement,[57] the Board "compromise[d] the Commission's fundamental commitment to a fair and thorough hearing process."

1. In a March 5, 1982 order, the Licensing Board conditionally admitted the intervenors' quality assurance contention and indicated that discovery on it could commence.[58] Two and one-half months later, because of a challenge to the admission of this contention (among others), the Board suspended discovery activities.[59] On December 1, 1982, the Board admitted a revised version of the quality assurance contention and reopened discovery.[60]

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[55] CLI-81-8, 13 NRC 452.

[56] See, e.g., Tr. 659-61, 701-02, 11,218; Memorandum and Order of June 13, 1983 (unpublished) at 4.

[57] 13 NRC at 453.

[58] LBP-82-16, 15 NRC 566, 577, 591.

[59] Memorandum and Order of May 25, 1982 (unpublished). See also LBP-82-51, 16 NRC 167, 178-79 (1982).

[60] LBP-82-107A, 16 NRC at 1795, 1810. In the interim, for reasons unimportant here, we reversed the conditional admission of the intervenors' initial quality assurance contention. ALAB-687, 16 NRC 460 (1982), reversed in part on other grounds, CLI-83-19, 17 NRC 1041 (1983).

Later that month, the Board announced its expectation that the evidentiary hearing on the various contentions before it would commence the following fall.[61] In this connection, the parties were asked to submit "detailed proposed schedules leading to a hearing. . . ."[62] Both the applicants and the staff complied with that request; the intervenors did not (although, at a January 20, 1983 prehearing conference, they objected to looking to the applicants' anticipated plant completion date in determining the hearing schedule).[63] On February 2, 1983, the Board directed that discovery would end on May 20, 1983, and the hearing would be held that October.[64]

As thus seen, between March 1982 and May 1983, the intervenors had a total of over seven months to conduct discovery on their quality assurance concerns. Moreover, after the close of discovery in May 1983, the Board granted the intervenors an additional twenty-five day period in which to take the depositions of Duke and NRC employees on certain welding quality assurance matters that the

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[61] LBP-82-116, 16 NRC 1937, 1953 (1982).

[62] Ibid.

[63] Memorandum and Order of February 2, 1983 (unpublished) at 6-7, 10.

[64] Id. at 11.

intervenors maintained had first come to their attention late in discovery.[65] To be sure, the intervenors had desired a longer discovery period, as well as a later hearing date.[66] And it may be, as they suggest, that their requests for that relief would have fallen on more sympathetic ears had not construction of the facility seemingly been so close to completion. But of itself that consideration scarcely provides a sufficient basis for overturning the Board's discovery orders.

As we long ago observed, "licensing boards must be vested with considerable latitude in determining the course of the proceedings which they are called upon to conduct."[67] Consequently, "we are entirely disinclined to assume the role of a post hoc overseer of the discharge by licensing boards of their scheduling functions [and] will enter that arena only to the extent necessary to insure that no party has been denied a fair opportunity to advance its cause."[68]

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[65] Memorandum and Order of June 13.

[66] See Palmetto Alliance Motion to Establish Discovery Schedule on its Quality Assurance Contention 6 (May 25, 1983) at 15 and Attachment 1.

[67] Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-212, 7 AEC 986, 991 (1974).

[68] Ibid. See also Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2),

(Footnote Continued)

Accordingly, it was incumbent upon the intervenors to demonstrate that the discovery period accorded to them was so inadequate as to deprive them of procedural due process. This burden manifestly has not been met. In short, despite considerable rhetoric on the subject of deprivation of hearing rights, the intervenors do not explain why the eight months of allowed discovery (almost two-thirds of which followed the admission of the revised contention) was insufficient to obtain the information necessary to flesh out their quality assurance concerns.[69]

(Footnote Continued)
ALAB-459, 7 NRC 179, 188 (1978) ("[W]e enter the scheduling thicket . . . only to entertain a claim that a board abused its discretion by setting a hearing schedule that deprives a party of its right to procedural due process.").

[69] After the staff and the applicants submitted their reports on the foreman override issue (see p. 15, supra), the intervenors moved for leave to conduct discovery on that issue. Motion by Palmetto Alliance and Carolina Environmental Study Group for the Conduct of Further Proceedings to Consider Evidence of Foreman Override (Sept. 17, 1984). The Board granted a limited period for such discovery, which was geared to the hearing schedule established at the same time. Tr. 12,840-53. Although intervenors complain to us that the allotted period was inadequate, they told the Licensing Board that, while they were not happy with it, the discovery/hearing schedule seemed "doable." Tr. 12,910-11. Having acquiesced in the schedule, they may not now claim the Board below erred in adopting it. In any event, we are satisfied that it did not offend due process.

We likewise conclude that the Board did not abuse its broad discretion in the conduct of the proceeding when it declined in December 1983 to reopen discovery in the wake of (1) the issuance of the Institute of Nuclear Power

(Footnote Continued)

2. The quality assurance hearings commenced on October 4, 1983. The first of six panels of applicant witnesses took the stand the following day[70] and, after a short direct examination, was made available for cross-examination by the intervenors.[71] That cross-examination consumed the balance of that day and all of October 6.

After the luncheon recess on October 7, the intervenors commenced cross-examination of the second panel, which consisted of the two members of the first panel and two additional individuals.[72] When this cross-examination had extended for over two hearing days, the Board stepped in and advised the intervenors' counsel that his cross-examination had to be concluded by noon the following day.[73]

(Footnote Continued)
Operations report, which contained the results of the applicants' self-initiated evaluation of Catawba's construction program (in camera Tr. 948-51); and (2) the testimony of certain in camera Board witnesses (Tr. 11,217-21). Suffice it to say that we have examined the reasons assigned by the Licensing Board for its rulings in this regard and find them adequate.

The intervenors' other discovery complaints have been considered and found without merit.

[70] Tr. 1888.

[71] Tr. 1917.

[72] Tr. 2310.

[73] Tr. 2813-16.

Counsel observed this deadline. The Board then expressed its concern respecting the length of time the intervenors might take in examining the remaining witnesses (both those testifying in panels and those welding inspectors and supervisors testifying individually).[74] After hearing from the parties, the Board adopted a "flexible" schedule. Under that schedule, the intervenors were given approximately two days to interrogate each of the remaining panels, with the understanding that the deadlines would not necessarily be rigidly enforced.[75] As it turned out, the intervenors finished the questioning of those witnesses within the allotted time.[76]

Insofar as the individual witnesses are concerned, the intervenors were permitted to cross-examine all fifteen of the welding inspectors and supervisors who testified. On appeal, they cite one specific instance in which that examination was cut short by the Board. They do not explain, however, why the Board was wrong in concluding that three and one-half hours was a reasonable period for the interrogation of the inspector in question.[77] Nor do they

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[74] Tr. 2839-42.

[75] Tr. 3744-52.

[76] See Tr. 5715-16.

[77] Tr. 6086.

provide illumination on what might have been elicited from the inspector had they been allowed to examine him at still greater length.

These shortcomings are dispositive of intervenors' cross-examination claims. As we had occasion to reemphasize earlier this year, a showing that the Licensing Board erred by curtailing cross-examination "is not sufficient to warrant appellate relief." In addition, "[t]he complaining party must demonstrate actual prejudice -- i.e., that the ruling had a substantial effect on the outcome of the proceeding."[78]

3. The intervenors initially proposed to call sixty employee witnesses to testify at the hearing a year later on the foreman override issue. The Licensing Board ordered the list reduced to fifteen on the ground that the testimony of any larger number would be "cumulative."[79] Although the intervenors do not appear specifically to challenge that action, they do complain that only five of these witnesses

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[78] Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 376-77 (1985), citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, 20 NRC 1102, 1151 (1984). See also Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 697 & n.14, aff'd, CLI-82-11, 15 NRC 1383 (1982).

[79] Tr. 13,306-07.

actually testified. Contrary to the impression that they endeavor to leave, however, we find nothing in the record to indicate that the Board refused to allow them to present more than five witnesses. Nor does the record reflect the intervenors' required proffer of testimony setting forth the substance of each witness's proposed testimony.[80] If, in fact, they did offer a witness whom the Board declined to permit to testify, it was incumbent upon the intervenors -- at bare minimum -- to say so explicitly in their brief and to inform us respecting (1) which witness or witnesses were not allowed to testify; (2) the reasons assigned by the Board; and (3) the substance of the precluded testimony. Having been provided none of this information, we need not pursue the matter further.

II. EMERGENCY PLANNING

In LBP-84-37, the Licensing Board examined in considerable detail the numerous contentions advanced by the intervenors with respect to the sufficiency of the emergency response planning for the Catawba facility. On the basis of that examination, the Board concluded that the emergency response plans meet all regulatory requirements and provide "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological

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[80] See n.78, supra.

emergency."[81] Before us, the intervenors challenge only the Licensing Board's findings respecting the sirens that are a part of the applicants' public alert and notification systems. On that score, the Licensing Board found that the alert system would prove adequate with the inclusion of ten additional sirens.[82] The intervenors insist, however, that such a finding cannot be made in advance of the final review of the system by the Federal Emergency Management Agency (FEMA).[83]

A. The applicants' principal witness on the siren question was Dr. M. Reada Bassiouni, a mechanical engineer who has specialized in the field of acoustics and has conducted analyses of the sirens associated with the emergency response planning of several other nuclear power

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[81] 20 NRC at 1007. The Board did, however, impose two additional emergency planning conditions upon the operating licenses. Id. at 1008.

[82] Id. at 978.

[83] FEMA has given conditional approval to the system (in the form of interim findings) founded upon both its scrutiny of the portion of the emergency response plans relating to the sirens and its preliminary assessment of a field exercise conducted in February 1984. Staff Exh. EP-3, Memorandum from Major P. May to Richard W. Krimm (April 18, 1984) and Attachment at 2 (admitted at EP Tr. 1468). At some future point, however, FEMA will make certain acoustical measurements. Additionally, following another sounding of the sirens, FEMA will conduct a survey to confirm that the persons within the ten-mile plume emergency planning zone (EPZ) heard the siren and understood its significance. EP Tr. 1570-81.

facilities.[84] He testified that, at the applicants' behest, he first made acoustical measurements of selected sirens in operation. Then incorporating those measurements in an analytic model of the entire siren system, he ascertained that, with the addition of ten sirens at specified locations, the system would meet the FEMA criteria for alerting the public to a radiological emergency. The significance of that assessment is that FEMA will use these same criteria in making its final finding on the adequacy of the sirens.[85]

The FEMA criteria do not require that the sirens reach every person in the plume EPZ -- a practical impossibility.[86] (Similarly, and for the same reason, there is no NRC requirement along that line.)[87] To supplement the siren

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[84] Applicants' Exh. EP-17, Vita of Dr. M. Reada Bassiouni, attached to Applicants' Testimony on Emergency Planning Contention 9 (April 16, 1984), admitted at EP Tr. 1825.

[85] EP Tr. 1571, 1834-35.

[86] See FEMA-43, "Standard Guide for the Evaluation of Alert and Notification Systems for Nuclear Power Plants," (September 1983) at E-4 to E-5. The criteria set forth therein are in the nature of guidelines addressed to the fulfillment of the requirements of FEMA's regulations regarding alert and notification systems (found in 44 CFR Part 350). FEMA-43 at 1.

[87] NUREG-0654/FEMA-REP-1, Revision 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power

(Footnote Continued)

system, the applicants have provided tone alert radios for such institutions as schools, hospitals, nursing homes, day care centers and industrial facilities with twenty or more employees.[88] Further, the emergency response plans call for "route alerting"; i.e., in the event of an emergency, assigned individuals will proceed on predetermined routes to alert persons by a variety of means.[89] We agree with the Licensing Board that these supplemental measures provide a satisfactory complement to the sirens.[90] Thus, there is an adequate foundation for the Board's ultimate conclusion on the sufficiency of the entire alert and notification system.

B. Despite the evidence and the findings of fact based thereon, the intervenors claim the Licensing Board was required as a matter of law to await the final FEMA finding on sirens before approving the emergency response plans. This claim manifestly is without merit.

It is now well-settled that the issuance of FEMA's final findings on the adequacy of offsite emergency plans

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(Footnote Continued)
Plants," (November 1980) at 3-1. This joint NRC/FEMA document contains guidance for all aspects of emergency response planning. Id. at 1.

[88] EP Tr. 1873. A tone alert radio will provide both an alert signal and the notification message over the Emergency Broadcast System. Ibid.

[89] EP Tr. 1885, 1888-89, 1911-12.

[90] LBP-84-37, 20 NRC at 974-75.

and preparedness is not a prerequisite to the authorization of a full-power operating license. Rather, "preliminary FEMA reviews and interim findings presented by FEMA witnesses at licensing hearings are sufficient as long as such information permits the Licensing Board to conclude that offsite emergency preparedness provides 'reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.'"[91] The recent decision of the Court of Appeals for the District of Columbia Circuit in Union of Concerned Scientists v. NRC,[92] relied upon by the intervenors, is not to the contrary. That decision focused upon a Commission rule to the effect that licensing boards need not consider the results of emergency preparedness exercises in a licensing hearing before authorizing the issuance of a full power license. The Court of Appeals determined that the rule violated Section 189a(1) of the Atomic Energy Act of 1954, as

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[91] Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1379 (1984), citing Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 380 n.57 (1983); Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), ALAB-727, 17 NRC 760, 775 n.20 (1983). See also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1066-67 (1983).

[92] 735 F.2d 1437 (1984).

amended,[93] in that it denied "a right to a hearing on a material factor relied upon by the Commission in making its licensing decisions."[94] In reaching this conclusion, however, the court neither held nor implied that a licensing board must invariably place in limbo an operating license proceeding in which emergency preparedness issues are contested to await the final FEMA findings.[95]

III. DIESEL GENERATORS

A. All nuclear power facilities are required to have an onsite electric power system to permit the "functioning of structures, systems, and components important to safety" in the event that the facility's offsite electric power system is inoperative.[96] To fulfill this requirement at Catawba, the applicants, inter alia, installed diesel generators manufactured by Transamerica Delaval Incorporated (TDI). While the hearing was in progress on the intervenors' quality assurance contention, the parties

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[93] 42 U.S.C. 2239(a)(1).

[94] 735 F.2d at 1438.

[95] As earlier noted, in this case an emergency preparedness field exercise took place in February 1984. The intervenors do not claim that they were precluded from exploring at the hearing the results of that exercise.

[96] 10 CFR Part 50, Appendix A, General Design Criterion 17.

learned of the discovery of defects in TDI diesel generators at other nuclear power facilities through the board notification process.[97] Prompted by this information, the intervenors sought to litigate the adequacy of Catawba's compliance with the onsite power system requirement by presenting a three-part contention challenging the reliability of its TDI diesel generators.[98]

In determining whether to accept the intervenors' late-filed contention, the Board below applied the five-factor test of 10 CFR 2.714(a)(1).[99] On a balancing of

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[97] Board Notification 83-160 (October 21, 1983). See also Board Notification 83-160A (November 17, 1983).

[98] Tr. 9659-75. As paraphrased by the Board, the contention stated:

> 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.

Memorandum and Order of February 23, 1984 (unpublished) at 4.

[99] Tr. 9624-25, 9659-75; Memorandum and Order of February 23 at 3. Those factors are:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the

(Footnote Continued)

those factors, it concluded that the first part of the contention dealing with crankshaft design should be admitted on the condition that the intervenors later demonstrate their ability to contribute to the resolution of the issue -- the third lateness factor.[100] The Board, however, rejected the other two parts of the contention.[101] Thereafter, the Licensing Board dismissed the conditionally-accepted "crankshaft" contention because the intervenors had failed to establish (by supplying the Board with the name of a qualified expert who would assist them) that they could make a substantial contribution to the record on the issue.[102]

In the interim, the applicants notified the Licensing Board of a number of problems encountered with the Catawba

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(Footnote Continued)
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.

[100] Memorandum and Order of February 23 at 6.

[101] Id. at 6-7. The Licensing Board also referred a portion of its ruling to us, but we declined to accept the referral. See ALAB-768, 19 NRC 988 (1984).

[102] Order of April 13, 1984 (unpublished).

generators.[103] This disclosure prompted the Board, on its own motion pursuant to 10 CFR 2.760a, to pose the problems as an issue in the proceeding.[104] Upon review, the Commission found that the matters raised by the Board sua sponte did not constitute a serious safety matter and it dismissed the issue.[105]

Following this development, the intervenors then sought the admission of the same issue as a late-filed contention. Applying the five section 2.714(a)(1) factors to the contention, the Licensing Board determined that the "balancing process" clearly favored its admission, provided that the intervenors demonstrated that they could make a substantial contribution to its resolution.[106] In the words of the Licensing Board:

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[103] Letter from J. Michael McGarry, III, to Licensing Board (February 17, 1984). See also letter from J. Michael McGarry, III, to Licensing Board (March 29, 1984).

[104] Memorandum and Order of February 27, 1984 (unpublished).

[105] Order of June 8, 1984 (unpublished).

[106] LBP-84-24, 19 NRC at 1586 n.50. As conditionally admitted, the contention read:

> Whether there is reasonable assurance that the TDI emergency diesel generators at the Catawba Station can perform their function and provide reliable service because of the problems that have arisen in the course of testing and inspection of such generators, such as the problems reported in the

(Footnote Continued)

> As we have made clear in the past, we do not believe the present Intervenors can make a substantial contribution to these technical issues unless they are prepared to present expert testimony or at least have expert assistance in their cross-examination. The Intervenors have repeatedly indicated that they will be able to produce experts; so far, however, they have not done so. Now that the Intervenors have in hand the Applicants' report on site-specific problems at Catawba, they should be in a position to move quickly to obtain the appropriate expert assistance. In these circumstances, our admission of this late contention is conditioned upon the Intervenors' serving by July 6, 1984 their designation of a named diesel generator expert or experts along with a description of qualifications (resume). Failure to meet this condition will result in dismissal of this contention. Conversely, if this condition is met, Factor 3 will favor admission of the contention.[107]

In an attempt to meet the Board's condition, the intervenors designated Dr. Robert Anderson, a professor of metallurgy at San Jose State University, as their "source of expert assistance."[108] According to the intervenors, Dr. Anderson was then serving as a consultant on TDI diesel generator issues to intervenors in the Shoreham proceeding.[109] On the basis of a subsequent telephone conference, however, the Licensing Board concluded that

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applicant's letter to the Board of February 17, 1984.

[107] Ibid.

[108] Letter from Robert Guild to Licensing Board (July 6, 1984) at 2.

[109] Ibid.

serious doubt existed as to the level of assistance Dr. Anderson would provide the intervenors in this case. This was because the intervenors were unable to state whether Dr. Anderson would appear as their witness or even be present at the hearing to assist them with cross-examination of the staff's and applicants' expert witnesses.[110] Thus, the Board ordered the intervenors to certify that their expert would review the principal documents and the other parties' prefiled direct testimony and be present at the hearing to assist in the intervenors' cross-examination on this issue. Alternatively, the Board gave the intervenors the option of taking additional time and submitting a detailed statement, prepared with the assistance of qualified experts, that outlined their disagreement with the other parties' technical reports and explained how the intervenors would substantiate their position.[111]

The intervenors advised the Licensing Board that they were unable to certify that Dr. Anderson would be available to review the principal documents and prefiled testimony or be present at the hearing because of his conflicting

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[110] Tr. 12,749.

[111] Memorandum and Order of July 20, 1984 (unpublished) at 4-5.

obligations in the Shoreham proceeding.[112] Instead, they submitted a purported statement of their technical position and attached to it the prefiled direct testimony of a group of witnesses from the Shoreham proceeding.[113] The Licensing Board then found, inter alia, that the intervenors' statement failed to reflect any review by a qualified expert of the applicants' and staff's reports on the Catawba diesels and contained no explanation from a qualified expert of how the proffered Shoreham testimony was relevant to the conditionally admitted contention. Thus, the Board concluded that the statement did not comply with its directive and that the intervenors had failed to demonstrate that they would be able to make a significant contribution to the record. Consequently, it dismissed the contention.[114]

B. Before us the intervenors assert that the dismissal of their contention improperly deprived them of the right to a hearing on the issue conferred by section 189a of the

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[112] Letter from Robert Guild to Licensing Board (August 1, 1984).

[113] Letter from Robert Guild to Licensing Board (August 16, 1984).

[114] Order of August 22, 1984 (unpublished); Memorandum and Order of September 4, 1984 (unpublished).

Atomic Energy Act of 1954, as amended.[115] First, they argue that it was error for the Licensing Board to apply the five section 2.714(a)(1) factors in evaluating the admissibility of their diesel generator contention. Second, they claim that, even if the Licensing Board acted correctly in imposing those requirements, the Board's unjustified scheduling actions prevented the intervenors from obtaining the services of the necessary experts.

1. The intervenors bring their first claim to the wrong forum. As they themselves recognize,[116] their argument has already been considered and rejected by the Commission in this very proceeding. In CLI-83-19, the Commission ruled that a licensing board is required to consider all five section 2.714(a)(1) factors before admitting a late contention, even if the contention is based on previously unavailable information.[117] In this connection, the Commission ruled that, contrary to the intervenors' assertion, section 189a of the Atomic Energy Act does not provide members of the public with an unqualified right to a hearing. Rather, the Act permits the establishment of reasonable threshold requirements for the

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[115] 42 U.S.C. 2239(a).

[116] Intervenors' Brief at 55-56.

[117] 17 NRC at 1045.

admission of contentions to NRC licensing proceedings and, in the Commission's view, the five-factor test represents a permissible exercise of that authority.[118] Inasmuch as the adjudicatory boards must adhere to the Commission's mandates, the Licensing Board thus necessarily was correct in balancing all of the section 2.714(a)(1) factors in assessing the admissibility of the intervenors' diesel generator contention.

2. The intervenors' second argument likewise must fail. The intervenors do not explicitly challenge the rejection of their purported technical statement by the Licensing Board. Rather, they insist before us that the Board should have heeded their objections and postponed the hearing on the diesel generator contention until after the completion of the hearing on diesel generators in the Shoreham proceeding. According to the intervenors, "[s]uch scheduling . . . served to deprive us of Dr. Anderson's expert assistance, and ultimately, our right to a hearing on these serious diesel generator claims."[119] But when the Licensing Board solicited the views of the parties on the hearing schedule before setting the final hearing dates, the intervenors did not object to the schedule on the grounds

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[118] Id. at 1045-47.

[119] Intervenors' Brief at 60.

that their expert would be unavailable. Rather, they objected to the Catawba hearing preceding other hearings involving diesel generators on the general grounds that it would waste the parties' time, effort and energy when similar issues would be more thoroughly aired in the Shoreham case.[120] Without having explicitly linked the Catawba hearing schedule with the unavailability of their expert witness in their objection before the Licensing Board, the intervenors may not now claim for the first time on appeal that the Board below erred in establishing the hearing schedule.

Nor did the Licensing Board err by not postponing the hearing when the intervenors informed the Board of Dr. Anderson's unavailability because of his conflicting commitment in the Shoreham proceeding. Once again, the intervenors failed to move for a continuance and to place the issue properly before the Board. In any event, as earlier noted, we will overturn a scheduling decision only when we find that a licensing board set a schedule that deprives a party of its right of procedural due process.[121] We do not find that here.

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[120] Tr. 12,730-33.

[121] See pp. 24-25, supra. See also South Texas, 21 NRC at 379.

As the Board pointed out, the intervenors had not made any unequivocal commitments on the availability of Dr. Anderson. Thus, whether the intervenors could count on his assistance even after the termination of his services in connection with the Shoreham proceeding was uncertain at best. Beyond that, we subscribe to the Licensing Board's observation that the intervenors had ample time to prepare for the hearing and obtain the assistance of experts had they made diligent efforts to do so.[122] As the Board also noted, given the Commission's policy on timely completion of operating license proceedings,[123] it would have required a much better reason than the intervenors supplied to justify a delay of this proceeding to await the conclusion of a hearing of uncertain duration being held in an entirely different proceeding.[124]

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[122] Memorandum and Order of September 4 at 5-7.

[123] CLI-81-8, 13 NRC at 452.

[124] Memorandum and Order of September 4 at 6.

We need not dwell upon the intervenors' claim (Intervenors' Brief at 60) that they were entitled to "mak[e] out our case [on the diesel generator issue] entirely through cross-examination if we choose." Had the contention been accepted for litigation, that no doubt would have been so. But, as we have seen, the contention was not accepted because the intervenors did not satisfy the section 2.714(a) test.

IV. MISCELLANEOUS ISSUES

The intervenors also complain of the Licensing Board's rejection of a number of their other contentions. None of their protests in this regard has substance.

A. The Licensing Board was clearly correct in declining to accept the intervenors' contentions seeking to litigate both the need for the power to be generated by Catawba and the financial qualifications of the municipalities that are co-owners of the facility.[125] The Commission has provided by rule that neither need-for-power nor financial qualifications questions are to be explored in an operating license proceeding such as the one at bar.[126]

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[125] LBP-82-107A, 16 NRC at 1801 (need for power); LBP-84-24, 19 NRC at 1425 n.3 (financial qualifications).

[126] See 10 CFR 51.106(c) (need for power); 10 CFR 2.104(c)(4), as amended effective September 12, 1984, 49 Fed. Reg. 35,747, 35,752 (1984) (financial qualifications).

The Licensing Board's action on the intervenors' financial qualifications contention had been based upon an earlier (1982) rule that, to the extent relevant here, was essentially identical to the 1984 rule. See 47 Fed. Reg. 13,750, 13,753 (1982). Although, upon judicial review, it was remanded to the Commission for further consideration, the 1982 rule remained in effect pending the completion of the remand and the publication of the 1984 rule. See 49 Fed. Reg. 24,111 (1984), interpreting New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984). The current rule has also been the subject of a judicial challenge, which is now pending in the District of Columbia Circuit. New England Coalition on Nuclear Pollution v. NRC,

(Footnote Continued)

Needless to say, in the absence of any endeavor by intervenors to seek a waiver of, or an exception to, the operation of these rules in this proceeding,[127] the Board below was obliged to apply them.[128]

B. On April 12, 1984, the intervenors submitted a contention to the effect that the applicants had failed adequately to correct certain identified control room design deficiencies.[129] Applying the five section 2.714(a)(1) lateness factors, the Board rejected the contention because the intervenors had failed to establish either good cause

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(Footnote Continued)
No. 84-1514 (D.C. Cir. filed Oct. 15, 1984), consolidated with Coalition for the Environment v. NRC, No. 84-1313 (D.C. Cir. filed July 12, 1984).

[127] See 10 CFR 2.758(b).

[128] In connection with their need-for-power claims, intervenors asserted below that the staff's draft environmental impact statement should have included construction costs in its cost/benefit assessment. We have not been enlightened by intervenors respecting why the analysis underlying the Licensing Board's rejection of their assertion was faulty. See LBP-82-16, 15 NRC at 584; LBP-82-107A, 16 NRC at 1801. We thus are constrained to observe once again that it is not enough simply to declare flatly that a particular Board ruling was in error. Rather, it is incumbent upon the appellant to confront directly the reasons assigned for the challenged ruling and to identify with particularity the infirmities purportedly inherent in those reasons.

[129] See Palmetto Alliance and Carolina Environmental Study Group Motion to Readmit Contentions Regarding Severe Accidents, Control Room Design Deficiencies and Lack of Financial Qualifications (April 12, 1984) [hereafter "Intervenors' Motion to Readmit Contentions"].

for their tardiness or their ability to make a substantial contribution to the resolution of this issue.[130]

We see no reason to overturn that result. Inasmuch as the information underlying their control room design claims had been made available in the applicants' Final Control Room Review sent to them on June 1, 1983,[131] the intervenors were not entitled to await the issuance of the staff's Safety Evaluation Report on March 9, 1984 before filing the contention.[132]

Moreover, intervenors did not establish that they would make a substantial contribution to development of the record. Their single assertion in this regard was that the past effectiveness of their participation (both on other issues in this proceeding and in other proceedings) provided a basis upon which the Board could and should conclude that they would assist in developing a sound record on the control room design matter.[133] Such a bare assertion, unsupported by specific information from which a Board could draw an informed inference that the intervenors can and will

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[130] LBP-84-24, 19 NRC at 1425 n.3.

[131] See letter from Albert V. Carr, Jr., to Licensing Board (June 8, 1983).

[132] See CLI-83-19, 17 NRC at 1045.

[133] Intervenors' Motion to Readmit Contentions at 6.

make a valuable contribution on a particular issue in this proceeding, will not suffice.[134]

C. Among the intervenors' originally filed contentions were those concerned with the consequences of an explosive hydrogen-oxygen reaction within the Catawba ice condenser containment following a loss-of-coolant accident. Relying on the proposition that contentions that are the subject of general rulemaking by the Commission should not be accepted in individual licensing proceedings, the Licensing Board rejected the intervenors' contentions. It noted in this regard that hydrogen generation in ice condenser containments such as that at Catawba was being addressed in an ongoing rulemaking proceeding.[135] The Board also noted that, although the Commission previously had held that the hydrogen issue could be litigated in individual proceedings where a credible loss-of-coolant accident scenario entailing hydrogen generation and certain other consequences were

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[134] See Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1181 (1983); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982).

[135] LBP-82-16, 15 NRC at 584. See Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974).

pled, no such scenarios were set forth in the intervenors' contentions.[136]

Subsequently, the intervenors filed four purported accident scenarios as contentions, in the guise of objections to the Board's order rejecting the contentions. Only three of these scenarios, however, concerned the generation of hydrogen and its consequences, and the Board again rejected them as barred by the pending rulemaking.[137] In doing so, the Board noted that the rulemaking directly addressed the intervenors' hydrogen concerns and would be completed before Catawba was licensed. It also observed that the intervenors were free to file comments on the proposed rule.[138]

Over a year later and after the applicants sought authority to conduct low-power testing, the intervenors once more moved to have their hydrogen contentions admitted. They claimed that the premise for the Board's earlier

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[136] LBP-82-16, 15 NRC at 584. See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674, 675 (1980).

[137] LBP-82-107A, 16 NRC at 1807-10. The Board found that the intervenors' fourth accident scenario, i.e., the scenario that did not involve the generation of hydrogen, had already been litigated in the construction permit proceeding and thus was barred from further litigation in the operating license proceeding. Id. at 1808.

[138] Id. at 1809-10.

ruling, i.e., that the rulemaking would be completed before Catawba was ready to be licensed, had proved wrong. Without addressing the criteria for late-filed contentions, the Board rejected the intervenors' contentions for a third time, finding that Commission action on a final rule dealing with the generic hydrogen generation issue was expected before full-power authorization of the applicants' facility.[139]

We have examined the intervenors' hydrogen control contentions and find that, in the circumstances presented, the Licensing Board was correct in rejecting them because they were the subject of an ongoing rulemaking. Moreover, even if we disagreed with the Board, the result would not change. On appeal, we are required to apply the Commission's regulations in effect at the time of the appeal.[140] Because the Commission's hydrogen control rule is now final[141] and sets forth specifically what measures are required in the case of Catawba, in all events we now would have to reject the intervenors' proffered contentions

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[139] LBP-84-24, 19 NRC at 1425 n.3.

[140] Douglas Point, 8 AEC at 82-83.

[141] 50 Fed. Reg. 3498 (1985), codified at 10 CFR 50.44(c)(3).

as an impermissible attack on the Commission's regulations.[142]

For the foregoing reasons, the Licensing Board's authorization of the issuance of full-power operating licenses for the Catawba facility is affirmed, except insofar as those licenses permit the receipt and storage on the facility site of spent fuel generated at other nuclear facilities.[143] As earlier noted, the issues pertaining to such receipt and storage will be considered in a subsequent opinion. Pending the issuance of that opinion, the applicants shall not receive at Catawba spent fuel generated elsewhere without reasonable prior notice to this Board.

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[142] 10 CFR 2.758.

[143] In this connection, we have considered all of the intervenors' other claims and have found them insubstantial. Additionally, we have examined on our own initiative the portions of the Licensing Boards' decisions not embraced by the appeals. This examination disclosed no error warranting corrective action.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board