Docket Nos.: 50-413
and 50-414

DEC 12 1985

Mr. Allen Hirsch, Director
Office of Federal Activities
U. S. Environmental Protection Agency
Room 2119m (A-104)
400 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Hirsch:

On November 21, 1985, the Atomic Safety and Licensing Appeal Board designated to preside in the proceeding involving the application of Duke Power Company, et.al., for operating licenses for the Catawba Nuclear Station, Units 1 and 2, issued a Decision affirming a previous decision of the Atomic Safety and Licensing Board which permits the storage at Catawba of spent fuel generated at Duke Power Company's Oconee and McGuire nuclear facilities.

A Final Environmental Statement related to the operation of the Station was prepared by the Office of Nuclear Reactor Regulation and was transmitted to you under cover of a letter dated January 10, 1983.

Sincerely,

ORIGINAL SIGNED BY:

B. J. Youngblood, Director
PWR Project Directorate #4
Division of PWR Licensing-A

Enclosure:
Decision

cc w/enclosure:
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DEC 12 1985

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DEC 12 1985

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '85 NOV 21 P2:18

ATOMIC SAFETY AND LICENSING APPEAL BOARD

DOCKETING & SERVICE BRANCH

Administrative Judges:

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

November 21, 1985
(ALAB-825)

SERVED NOV 21 1985

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

Robert Guild, Columbia, South Carolina, for the intervenors Palmetto Alliance and 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

In ALAB-813,[1] we decided the consolidated appeals of intervenors Palmetto Alliance and Carolina Environmental Study Group from a series of Licensing Board decisions, the last of which authorized full power operating licenses for

[1] 22 NRC 59 (1985).

DS02

the two-unit Catawba Nuclear Station owned by Duke Power Company, North Carolina Municipal Power Agency Number 1, North Carolina Electric Membership Corporation and Saluda River Electric Cooperative. Although we affirmed the major portion of the Licensing Board's license authorization, we deferred all questions pertaining to a small part of the authorization permitting the applicants to receive and store at Catawba spent fuel generated at Duke Power Company's Oconee and McGuire nuclear power facilities.[2] We now address those questions and affirm the remainder of the Licensing Board's full power license authorization.

I.

This proceeding was instituted with the publication of the customary notice of opportunity for hearing indicating that the Commission had received an operating license application pursuant to 10 C.F.R. Part 50 "to possess, use and operate" the Catawba Nuclear Station, Units 1 and 2.[3] In addition to the conventional information concerning the procedures for intervening in the proceeding, the notice closed with the usual statement that the license application on file in the agency's various public document rooms should be consulted "[f]or further details pertinent to the matters

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[2] Id. at 64, 86-87.

[3] 42 Fed. Reg. 32,974 (1981).

under consideration."[4] The Commission's published notice said nothing about the possible utilization of the Catawba facility as a repository for spent fuel generated at other nuclear power plants. The application referenced in the notice stated, however, that

> [t]he license hereby applied for is a class 103 operating license as defined by 10 CFR 50.22. It is requested for a period of forty (40) years. Applicants further request such additional source, special nuclear, and by-product material licenses as may be necessary or appropriate to the acquisition, construction, possession, and operation of the licensed facilities and for authority to store irradiated fuel from other Duke nuclear facilities. At present, Duke has no specific plans to utilize this storage alternative but, rather, considers it prudent planning to have this storage as one of the alternatives available.[5]

In response to the Commission's notice, both Palmetto Alliance and Carolina Environmental Study Group filed petitions to intervene and proffered contentions aimed at, inter alia, the fuel storage proposal contained in the license application.[6] The Licensing Board admitted both

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[4] Id. at 32,975.

[5] Duke Power Company, Catawba Nuclear Station License Application (Mar. 31, 1981), Volume 1 at 11-12.

[6] After the intervenors' petitions to intervene were filed, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel (acting pursuant to the standing delegation of authority contained in the Commission's Rules of Practice, 10 C.F.R. § 2.714) established a Licensing Board to rule on the petitions and preside over any

(Footnote Continued)

intervenors as parties to the operating license proceeding, but, in initially considering the admissibility of the intervenors' contentions concerning the fuel storage proposal, the Board questioned whether it had jurisdiction over that subject matter. Asserting that its jurisdiction "is normally established by the notice of opportunity for hearing" and that here the notice did not mention the fuel storage proposal, the Licensing Board sought the parties' views on the issue.[7] After receiving them, the Board concluded, without elaboration, that it "must consider the environmental impacts associated with [spent fuel] transport to, and storage at Catawba."[8] As pertinent to the issues now before us, the Licensing Board then rejected for various reasons most of the intervenors' contentions regarding the applicants' spent fuel proposal.

On appeal, the intervenors purport to challenge the Licensing Board's rejection of certain of their contentions concerning the applicants' spent fuel proposal. Because they sought to contest the applicants' plan, the intervenors

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(Footnote Continued)
operating license proceeding. See 46 Fed. Reg. 39,710 (1981). Other than naming the members of the Licensing Board, this notice only referred to the Commission's previous notice of opportunity for hearing.

[7] LBP-82-16, 15 NRC 566, 580 (1982).

[8] LBP-82-51, 16 NRC 167, 171 (1982).

understandably did not dispute the Licensing Board's assertion of jurisdiction over the portion of the license application containing the spent fuel proposal. We, on the other hand, raised the issue of the power of the Licensing Board to consider the intervenors' spent fuel contentions at oral argument of the intervenors' appeal. Because the issue of subject matter jurisdiction may be raised at any time, we questioned (for much the same reason originally asserted by the Board below) that Board's naked conclusion that it had authority over the spent fuel portion of the license application. Accordingly, we invited the parties to brief the jurisdictional issue.

In response, the applicants and the NRC staff assert that the Licensing Board properly exercised jurisdiction over the spent fuel proposal. They also argue that the Board properly rejected the intervenors' related contentions. The intervenors, in effect, now argue alternatively that the applicants' spent fuel plan was beyond the jurisdiction of the Licensing Board, but that, in any event, the Board erred in rejecting their contentions.

II.

Although it failed to articulate the rationale for its conclusions, the Licensing Board was correct in asserting jurisdiction over the spent fuel proposal contained in the operating license application. This being the case, the Board properly could, as it did, determine whether the

intervenors' spent fuel proposal contentions were admissible.

Adjudicatory boards do not have plenary subject matter jurisdiction in Commission proceedings.[9] Under the Atomic Energy Act, the Nuclear Regulatory Commission is empowered to administer the licensing provisions of the Act[10] and use licensing boards "to conduct such hearings as the Commission may direct."[11] The boards, therefore, are delegates of the Commission and, as such, they may exercise authority over only those matters that the Commission commits to them.[12] The various hearing notices[13] are the means by which the

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[9] See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983).

[10] 42 U.S.C. §§ 2132, 2133. The Atomic Energy Commission was abolished and its regulatory functions were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974, 42 U.S.C. § 5841(f) & (g).

[11] 42 U.S.C. § 2241.

[12] See Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-577, 11 NRC 18, 25 (1980); Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-249, 8 AEC 980, 987 (1974).

[13] See 10 C.F.R. § 2.700.

Commission identifies the subject matters of the hearings and delegates to the boards the authority to conduct proceedings.[14]

Our decisions make clear that licensing boards generally "can neither enlarge nor contract the jurisdiction conferred by the Commission."[15] For example, in Marble Hill,[16] we faced the question whether a notice of opportunity for hearing on a construction permit application gave the Licensing Board jurisdiction to consider an intervention petition seeking to raise antitrust issues where the Commission previously had issued a notice of hearing on the antitrust aspects of the application. In affirming the Licensing Board's determination that it lacked jurisdiction, we held that the Board correctly turned to the Commission's hearing notices to ascertain its subject matter jurisdiction, and that the Board had no discretion to alter

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[14] See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units Nos. 1 and 2), CLI-76-1, 3 NRC 73, 74 n.1 (1976).

[15] Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974).

[16] Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976).

this delegated authority absent Commission approval.[17] Thereafter, in Trojan,[18] the issue of the Licensing Board's jurisdiction arose in a special proceeding involving the question of the interim operation of the facility where the notice initiating the hearing spelled out the issues to be heard. We agreed with the Licensing Board's conclusion that it lacked jurisdiction over certain issues proffered by the intervenors because the "issues manifestly [were] beyond the bounds of the issues identified in the notice of hearing which triggered this special proceeding."[19] In so holding, we relied upon Marble Hill as a precedent of general applicability and characterized that decision as "squarely hold[ing] that a licensing board does not have the power to explore matters beyond those which are embraced by the notice of hearing for the particular proceeding."[20] Finally, in Zion,[21] we had occasion in an operating license amendment proceeding concerning the modification of a spent fuel pool to state, in a somewhat different context, that the Licensing Board's "jurisdiction was limited by the

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[17] Id. at 170-71.

[18] Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287 (1979).

[19] Id. at 289 n.6.

[20] Id.

[21] Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419 (1980).

Commission's notice of hearing" and that its "jurisdiction extended only to issues fairly raised by the application to modify the spent fuel pool, the sole matter which the Commission had placed before it."[22]

Unlike the hearing notice in the special Trojan proceeding that specified the issues for hearing, the notice of opportunity for hearing on the Catawba operating license application followed the Commission's customary practice for such notices and was very general. As pertinent here, the notice referenced only the application to possess, use and operate the two Catawba units and stated that the application should be consulted for further details. By employing a broad announcement without specifying any limitations, the Commission delegated to the Catawba Licensing Board authority over all portions of the license application in the event of an operating license proceeding; the application itself therefore set the bounds of the Licensing Board's jurisdiction. The fact that the hearing notice did not specifically identify the applicants' spent fuel proposal, or any other particular feature of the application, is irrelevant to the question of the Licensing Board's subject matter jurisdiction because the Commission's

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[22] Id. at 426. See also Point Beach, 18 NRC at 339.

delegation of authority to the Licensing Board in the hearing notice necessarily covered the entire operating license application.[23] All matters properly included as part of an operating license application pursuant to the Commission's regulations thus fell within the jurisdiction of the Licensing Board.

Moreover, the Commission's regulations, 10 C.F.R. Part 50, do not prohibit the type of spent fuel proposal contained in the applicants' application. Indeed, in the statement of basis and purpose accompanying the Commission's

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[23] Because the intervenors sought to challenge the applicants' spent fuel proposal in their proffered contentions (and on appeal did not raise any questions concerning the notice) and we raised only the question of the Licensing Board's jurisdiction to consider the spent fuel portion of the license application, we leave for another day any questions concerning the adequacy of the Commission's hearing notice under the Atomic Energy Act, 42 U.S.C. § 2239, the Administrative Procedure Act, 5 U.S.C. § 554, and the Commission's regulations, 10 C.F.R. § 2.105. For example, 10 C.F.R. § 2.105(b)(1) states, inter alia, that the notice of opportunity for hearing on an operating license application set forth the "nature of the action proposed." One substantial question is whether that section requires something more in a notice than a simple statement to consult the license application for further information when the noticed application, in addition to seeking authority "to possess, use and operate" a nuclear power plant, also seeks authority for a second activity that is clearly nonintegral and coincidental to the operation of the plant (such as receiving and storing spent fuel generated at other facilities). Regardless of what 10 C.F.R. § 2.105(b)(1) requires, however, explicit mention in the notice of opportunity for hearing of such nonintegral activities clearly would be advisable in the future so that the notice may fully serve its intended purpose.

rule setting forth requirements for the storage of spent fuel in an independent spent fuel storage installation, 10 C.F.R. Part 72, the Commission indicated that proposals such as that contained in the Catawba application that do not qualify as independent storage installations should be licensed pursuant to 10 C.F.R. Part 50.[24] Consequently, the applicants' spent fuel proposal was properly included within their operating license application, and the Licensing Board's jurisdiction encompassed that proposal as well as the intervenors' contentions directly challenging the applicants' spent fuel plan.

III.

On appeal, the intervenors claim that the Licensing Board erred in rejecting their "environmental contentions which sought to require thorough environmental impact analys[e]s of the costs and benefits, as well as the consideration of more environmentally-sound alternatives" to the applicants' transshipment proposal.[25] They assert that the lower Board incorrectly relied upon the Commission's generic determination of insignificant environmental impacts contained in Table S-4, "Environmental Impact of

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[24] 45 Fed. Reg. 74,693, 74,698 (1980).

[25] Brief of Appellants Palmetto Alliance and Carolina Environmental Study Group (Jan. 9, 1985) at 69.

Transportation of Fuel and Waste To and From One Light-Water-Cooled Nuclear Power Reactor," 10 C.F.R. § 51.20 (1984). They argue that the S-4 Table applies only to the shipment of irradiated fuel from a reactor to a reprocessing plant, not from one reactor to another.

But the intervenors have failed to identify which specific contention was wrongly rejected and which Licensing Board ruling was incorrect. Over the course of the operating license proceeding, they filed a number of similar contentions all aimed at the applicants' spent fuel proposal.[26] Moreover, the Licensing Board dealt with all of them in a number of different rulings.[27] Consequently, like so many of the intervenors' arguments in ALAB-813 their argument here suffers from a lack of proper briefing.[28] Once again the intervenors have not fulfilled their obligation under the Rules of Practice "clearly [to] identify the errors of fact or law that are the subject of the appeal" and, "[f]or each issue appealed, [to identify]

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[26] See CESG's Contentions (Dec. 9, 1981); Palmetto Alliance Supplement to Petition to Intervene (Dec. 9, 1981); Palmetto Alliance and Carolina Environmental Study Group Supplement to Petitions to Intervene Regarding Draft Environmental Statement (Sept. 22, 1982).

[27] See LBP-82-16, 15 NRC at 578-81; LBP-82-51, 16 NRC at 171-72; LBP-83-8B, 17 NRC 291 (1983).

[28] See ALAB-813, 22 NRC at 66 n.16, 71, 84 n.128.

the precise portion of the record relied upon in support of the assertion of error."[29] For this reason their argument fails. Nevertheless, as best we can determine, it appears that the intervenors intend to challenge the Licensing Board's rejection of combined contention 19.[30] If that is the case, their protest is without substance.

One part of the intervenors' contention 19 questioned the environmental costs and benefits of the applicants' transshipment proposal and sought an examination of the alternatives to it. In rejecting the contention, the Licensing Board found that the intervenors' challenge was an impermissible attack on the Commission's regulations, specifically Table S-4.[31] That ruling and the Board's supporting reasoning is generally correct. We need only add that the intervenors' sole argument before us (i.e., Table S-4 is inapplicable to the transport of spent fuel from one reactor to another because 10 C.F.R. § 51.20(g)(1) (1984) speaks of the spent fuel being shipped to a reprocessing

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[29] 10 C.F.R. § 2.762(d)(1). See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387, 395 (1983); Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 NRC 952, 954-56 (1982); Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473, 476 (1975).

[30] See LBP-83-8B, 17 NRC 291 (1983).

[31] Id. at 294.

plant) is unavailing. As the Licensing Board indicated in rejecting another of the intervenors' contentions, the Commission's generic determination of transportation impacts in the regulation is equally applicable to the transshipment of spent fuel between reactors as well as to a hypothetical reprocessing facility because it is the same fuel regardless of destination.[32]

Even if the intervenors' literal reading of the regulation were accepted, however, the Licensing Board's result would not change. First, the intervenors have not challenged the Board's alternative determination that the contention lacked specificity.[33] More important, subsequent to the Licensing Board's decision, the Commission's regulation was amended to delete all reference to a reprocessing facility.[34] Hence, there no longer can be any basis for arguing that Table S-4 does not apply to the transshipment of spent fuel from one reactor to another. Because we are required to apply the regulations in effect at the time of the appeal,[35] the amended regulation is

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[32] LBP-82-16, 15 NRC at 579 (1982).

[33] See LBP-83-8B, 17 NRC at 295.

[34] See 49 Fed. Reg. 9352, 9389-90 (1984). The substance of 10 C.F.R. § 51.20(g)(1) is now codified in 10 C.F.R. § 50.52 (1985).

[35] ALAB-813, 22 NRC at 86.

controlling and the intervenors' semantic argument is now moot.

For the foregoing reasons, therefore, we affirm the remaining part of the Licensing Board's operating license authorization that permits the applicants to receive and store at Catawba spent fuel generated at Duke Power Company's Oconee and McGuire nuclear power facilities.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board