

RAS 2775

**DOCKETED 02/21/01
SERVED 02/21/01**

DOCKET NO. 50-400-LA

February 21, 2001

Mr. Jim Warren
Executive Director
NC WARN
P.O. Box 61051
2009 Chapel Hill Road
Durham, NC 27715-1051

Dear Mr. Warren:

I am responding to your letter dated January 29, 2001, addressed to Chairman Richard A. Meserve. In your letter you request the personal intervention of Chairman Meserve in the matter of Carolina Power & Light's (CP&L) pending application to increase storage of spent fuel at the Shearon Harris Nuclear Plant (Shearon Harris). More specifically, you ask that the Chairman immediately suspend the issuance of the license amendment issued on December 21, 2000 by the NRC staff to CP&L. In noting your concerns about the staff's actions and the staff's arrival at its determination to issue a license amendment to CP&L after making a final no significant hazards consideration (NSHC), your letter addresses aspects of the proceeding before the Atomic Safety and Licensing Board established for the Shearon Harris spent fuel pool proceeding as well as matters involving the staff's NSHC determination that are currently before the Commission itself.

Under Nuclear Regulatory Commission procedural rules for adjudications, the Commission has an appellate role in proceedings commenced before its Atomic Safety and Licensing Boards. Because of that appellate role and the pendency of issues in the Shearon Harris adjudication, I trust that you will understand that neither Chairman Meserve nor the other Commissioners can respond to the specifics of your letter. The Commissioners must remain impartial during the pendency of a case, whether it is before a Licensing Board or the Commission itself.

On December 22, 2000, the Board of Commissioners of Orange County, North Carolina (Orange County) filed a petition for review, request for immediate suspension and stay of the staff's issuance of the license amendment. The petition was recently addressed in CLI-01-07 issued on February 14, 2001. I have enclosed a copy of that opinion. The opinion discusses the regulatory basis for rejection by the Commission of Orange County's petition. However, the opinion indicates that in order for the Commission to determine whether it should exercise its discretionary supervisory authority of the staff under NRC regulations, the staff is to provide further information to the Commission on the basis for its no significant hazards determination. The opinion further directs CP&L to not store spent fuel under the license amendment pending further order of the Commission or a Licensing Board decision in the case.

I have provided a copy of your letter to the Inspector General for the NRC. A copy of your letter and this response are also being placed on the Shearon Harris docket and served on the parties to the proceeding.

Sincerely,

/RA/

Annette L. Vietti-Cook

Enclosure: As stated

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 02/14/01

COMMISSIONERS

SERVED 02/14/01

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)

CAROLINA POWER & LIGHT)
COMPANY)

(Shearon Harris Nuclear Power Plant))
)
)
)
_____)

Docket No. 50-400-LA

CLI-01-07

MEMORANDUM AND ORDER

The Board of Commissioners of Orange County, North Carolina ("Orange County"), has filed a petition for review and request for immediate suspension and stay of the NRC staff's no significant hazards consideration ("NSHC") determination and issuance of a license amendment for spent fuel pool expansion at the Shearon Harris nuclear power plant ("Shearon Harris"). Such a petition is not permitted by our regulations and we reject it summarily. However, to assist us in determining whether we should exercise our discretion and review the NRC staff's NSHC determination in this specific case, we seek additional information and views from the staff, and direct the licensee temporarily not to store spent fuel under the license amendment pending further Commission order or a Licensing Board decision approving the amendment.

I. BACKGROUND

This proceeding involves a December, 1998, license amendment application filed by Carolina Power & Light Company ("CP&L") to increase the spent fuel storage capacity at Shearon Harris. The Shearon Harris fuel handling building was originally designed and constructed with four separate storage pools to support four nuclear units. All four spent fuel pools had been constructed by the time three of the four Shearon Harris units were cancelled. Only pools A and B are currently in service. CP&L desires to add rack modules to spent fuel pools C and D and place pool C in service.

The Licensing Board granted Orange County intervenor status to challenge the application, and admitted two of Orange County's technical contentions. See LBP-99-25, 50 NRC 25 (1999). Following an oral argument held pursuant to 10 C.F.R. Part 2, Subpart K, the Board ruled that Orange County had presented no genuine and substantial dispute of fact or law requiring an evidentiary hearing and resolved the merits of the contentions in favor of CP&L. See LBP-00-12, 51 NRC 247 (2000). Orange County prematurely sought review of the Board's order while admissibility of the County's late-filed environmental contentions was pending, and the Commission denied the request for interlocutory review without prejudice. See CLI-00-11, 51 NRC 297 (2000).

The Board subsequently admitted one of Orange County's environmental contentions (EC-6) and heard oral argument on it on December 7, 2000, after receiving extensive written submissions from all parties. See LBP-00-19, 52 NRC 85 (2000). The Board has not yet issued its ruling on the environmental contention. The crux of the contention proposed by Orange County is whether a seven-step accident sequence, culminating in initiation of an

exothermic oxidation reaction in spent fuel pools C and D,¹ has “a probability sufficient to provide the beyond-remote-and-speculative ‘trigger’ that is needed to compel preparation of an EIS [environmental impact statement] relative to [the] proposed licensing action.” See 52 NRC at 95.

On December 21, 2000, the NRC staff, pursuant to 10 C.F.R. §§ 50.58(b)(5) and 50.92, issued the license amendment, making it immediately effective on the ground that it raised no significant hazards consideration. The staff is authorized by our rules to make such a determination if operation of the facility “in accordance with the proposed amendment would not: (1)[i]nvolve a significant increase in the probability or consequences of an accident previously evaluated; or (2) [c]reate the possibility of a new or different kind of accident from any accident previously evaluated; or (3) [i]nvolve a significant reduction in a margin of safety.” See 10 C.F.R. § 50.92(c). Our rules implement a statutory directive, the so-called “Sholly Amendment,” authorizing the Commission to issue immediately effective reactor license amendments, “in advance of the holding and completing of any required hearing,” upon a “no significant hazards consideration” determination. See Atomic Energy Act, § 189a(2)(A), 42 U.S.C. § 2239(a)(2)(A).

On December 22, 2000, Orange County submitted a “petition for review and request for immediate suspension and stay of the NRC staff’s no significant hazards determination and issuance of license amendment for Harris spent fuel pool expansion” (“Orange County’s Petition”). Orange County alleged that the no significant hazards consideration determination fails to satisfy the criteria in 10 C.F.R. § 50.92 and violates the National Environmental Policy

¹The seven-step sequence is as follows: (1) a degraded core accident; (2) containment failure or bypass; (3) loss of all spent fuel cooling and makeup systems; (4) extreme radiation doses precluding personnel access; (5) inability to restart any pool cooling or makeup systems due to extreme radiation doses; (6) loss of most or all pool water through evaporation; and (7) initiation of an exothermic oxidation reaction in pools C and D.

Act ("NEPA"). See 42 U.S.C. §§ 4321-4347 (2000). A series of motions, responses, and replies ensued. The most recent was the NRC staff's January 19 opposition to Orange County's motion to file a reply.

II. Discussion

A. Orange County's Petition

Our regulations provide that "[n]o petition or other request for review of or hearing on the staff's no significant hazards consideration determination will be entertained by the Commission." See 10 C.F.R. § 50.58(b)(6). The regulations are quite clear in this regard. Accordingly, we reject Orange County's petition.

B. Exercise of the Commission's Discretion

Under our regulations, the staff's determination on the no significant hazards consideration ("NSHC") issue is final, "subject only to the Commission's discretion, on its own initiative, to review the determination." See id. The Commission has inherent authority to exercise its discretionary supervisory authority to stay the staff's actions or rescind the license amendment. See Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986); rev'd and remanded on other grounds, San Luis Obispo Mothers for Peace v. NRC, 799 F.2d 1268 (9th Cir. 1986).

In enacting the "Sholly amendment" in 1983, Congress expressed "special concerns about significant hazards considerations for spent fuel license amendments." Diablo Canyon, CLI-86-12, 24 NRC at 5, n.2. But "what may appear to raise significant hazards consideration at one time may, at some subsequent time and in light of technological advances and further study, be determined to present no significant hazards consideration." Id. at 6. The Commission, in response to the stated Congressional concern for spent fuel pools, obtained comment, used an outside contractor evaluation, and considered staff recommendations on

how to apply proposed rule criteria to spent fuel pool amendment cases. As a result of this process, in adopting final implementing regulations for the Sholly Amendment, the Commission also provided in the Statement of Considerations particular criteria for making NSHC determinations in spent fuel amendment cases.²

The NRC staff's final NSHC determination and assessment of comments in this particular case do not appear to reference explicitly the specific spent fuel pool criteria as such, although information relevant to the criteria is identifiable in the SER. The staff's NSHC determination also does not explicitly reference one of Orange County's comments on the then-proposed NSHC finding -- i.e., the County's expression of concern about a severe accident scenario (whose probability the Licensing Board currently is assessing under the rubric of NEPA).

Before deciding whether the staff's NSHC determination requires further action by the Commission under its discretionary powers, therefore, we request additional information and views from the NRC staff. Accordingly, we direct the staff, within 14 days of the date of this order, to file a brief addressing the 1986 NSHC criteria, the severe accident question, and any other aspect of the NSHC determination that, in the staff's judgment, would benefit from elaboration. The Commission would be particularly interested in a summary of any quantitative data that underlie the staff's NSHC determinations on accident probability, accident consequences and margins of safety. Thus far, the staff understandably has taken the position that it need file no merits pleading, as Orange County's petition for Commission review was unauthorized by our rules. Both Orange County and CP&L already have filed substantive briefs on the no significant hazards consideration issue. We will entertain no further filings on this issue from any party other than the NRC staff.

² See "Final Procedures and Standards on No Significant Hazards Considerations," 51 Fed. Reg. 7744, 7753-7755 (Mar. 6, 1986).

To preserve the status quo while we consider the staff's brief, we direct CP&L to store no spent fuel under the license amendment, pending a further order of the Commission or a Licensing Board decision approving the amendment, whichever comes sooner. See 10 C.F.R. § 2.764. CP&L may continue necessary pre-storage activities should it so choose.

IT IS SO ORDERED.

For the Commission³

***/RA by Andrew L. Bates Acting
For/***

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 14th day of February, 2001.

³Commissioner Diaz was not present at the affirmation of this Order. Had he been present, he would have affirmed his prior vote to approve this Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

| | | |
|--------------------------------------|---|----------------------|
| In the Matter of |) | |
| |) | |
| CAROLINA POWER & LIGHT COMPANY |) | Docket No. 50-400-LA |
| |) | |
| (Shearon Harris Nuclear Power Plant) |) | |

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-01-07) have been served upon the following persons by U.S. mail, first class, as indicated by an asterisk (*) or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by double asterisks (**), with copies by electronic mail as indicated.

Office of Commission Appellate
Adjudication**
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
G. Paul Bollwerk, III, Chairman**
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: gpb@nrc.gov)

Administrative Judge
Peter S. Lam**
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: psl@nrc.gov)

Administrative Judge
Thomas D. Murphy**
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: tdm@nrc.gov)

Susan L. Uttal, Esq.**
Robert M. Weisman, Esq.**
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: harris@nrc.gov)

Diane Curran, Esq.*
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036
(E-mail: dcurran@harmoncurran.com)

Docket No. 50-400-LA
COMMISSION MEMORANDUM AND ORDER
(CLI-01-07)

William D. Johnson*
Vice President and Senior Counsel
Carolina Power & Light Company
P.O. Box 1551
Raleigh, NC 27602

John H. O'Neill, Jr., Esq.*
Douglas J. Rosinski, Esq.*
Shaw Pittman
2300 N Street, NW
Washington, DC 20037
(E-mail: john_o'neill@shawpittman.com;
douglas.rosinski@shawpittman.com)

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of February 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CAROLINA POWER & LIGHT COMPANY) Docket No. 50-400-LA
)
(Shearon Harris Nuclear Power Plant))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LETTER FROM ANNETTE L. VIETTI-COOK TO JIM WARREN DATED 02/21/01 have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
G. Paul Bollwerk, III, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Thomas D. Murphy
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Susan L. Uttal, Esq.
Robert M. Weisman, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Diane Curran, Esq.
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

William D. Johnson
Vice President and Senior Counsel
Carolina Power & Light Company
P.O. Box 1551
Raleigh, NC 27602

John H. O'Neill, Jr., Esq.
Douglas J. Rosinski, Esq.
Shaw Pittman
2300 N Street, NW
Washington, DC 20037

Docket No. 50-400-LA
LETTER FROM ANNETTE L. VIETTI-COOK
TO JIM WARREN DATED 02/21/01

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of February 2001