UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Glenn O. Bright
Dr. James H. Carpenter
James L. Kelley, Chairman

In the Matter of CAROLINA POWER AND LIGHT CO. et al. (Shearon Harris Nuclear Power Plant, Units 1 and 2)	Dockets 50-400 OL 50-401 OL October 8, 1982

RESPONSE TO MEMORANDUM AND ORDER

On September 22, 1982, the Board issued a "Memorandum and Order (Reflecting Decisions Made Following Prehearing Conference)," following a prehearing conference which took place at Raleigh, North Carolina on July 13-14, 1982. Now comes Intervenor CHANGE/ELP and responds to that order as follows:

Objection Number 1

On the 27th day of September, 1982, CHANGE/ELP submitted a "Supplemental Statement Regarding Psychological Stress Contentions;" also on the 27th, after mailing same, Daniel F. Read of CHANGE/ELP received the Board's order. The Supplemental Statement consisted largely of legal argument concerning the PANE v. NRC case, the cognizability of psychological stress issues under it, and the duties of the NRC and the Board under the Administrative Procedure Act, 5 U.S.C. 551 et seq. In essence, the statement contended that the NRC policy state-

ment on such issues, 47 F.R. 31762, had no binding effect on this proceeding under the rule of law in Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33 (D.C. Cir. 1974) and related cases, and that the Board must be "prepared to support the policy statement just as if it had never been issued," Id., rather than dismiss Intervenor's contentions out of hand with a simple reference to the policy statement (as unfortunately happened, Order at pp. 25-26). Since the two items crossed in the mail, CHANGE/ELP asks the Board to reconsider its action based on the arguments in the Supplemental Statement moves such reconsideration be made (if necessary), or alternatively to respond to the arguments made by CHANGE/ELP concerning the cognizability of psychological stress issues "just as if the policy statement had never been issued."

Objection Number 2

CHANGE/ELP has moved that the Board postpone consideration of an operating license for Unit 2 of the Harris plant until such time as reasonable assurance can be had that it will in fact be substantially complete. The Board denied this motion, citing policy considerations that facilities not be unnecessarily idled, considerations of judicial efficiency, and advantages and efficiencies for applicants and staff, Order at pp. 75-76. Again, CHANGE/ELP has submitted information with regard to this motion which crossed the Board's order, and asks that the Board reconsider its decision in light of that information. Intervenor would also point out that Unit 2 is not scheduled for completion until 1989, seven years hence, and even disregarding the fact that planned 1983 ex-

penditures for the unit would be cancelled, so that if (as Applicants predicted) these hearings begin next year and conclude within a year or two, the Board's decision would still predate startup by at least four years, making any "delay" of "needed facilities" a distant possibility. But it is CHANGE/ELP's contention now as before that the CP/OL process was not designed, and adhered to by Congress, with an idea to building in comfortable safety margins for Applicants worried about licensing dleays. CHANGE/ELP objects to the Board's decision to hear Docket 401 at this time, and asks that the Board reconsider its decision in light of new information submitted. In the alternative, CHANGE/ELP asks that the Board, taking notice of the unsettled nature of matters regarding financing, etc. of the plant in light of the surprising nature of the order of the Utilities Commission, vacate its denial of the motion and hold the question open until the end of the next CP&L rate case (note Graham's comment, "we have to file another rate case as quickly as we can," "New Information" at p. 6). As a third alternative, CHANGE/ELP asks the Board to certify the question to the Commission: as noted earlier by CHANGE/ELP, the question of what is "substantially complete" or when a facility is "essentially completely constructed" for purposes of OL consideration has not been considered at length in the case law, see "Renewal and Reformation of Motion" at pp. 6-7. Therefore, this is "a major or novel question of law, policy or procedure," 10 C.F.R. Part 2, App. A(VI)(f)(4), which should be consider-

ed by the Commission or the Appeal Board, approximately in the following form:

> At what point is a facility sufficiently complete such that an application for an operating license for that facility is not premature? and
> In the case of a multi-unit facility, assuming that the unit nearest completion has satisfied the criteria outlined in response to the first part of this question, at what point is (are) the other unit(s) sufficiently complete such that an application for an operating license for these other facilities is not premature?

Objection Number 3

In rejecting CHANGE/ELP contention 38, the Board noted that the mandate of the Court in NRDC v. NRC, ___F.2d___, 12 E.L.R. 20465 (D.C. Cir. 1982) "has not yet issued," and that therefore the Board must consider the rule (Table S-3) still to be in effect. Intervenor objects to this holding, which it cannot reconcile with the language of the Court:

> [W]e hold that the original, interim and final Table S-3 Rules are invalid due to their failure to allow for proper consideration of the uncertainties that underlie the assumption that solidified high-level and transuranic wastes will not affect the environment once they are sealed in a permanent repository....We, therefore, vacate all three rules. 12 E.L.R. 20484.

The Court discussed retroactive effect of its decision, and implicit in its holding is the invalidity of the table as to the licenses under consideration here. CHANGE/ELP asks the Board to clarify its rejection, or to reconsider and lift it.

Objection Number 4

The Board rejected CHANGE/ELP contention 73(b), which

called for a NEPA consideration of the possible environmental effects of use of plutonium produced at the plants for military applications. The Board rejected this contention as too "remote" and suggests that military use of plutonium produced at Harris is unlikely, Order at pp. 27-28. Intervenor objects, on the ground that the Board has overlooked one of the critical points with regard to this contention, i.e., that Applicants propose to manufacture some hundreds of kilograms of plutonium each year at their plant. This plutonium, once manufactured, will be accessible for use as weapons material or for other uses, not just for the life of the plant, but for thousands of years. It is this special long-lived potential of plutonium that presents the real danger of "adverse environmental effects" which might be avoided, see 42 U.S.C. 4332(2)(C)(ii). Because there is not at this moment a policy to use this plutonium for weapons, does not mean that it will not happen, although fortunately the only steps taken under the present administration have been suggestions. Nevertheless, as Commissioner Gilinsky pointed out, "governments that seem 'safe' one day can be replaced by governments which are not, whereas nuclear explosives remain explosive for thousands of years," Wall Street Journal, July 15, 1982, p. 31. While Commissioner Gilinsky's comments were adressed to exportation of nuclear materials, they hold equally true for the United States government or whatever government may control Harris spent fuel in the next few thousand years. The Board questions the likelihood of such usage of plutonium; Intervenor would point the Board's attention to well-established legal theory

of risk assessment, where as the magnitude of the risk increases, the probability of its occurrence necessary to justify legal action decreases proportionally, and in light of the terrible risk involved here, would ask that the Board certify the question to the Commission for the same reasons outlined at p. 3, in approximately the following form:

> Whether, in light of the magnitude of the potential harm, and the exceptional long life of plutonium produced by the Harris plant as a source of explosive material and our known inability to foresee continuity of governments or their policies for more than one hundred years, the NEPA consideration of the effects of operation of said plant should include the effects of military use of plutonium produced at said plant, or whether despite the special nature of plutonium the usual common law of NEPA should apply?

Conclusion

CHANGE/ELP also notes the Board's deferral of ruling on the applicability of Table S-4 to the present application and environmental considerations under it. CHANGE/ELP would respectfully question whether the proposed rulings are within the Board's authority, but will reserve any formal objection until such time as the Board rules on the matter.

CHANGE/ELP recognizes and appreciates the mammoth task the Board has accomplished with this order, but objects as stated above. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Response to Memorandum & Order" were served this 9th day of October, 1982, by deposit in the U.S. Mail, first-class postage prepaid, upon all parties whose names appear below, except those whose names are marked with an asterisk, for whom service was accomplished by hand delivery.

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