November 2, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CAROLINA POWER & LIGHT COMPANY	)	Docket Nos. 50-400 OL
AND NORTH CAROLINA EASTERN	)	50-401 OL
MUNICIPAL POWER AGENCY	)	
	)	
(Shearon Harris Nuclear Power	)	
Plant, Units 1 and 2)	)	

APPLICANTS' REPLY TO OBJECTIONS
BY OTHER PARTIES TO THE BOARD'S
PREHEARING CONFERENCE ORDER

On September 22, 1982, the Atomic Safety and Licensing Board issued a Memorandum and Order (Reflecting Decisions Made Following Prehearing Conference). Pursuant to the schedule established therein, Applicants, the NRC Staff, and intervenors CHANGE, CCNC, Edleman and Wilson have filed timely objections to the Memorandum and Order. Applicants Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency herein submit their reply to the objections by other parties.

Table S-3

Intervenors CHANGE and Eddleman each object to the Board's rulings on proposed contentions which challenge the Table S-3 rule in 10 C.F.R. Part 51. Observing that the mandate has not issued in Natural Resources Defense Council v. NRC, 685 F.2d 459 (D.C. Cir. 1982), petition

for cert. filed, the Board held that until it does the Board must consider the Table S-3 rule to be in effect.[1/] Memorandum and Order at 25. On September 1, 1982, the Court issued an order staying the issuance of its mandate for a period thirty days. In September, several petitions for writ of certiorari were filed with the United States Supreme Court seeking review of the Court of Appeals decision. Consequently, the stay of the mandate shall continue until final disposition by the Supreme Court. See Fed. R. App. P. 41(b).

In addition, on October 29, 1982, the NRC issued the attached Statement of Policy on the effect of the decision in NRDC v. NRC, supra, on the power reactor licensing program. In its Statement,

> . . . the Commission directs its Licensing and Appeal Boards to proceed in continued reliance on the Final S-3 rule until further order from the Commission, provided that any license authorizations or other decisions issued in reliance on the rule are conditioned on the final outcome of the judicial proceedings.

Statement of Policy at 9.

Service of Documents

Intervenors CCNC, Eddleman and Wilson have objected to the Board's order with respect to the service by Applicants of licensing review documents upon Intervenors. See Memorandum and Order at 77-79. Because these objections reflect some

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1/ The Board is clearly correct in applying the law that an appellate court acts formally and officially only through its mandate. See, e.g., Barley v. Henslee, 309 F.2d 840, 844 (8th Cir. 1962).

confusion and uncertainty about the commitments Applicants have undertaken voluntarily with respect to making documents available, we repeat those commitments here,[2/] even though there is no indication that the Licensing Board, in choosing another path, relied upon them in any way.

Applicants will provide copies of FSAR and ER amendments, and other documents filed with the NRC Staff in support of the application for operating licenses, directly to local NRC public documents rooms in Raleigh and Chapel Hill.

Applicants will also serve all intervenors with the cover letters which forward to the NRC Staff amendments to the FSAR and ER, or responses to formal Staff review questions on those documents leading to the issuance of an environmental impact statement or the operating license safety evaluation report and supplements.

Hearings on Unit 2

Intervenors CHANGE and Eddleman have objected to the Board's denial of the CHANGE motion to defer hearings on Unit 2 of the Harris Plant. See Memorandum and Order at 75-76.

In denying the CHANGE motion for bifurcation of the operating license proceeding for Units 1 and 2 of the Harris Plant, the Board ruled that Commission policy favors a single hearing for all units at a multiple unit site in

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2/ See Applicants' Position on Service of Documents to Intervenors, August 10, 1982.

order that facilities eligible for licensing will not be unnecessarily idled. Id. at 75. The Board also pointed out that there are certain issues which are more accurately addressed and resolved when all units at a single site are considered. Id. at 76. The Board observed that several mechanisms exist by which an intervenor might raise for Board scrutiny issues relating to the second unit which arise as a result of changed circumstances. Id. There is, the Board held, no prejudice to intervenors that can result from the litigation in a single proceeding of issues common to both units. Id.

Applicants wish to call to the attention of the Board and the parties the recent action of the Commission[3/] denying a petition for rulemaking submitted by Mr. Eddleman relating to this precise issue. In his petition, Mr. Eddleman requested that the Commission regulations be amended to require that a separate operating license hearing be held for each unit at a single site. Under his proposed amendments, any issue, including need for power, and alternative sources of energy, would be litigable in each hearing for each unit at a multiple unit site.

The Commission's rationale in denying the Eddleman petition is consistent with this Board's reasoning. The Commission stated

> Based on experience, the Commission has found its present practice of consolidating

3/ 47 Fed. Reg. 46524 (October 19, 1982).

> operating license hearings for nuclear power reactors constructed on the same site to be conducive to the proper dispatch of business and to the ends of justice.

47 Fed. Reg. at 46524.

The Commission noted that its regulations as currently written permit the Commission to hold a separate hearing on a single reactor unit where it finds that the public interest so requires. The Commission expressly held, however, that Mr. Eddleman had presented no reason to believe that time lags between the in-service dates of several units at a multi-unit plant might impair the proper litigation of issues or restrict the ability of interested persons to participate in the litigation of relevant issues. See id. at 46525. Moreover, the Commission pointed out, petitioner Eddleman had failed to recognize that although a single hearing is conducted, a separate operating license is issued for each unit; and before each unit may be licensed the Commission must make the requisite findings required by the regulations in effect at the time of the issuance of the license. Id. The single hearing for all units at a plant thus "provides assurance that the reactor unit is licensed to operate in accordance with current safety requirements." Id.

Finally, the Commission expressly rejected the notion advanced by Mr. Eddleman that the issues of need for power and alternative sources be considered in an operating license hearing directed towards a second unit planned

for a site. The Commission based its ruling on the recent Commission amendment of its regulations[4/] by which it has eliminated those issues from those which may be litigated in the context of an operating license proceeding. 47 Fed. Reg. at 46526.

The Commission's rationale in denying Mr. Eddleman's petition thus fully supports this Board's denial of the CHANGE motion for bifurcation of the hearings for Units 1 and 2 of the Harris Plant, and demonstrates that the objections to the Board's ruling advanced by the intervenors are without merit.

In their respective responses to the Board's ' randum and Order, CHANGE and Mr. Eddleman also have pointed to recent media reports and statements of Applicant CP&L as evidence that CP&L does not plan to complete construction of Harris Unit 2. A similar suggestion was made by CHANGE in its "Supplement to Motion: New Information," dated September 24, 1982.

In denying the CHANGE motion for bifurcation, the Board apparently did not rely upon CP&L's schedule for construction of Unit 2 or the Company's intention to complete that unit. Applicants wish to advise the Board, however, that while CP&L plans to make no direct construction expenditures for Unit 2 in 1983, CP&L is not presently contemplating the cancellation of Unit 2. CP&L is considering a revised in-service date for Unit 2 of March 1990. A

4/ 47 Fed. Reg. 12940 (March 26, 1982).

revised in-service date for Unit 2 will be established at the time of approval of the CP&L 1983 construction budget by the Company's Board of Directors in December, 1982.

Respectfully submitted,

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Dated: November 2, 1982

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion for Leave to File a Reply to Objections by Other Parties to the Board's Prehearing Conference Order," "Applicants' Reply to Objections by Other Parties to the Board's Prehearing Conference Order," and Commission Statement of Policy dated October 29, 1982, were served this 2nd day of November, 1982, by deposit in the U.S. mail, first class, postage prepaid, to the parties identified on the attached Service List.

Thomas A. Baxter

Thomas A. Baxter, P.C.

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[7590-01]

LICENSING AND REGULATORY POLICY AND PROCEDURES FOR ENVIRONMENTAL PROTECTION; URANIUM FUEL CYCLE IMPACTS

AGENCY: Nuclear Regulatory Commission

ACTION: Statement of Policy

Earlier this year a decision of the United States Court of Appeals for the District of Columbia Circuit vacated three Commission rules which govern the treatment of uranium fuel cycle environmental impacts in individual nuclear power reactor licensing proceedings. Natural Resources Defense Council, et al. v. NRC, No. 74-1586 and consolidated cases (decided April 27, 1982). 1/ By its order of September 1, 1982, the D.C. Circuit stayed its mandate pending the filing of application for review of the decision by the Supreme Court. The Solicitor General, on behalf of the Nuclear Regulatory Commission, on September 27, 1982, filed with the Supreme Court a petition for a writ of certiorari. Other parties to the case have also filed petitions for Supreme Court review. In this Statement of Policy the Commission provides guidance to the Commission's staff and licensing boards and the interested public regarding ongoing licensing proceedings and the status of licenses already issued, pending final action by the Supreme Court. 2/

1/ On June 30, 1982 the D.C. Circuit denied the Commission's petitions for rehearing and rehearing en banc.

2/ The Commission dealt with a previous invalidation of a fuel cycle rule by the D.C. Circuit in 1976 by issuance of a policy statement. Natural Resources Defense Council v. NRC, 547 F.2d 633, rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519 (1978). See

(Continued on following page)

DUPE OF 8211030173

1. Background of the Decision in NRDC v. NRC

The rules in question form part of the Commission's procedures for compliance with the National Environmental Policy Act of 1969 (NEPA). 10 CFR Part 51. The Commission has interpreted NEPA as requiring that the environmental impacts of the uranium fuel cycle be considered in environmental impact statements for individual light water nuclear power reactors. 3/ The Commission determined some time ago that a generic rule would be the most effective means for considering such impacts in individual reactor licensing proceedings. The most recent version of the Commission's fuel cycle rule, the "Final" fuel cycle rule, was promulgated in 1979. 44 Fed. Reg. 45362 (August 2, 1979). 10 CFR 51.20, 51.23. The rule is frequently referred to as "Table S-3," after the table of impacts which the rule prescribes for use in evaluating the fuel cycle contribution to the environmental costs of licensing an individual nuclear power reactor. In issuing reactor construction permits and operating licenses the Commission has relied on this fuel cycle rule or its predecessors (the

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2/ (Continued from preceding page)

General Statement of Policy, 41 Fed. Reg. 34707 (August 16, 1976), and Supplemental General Statement of Policy, 41 Fed. Reg. 49898 (November 11, 1976). For reasons discussed in the text below, the Commission does not believe that the major, though temporary, disruption in licensing announced by the policy statement of August 1976 is a necessary or appropriate response to the D.C. Circuit's latest decision.

3/ In addition to the operation of the nuclear power reactor itself, the uranium fuel cycle includes uranium mining and milling, the production of uranium hexafluoride, isotopic enrichment, fuel fabrication, spent fuel storage and disposal, possible reprocessing of irradiated fuel, transportation of radioactive materials and management of low- and high-level wastes.

"Original" and "Interim" rules) since adoption of the Original rule in 1974. 39 Fed. Reg. 14188 (April 22, 1974).

Litigation involving the fuel cycle rules began with the Original S-3 rule. In a decision issued July 21, 1976 the United States Court of Appeals for the District of Columbia Circuit set aside those portions of the Original rule pertaining to waste management and spent fuel reprocessing, Natural Resources Defense Council v. NRC, 547 F.2d 633, rev'd sub nom. Vermont Yankee Nuclear Power Corp. v. NRC, 435 U.S. 519 (1978), but the court stayed its mandate pending review on a petition for certiorari to the United States Supreme Court. The Supreme Court reversed the Court of Appeals and remanded for further proceedings. The Court of Appeals consolidated the remanded case with challenges to the Commission's Interim and Final fuel cycle rules and issued a decision on April 27, 1982. NRDC v. NRC, No. 74-1486 and consolidated cases.

2. The Holding by the Court of Appeals

In the D.C. Circuit's decision in NRDC v. NRC, Judge Bazelon, speaking for the majority, held the Commission's Original, Interim and Final Table S-3 rules 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." Slip Op. at 69. The court's opinion acknowledged that in promulgating the Final rule the Commission considered and disclosed uncertainties concerning permanent disposal of spent fuel and high-level wastes from power reactors. See the Commission's notice of final

rulemaking, 44 Fed. Reg. 45362 (August 2, 1979). The court did not suggest that the evidentiary record for the Commission's final rulemaking omitted any substantial body of material regarding waste disposal uncertainties which might have been available at the time of the rulemaking. Nevertheless, the court held it to be a violation of NEPA that the rule binds Licensing Boards to evaluate fuel cycle impacts on the basis of waste disposal impacts in Table S-3, which does not explicitly include uncertainties. 4/

Although the court concluded that uncertainties could be dealt with generically, rather than on a case-by-case basis, the court held that the Table S-3 rule in question "does not allow the uncertainties concerning permanent storage to play a role in the ultimate licensing decision. That omission, and hence, the Rule, which causes it, constitutes a blatant

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4/ Concerning the choice not to include uncertainties explicitly in Table S-3, the Commission stated in promulgating the rule:

> In view of the uncertainties noted regarding waste disposal, the question then arises whether these uncertainties can or should be reflected explicitly in the fuel cycle rule. The Commission has concluded that the rule should not be so modified. On the individual reactor licensing level, where the proceedings deal with fuel cycle issues only peripherally, the Commission sees no advantage in having licensing boards repeatedly weigh for themselves the effect of uncertainties on the selection of fuel cycle impacts for use in cost-benefit balancing. This is a generic question properly dealt with in this rulemaking as part of choosing what impact values should go into the fuel cycle rule. The Commission concludes, having noted that uncertainties exist, that for the limited purpose of the fuel cycle rule it is reasonable to base impacts on the assumption which the Commission believes the probabilities favor, i.e., that bedded-salt repository sites can be found which will provide effective isolation of radioactive waste from the biosphere.

44 Fed. Reg. 45369 (footnote omitted).

violation of NEPA." Slip Op. at 46. The dissenting opinion by Judge Wilkey rejected the majority's analysis and would have upheld the Final rule on the grounds that in dealing with uncertainties the Commission had considered the relevant factors and arrived at a reasonable policy judgment.

An additional challenge had been raised to the Original and Interim rules that they improperly precluded Licensing Boards from considering health effects that might result from radioactive effluents set out in Table S-3 and also precluded consideration of socioeconomic and possible cumulative impacts of the fuel cycle. 5/ No such preclusion appeared explicitly in the rules, and the Commission had maintained before the court that no preclusion had been implicitly intended or ever actually applied. Nevertheless, the majority held that the Original rule and the Interim rule, prior to an amendment in 1978, "effectively eliminated the consideration and disclosure of the health, socioeconomic and cumulative impacts of fuel-cycle activities." Slip Op. at 57. Accordingly, the majority held that the Original and Interim rules, in addition to their failure to provide for proper consideration of uncertainties, also failed to allow for proper consideration of health, socioeconomic and cumulative fuel cycle effects.

5/ This challenge was not raised against the Final rule, which specifically requires that environmental impact statements "shall take account of dose commitments and health effects from fuel cycle effluents set forth in Table S-3 and shall in addition take account of economic, socioeconomic, and possible cumulative impacts and such other fuel cycle impacts as may reasonably appear significant." 10 CFR 51.23(c). Since ongoing licensing proceedings depend on the Final rule, this aspect of the court's decision does not bear on the Commission's decision whether to continue licensing.

On the issue whether the waste management and reprocessing models underlying the entries in Table S-3 would be economically feasible, a majority of the panel (Judge Bazelon and Judge Wilkey) upheld the Commission's finding of feasibility.

3. Effect on the Power Reactor Licensing Program

The D.C. Circuit's decision does not call into question the Commission's awareness of waste disposal uncertainties or the adequacy of the evidence regarding uncertainties in the record on which the Commission relied. 6/ The state of the Final rulemaking record does not suggest that supplementary studies of uncertainties are likely to produce evidence that would change licensing decisions. The Commission continues to address the uncertainty over whether and when a permanent repository, or equivalent system of disposal, will be developed. Slip Op. at 45. The Commission has stated that it would not license plants without reasonable confidence that safe waste disposal will be available when needed, and has found that it has such reasonable confidence. 42 Fed. Reg. 34391 (July 5, 1977), NRDC v. NRC, 581 F.2d 166 (2d Cir. 1978). The Commission is now entering the final

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6/ The Commission thus views the present decision by the D.C. Circuit not as a finding of fault with the evidentiary record on waste management impacts and uncertainties but rather as a rejection of the Commission's policy judgments regarding the weight and effect which those impacts and uncertainties should exert in reactor licensing. By way of contrast, after the D.C. Circuit issued its 1976 decision the Commission suspended licensing pending the outcome of a supplementary environmental survey of waste management and reprocessing impacts to remedy what the Commission perceived as gaps in the record identified by the court. 41 Fed. Reg. 43707, 43708, col. 2.

stages of the so-called "waste confidence" proceeding, a proceeding designed to reassess whether there is reasonable assurance that safe waste disposal will be available when needed. 44 Fed. Reg. 61372 (1979). The Court of Appeals has made clear that licensing need not be suspended pending the outcome of this reassessment. See Potomac Alliance v. NRC, ___ F.2d ___ (D.C. Cir. No. 80-1862, decided July 20, 1982). In view of these considerations and the high cost of delaying the issuance of licenses for qualified facilities, the Commission concludes that power reactor licensing may continue. Should the "waste confidence" proceeding arrive at an outcome inconsistent with this policy judgment, the Commission will immediately inform the Congress and will reassess the positions taken in this policy statement.

Next the question arises what role the fuel cycle rules should play in continued licensing. As the Commission interprets the D.C. Circuit and Supreme Court decisions which bear on environmental analysis of fuel cycle impacts, the Commission could conduct individual licensing proceedings by addressing fuel cycle impacts on a case-by-case basis without a generic rule. The Commission already deals with the matter partly in this fashion. In application of the Commission's Final rule a number of significant generic fuel cycle issues, including health effects associated with the effluents given in Table S-3, are presently treated on a case-by-case basis, pending further progress toward an expanded generic rule. To move further toward case-by-case litigation would reintroduce the significant burdens the rule was intended to relieve. Use of the S-3 rule has served the important purpose of providing the underlying basis for consideration of fuel cycle

impacts, and the Commission believes that an attempt to proceed without the rule would probably prove unworkable. In principle, and quite possibly in practice, contested licensing cases could rapidly evolve into replays of the S-3 rulemaking. 7/ The resulting delay and drain on staff resources would be substantial, and would not only delay licensing of qualified facilities, but would also substantially disrupt the Commission's regulatory program, including its program to develop safety standards for high-level waste disposal facilities.

The most straightforward way of proceeding is to continue using the S-3 rule in licensing, pending possible supplementation to be discussed later in this statement, insofar as such use is permissible. The Commission notes that after the NRDC v. NRC decision of 1976 invalidating the Original S-3 rule, 547 F.2d 633, the court, by staying its mandate, in effect permitted the continuation of licensing pursuant to the rule pending further judicial proceedings provided that future licenses be conditioned on the outcome of those proceedings. See Supplemental General Statement of Policy, 41 Fed. Reg. 49898 (November 11, 1976). The D.C. Circuit's current stay of mandate and the filing of petitions for Supreme Court review place the present case in a similar posture. Indeed the NRC advised the D.C. Circuit that it would proceed in reliance on the rule should the court grant its request to stay the mandate. The Commission anticipates that the

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7/ The same result could follow if the Commission amended the rule to allow Licensing Boards to take evidence on uncertainties in the Table S-3 entries. Such a proceeding could readily lead to complete reexamination of the Table by each board.

mandate will not issue until the Supreme Court has either declined review or taken review and addressed the merits of the lower court's decision. Accordingly, the Commission directs its Licensing and Appeal Boards to proceed in continued reliance on the Final S-3 rule until further order from the Commission, provided that any license authorizations or other decisions issued in reliance on the rule are conditioned on the final outcome of the judicial proceedings.

With regard to licensing proceedings now closed in which there was reliance on any of the fuel cycle rules, the Commission has concluded that for the present, at least, show-cause proceedings based on issues raised by the D.C. Circuit's decision should not be initiated. The Court of Appeals specifically noted that it expressed no view as to the validity of licenses already issued pursuant to the rules and that the matter of the validity of each would be addressed in subsequent judicial proceedings. Slip Op. at 69. Several cases which have been held in abeyance pending disposition of the main case challenge the validity of licenses and permits issued for specific facilities. 8/ The Commission believes these cases should remain in

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8/ The court cited five cases now before the D.C. Circuit in which individual licenses granted under the Original or Interim rules have been challenged on that ground. These include Lloyd Harbor Study Group, Inc. v. NRC, No. 73-2266; Aeschliman v. NRC, No. 73-1776; Saginaw Valley Study Group v. NRC, No. 73-1867; NRDC v. NRC, No. 74-1385; Coalition for the Environment v. NRC, No. 77-1905. Also, there is pending in the First Circuit a challenge to a reactor construction permit involving as an issue the validity of the fuel cycle rule. New England Coalition on Nuclear Pollution v. NRC, No. 76-1525.

abeyance, pending final Supreme Court action and has advised the courts of this position. The Commission does not intend to initiate show-cause proceedings sua sponte for these or other licenses, pending further direction by the courts. The Commission directs that any petitions for such proceedings filed pursuant to 10 CFR 2.206, insofar as they raise issues associated with validity of the S-3 rules, be held in abeyance pending a further order from the Commission.

4. Supplementation of the Record

As the Commission noted in promulgating the Final rule, events which might lead to major releases from the bedded-salt repository used as the model for the S-3 rule appear remote in probability while any releases which might reasonably be expected eventually to occur appear very small. Accordingly, the Commission found that the staff's assumption that the integrity of the repository would be maintained after sealing was a reasonable description of the performance of a properly selected repository and, when taken together with the staff's highly conservative assumption that all volatile fission products in reactor spent fuel would be released to the atmosphere prior to repository sealing, left Table S-3 overall a conservative description of fuel cycle impacts. See 44 Fed. Reg. 45369, col. 2. Considering the rule's limited purpose and taking into account the Commission's "waste confidence" proceeding, the Commission continues to believe that the record of the final S-3 rulemaking contains adequate information on waste disposal uncertainties to support continued use of the fuel cycle rule.

The Commission notes that over the past few years considerable effort has been devoted to the development of the national standards for a repository by the Environmental Protection Agency. These draft standards are essentially complete and should be issued soon as formal proposals. The NRC staff has informed the Commission that the release limits contained in the EPA standards and the studies done in support of the standards may provide additional information on releases associated with waste disposal. The Chairman of the NRC has urged early issuance of these important standards and the supporting documents.

The NRC staff has been directed to examine the EPA standard when published for comment and supporting documentation as it becomes available to determine the degree to which it could be used in Table S-3. This examination will include releases under both normal and abnormal conditions. The NRC staff should be prepared to provide recommendations on possible revisions within 60 days of publication of the EPA standards for comment.

Dated at Washington, D.C. this 29th day of October, 1982.

SAMUEL J. CHILK
Secretary of the Commission