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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )

CAROLINA POWER & LIGHT COMPANY )  
AND NORTH CAROLINA EASTERN )  
MUNICIPAL POWER AGENCY )Docket Nos. 50-400 OL  
50-401 OL(Shearon Harris Nuclear Power Plant, )  
Units 1 & 2) )APPLICANTS' RESPONSE TO LOTCHIN PROPOSED CONTENTIONS  
ON HARRIS OFF-SITE EMERGENCY PLAN

## I. INTRODUCTION

By letter entitled "Response to the Emergency Plan," dated April 2, 1984, Petitioner Phyllis Lotchin submitted three proposed contentions, all ostensibly dependent on the North Carolina Emergency Response Plan in Support of the Shearon Harris Nuclear Power Plant (Feb. 1984) (the "off-site emergency plan" or "ERP"), which was served on all parties to this proceeding on February 28, 1984.

The Licensing Board's September 22, 1982 "Memorandum and Order (Reflecting Decisions Made Following Prehearing Conference)" deferred consideration of previously filed contentions and permitted new contentions within 30 days after emergency planning documents become available. The Board stated:

The following procedures are adopted for considering such contentions in this case: once the relevant document—e.g., the draft impact statement or the emergency plans—is in an intervenor's hands, he or she must review the document and, within 30 days, serve a document advising the Board and parties as to which of his or her previously filed contentions are (1) submitted for ruling as they stand, or (2) withdrawn, or (3) revised on the basis of new information, including the text of the

revision. At the same time, the intervenor shall submit any new contentions based on new information in the document. The Applicants and Staff shall serve any responses to the intervenor's revised or new contentions within 15 days following receipt. Thereafter, the Board will rule on their admissibility, possibly following another prehearing conference.

Id. at 8. Among the deferred items were three emergency planning contentions submitted by Ms. Lotchin on May 14, 1982. The Board also noted that Ms. Lotchin had failed to proffer any valid contentions and that her party status would be determined in view of the revised contentions she might submit after emergency plans are available for review. Id. at 3. Applicants have previously responded to Ms. Lochin's original emergency planning contentions (Lotchin Contentions 2, 3, and 4) in a June 15, 1982 pleading entitled "Applicants' Response to Supplement to Petition to Intervene by Phyllis Lotchin." Because Ms. Lotchin has not provided a document regarding the status of those contentions as directed by the Board's September 22, 1982 Memorandum and Order, her previously filed contentions should be deemed abandoned. For the reasons discussed below, her latest emergency planning contentions should be rejected. Because Ms. Lotchin has failed to show a legal interest in the proceeding and to proffer any admissible contentions, her petition for leave to intervene should be denied.

## II. DISCUSSION

### A. Requirements for Contentions

Applicants have previously discussed at length the general legal standards governing the admissibility of proposed contentions in an NRC licensing proceeding. See, e.g., "Applicants' Response to Supplement to Petition to Intervene by Wells Eddleman" (June 15, 1982), at 2-19. Accordingly, there is no need to restate in full the Commission's requirements; rather, Applicants simply summarize here the general principles to be applied in determining the admissibility of Ms. Lotchin's and other intervenors' proposed contentions.

1. Scope of Hearing Notice

A threshold requirement for an admissible contention is that it address a matter which is within the scope of the issues set forth in the Commission's Notice of Opportunity for Hearing in this proceeding. See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 N.R.C. 558, 565 (1981); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 N.R.C. 287, 289-90, n.6 (1979); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 N.R.C. 167, 170-71 (1976).

2. Bases with Reasonable Specificity

The Commission's Rules of Practice, at 10 C.F.R. § 2.714(b), further require that an intervenor include with proposed contentions "the bases for each contention set forth with reasonable specificity."

There are several purposes which underlie the Commission's standard in section 2.714(b):

A purpose of the basis-for-contention requirement in Section 2.714 is to help assure at the pleading stage that the hearing process is not improperly invoked. For example, a licensing proceeding before this agency is plainly not the proper forum for an attack on applicable requirements or for challenges to the basic structure of the Commission's regulatory process. Another purpose is to help assure that other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against or oppose. Still another purpose is to assure that the proposed issues are proper for adjudication in the particular proceeding. In the final analysis, there must ultimately be strict observance of the requirements governing intervention, in order that the adjudicatory process is invoked only by those persons who have real interests at stake and who seek resolution of concrete issues.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20-21 (1974) (footnotes omitted).

The notice aspect of the requirement is a natural outgrowth of fundamental notions of fairness applied to the party with the burden of proof. The Atomic Safety and Licensing Appeal Board has observed:

The applicant is entitled to a fair chance to defend. It is therefore entitled to be told at the outset, with clarity and precision, what arguments are being advanced and what relief is being asked \* \* \* \* So is the Board below. It should not be necessary to speculate about what a pleading is supposed to mean.

Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit No. 1), ALAB-279, 1 N.R.C. 559, 576 (1975) (emphasis supplied; footnote omitted). Moreover, the Licensing Board is entitled to adequate notice of a petitioner's specific contentions to enable it to guard against the obstructionism of its processes. As the Supreme Court noted, in upholding the Commission's requirements for a threshold showing of materiality for environmental contentions:

\* \* \* [I]t is incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contention. \* \* \*

Indeed, administrative proceedings should not be a game or forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered \* \* \*.

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 553-54 (1978).

Yet, important as the notice aspect of the standard is, the requirement for bases with reasonable specificity goes beyond the "notice pleading" allowed in the federal courts, which has been found to be insufficient for NRC Licensing proceedings. See Wolf Creek, supra, ALAB-279, 1 N.R.C. at 575, n.32 (1975). On the other hand, the regulation does not require the intervenor to detail the evidence which will be offered in support of each proposed contention. Peach Bottom, supra, ALAB-216, 8 A.E.C. 13, 20 (1974).<sup>1</sup> In short, the standard falls somewhere in between, and "[t]he degree of specificity with which the basis for a contention must be alleged initially involves the exercise of judgment on a case-by-case basis." Id.

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<sup>1</sup>See also Mississippi Power and Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 A.E.C. 423, 426 (1973); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 N.R.C. 542, 548-49 (1980).



There are also certain practical considerations which should play a particularly important role here in the Board's application of the "bases with reasonable specificity" standard to a particular proposed contention — beyond the question of whether the proposed contention provides clear and precise notice of the issues on which Applicants may bear the burden of proof. First, the contention should refer to and address pertinent documentation, available in the public domain, which is relevant to this facility.<sup>2</sup> In the instant case, the Board deferred ruling on emergency planning contentions filed prior to availability of the emergency plans, pending service of the plans themselves, and accorded intervenors the opportunity to file refined and additional contentions after reviewing the plans. See "Memorandum and Order (Reflecting Decisions Made Following Prehearing Conference)" (September 22, 1982), at 4-8. Thus, the requirement for specific reference to relevant documentation applies with special force to the ERP, but may also include applicable NRC Staff regulatory guides and other published reports. In addition, there should be either a reasonably logical and technically credible explanation, or a plausible and referenced authority for the factual assertions in the contentions. The intervenor's personal opinion alone is not adequate for this purpose.

### 3. Challenges to Regulations

All rules and regulations of the Commission, and the underlying bases for those rules and regulations, are immune to attack in an individual licensing proceeding unless a petition is first made to the licensing board for an exception or waiver. The sole ground for a petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that application of the specific challenged rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted. The petition must be accompanied by an

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<sup>2</sup>See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 N.R.C. 175, 181-84 (1981).

affidavit in support of that basis for the petition. Opportunity is provided for other parties to respond to the petition, including the submission of reply affidavits. If the licensing board determines that a prima facie showing has been made in support of waiver or exception, it shall, before ruling, certify directly to the Commission for a determination on the matter. If the licensing board does not determine that such a prima facie showing has been made, it must deny the petition. 10 C.F.R. § 2.758; Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 89 (1974).

#### 4. Rulemakings

Licensing boards should not accept in individual licensing proceedings contentions which are, or are about to become, the subject of general rulemaking by the Commission. Potomac Electric Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 85 (1974); Sacramento Municipal Utility District (Rancho Seco Nuclear Generation Station), ALAB-655, 14 N.R.C. 799, 816 (1981).

#### B. Lotchin's Proposed Contentions

Ms. Lotchin's three newly proposed contentions on the off-site emergency plan share several characteristics which, taken together, demonstrate a complete lack of conformity with the Commission's rules which require that an intervenor state "the bases for each contention set forth with reasonable specificity." 10 C.F.R. § 2.714(b). None of the proposed contentions contain any reference to particular portions of the off-site emergency plan. Ms. Lotchin makes no effort whatsoever to specify how or in what particular areas the plan is deficient in the ways alleged in the contentions. Nor are there any references to other relevant documentation or authority to support the assertions in the contention. The nexus between these assertions and the contents of the Harris off-site emergency plan is unclear and unspecified. As discussed in the Wolf Creek decision, supra, Applicants are entitled to be told with clarity and precision what

arguments are being advanced and what relief is being asked in order to properly defend against a contention. Ms. Lotchin's proposed contentions are wholly deficient in such clarity and precision. The vagueness of the contentions also provides no notice to the Licensing Board in order to enable it to guard against the obstructionism discussed in the Vermont Yankee case, supra. Each of the proposed contentions must be rejected, then, as failing to meet the specificity requirements of 10 C.F.R. § 2.714(b).

Apart from their nebulous and unsupported character, each of Ms. Lotchin's latest contentions does not meet the standards for admissibility for other reasons. Lotchin Contention 1 is a generalized assertion that the off-site emergency plan "does not provide appropriate emergency measures" for a Class 9 accident. However, Ms. Lotchin has completely failed to explain what emergency measures are "appropriate" for Class 9 accidents and how provisions of the ERP would differ from the present plan to reflect consideration of such accidents. The contention, therefore, lacks the specificity required of a litigable contention.

Moreover, to the extent that Lotchin Contention 1 alleges that the ERP does not consider Class 9 accidents, the contention has no basis. In fact, the ERP was developed in accordance with the requirements of the NRC's final rule on emergency planning. 45 Fed. Reg. 55402 (1980). The Commission's rule was promulgated only after full consideration of the entire spectrum of potential accidents, including Class 9 accidents.

The basis for establishing elements of off-site emergency plans, including the size and nature of the emergency planning zones (EPZs), set forth in Commission regulations is contained in, inter alia, NUREG-0396, "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants," NUREG-0396; EPA 520/1-78-016 (December 1978). Appendix E to 10 C.F.R. Part 50, note 2. NUREG-0396 was developed by a task force composed of recognized NRC and EPA experts on the effects of radioactivity on the environment and

human population. In recommending the size and nature of the EPZs, this planning document specifically recognized the possibility of a range of accidents including worst case Class 9 accidents:

The EPZ recommended is of sufficient size [10 mile radius] to provide dose savings to the population in areas where the projected dose from design basis accidents would be expected to exceed the applicable PAGs [Protective Action Guidelines] under unfavorable atmospheric conditions \* \* \* \* [C]onsequences of less severe Class 9 accidents would not exceed the PAG level outside the recommended EPZ distance. In addition, the EPZ is of sufficient size to provide a substantial reduction in early severe health effects (injuries or deaths) in the event of the more severe Class 9 accidents.

[NUREG-0396, at 16-17]

Appendix I of NUREG-0396 further explained that the task force considered the complete spectrum of potential accidents and that the resulting planning basis was designed to provide full protection to the public in the event of any Class 9 accident.

Class 9 accidents cover a full spectrum of releases \* \* \* \* The lower range of the spectrum would include accidents in which a core "melt-through" of the containment would occur \* \* \* \* [T]he doses from "melt-through" releases \* \* \* \* generally would not exceed even the most restrictive PAG beyond about 10 miles from a power plant. The upper range of the core-melt accidents is categorized by those in which the containment catastrophically fails and releases large quantities of radioactive materials directly into the atmosphere because of over-pressurization or a steam explosion. These accidents have the potential to release very large quantities \* \* \* of radioactive materials. There is a full spectrum of releases between the lower and upper range with all of these releases involving some combination of atmospheric and melt-through accidents. These very severe accidents have the potential for causing serious injuries and deaths. Therefore, emergency response for these conditions must have as their first priority the reduction of early severe health effects. Studies have been performed which indicate that if emergency action such as sheltering or evacuation were taken within about 10 miles of a power plant, there would be significant savings of early injuries and deaths even from the most "severe" atmospheric releases. [NUREG-0396, at I-6 to I-7. Footnote omitted].

Commission regulations also reference NUREG-0654, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants," NUREG-0654/FEMA-REP-1, (January 1980), as addressing standards for off-site emergency plans. 10 C.F.R. § 50.47, note 1. The foreword to the



Harris ERP clearly states that it "was developed using the guidelines and information in NUREG-0654." ERP at p. vii. NUREG-0654, a joint NRC and Federal Emergency Management Agency (FEMA) document, adopted the approach recommended in NUREG-0396 for emergency preparedness around nuclear power facilities and noted that its conclusions were based upon inter alia, consideration of a range of potential accidents to include worst case core melt accidents involving a containment breach. NUREG-0654, at 7. In short, Commission emergency planning regulations and implementing criteria were promulgated after thorough consideration of, inter alia, accidents of all types, including worst case core melt "Class 9" accidents. The Harris ERP was, in turn, based on the requirements and guidance contained therein.

In sum, Applicants oppose the admission of Lotchin Contention 1 as wholly lacking in specificity and without basis.

Lotchin Contention 2 asserts that "the emergency plan does not adequately make provisions for citizens to protect themselves from the effects of the continuous releases—however small—of low-level radiation" and omits educational or safety measures related thereto. This contention evidences a fundamental misapprehension of the purpose of the Harris off-site emergency plan. The purpose of the ERP is to establish procedures to respond in the event of an emergency situation arising at the Harris Plant, not to address the effects and alleged need for protective measures against routine radioactive releases. Clearly, Lotchin Contention 2 raises issues that are beyond the scope of emergency preparedness. To the extent that this contention can be read as asserting that the ERP ought to address such matters, it is an oblique challenge to the Commission's emergency planning regulations (10 C.F.R. § 50.47), which do not require such consideration. Design objectives for routine operation of nuclear reactors to ensure that radioactive effluents are "as low as reasonably achievable" are specified in Appendix I to 10 C.F.R. Part 50, which is applicable to the Harris Plant. The ERP is simply not intended to address releases that come within the Appendix I criteria.

In sum, Contention 2 must be rejected for lack of the requisite specificity, lack of basis, and as a challenge to the Commission's regulations.

Lotchin Contention 3 is equally deficient in its failure to meet minimal standards for a litigable contention. Contention 3 asserts that "in preparing the Emergency Plan, CP&L has neither sought nor received the counsel and/or approval" of citizens affected by operation of the Harris Plant. In addition to its utter lack of specificity discussed above, this contention is based on a faulty premise that renders it without any basis. The ERP was prepared by the Division of Emergency Management of the North Carolina Department of Crime Control and Public Safety and by the emergency management coordinators of Chatham, Harnett, Lee and Wake Counties, not by Carolina Power & Light Company. To the extent that the contention is read as suggesting that the Division of Emergency Management or the counties have an obligation to consult with the general public in preparing the ERP, the contention constitutes a challenge to the Commission's emergency planning regulations, 10 C.F.R. § 50.47. No requirement for consultation with the general public is contained in the Commission's regulations or in the guidance or criteria documents issued pursuant thereto. Nor does Ms. Lotchin specify where such a requirement is to be found. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 377 (1983) (holding that the emergency planning regulations do not impose a requirement that local officials be consulted in determining whether a county be included in the plume EPZ).

Finally, it should be noted that Contention 3 contains no criticism of the substance of the ERP, nor does it specify how the ERP would differ had there been consultation with the general public regarding its provisions. The process of proposing contentions is designed to permit a party to raise issues regarding the substance of an emergency response plan, not the process whereby it is developed.

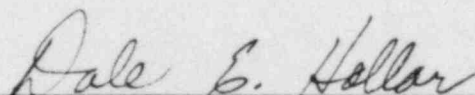
In sum, Lotchin Contention 3 must be rejected because it lacks any basis or specificity and because it constitutes a challenge to the Commission's regulations.

### III. CONCLUSION

In order to be admitted as a party to an NRC proceeding, a petitioner must demonstrate an interest in the proceeding and proffer at least one admissible contention. See Mississippi Power & Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 A.E.C. 423, 424 (1973); Louisiana Power & Light Company (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 A.E.C. 371 (1973).

In Applicants' February 23, 1982 response to Ms. Lotchin's petition, Applicants took the position that Ms. Lotchin had not demonstrated her legal interest in the proceeding. In Applicants' June 15, 1982 response to her initial contentions, we argued that she had not advanced a single admissible contention. Applicants reiterate those positions now. Therefore, Ms. Lotchin's petition for leave to intervene should be denied, and she should not be admitted as a party to this proceeding.

Respectfully submitted,

  
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Dale E. Hollar, Esq.  
Associate General Counsel  
Carolina Power & Light Company  
Post Office Box 1551  
Raleigh, North Carolina 27602  
(919) 836-8161

Attorneys for Applicants:

Thomas A. Baxter, Esq.  
John H. O'Neill, Jr., Esq.  
Shaw, Pittman, Potts & Trowbridge  
1800 M Street, N.W.  
Washington, D.C. 20036  
(202) 822-1000

Richard E. Jones, Esq.  
Samantha Francis Flynn, Esq.  
Carolina Power & Light Company  
Post Office Box 1551  
Raleigh, North Carolina 27602  
(919) 836-6517



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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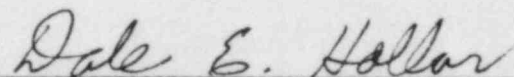
(Shearon Harris Nuclear Power Plant,  
Units 1 & 2)

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Docket Nos. 50-400 OL  
50-401 OL

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to CCNC Contentions Arising From Review of Emergency Response Plan" and "Applicants' Response to Lotchin Proposed Contentions on Harris Off-site Emergency Plan" were served this 23rd day of April, 1984 by deposit in the United States mail, first class, postage prepaid, to the parties on the attached Service List.



Dale E. Hollar  
Associate General Counsel  
Carolina Power & Light Company  
Post Office Box 1551  
Raleigh, North Carolina 27602  
(919) 836-8161

Dated: April 23, 1984

## SERVICE LIST

James L. Kelley, Esquire  
Atomic Safety and Licensing Board  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Mr. Glenn O. Bright  
Atomic Safety and Licensing Board  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Dr. James H. Carpenter  
Atomic Safety and Licensing Board  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Charles A. Barth, Esquire  
Myron Karman, Esquire  
Office of Executive Legal Director  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Docketing and Service Section  
Office of the Secretary  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Mr. Daniel F. Read, President  
Chapel Hill Anti-Nuclear  
Group Effort  
5707 Waycross Street  
Raleigh, North Carolina 27606

Dr. Linda Little  
Governor's Waste Management Board  
513 Albemarle Building  
325 Salisbury Street  
Raleigh, North Carolina 27611

Ruthanne G. Miller, Esquire  
Atomic Safety and Licensing  
Board Panel  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

John D. Runkle, Esquire  
Conservation Council of North Carolina  
307 Granville Road  
Chapel Hill, North Carolina 27514

M. Travis Payne, Esquire  
Edelstein and Payne  
Post Office Box 12643  
Raleigh, North Carolina 27605

Dr. Richard D. Wilson  
729 Hunter Street  
Apex, North Carolina 27502

Mr. Wells Eddleman  
718-A Iredell Street  
Durham, North Carolina 27705

Thomas A. Baxter, Esquire  
John H. O'Neill, Jr., Esquire  
Shaw, Pittman, Potts & Trowbridge  
1800 M Street, N.W.  
Washington, D. C. 20036

Dr. Phyllis Lotchin  
108 Bridle Run  
Chapel Hill, North Carolina 27514

Bradley W. Jones, Esquire  
U. S. Nuclear Regulatory Commission  
Region II  
101 Marietta Street  
Atlanta, Georgia 30303

Robert P. Gruber  
Executive Director  
Public Staff  
North Carolina Utilities Commission  
Post Office Box 991  
Raleigh, North Carolina 27602