

July 18, 1984  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' MOTION FOR RECONSIDERATION  
OR CLARIFICATION OF BOARD MEMORANDUM  
AND ORDER ON JOINT CONTENTION IV

On April 13, 1984 the Atomic Safety and Licensing Board ("Board") ruled on Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency's ("Applicants") Motion for Summary Disposition of Joint Contention IV, which concerns Applicants' use of thermoluminescent dosimeters ("TLDs") as the dosimeters of record for monitoring radiation exposure to personnel at the Shearon Harris Nuclear Power Plant ("SHNPP").

The Board granted Applicants' Motion regarding Joint Intervenors' allegations that TLDs were inadequate to protect worker health and safety and rejected Joint Intervenors' contention that real-time monitoring and pressurized ionization

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monitors are necessary in radiation areas. However, the Board raised as an issue of material fact whether compliance with a 1983 ANSI standard embodied in an NRC proposed rule "insure[s] compliance with the NRC regulations." Memorandum and Order (Ruling on Motions for Summary Disposition), 1-20 (April 13, 1984) (hereinafter "April 13 Memorandum"). Because Applicants' Motion For Summary Disposition was filed prior to publication of the proposed rule, Applicants had no opportunity prior to the April 13 Memorandum to address any ramification the rule might have on Joint Contention IV.

After careful consideration of the April 13 Memorandum, however, Applicants hereby request that for the reasons set forth in detail below, the Board reconsider its ruling on Applicants' motion for summary disposition insofar as the Board found the existence of an issue which must be addressed in the safety hearing, presently scheduled to commence October 10, 1984. In the event that the Board continues to deny summary disposition on all aspects related to Joint Contention IV, however, Applicants seek clarification of the scope of the issue which remains before the Board.1/

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1/ There is no provision in the Commission's rules for when a motion for reconsideration of a Board ruling must be filed. At the prehearing conference prior to the commencement of the hearing on environmental issues, the NRC Staff stated that it would move for reconsideration of Joint Contention IV. Consequently, Applicants did not prepare their own motion. Now,

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## I. Background

As accepted by the Board, Joint Contention IV reads as follows:

Applicants intend to rely on the thermoluminescent dosimeters (TLDs) as the dosimeter of record to monitor occupational radiation exposure. Because of TLD inaccuracies and their lack of real-time monitoring capability, these devices are inadequate to assure worker safety and health. Applicants should be required to use portable pressurized ionization monitors in support of workers in radiation hazard areas to corroborate the exposure indicated by the TLDs.

At the time the proposed contention was accepted, the Board stated that:

. . . TLDs are inaccurate and lack real-time monitoring capability. This contention was opposed by Applicants on the grounds that TLDs are commonly used to measure cumulative worker exposures and that pocket dosimeters are used for real-time measurement. If these grounds can be clearly demonstrated, this contention might eventually be a good candidate for summary disposition.

Memorandum and Order (Reflecting Decisions Made Following Prehearing Conference), LBP-82-119A, 16 N.R.C. 2069, 2077

(September 22, 1982). Applicants moved for summary disposition and addressed those two issues in detail. In their motion for

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(Continued)

however, since the date for the safety hearing is approaching and testimony must be filed on August 9, Applicants believe that it is necessary to seek reconsideration or clarification without further delay.

summary disposition and the supporting affidavit of Stephen A. Browne ("Browne Affidavit"), Applicants demonstrated that, although no specific accuracy requirements are set forth in current regulations, Applicants' TLDs comply with nationally recognized standards for accuracy. In particular Applicants conform to ANSI N.130 H-1983, which is the basis of a proposed regulatory requirement for the accuracy of TLDs. 49 Fed. Reg. 1205-11 (January 10, 1984) (hereinafter referred to as the "proposed rule").

In its April 13 Memorandum the Board granted summary disposition over the portions of Joint Contention IV that concern real-time monitoring capability and the use of portable pressurized ionization chambers. The Board also found that the TLDs used by Applicants are adequate to protect worker health and safety. Nonetheless after disposing of the ultimate issue of the adequacy of the TLDs, the Board found that a material issue of fact exists with respect to the accuracy of TLDs. This perception of a material issue of fact is based on the Board's belief that the standards set forth in 10 C.F.R. Part 20 for limitations on annual and quarterly dose to personnel are inconsistent with the standards for TLD accuracy contained in the proposed rule now under consideration by the Commission.

After reviewing the Board's detailed April 13 Memorandum, Applicants respectfully submit that the Board erred in four significant respects in denying summary disposition of Joint

Contention IV in its entirety.<sup>2/</sup> First, Applicants believe that under the controlling law, the Board erred in raising the compatibility of 10 C.F.R. Part 20 and the proposed NRC rule as a sua sponte issue. Second, Applicants respectfully submit that it was inappropriate for the Board to attempt to resolve through the hearing process an issue that currently is the subject of agency rulemaking. Third, Applicants believe that the issue raised by the Board is immaterial in light of other specific findings on the TLD contention. Finally, it is Applicants' belief that the Board's order is premised on a misunderstanding of the relationship between the dose limitations in 10 C.F.R. Part 20 and the accuracy requirement contained in the proposed rule and on an unsupported interpretation of 10 C.F.R. § 20.101(a) and § 20.407(b). For these reasons Applicants move the Board to reconsider its ruling denying summary disposition of a portion of Joint Contention IV.

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<sup>2/</sup> The general standards governing summary disposition are discussed in detail in "Applicants' Memorandum of Law in Support of Motions For Summary Disposition on Intervenor Eddleman's Contentions 64(f), 75, 80 and 83/84," dated September 1, 1983.

II. The Board's Ruling on Joint  
Contention IV Constituted  
An Unjustified Exercise of  
Sua Sponte Authority

Applicants submit that in ordering a hearing on the question of the interface between current regulatory requirements contained in 10 C.F.R. Part 20 and the proposed rule, the Board has exceeded its authority by raising an issue that has not been broached by the parties, either at the time the contention was admitted, during the discovery process or during the summary disposition proceeding. In fact, the proposed rule was promulgated after Applicants moved for summary disposition of Joint Contention IV. While Joint Intervenors did raise the issue of the accuracy of Applicants' TLDs, as discussed in Applicants' Motion for Summary Disposition at 7, it was raised only by vague and unsupported allegations that Applicants' TLDs were accurate only to + 30%. Joint Intervenors produced no support for that allegation and no coherent explanation of what accuracy they believed to be required. A party cannot avoid summary disposition on the basis of guesses or suspicions, such as Joint Intervenors have asserted on this issue. Gulf States Utilities Company (River Bend Station, Units 1 and 2), LBP-75-10, 1 N.R.C. 246, 248 (1975). Thus, summary disposition clearly was appropriate on that issue.

Joint Intervenors simply did not raise any material issue with respect to the accuracy standards set forth in the



proposed regulation. Nonetheless, the Board, on its own initiative, found that an issue of fact existed because, in its opinion, the standards set forth in the proposed rule were not compatible with the Board's interpretation of 10 C.F.R. Part 20.3/ The sua sponte nature of this issue is demonstrated graphically by "Joint Intervenors' Response to Summary Disposition on Joint Contention IV - Thermoluminescent Dosimeters," dated February 6, 1984. ("Joint Intervenors' Response"). Joint Intervenors did not oppose the proposed rule -- in fact they stated that "Joint Intervenors believe that this contention is not a collateral attack on this rule proposal . . . but is in fact consistent with it." Joint Intervenors' Response at 4. The Joint Intervenors' articulated concern was not that the rule is inappropriate, but that, for unspecified reasons, Applicants will fail to comply with it.4/ Therefore, Applicants submit that there was no legal justification for raising an issue regarding the suitability of the proposed rule.

Moreover, the Board did not find that an issue of fact existed with respect to Applicants' ability to comply with the

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3/ The Board's action in raising this issue sua sponte contrasts markedly with the limited scope of the Board's order admitting Contention IV.

4/ The fact that the Board directed Joint Intervenors to prepare testimony on this "if they choose" suggests that the Board does not view the "issue of material fact" set for hearing as one sponsored by the Joint Intervenors. See April 13 Memorandum at 20.

rule, the one issue which may have been raised in Joint Intervenor's Response. In fact, the Board found that the "TLDs as used by CP&L in this test produced results well within the tolerance limits of ANSI N13.11-1983" (the standard upon which the proposed rule is based). April 13 Memorandum at 17. Thus, having found in Applicants' favor on the sole issue concerning the proposed regulation raised by the Joint Intervenor, it was inappropriate for the Board to formulate another issue which was outside the scope of the Contention as envisioned by the parties.

In addition, it should be noted that the issue raised by the Board does not constitute a "serious safety, environmental, or common defense and security matter" so as to invoke the Board's limited authority to raise a sua sponte issue. 10 C.F.R. § 2.760a; See Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 N.R.C. 1111, 1114 (1981) and CLI-81-24, 14 N.R.C. 614 (1981). As discussed in detail in Applicants' motion for summary disposition, TLDs are not used to obtain frequent readings of dosage for exposure control purposes and are not used to provide the basis for immediate decisions and actions to prevent over-exposure. Browne Affidavit at ¶ 15.

More importantly, however, the compatibility of 10 C.F.R. Part 20 and the proposed rule cannot be a serious safety issue because the Board already has determined that there is no issue



of fact with respect to the ultimate issue of whether Applicants' use of TLDs is inadequate to protect worker health and safety. In addition, the Board has recognized that Applicants can satisfy the alternative standard for accuracy urged by the Board. See April 13 Memorandum stating in connection with the Board's interpretation of 10 C.F.R. Part 20 "[T]hat such performance is reasonable and not beyond limitations dictated by available measurement techniques is demonstrated by the performance of CP&L. . . ." Id. at 19. Since it is beyond peradventure that no serious safety problem is at issue, the Board erred in invoking its limited authority to raise a sua sponte issue.<sup>5/</sup>

III. The Appropriateness of the Proposed  
Rule Properly Should Be Resolved  
Through The Administrative Rulemaking  
Procedure

Applicants respectfully submit that it is unnecessary and inappropriate for the Board to consider, in the context of this individual licensing proceeding, the desirability of the proposed rule on standards for processing TLDs. The general rule with respect to this issue has been stated as follows:

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<sup>5/</sup> Had the Board determined that a serious safety matter existed it should have prepared a memorandum to the Commission describing the matter and the basis for the Board's decision that it warranted sua sponte treatment. NRC Secretary's Memorandum, "Raising of Issues Sua Sponte in Adjudicatory Proceeding," June 30, 1981.

[L]icensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.

Potomac Electric Power Company (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 85 (1974).

The rationale for this rule is that a basic change in policy is more fully and fairly considered in rulemaking proceedings, where the inquiry can be thorough and all interested parties can participate. Hale v. F.C.C., 425 F.2d 556, 560 (D.C. Cir. 1970). The circumstances of the instant case militate strongly in favor of resolution of the issue by rulemaking rather than on an ad hoc basis.

The publication of the proposed rule contains a discussion of interim actions that can be taken to improve dosimetry processing during the pendency of the rulemaking. 49 Fed. Reg. at 1207. It would seem from this language that the Commission did not believe that the present situation warranted drastic action or immediate ad hoc adjudication. Furthermore, the proposed rule explicitly states that the Commission has determined that "the only acceptable alternative procedure for solving this problem is by rulemaking action." 49 Fed. Reg. at 1211. This choice between rulemaking and ad hoc adjudication lies within the informed discretion of the administrative agency. SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

Applicants question what would result from a Board finding that the proposed rule is incompatible with its interpretation of 10 C.F.R. Part 20. The standard for accuracy of TLDs is one of generic applicability. Applicants will be bound by the rule as adopted by the Commission. Would the Board also consider requiring Applicants to adhere to a standard for TLD accuracy that is more stringent than that required by the Commission for the rest of the industry before resolving this contention in Applicants' favor? And if the answer to the rhetorical question is in the negative, what purpose will be served by litigating this issue? It is this kind of quandary that the rule in Douglas Point would seek to avoid.

Moreover, the proposed rule was published on January 31, 1984 and provided that comments should be received by March 12, 1984. Thus the rule is now ripe for decision and there is no reason to expect that promulgation of a final rule will be unduly delayed. Since the proposed rule was published, comments have been received from over ninety interested parties, providing ample assurance that the issues raised will be fully addressed. Furthermore, the proposed rule provides specific guidance about the very issue before the Board -- the accuracy of TLDs. Notwithstanding the Board's belief that the proposed rule conflicts with the current regulations, as a matter of statutory construction it is inappropriate to presume that this rule will conflict with the existing regulation. Wilderness

Society v. Morton, 479 F.2d 842, cert. denied, 411 U.S. 917 (1973); Araya v. McLelland, 525 F.2d 1194 (3d Cir. 1979). The regulations should be reconciled if possible; as discussed below, Applicants believe that a logical interpretation exists that does not bring the regulations into conflict. Therefore, Applicants respectfully submit that the Board should reconsider its decision to have a hearing on the issue of the propriety of the standards imposed by the proposed rule.

IV. To Preclude Summary Disposition,  
An Issue Must Be Material To The  
Contention Before the Board

In addition to being a sua sponte issue that is the subject of a pending rulemaking, the issue raised by the Board is not a genuine question of material fact so as to prevent summary disposition of Joint Contention IV. The standards governing summary disposition motions in a licensing proceeding are akin to the standards applied under Rule 56 of the Federal Rules of Civil Procedure. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A and 2B), ALAB-554, 10 N.R.C. 15, 20 n.17 (1979); Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 A.E.C. 210, 217 (1974). Under those rules, not every factual question will preclude summary judgment -- it must be an issue material to an operative legal theory of the proceeding or, in other words, an issue that could change the outcome of the case. United States v.

Sumitomo Shoji, New York, Inc., 534 F.2d 320 (2d Cir. 1976); Bolack v. Underwood, 340 F.2d 816 (10th Cir. 1965). Applicants submit that the issue raised by the Board simply is not material, and therefore should not preclude summary disposition of Joint Contention IV in its entirety.

First, the Board found that no issue of fact existed with respect to whether Applicants' TLDs were adequate to protect worker health and safety. This must be the ultimate issue for determination in Joint Contention IV. Once this issue is decided in Applicants' favor, there simply are no other issues material to the contention.

Secondly, the question raised is not really a question of fact at all but rather a legal question involving the interpretation of the existing regulation and proposed rule. Although the issue of whether the TLDs to be used at the Harris Plant are sufficiently accurate to ensure compliance with Commission regulations does involve a question of fact, the Board found that Applicants are capable, through their present program, of meeting the implicit standard of accuracy that the Board reads into 10 C.F.R. Part 20. See April 13 Memorandum at 19. In fact, the Board cited Applicants' performance as evidence of the fact that the Board's interpretation of 10 C.F.R. Part 20 resulted in a reasonable and attainable standard. Id. Since Applicants can satisfy both the Board's suggested standard and the standard set forth in the proposed rule it cannot follow,

as the Board suggests, that a material issue of fact exists with respect to Applicants' program. If Applicants' program is satisfactory, it is immaterial for the purposes of this licensing proceeding whether a discrepancy exists between 10 C.F.R. Part 20 as currently enacted and the proposed rule.

V. The Board's Order Is Premised  
On A Misinterpretation Of The  
Standards Set Forth In  
10 C.F.R. Part 20

The Board's decision on Joint Contention IV is premised on the assumption that the standard in the proposed rule conflicts with the standards of 10 C.F.R. Part 20. Applicants respectfully submit that this is not the case.

The proposed rule addresses the issue of accuracy of TLDs with specificity and in great detail. By contrast, 10 C.F.R. Part 20 does not address the issue of accuracy of measurement, but sets conservative dose limits for worker exposure. The proposed rule is an acknowledgement of the fact that accuracy of measurement is one additional way to ensure that doses do not approach the limitation. However, the proposed regulation is supplementary to, rather than a replacement for, the current regulations.

The Board found, however, that a discrepancy existed because, in its view, 10 C.F.R. § 20.101(a) and § 20.407(b) imply a requirement that TLDs be accurate to integer values. The



Board is of the opinion that the proposed rule contains a less rigorous standard. Applicants respectfully submit that the purported conflict found by the Board is generated only by applying a somewhat artificial interpretation of the current regulations. The fact that 10 C.F.R. § 20.101(a) provides that doses are limited to 5 rem/year whole body simply does not mean that dose must be accurate to integer values. In fact, the regulation actually limits quarterly dose to 1 1/4 rems -- a non-integer value. There is no basis for the Board's belief that the 1/4 rem value has no regulatory significance, as the Board itself stated, a licensee can be fined for exceeding the 1 1/4 limit by any amount, not for exceeding it only by an entire rem.

Similarly, the provisions of 10 C.F.R. § 20.407(b) for a statistical summary of doses recorded at various levels simply should not be interpreted to mean that accuracy of measurement should be related to integer values. The discussion in the Federal Register concerning the adoption of that provision demonstrates that the Commission did not intend the statistical summary to supplant the existing provisions for recording exposure to the limits of the accuracy of the instrumentation in use. In other words, 10 C.F.R. § 20.407(b) does not supercede or in any way curtail the reporting requirements of § 20.401. In this regard, the explanation accompanying the promulgation of § 20.407(b) states that the statistical summary is distinct

from the overall data bank and that "personnel monitoring records should reflect the sensitivity of the monitoring device." 39 Fed. Reg. 1000 (January 4, 1974). Thus, it is clear that the integer value reporting requirement is unrelated to actual routine measurements and the accuracy thereof.

In addition, Applicants fail to understand the Board's attempt to reconcile a 50% limit on uncertainty as cited by the Staff, and accepted by the Board, with an integer value accuracy. The two figures are reconcilable at one and only one dose level -- the 2 rem figure chosen by the Board as an illustration. For doses less than 2 rem -- the most common doses in practice -- an integer value accuracy would result in much more than 50% uncertainty.

In sum, Applicants believe that the Board has misinterpreted 10 C.F.R. § 20.101(a) and § 20.407(b) so as to create an unnecessary conflict with the proposed rule. As Applicants' understand it, the result of the Board's interpretation would be less accurate measurements at the most common doses. Applicants submit that this result cannot be correct.

For all of the foregoing reasons, the Board should reconsider that part of its ruling on Applicants' Motion for Summary Disposition of Joint Contention IV which raised the question of the compatibility of the proposed rule with existing regulations.

VI. In the Alternative, Applicants  
Request Clarification of the  
April 13 Memorandum

In the event the Board denies the relief requested by Applicants in their Motion for Reconsideration, in the alternative, Applicants seek clarification of the Board's April 13 Memorandum.

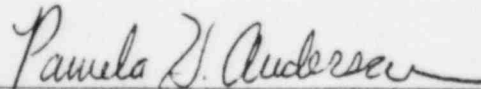
Applicants understand that the Board has directed the Staff and Applicants to prepare testimony on at least one of two issues: 1) whether compliance with the 1983 ANSI standard ensures compliance with the Commission's regulations and 2) whether the TLDs to be used at the Harris facility nevertheless can be used to measure occupational doses with sufficient accuracy to comply with the Commission's regulations. These issues are said to be alternatives, yet the Board's order continues by asking Applicant and Staff, to prepare testimony on this issue. Applicants therefore do not understand whether they must choose between the two issues, or present proof on both alternatives.

In addition, the second "issue," appears to contradict the Board's other finding that the reasonableness of the Board's suggested standard already has been demonstrated by CP&L's performance as described in the Browne Affidavit. See April 13 Memorandum at 19. Therefore, Applicants request clarification on the scope of proof that will be relevant in light of this finding.

VII. CONCLUSION

Applicants request that the Board reconsider and grant in its entirety Applicants' Motion for Summary Disposition of Joint Contention IV. In the event that reconsideration is denied, Applicants alternatively seek additional clarification on the scope of the hearing on Joint Contention IV, as specified above.

Respectfully submitted,



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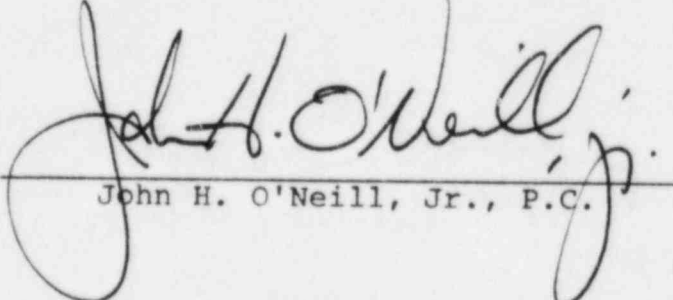
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	)	
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Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing letter to the Atomic Safety and Licensing Board and "Applicants' Motion for Reconsideration or Clarification of Board Memorandum and Order on Joint Contention IV" were served this 18th day of July, 1984, by Federal Express to the parties identified by asterisk, and by deposit in the U.S. mail, first class, postage prepaid, to the other parties on the attached Service List. In addition a copy will be hand-served on the NRC Staff on July 19, 1984.

  
John H. O'Neill, Jr., P.C.

Dated: July 18, 1984

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