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June 6, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

CAROLINA POWER AND LIGHT COMPANY AND
NORTH CAROLINA EASTERN MUNICIPAL
POWER AGENCY

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

DOCKETED
USNRC

Docket Nos. 50-400 OL
50-401 OL

'85 JUN 13 P4:44

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NRC STAFF ANSWER IN OPPOSITION TO
CONSERVATION COUNCIL OF NORTH CAROLINA'S MOTION
TO STAY PROCEEDINGS ON CONTENTION WB-3 (DRUG USE)

I. INTRODUCTION

By filing dated May 24, 1985 Conservation Council of North Carolina (CCNC) has moved to stay all proceedings on Contention WB-3 relating to drug use at the Harris site until drug use charges against persons arrested at the Harris site on or about January 10, 1985 have been resolved. The Staff opposes CCNC's request for a stay on the ground that the criteria for the grant of such a stay are not met.

II. BACKGROUND

The Raleigh News and Observer on January 11, 1985 published an article which stated that six workers at the Harris site had been arrested on drug charges. Citing this newspaper article, Mr. Runkle on behalf of CCNC, proffered the following contention:

WB-3 Drug and alcohol use at the Harris Plant is widespread
(see the attached newspaper article for details and basis).

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Construction workers under the influence of drugs are less able to follow proper procedures and tech specs for the installation of electrical systems, pipefitting, and other safety-related work. Applicants' management has failed to control drug use during the construction and further, has failed to reinspect all safety-related work done by known drug abusers. [Request For Admission of New Contention WB-3 (Drug Abuse During Construction), January 18, 1985.]

The Staff ^{1/} by filing dated February 7, 1985 and the Applicants ^{2/} by filing dated February 6, 1985 opposed admission of the contention upon the basis that the five factors of 10 C.F.R. § 2.714(a)(1) required to be considered for late filed contentions weighed against admission of the contention and that both basis and specificity were lacking. In an order ^{3/} dated March 13, 1985 the Licensing Board admitted the contention, deleting the reference to alcohol. The parties have served interrogatories upon each other. ^{4/} Applicants and CCNC have responded to each

^{1/} NRC Staff Response in Opposition to Conservation Council of North Carolina's Motion to Admit Proffered Contention WB-3 Regarding Drug Use.

^{2/} Applicants' Response to CCNC's Request for Admission of New Contention WB-3 (Drug Use During Construction).

^{3/} Memorandum and Order (Ruling on Contentions Concerning Diesel Generators, Drug Use and Harassment at the Harris Site).

^{4/} NRC Staff Interrogatories to Conservation Council of North Carolina Regarding Contention WB-3, April 24, 1985; Discovery Requests to Applicants on Contention WB-3 (Drug Abuse During Construction), May 1, 1985; Applicants' Interrogatories and Request for Production of Documents to Intervenor Conservation Council of North Carolina (Contention WB-3), May 1, 1985.

others interrogatories. ^{5/} Discovery is now closed. Issue has been joined and Contention WB-3 is now ripe for summary disposition or trial.

At this juncture, with the contention ready to be resolved by an evidentiary hearing, CCNC has moved to stay the proceedings on this drug use contention until charges against persons arrested on January 10, 1985 on the Harris site have been resolved. The Staff opposes the motion.

III. DISCUSSION

A. Legal Standards

The Commission's legal standards for a stay of a proceeding are set forth in 10 C.F.R. § 2.788(e) which reads as follows:

- (e) In determining whether to grant or deny an application for a stay, the Commission, Atomic Safety and Licensing Appeal Board, or presiding officer will consider:
 - (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
 - (2) Whether the party will be irreparably injured unless a stay is granted;
 - (3) Whether the granting of a stay would harm other parties; and
 - (4) Where the public interest lies.

^{5/} Applicants' Answers to Conservation Council's Discovery Requests to Applicants on Contention WB-3 (Drug Abuse During Construction), May 20, 1985; Conservation Council's Answers to Applicants' Discovery Requests on Contention WB-3, May 24, 1985.

These standards have been rigidly applied since their adoption. ^{6/}
10 C.F.R. § 2.788(d) requires that this answer address the matters of
§ 2.788(b)(1)-(4). These generally are framed for a stay of a particular
action pending appeal, a situation not here present. § 2.788(b)(1)-the
action which is sought to be stayed is the operating license administra-
tive proceeding insofar as it relates to the drug use contention, WB-3.
The ground asserted for stay seems to be that CCNC wants a sheriff's
department major and the charged persons to testify. This seems
unrelated to whether the plant is built safely and whether applicants'
have an adequate drug information, detection and prevention plan.
§ 2.788(3) and (4) relate to appeals and are not addressed here. CCNC's
application for a stay did not directly address the § 2.788(b)(1)-(4)
considerations except to identify that they wanted the proceeding itself
stayed.

The title to § 2.788 and subpart (a) are in terms of staying a
decision or action pending appeal. The motion of CCNC now before this
Board is not for a stay of an action or decision pending appeal. The
present 10 C.F.R. § 2.788 criteria for a stay are those enumerated in
Virginia Jobbers Ass'n v. FPC, 295 F.2d 921, 925 (D.C. Cir. 1958) and
first applied by the Appeal Board in Allied-General Nuclear Services

^{6/} Most recently, see Duke Power Company, et al. (Catawba Nuclear
Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1632-1633 (1984);
Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1),
CLI-84-21, 20 NRC 1437, 1440 (1984); Philadelphia Electric Company
(Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443,
1446 (1984); and Metropolitan Edison Company (Three Mile Island
Nuclear Station, Unit No. 1), CLI-84-17, 20 NRC 801, 803 (1984).

(Barnwell Facility), ALAB-296, 2 NRC 671, 677-78 (1975) (Barnwell). ^{7/}
In Barnwell Intervenor's requested a stay of the Licensing Board
proceedings, not of a Licensing Board decision or action. In Midland
ALAB-395, cited supra fn. 7, the Appeal Board required consideration of
the four factors of § 2.788(e) in a situation where a stay was requested
of proceedings pending before a Licensing Board, not where a stay was
sought pending appeal of a decision. Thus it is clear that CCNC's motion
must be analyzed against the stay criteria set forth in 10 C.F.R.
§ 2.788(e).

A second legal principle involved in CCNC's motion is to be found
in Wisconsin Electric Power Company (Koshkonong Nuclear Plant, Units 1
and 2), CLI-74-45, 8 AEC 928, 929 (1974) where the Commission stated as
a general rule that its administrative proceedings were to proceed while
other state and local proceedings were underway.

B. CCNC's Motion

The argument of CCNC which accompanies their May 24, 1985 motion
does not address the criteria of 10 C.F.R. § 2.788(e), nor does it even
feign to do so.

There is nothing new in this record or in CCNC's filing of May 24,
1985 that would indicate that CCNC might prevail upon the merits if a

^{7/} See Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395,
5 NRC 772, 778-79 (1977) and the Statement of Considerations that
accompanied publication of 10 C.F.R. § 2.788 in the Federal Register,
42 Fed. Reg. 22128, May 2, 1977. § 2.788 is, in fact, a codification
of the Appeal Board's Barnwell decision.

stay were granted. The newspaper article attached to proffered WB-3 stated that six persons were arrested upon drug charges. The newspaper does not address the capability of the arrested persons correctly to perform their assigned tasks, whether those tasks involve safety-related work, and whether Applicants re-inspected work performed by the arrested persons. In fact, thus far, CCNC has demonstrated no merit at all to its contention. The total and sole basis supporting the admitted contention is the Raleigh News and Observer January 11, 1985 article attached to the proffered contention.^{8/} Having no case except for a newspaper clipping^{9/} it seems highly improbable that CCNC can carry its contention to victory, especially such parts as the allegation that the Applicants have failed to reinspect safety-related work done by known drug users.

There is no showing that CCNC will be irreparably injured if the stay is denied. Nor can the Staff conjure how such possible injury could occur.

The stay could prolong this proceeding for some time. Granting the stay could delay issuance of the operating license.

The public interest lies in expeditiously concluding this operating license proceeding. The Commission has articulated its policy that licensing reviews and hearings should be completed prior to completion of

^{8/} See CCNC Answer 4(b) to Applicants' Interrogatories cited supra.

^{9/} In Illinois Power Company (Clinton Power Station, Unit Nos. 1 and 2), ALAB-340, 4 NRC 27, 31 (1976) the Appeal Board found that newspaper clippings were relevant and material evidence. There there was other evidence. Here the newspaper clipping is CCNC's entire case.

construction. ^{10/} Granting the motion for a stay would delay the fuel load date for Harris which is now set for March 11, 1986.

The Staff's review of the stay criteria set forth in 10 C.F.R. § 2.788 discloses that all criteria weigh against granting the motion.

Prosecution or non-prosecution of those persons arrested on January 11, 1985 upon drug charges is (1) a matter independent of and not relevant to NRC's concern under the Atomic Energy Act which is the safe construction and operation of Harris and (2) a state and local matter which may and should proceed to resolution independent of NRC's licensing proceeding, see Koshkonong, CLI-74-45 cited supra.

There are two further considerations that should be factored into resolution of CCNC's motion. First, the motion attempts to raise matters not relevant or material to the issue before this Licensing Board. Contention WB-3 raises two issues: (a) whether there is an adequate drug education and detection program at Harris and (b) whether Applicants adequately reinspected safety related work performed by known drug users. Resolution of the criminal charges against those arrested for drug use in January 1985 has no bearing upon the issues raised by Contention WB-3.

Issue has been joined and now is the time for CCNC to put forth its substantive case, either in opposition to a motion for summary disposition or at trial. Either CCNC has a case to support its Contention WB-3 or it doesn't. Now is the time to find out. Ultimate disposition of

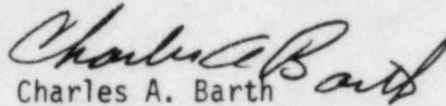
^{10/} Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981).

the drug use charges is not relevant to the issues before this Licensing Board.

IV. CONCLUSION

For all of the above reasons, the Licensing Board should deny CCNC's motion to stay the proceedings on Contention WB-3 until final resolution of the criminal charges placed against those persons arrested at the Harris site in January 1985 for drug use.

Respectfully submitted,


Charles A. Barth
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 6th day of June, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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I hereby certify that copies of "NRC STAFF ANSWER IN OPPOSITION TO CONSERVATION COUNCIL OF NORTH CAROLINA'S MOTION TO STAY PROCEEDINGS ON CONTENTION WB-3 (DRUG USE)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or deposit in the Nuclear Regulatory Commission's internal mail system (*), this 6th day of June, 1985:

James L. Kelley, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Richard D. Wilson, M.D.
729 Hunter Street
Apex, NC 27502

Mr. Glenn O. Bright*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Travis Payne, Esq.
723 W. Johnson Street
P.O. Box 12643
Raleigh, NC 27605

Dr. James H. Carpenter*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Linda Little
Governor's Waste Management Building
513 Albermarle Building
325 North Salisbury Street
Raleigh, NC 27611

Daniel F. Read
CHANGE
P.O. Box 2151
Raleigh, NC 27602

John Runkle, Esq. Executive Coordinator
Conservation Counsel of North Carolina
307 Granville Rd.
Chapel Hill, NC 27514

Steven Rochlis
Regional Counsel
FEMA
1371 Peachtree Street, N.E.
Atlanta, GA 30309

Spence W. Perry, Esq.
Associate General Counsel
Office of General Counsel
FEMA
500 C Street, SW Rm 840
Washington, DC 20472

Atomic Safety and Licensing Appeal
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Robert P. Gruber
Executive Director
Public Staff - NCUC
P.O. Box 991
Raleigh, NC 27602

Wells Eddleman
718-A Iredell Street
Durham, NC 27701

Richard E. Jones, Esq.
Associate General Counsel
Carolina Power & Light Company
P.O. Box 1551
Raleigh, NC 27602

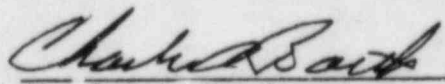
Robert Guild, Esq.
Counsel for Contention 41-G
2135½ Devine Street
Columbia, SC 29201

Bradley W. Jones, Esq.
Regional Counsel, USNRC, Region II
101 Marietta St., N.W. Suite 2900
Atlanta, GA 30323

George Trowbridge, Esq.
Thomas A. Baxter, Esq.
John H. O'Neill, Jr., Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, DC 20036

Atomic Safety and Licensing Board
Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Harry Foreman, Alternate
Administrative Judge
P.O. Box 395 Mayo
University of Minnesota
Minneapolis, MN 55455



Charles A. Barth
Counsel for NRC Staff