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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
REGULATING & SERVICE
BRANCH

In the Matter of)

CAROLINA POWER & LIGHT COMPANY)
and NORTH CAROLINA EASTERN)
MUNICIPAL POWER AGENCY)

Docket No. 50-400 OL

(Shearon Harris Nuclear Power Plant))
)

APPLICANTS' REPLY TO THE RESPONSE BY THE ATTORNEY GENERAL
OF NORTH CAROLINA TO APPLICANTS' MOTION FOR SUMMARY
DISPOSITION OF CCNC CONTENTION WB-3
(DRUG ABUSE DURING CONSTRUCTION)

I.
Introduction

On July 12, 1985, Applicants filed a "... Motion for Summary Disposition of CCNC Contention WB-3 (Drug Abuse During Construction)" (hereinafter "Applicants' Motion"). On July 31, 1985, prior to the submission by other parties of any responses to Applicants' Motion, the Attorney General of North Carolina filed a petition to intervene pursuant to 10 C.F.R. §2.715(c), accompanied by a response to Applicants' Motion and the Affidavit of S. L. Burch (hereinafter referred to collectively as the "NCAG Response"). Pursuant to leave granted by the Board, Tr. 8196-98, Applicants submit this reply to the NCAG Response. Applicants' reply is supported and accompanied by the Affidavits of Michael W. King, D. Glenn Joyner, Michael L. Plueddemann, and William J. Hindman, Jr.

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II.
The North Carolina Attorney General's Response
Addresses Only a Narrow Element of Applicants'
Motion for Summary Disposition of CCNC Contention WB-3

Before addressing the merits of the North Carolina Attorney General's response to Applicants' Motion, it is important first to recognize the extensive evidence in support of Applicants' Motion which is totally unaffected by that response. Applicants' Motion is supported by the Affidavits of William J. Hindman, Jr., John D. Ferguson, A. Reid Pannill and Garry W. Flowers, which describe CP&L and Daniel drug abuse policies and procedures employed for the Harris Project, the instruction provided to employees, additional training of supervisors and managers, the personnel actions taken for violations of the drug abuse policies, the drug screen urinalysis testing used to identify drug use, the procedures followed on site for pursuing information on potential drug activity, the role of the Quality Check program, and the project's favorable industrial safety record. The North Carolina Attorney General's response does not address any of these affidavits.¹

Neither does that response address the Affidavit of Peter B. Bensinger, which provides an outside, independent assessment of the programs in place at the Harris site to control drug use, and of the extent and significance of the identified drug use by employees at the Harris Project. Significantly, the NCAG Response does not address the Affidavit of N. J. Chiangi, which explains why the Quality Assurance program at Harris provides reasonable assurance that any deficiencies in safety-related work caused by any employees impaired by drug use have been identified and corrected.

Furthermore, as stated in the NCAG Response, "... the Attorney General requested that the State Bureau of Investigation of the North Carolina Department of Justice

¹While the Affidavit of S. L. Burch does not comment on these affidavits filed by Applicants, her description of the stringent personnel actions taken against violators of the drug abuse policies strongly supports the statements of these affiants that the drug abuse policies on the Harris Project are vigorously enforced.

evaluate the assertions made in the Affidavit of Michael W. King concerning the undercover drug operation conducted at the Shearon Harris Nuclear Power Plant." That indeed describes the scope of the Burch Affidavit. It does not address the bulk of Mr. King's Affidavit, which describes the various security measures employed on site to discourage and to identify drug activity, and the assessment of the extent of drug activity among site employees.²

III.

The North Carolina Attorney General's
Response Does Not Raise a Genuine Issue
to be Heard with Respect to Any Material Fact

The NCAG Response raises serious questions about CP&L's role in the undercover drug investigation at the Harris Plant. CP&L takes the assertions in the Burch Affidavit seriously, and therefore requested the opportunity to respond to them. Further, we have inquired of the Wake County Sheriff's Department (WCSD) personnel on whom the Burch Affidavit chiefly relies. However, while Applicants (as did the Attorney General) desire to set the record straight as to the facts, we dispute any suggestion that the NCAG Response raises a genuine issue to be heard with respect to any material fact in dispute on CCNC Contention WB-3.

First, it is far from clear that the Attorney General of North Carolina opposes Applicants' Motion and suggests that a hearing be held. Nowhere does the Attorney General state that he opposes Applicants' Motion, or suggest that it be denied. Rather, it is stated that the Burch Affidavit is submitted to assist the Board in developing a sound

²The Board is well aware of its authority, which it has exercised on several occasions in the past, to grant summary disposition as to some, but not all, facts or issues material to a contention, and to define more specifically the matters to be contested at a hearing. See Applicants' Motion at 6. Applicants continue to urge the grant of their summary disposition motion in its entirety. And even if the Board were persuaded that the facts surrounding the undercover operation are in dispute, a hearing to attempt to resolve these questions would not be meaningful where the effective implementation of the quality assurance program (i.e., the safe operation of the plant) has not been disputed.

record, and to enable the Board to make a more informed decision. "Response by the Attorney General of North Carolina to Applicants' Motion for Summary Disposition of CCNC Contention WB-3 (Drug Abuse During Construction)," ¶3. This is entirely consistent with the provisions of 10 C.F.R. §2.715(c) -- under which participation was sought -- which does not require an interested state agency to take a position on the issues. Further evidence that the Attorney General does not oppose Applicants' Motion is the absence of a filed statement of the material facts as to which it is contended that there exists a genuine issue to be heard.³

As required by 10 C.F.R. §2.749(a), Applicants' Motion is accompanied by a separate, short and concise statement of the material facts as to which Applicants contend that there is no genuine issue to be heard. See "Applicants' Statement of Material Facts as to Which There is No Genuine Issue to be Heard," July 12, 1985. The NCAG Response does not explicitly address any of the eleven material facts advanced by Applicants, although the Burch Affidavit provides strong support for material fact number 7: "Applicants have terminated or otherwise removed from the project employees who violate the drug abuse policies."

Applicants did identify (though not as a material fact) cooperation with local law enforcement agencies as one of many elements of the Harris Project's multi-faceted program to identify and to curb drug abuse among site employees. Applicants also pointed to the 1984 undercover operation as an example of that cooperation. For the

³"There shall be annexed to any answer opposing the motion a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be heard. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." 10 C.F.R. §2.749(a); Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-629, 13 N.R.C. 75,78,83 n. 12 (1981); Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 N.R.C. 451,453 (1980). See also Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-83-56, 18 N.R.C. 421,430 (1983) (intervenor's statement of material facts in dispute which merely sets forth denials of moving party's statement does not meet the requirements of section 2.749).

reasons set forth in our accompanying affidavits, Applicants still believe that, contrary to the implications of the Burch Affidavit, CP&L cooperated fully with the undercover investigation. Whether or not the pleadings satisfy the Board on that question, however, the degree or level of cooperation by CP&L in this one investigation is not material to the contention. Joint efforts with law enforcement agencies represent only one of many tools utilized by Applicants, and described in Applicants' Motion, to implement site drug abuse policies. And there is no direct link between CP&L cooperation in this investigation and the safe operation of the Shearon Harris Nuclear Power Plant -- which is the ultimate issue before the Board.

Ms. Burch also expresses the opinion that drug use at the Harris Plant is widespread. For the reasons discussed below, we believe that is not a correct view. Nevertheless, whether or not drug use is estimated to be "widespread," a subjective term at best, is not a material fact. Drug use among site employees is relevant to the NRC's review of this operating license application only insofar as it might affect the successful implementation of the quality assurance program. See Applicants' Motion at 8-10. Applicants have disclaimed the capability to identify and to eliminate drug activity in its entirety. Applicants' Material Fact No. 3. We have, however, asserted that Applicants have a reasonably effective capability to identify violators of the drug abuse policies. Applicants' Material Fact No. 6. We have confirmed that the WCSD and the State Bureau of Investigation (SBI) have provided to CP&L the names of all of the employees they identified during the investigation as suspected of drug activity. Ms. Burch simply reports that the agents believe they saw others, whom they were not able to identify, dealing in or using drugs. This is not unexpected, and Applicants' ongoing program, including searches with the narcotics detection dog, remains in force to discourage and to identify these employees. The capability of the Quality Assurance program to identify and to enable correction of any safety-significant construction

deficiencies, however, remains unchallenged.⁴ Even if one or more inspectors were involved, the numerous checks on their inspection work, described in the Chiangi Affidavit, provide the requisite reasonable assurance that significant deficiencies will be identified. See Applicants' Motion at 43-51.

IV.

The Burch Affidavit

A. Introduction

Applicants understand that the North Carolina Attorney General sought the SBI's review of Applicants' Motion and filed the results of that review with the Board in order to provide additional information which might assist the Board in its decision. However, given that the purpose of the Burch Affidavit was to provide a complete picture of the undercover drug investigation at the Harris Plant, Applicants submit that it has not met that goal. The Burch Affidavit is in some respects inaccurate, and to a great degree incomplete in its description of events. This may be attributable to the facts that neither Ms. Burch nor anyone else at the SBI sought CP&L participants' views on the events in question, and that Ms. Burch relies almost exclusively on the statements of others.

In particular, except for a description of an October 17, 1984 meeting which she attended, and a report of a telephone conversation with SBI Agent Williams, the facts asserted by Ms. Burch are based exclusively on statements attributed to Lt. Self and Deputy Hensley of the WCSD. There is no indication that Ms. Burch has personal or direct knowledge of the facts on which her affidavit is based.⁵ In contrast, Applicants

⁴Our discussions with WCSD personnel reveal that the undercover operatives have no information on, and do not feel qualified to assess, the quality of construction work at the Harris Plant.

⁵Ms. Burch was not the immediate supervisor of the SBI agent (Williams) who worked as an undercover operative. She was not in routine or frequent contact with those on site conducting the operation. See Joyner Affidavit, ¶ 2.

have provided affidavits by personnel with direct and personal knowledge of the facts.⁶ In addition, CP&L personnel met with the knowledgeable WCSD personnel -- including Sheriff Baker, Major Lanier, Lt. Self and Deputy Hensley -- on August 12, 1985 to review, confirm and explain CP&L's understanding of the facts asserted in the Burch Affidavit. The discussion with the WCSD confirmed CP&L's view that the Burch Affidavit is incomplete and misleading, as well as inaccurate in some respects.

B. CP&L Motivation and Support for the Operation

The Burch Affidavit implies early on that CP&L did not really want to conduct this undercover operation -- a claim which serves to impart to the CP&L actions, discussed in the remainder of the affidavit, a motive of intent to thwart the investigation. This claim is untrue and unfair. The Burch Affidavit omits, as well, information on CP&L's support for the operation -- information which serves to discredit the theory that CP&L did not want to see the investigation succeed.

Ms. Burch asserts that at an October 17, 1984 meeting which she attended (to discuss drug activity and a possible investigation by law enforcement agencies), Mr. King advised that the NRC was putting pressure on CP&L to look into the problem. Burch Affidavit, ¶ 4. Mr. King states that he did not indicate that the NRC or anyone else was putting pressure on CP&L to conduct an undercover operation at the Harris site. King II Affidavit,⁷ ¶ 3. Mr. Joyner, who attended the meeting, does not recall Mr. King making any statement indicating that pressure from any source was our motivation for requesting the drug operation. Joyner Affidavit, ¶ 3.

⁶Mr. Joyner, for example, was directly and personally involved in the decision to initiate the investigation, the planning of and support for the operation, and the regular contact and coordination with the undercover agents. Joyner Affidavit, ¶ 2. Mr. Plueddemann of Daniel Industrial Relations also acted as an on-site contact with the two law enforcement undercover operatives -- meeting with them on a regular basis (almost every day that they were on site). Plueddemann Affidavit, ¶ 2.

⁷Affidavit of Michael W. King, dated August 14, 1985. Likewise, Mr. Hindman's affidavit of August 14 will be cited as "Hindman II Affidavit" to distinguish it from his affidavit of July 10, 1985.

Mr. Joyner explains that the operation came about because of a weekly report he prepared on August 16, 1984, which advised of drug information being received about employees at the site. Mr. McDuffie, CP&L Senior Vice President, Nuclear Generation Group, read the report and telephoned Mr. Joyner to discuss it. Mr. Joyner suggested to Mr. McDuffie that CP&L should proceed with an undercover operation utilizing members of the law enforcement community as operatives. After further discussions, a letter was sent to the WCSD on August 30, 1984, requesting a meeting to discuss the drug activity. Joyner Affidavit, ¶13.

In short, no external pressure motivated CP&L to seek this investigation. Rather, CP&L's proposal reflected the sincere concerns and desires of CP&L Security, Harris Project and corporate management to take effective action to address an identified problem. In fact, Sheriff Baker of Wake County has stated that CP&L deserves great credit for taking the initiative to request this investigation at the Harris Plant.

CP&L provided full support for the undercover operation. During the planning stage, Lt. Self of the WCSD stated that in order to help the undercover operatives gain access to the drug dealers, he wanted the assistance, as an informant, of an employee who had been terminated and turned over to the WCSD for possession of cocaine. The individual agreed to perform this role in exchange for the dropping of criminal charges against him, and with the understanding that he would not testify in any subsequent criminal proceedings. (Consequently, only hand-to-hand purchases by the law enforcement officers could be the basis for arrests.) The informant had been an employee of Davis Electric Company, a subcontractor of Daniel Construction Company. Because he had been terminated for violating site drug abuse policies, Daniel could not be persuaded to re-hire him. CP&L then arranged to have him hired through a temporary agency with his salary paid by CP&L, and gave him total access to the site.⁸ Joyner

⁸It was understood by the WCSD and others involved in the investigation that co-workers of this former employee knew he had been fired and the reasons for his termination, but a cover story was developed to the effect that the charges could not be proven against him. Joyner Affidavit, ¶16.

Affidavit, ¶6. In short, CP&L made a considerable effort to accommodate the WCSD request that this confidential informant be permitted back on the site to support the investigation. Hindman II Affidavit, ¶3.

CP&L gave badges to both operatives (Hensley and Williams) under a fictitious company (called Management Consultants). These security passes allowed them to enter and depart the site at their own discretion at any time and without escort. In the case of Deputy Hensley, his assigned consultant work involved terminals for computer systems -- a role which utilized his expertise at the WCSD.⁹ Given the nature of their consultant roles, the operatives were not tied to a single shift or work area.¹⁰ Consequently, other employees would not necessarily expect their work to require strict adherence to a given shift schedule. The agents were provided with private office space, a telephone, and a sign on the door identifying their fictitious company. Mr. Joyner of CP&L Security even took hard hats home and painted them for the operatives' use, adding their names and company, so that they would appear to blend in as legitimate employees. Joyner Affidavit, ¶7; Hindman II Affidavit, ¶3.

At the outset of the operation, CP&L provided the agents with a list of employees suspected of drug activity, and shared intelligence on likely locations of drug activity. Joyner Affidavit, ¶¶8,15. Mr. Joyner of CP&L Security and Mr. Plueddemann of Daniel Industrial Relations were available to the operatives on a daily basis, and did all follow-up work to make positive identification of each person reported to have used, possessed or sold drugs. Joyner Affidavit, ¶8; Plueddemann Affidavit, ¶2; Hindman II Affidavit, ¶3. Mr. Hindman, CP&L's Manager, Harris Project Administration, personally told the operatives that they should contact him if he could be of any assistance during the operation, or if problems arose. Hindman II Affidavit, ¶3.

⁹Deputy Hensley had been working with and teaching computer systems for the WCSD. Joyner Affidavit, ¶4.

¹⁰On one occasion, when Deputy Hensley was in doubt about the perceived legitimacy of his presence in a given area, Mr. Hindman provided him with a letter of authorization to work there. Hindman II Affidavit, ¶3.

These are not the actions of a reluctant company uninterested in the success of the investigation. To the contrary, CP&L was totally supportive of the agents and their efforts, and obviously wanted the operation -- which CP&L proposed on its own -- to succeed. At the meeting of August 12, 1985 among CP&L and WCSD personnel, Deputy Hensley confirmed that he was satisfied with and appreciative of the assistance provided, and stated that Mr. Hindman, Mr. King and Mr. Joyner were totally supportive of his efforts on site, and cooperated with him in every way that they could. Joyner Affidavit, ¶4.

C. General Conduct of the Operation

Ms. Burch states that at the October 17, 1984 planning meeting, Sheriff Baker indicated he was limited in experienced manpower, but that he would assign an individual to act as an undercover operative. Burch Affidavit, ¶4. At the time, Lt. Self was, to Applicants' knowledge, the only member of the WCSD drug unit. The assigned WCSD undercover operative, Deputy K. G. Hensley, had not had narcotics investigation experience prior to this operation. Joyner Affidavit, ¶4.

Ms. Burch also states that at the October 17, 1984 meeting, Sheriff Baker requested that the SBI furnish an experienced undercover operative to work with the WCSD, and that the SBI assured Sheriff Baker it would assist in whatever way possible. Burch Affidavit, ¶4. Special Agent Williams, the SBI undercover operative, was experienced,¹¹ but his support for the investigation proved to be inadequate. While CP&L Security did not keep a record or log of his activities, it is estimated that Agent Williams appeared for work at the Harris site on only 10 to 15 occasions during the 8-week investigation. In addition, when he did report for work, he frequently remained on site for only 3 to 5 hours. Agent Williams made only one drug purchase during the

¹¹We understand that Mr. Williams is now employed by the U. S. Drug Enforcement Administration in the Pittsburgh area.

operation. During our recent meeting, Deputy Hensley confirmed this description of Agent Williams' attendance and of the results he achieved. Joyner Affidavit, ¶ 5. During the investigation, Mr. Joyner of CP&L telephoned Ms. Burch to seek her assistance in locating the supervisor of SBI Agent Williams to report his irregular attendance at the job site.¹² Joyner Affidavit, ¶ 2; see also Plueddemann Affidavit, ¶ 3.

This important information is missing from the Burch Affidavit. Given the Wake County Sheriff's stated reliance on the SBI to support the investigation with an experienced undercover operative, the performance of SBI Agent Williams had a significant impact on the operation.

D. CP&L Actions, Agent Safety and Effectiveness

The impression left by the Burch Affidavit is that CP&L took several actions during the investigation which endangered the safety of the undercover operatives and hampered their effectiveness. This impression is incorrect and, to a great extent, reflects a misunderstanding of the Harris Project and of the motives for Applicants' actions. In retrospect, it is clear that there is some inherent tension between law enforcement and company goals and responsibilities during an undercover drug investigation at a nuclear power plant construction site. Concerned with the quality of construction and its potential need to prove it, CP&L wanted to remove from the site as soon as possible drugs and those identified as involved in drug activity. Concerned with building as many criminal cases as possible, the law enforcement agencies wanted to leave identified suspects undisturbed until the investigation was complete in their view, and did not want the company to take action which discouraged drug activity. Further, we now understand that the officers viewed almost any change in the status quo at the plant to be detrimental to the operation, since it might arouse employee suspicion. See

¹²This is yet another indication of CP&L's interest in an effective and successful investigation.

Joyner Affidavit, ¶11. A construction project, however, is not like a manufacturing operation where routine procedures remain in effect for extended periods, and where even minor changes may attract attention. Construction workers expect procedures to change and new procedures to be initiated. This is a routine part of their work environment. See Hindman II Affidavit, ¶4.

A good example of this misunderstanding is the initiation of metal detector searches. Ms. Burch cites as a problem the initiation of a gate search using metal detectors, approximately two to three weeks into the undercover operation. Ms. Burch reports that this procedure slowed the progress of the operation, and that Deputy Hensley began to hear talk of a "snitch" on site. She concludes with the criticism that "CP&L could have stopped this procedure but did not." Burch Affidavit, ¶6.

In fact, CP&L initiated a gate exit search with metal detectors, on a random selection of employees, on November 12, 1984. Since the undercover operation began on November 6, the procedure was not initiated two to three weeks into the operation and could not have slowed its "progress," since it had barely begun. More importantly, it did not even occur to CP&L Security that this procedure could affect the investigation. The metal detectors detect only metal, not drugs. Their purpose was to curb tool theft at the site. They had been requested by the new construction manager well before the undercover operation had been conceived. The use of metal detectors is common in the nuclear construction industry, and workers with experience at other sites (or with airport security) are familiar with them. In short, this was not considered to be an unusual or particularly significant event. Joyner Affidavit, ¶11; Hindman II Affidavit, ¶4; King II Affidavit, ¶4.

The agents did express concern to CP&L about these searches, in that they felt the availability of drugs might be affected. CP&L Security advised the agents at the time that the detectors had been used for one week, and that to stop their use abruptly would arouse suspicion as well as require additional personnel to be informed of the undercover

operation. The agents expressed no concern as to their safety. Further, there was no perceived retrenchment in drug activity in the circle of employees with which the operatives were involved. During our meeting of August 12, Lt. Self and Deputy Hensley agreed that there was no apparent diminishment in drug activity by those under investigation.¹³ Joyner Affidavit, ¶11; King II Affidavit, ¶4.

Ms. Burch states that Lt. Self of the WCSO reported that he was advised by the informant that Mr. King and Mr. Joyner were searching stash areas on site after they were informed of the stash areas by Deputy Hensley, and that he instructed Hensley to cease reporting stash area locations to CP&L Security in order to insure Deputy Hensley's safety. Burch Affidavit, ¶7. In fact, neither Mr. King nor Mr. Joyner searched any stash area locations during the undercover operation. Joyner Affidavit, ¶12; King II Affidavit, ¶5. Further, CP&L Security was not informed of any stash areas by Deputy Hensley or Agent Williams. During the August 12, 1985 meeting, Deputy Hensley confirmed that he did not advise CP&L of any stash area locations, which he stated were constantly changing. Joyner Affidavit, ¶12.

Ms. Burch states that on one occasion Deputy Hensley received information that two employees were to bring a large amount of marijuana inside the plant, and that Deputy Hensley asked CP&L Security to allow the two individuals to pass through the gate. Instead, according to Ms. Burch, CP&L personnel stopped the employees at the gate, searched them and confiscated the marijuana, causing further talk of a "snitch" operating inside the plant. Burch Affidavit, ¶7. This account of the events is incomplete and in part inaccurate.

Mr. Joyner of CP&L was present on December 20, 1984, when the informant told Deputy Hensley about the two employees who were to bring a large quantity of marijuana

¹³In Applicants' view, the more likely cause of any rumors of a "snitch" was the use of an informant who had been previously fired for drug use. Joyner Affidavit, ¶11; Hindman II Affidavit, ¶4.

on site. Mr. Plueddemann of Daniel then joined the discussion. Mr. Joyner and Mr. Plueddemann agree that the facts are as follows. Deputy Hensley had tried on numerous occasions to purchase drugs from these two suspected employees. Deputy Hensley and the informant told Mr. Joyner and Mr. Plueddemann that these employees would sell to the informant, but not to Deputy Hensley, who advised that he would not be able to make a case against these employees. There was never a request to let these individuals pass through the gate. To the contrary, it was discussed and agreed that we should proceed to search these employees since they would not sell to Deputy Hensley and because they could be bringing a large amount of marijuana on site for distribution to other employees. The plan was to have a sheriff's deputy with a search warrant at the site the following morning to search the two individuals as they attempted to enter. Deputy Hensley agreed with the plan, and everyone agreed that it would not compromise the cover of either Deputy Hensley or the informant. Deputy Hensley telephoned Lt. Self, in the presence of Mr. Joyner and Mr. Plueddemann, to explain the plan. During the same call, Mr. Joyner discussed the plan with Lt. Self. Mr. Joyner later telephoned Lt. Self in the evening to go over the plan and his suggestion of getting a search warrant. Joyner Affidavit, ¶13; Plueddemann Affidavit, ¶7.

Mr. Joyner arrived on site on the morning of December 21 expecting to meet Lt. Self or someone else from the WCSD. When no officers arrived, Mr. Joyner and Mr. Plueddemann decided that they had no choice but to proceed to search these two employees, rather than knowingly to allow a potentially large quantity of drugs to be brought on site.¹⁴ While a search by CP&L Security had not previously been discussed (in view of the plan to arrest the employees), Mr. Joyner and Mr. Plueddemann felt they had WCSD agreement that the employees should be stopped and searched. Joyner Affidavit,

¹⁴The two suspects were found to have drugs. One had two packages of marijuana in his pants; the other had a package of marijuana in his pants and a small amount of cocaine in a pocket. The marijuana was packaged in individual glassine bags and clearly was for distribution to other persons. Plueddemann Affidavit, ¶8.

¶13; Plueddemann Affidavit, ¶¶6-8. Mr. Joyner and Mr. Plueddemann reported the results of the search to Deputy Hensley later that morning. Deputy Hensley seemed quite pleased and reiterated that this was the only way to have handled these two suspects since they would not sell to the agents. Plueddemann Affidavit, ¶9.

Mr. Joyner discussed his recollection of these events with Lt. Self and Deputy Hensley at the meeting of August 12, 1985. Deputy Hensley agreed that he did not request that CP&L Security allow the two individuals to pass through the gate. Rather, he was interested principally in arresting the two employees in some manner. Deputy Hensley also recalls hearing Mr. Joyner discuss with Lt. Self the possibility of getting a search warrant. When the arrangements for conducting a WCSD search with a warrant prior to entry on site did not work out, Deputy Hensley agreed in retrospect that CP&L Security took an understandable and appropriate action in preventing the drugs from coming on site. Lt. Self could not recall precisely why the WCSD did not appear to arrest the workers, but expressed the belief that they were distracted by another priority drug investigation. While Mr. Joyner and Mr. Plueddemann are convinced that their recollection of the events is correct, these discussions reveal that at worst there was a misunderstanding at the time or that memories have since become fuzzy. It is undisputed, however, that CP&L did not go against the WCSD's expressed wishes in stopping these employees. Joyner Affidavit, ¶14.

Ms. Burch states that Lt. Self advised her that Deputy Hensley began to develop intelligence indicating that there were several cliques dealing drugs at the Harris Plant, and that the dealings were taking place for the most part inside the plant, outside in the parking lots and in a nearby grocery store. Burch Affidavit, ¶8. In assessing the significance of this assertion, it is important to recognize that CP&L advised the agents, before the operation began, about suspected drug activity in the parking lots and at the grocery store. Deputy Hensley has confirmed that he was so advised. Nevertheless, the agents were not able to make a purchase at the parking lots during the 8-week operation,

and to Applicants' knowledge did not attempt to investigate activity at the grocery store. Joyner Affidavit, ¶ 15.

Ms. Burch reports that Lt. Self stated that Deputy Hensley was obtaining information that a supervisor with either Daniel or CP&L was allegedly making trips to Florida and picking up pound quantities of cocaine which was being distributed by an identified suspect. She further states that attempts to make a cocaine purchase from the identified suspect were made, but that the termination of the undercover operation precluded any possible results. Burch Affidavit, ¶ 8.

Mr. Plueddemann has direct knowledge of the facts concerning these assertions. Several weeks before the end of the undercover operation, Deputy Hensley told Mr. Plueddemann about some information that the informant assisting in the operation had told him. Hensley told Mr. Plueddemann there was allegedly an electrical supervisor who was making trips to Florida and picking up large quantities of drugs. Hensley stated that the supervisor was supposedly working somewhere "on the hill," a reference to the main construction building at the Harris Plant. Hensley did not have a name or other identifying information about this person. Deputy Hensley asked Mr. Plueddemann if he could trace the person down if provided with the dates when the individual was making his trips. Using information provided by Deputy Hensley on the dates that this person was allegedly making his trips, Mr. Plueddemann researched time cards for Daniel and Davis Electric Company personnel to try to determine whether anyone had been absent from work during those time periods. Given the small amount of information available and the large number of time records, this was a time-consuming process. After completing his research, Mr. Plueddemann reported back to Deputy Hensley that he was not able to identify anyone who was not working during the combination of times identified. Hensley was told that if he could provide a name (either a first name, last name or nickname), Mr. Plueddemann could probably trace the individual down. Deputy Hensley said he would work on obtaining more information, but Mr. Plueddemann never heard back from him. Plueddemann Affidavit, ¶ 4.

Further, in none of Deputy Hensley's conversations with Mr. Plueddemann did Hensley state that there was an identified suspect distributing cocaine received from the supervisor. Plueddemann Affidavit, ¶5. At the August 12, 1985 meeting, Deputy Hensley stated that he still does not know who the alleged distributor was. Rather, Deputy Hensley stated that he was still exploring, when the investigation ended, two possible suspects -- neither of whom had yet been willing to make a sale to the deputy. Information on these two employees, however, had been provided to CP&L by the WCSD. Deputy Hensley also rejected any implication that the undercover operation was terminated because of his pursuit of this information. Joyner Affidavit, ¶16. In short, the Burch Affidavit is not correct on the progress which had been made in the pursuit of information on this matter, and it could leave the erroneous impression that termination of the operation was related to this aspect of the investigation.

Ms. Burch states that employees dealing in drugs included a QA person whose duties included inspecting electrical pulls. It is also stated that he was dismissed after Deputy Hensley identified the person to CP&L Security. Burch Affidavit, ¶9. In fact, this employee worked in Construction Inspection (CI), and was the subject of a search warrant served on him at the end of the operation, on January 10, 1985, with negative results. The employee was terminated that day, after the search, on the basis of previously acquired information. In the August 12, 1985 meeting Deputy Hensley agreed that this in no way interfered with the investigation. Ms. Burch also states that employees dealing in drugs included "safety personnel." Burch Affidavit, ¶9. Applicants believe this refers to a single clerical employee working in industrial safety. In our meeting, Deputy Hensley confirmed that he did not distinguish between personnel doing nuclear safety-related work and personnel engaged in non-nuclear safety work (e.g., construction personnel safety). Joyner Affidavit, ¶17.

Ms. Burch states that Deputy Hensley made his first drug buy after being on site for only one and one-half hours. Burch Affidavit, ¶¶ 9, 5. This statement is not

accurate. Deputy Hensley told Mr. Joyner that the informant purchased a controlled substance shortly after Hensley was on site. Consequently, since the purchase was not made by the officers, it could not be used to draw warrants. Deputy Hensley has confirmed that this first buy was made by the informant, not by Hensley. Joyner Affidavit, ¶10; Plueddemann Affidavit, ¶3.

Ms. Burch makes reference to a statement from SBI Agent Williams that he felt there was a leak at the Harris Plant regarding the fact that there were undercover officers being utilized. Burch Affidavit, ¶13. In planning and executing the operation, all those directly involved were very much concerned about the possibility of a leak. CP&L took extraordinary precautions to prevent any leak. The number of persons who were made aware of the operation was kept to an absolute minimum, and those who were aware took precautions to make sure that their communications were not overheard. Hindman II Affidavit, ¶8. Mr. King and Mr. Joyner are experienced law enforcement officers. Their concern for secrecy and the safety of the undercover agents came naturally. It was because of their concern that CP&L could not afford to create a major fuss in order to have Daniel re-hire the informant. CP&L's concern for secrecy also prevented project management from altering routine site operations and procedures, or planned changes to those operations and procedures, in a way which would attract attention or suspicion. Joyner Affidavit, ¶9.

While there may have been some misunderstanding -- based on differences in goals, responsibilities and perspectives -- on the significance of some actions taken by CP&L, there is no reason to conclude that the effectiveness of the agents was in any way impaired. Further, Applicants reject categorically the assertion that CP&L ever endangered the lives of the undercover officers. See Burch Affidavit, ¶15. Neither Deputy Hensley nor Agent Williams ever expressed to CP&L Security any concern about their personal safety during the operation. At the August 12, 1985 meeting, Deputy

Hensley stated that he did not think anything done by CP&L during the undercover operation endangered his life.¹⁵ Joyner Affidavit, ¶ 18.

E. Termination of the Investigation

Ms. Burch advances her opinion that the termination of the undercover operation was premature, that the operation was not complete, and that it was not terminated because the law enforcement agencies recommended it or because of a lack of suspects. Ms. Burch states that the sole and exclusive reason for termination was CP&L's insistence that drug dogs be used -- thereby creating a substantial and too high risk to the personal safety of the law enforcement officers if they remained in the operation with the dogs on site. Burch Affidavit, ¶ 14. She also expresses the opinion that if the investigation had continued, more arrests would have been made. Id., ¶ 15.

It is difficult to conclude objectively when a drug investigation of a population the size of a town is complete. It was CP&L's understanding, however, prior to the operation and up until the extension proposal of mid-December, that the investigation would last roughly eight weeks or until the end of the year. Hindman II Affidavit, ¶ 5. Lt. Self stated to Mr. Joyner before the operation began that January 2, 1985 would be the termination date for the investigation. (Eight weeks was also viewed by Applicants to be sufficient time for such an operation, given the assistance of the informant and the leads provided by CP&L, as well as the geographically concentrated area to be investigated.) At the August 12, 1985 meeting, Lt. Self agreed that he made this statement to Mr. Joyner, but added that he intended the operation would also be reviewed and its status re-assessed at that time. This was not CP&L's understanding. Joyner Affidavit, ¶ 19.

¹⁵WCSD personnel did confirm, however, that they terminated the operation because of their concern that narcotic detection dogs would be used on site immediately, and that such searches would endanger the officers. Joyner Affidavit, ¶ 18; Burch Affidavit, ¶ 14. Applicants address this concern below.

When Lt. Self of the WCSO contacted Mr. King in mid-December about the possibility of extending the undercover operation beyond the end of 1984 (Burch Affidavit, ¶10), Mr. King advised him of CP&L's plan to begin the use of narcotic detection dogs on site, and of an upcoming reduction in force which could result in the departure of suspects. Mr. King also had in mind the fact that the confidential informant could not safely and effectively continue in his role for an extended period and that he could not help with the second shift. (Once a person has a circle of drug contacts and his current friends know him to be well supplied, it becomes highly suspicious if he attempts to associate with a different group in order to make purchases.) Toward the end of the operation, the informant had been expressing concern about his personal safety. King II Affidavit, ¶6; Hindman II Affidavit, ¶5.

From Applicants' perspective, keeping known drug users and sellers on site (those identified through the investigation) for an extended period of time was a matter of concern. We believe that both the NRC and CCNC (see Contention WB-3) share this concern. In addition, continuation of the undercover operation temporarily inhibited CP&L and Daniel from taking vigorous action to execute some elements of the drug control program (which otherwise might have interfered with the operation). Hindman II Affidavit, ¶5; King II Affidavit, ¶6. In essence, while cooperation with these law enforcement agencies is considered to be a positive element of the overall program against drug activity at the Harris Project, an extended undercover operation, which inhibits other elements of that program and which prevents Applicants from promptly terminating offenders, could be detrimental.

The use of narcotic detection dogs once more brings this tension into play. CP&L began in 1981 to evaluate possible use of dogs. In August 1984, CP&L corporate management requested additional information on the use of dogs, and at that time CP&L Security started making plans to begin dog searches after the undercover operation was completed (i.e., after the end of 1984, based on CP&L's understanding). CP&L recognized

that it would be undesirable to initiate searches with dogs in the midst of the investigation -- not because of concern with the agents' cover, but because the drug activity under investigation might dry up at least temporarily. King II Affidavit, ¶7; Hindman II Affidavit, ¶5. Neither Mr. King nor Mr. Joyner, who have extensive prior experience with the Raleigh Police Department, believe that use of a narcotic detection dog to search diverse and random locations on the site would have compromised the cover of, or endangered, the undercover agents. King II Affidavit, ¶7; Joyner Affidavit, ¶18.

When Mr. King was approached in mid-December and during a subsequent meeting about extending the operation, CP&L had already contacted a dog handler and was beginning contract negotiations. Mr. King did advise the WCSD and SBI personnel that Harris Project management wanted the dog detection searches. The first visit with the dog was in fact on February 25, 1985 -- some six weeks after the undercover operation ended. Mr. King does not recall stating that CP&L was going to use, or insisted upon using, the drug dogs "immediately." See Burch Affidavit, ¶14. However, it is clear from discussions at the meeting of August 12, 1985 with WCSD personnel, that Mr. King did not succeed back in December in communicating that the dog would not actually be on site until late February, and that the law enforcement personnel were left with the impression that use of the drug dog was imminent. Sheriff Baker stated at the August 12 meeting, however, that he did not believe CP&L was attempting to stop the investigation, but rather that we had a conflict of goals and objectives. King II Affidavit, ¶8. The Sheriff is correct in concluding that CP&L did not use the detection dog to cut off the investigation.

There is also a difference of professional opinion as to whether the results of the investigation would have been substantially different if it had continued. This undercover operation was not perfect -- as few are. The SBI agent, who was experienced, did not support the investigation adequately, leaving it for the most part to

Deputy Hensley to obtain cases against suspects. Employees willing to sell drugs to the informant often would not sell to Deputy Hensley. To illustrate, except for one employee, the individuals who sold drugs to Deputy Hensley in December, 1984, were the same employees who made sales to him in November. This was not necessarily anyone's fault, but combined with the low level of SBI support, it casts serious doubt on the likelihood of success for an extended operation. The agents could have worked any hours, but the informant had not worked the second shift and did not have contacts among those employees. Therefore, the efforts were concentrated on the first shift. Finally, the selection of this informant -- known by some on site to have been fired earlier for drug use -- made it difficult to preserve secrecy and perhaps to gain the trust of suspects. Further, near the end of the operation the informant was concerned with his personal safety because of the suspicious situation, where for eight weeks he was constantly talking about drugs and trying to arrange purchases for the two consultants (agents). In our discussion on August 12, WCSO personnel disagreed with our assessment that an extended operation would not likely have been successful. They believe that Deputy Hensley and a new SBI agent could have been productive on the second shift without the informant. This remains a difference of professional opinion. Joyner Affidavit, ¶20.

F. Assessment of Drug Activity

Ms. Burch states that personal observations and intelligence gathered by the officers indicated that drug dealings and drug use were widespread at the Harris Plant.¹⁶ Burch Affidavit, ¶15. Applicants submit that such unsubstantiated estimates are not useful. If the agents were not close enough to read the employees' name or number on the hardhat, at least some doubt can be raised as to whether actual drug activity was observed. In addition, Applicants must observe that if law enforcement

¹⁶Ms. Burch does not assert that she has personal knowledge upon which to formulate such an opinion.

agencies genuinely believe there is substantial drug traffic (for example, in the parking lots, at a nearby grocery store, or in the form of pounds of pure cocaine being flown in from Florida), they have means available to enforce the law without CP&L's cooperation in an undercover operation.

It is somewhat understandable if the undercover agents believe there was more drug use at the Harris site than they could confirm. The informant was an experienced drug user who introduced them immediately into a circle of drug dealers and users.¹⁷ It is also to be expected that rumors would exist, among these people, on the extent of drug activity. The investigation did provide CP&L with, and confirm in some cases, valuable intelligence on drug activity at the site. This has enabled CP&L to implement site drug abuse policies more effectively. Joyner Affidavit, ¶21.

Based on his six years of security work at the site, Mr. Joyner does not conclude that drug use is widespread. Joyner Affidavit, ¶21. Mr. King also continues to challenge the suggestion that drug use at the site is widespread. There have been 13 searches at the site with the detection dog, on an unannounced basis, at all hours of the work day, and covering all areas of the site, including 16 vehicles the dog selected in the parking lots. These searches, including physical searches of the vehicles, have uncovered no, or only insignificant quantities of, drugs. King II Affidavit, ¶9.

¹⁷Because the informant was already associated with drug users on site, it was not surprising that he was able to make a purchase shortly after the operation began and Deputy Hensley arrived on site. See pp. 17-18, *supra*.

V.
Conclusion

Applicants' reply to the NCAG Response eliminates, in our view, any dispute about CP&L's support for and cooperation with the undercover drug investigation at the Harris Plant -- an operation proposed by CP&L itself solely out of its own desire to confront drug activity on the project. The contrary impression left by the Burch Affidavit is based upon information which is incomplete and in part inaccurate, but more importantly upon a misunderstanding of CP&L's actions during the operation. Further, in retrospect it is apparent that all parties to the operation failed to recognize the significance of the somewhat conflicting goals and responsibilities of CP&L and the law enforcement agencies. CP&L, concerned about the quality of construction, wanted drugs and drug users/sellers off the job as soon as possible. Law enforcement agencies, concerned with building the maximum number of criminal cases, wanted suspects left undisturbed until the investigation in their view was over, and were anxious that CP&L not take actions to disrupt or curb drug activity during the operation. Nevertheless, while the participating law enforcement agencies wanted the investigation to continue, it is clear that CP&L's actions were not aimed at disruption of the investigation.

It cannot be said that every single dispute of fact has been eliminated. Memories of conversations and events of last year are not in all cases identical, and legitimate differences of professional opinion remain. An evidentiary hearing, however, is very unlikely to advance the current understanding of the facts or to resolve the differences in judgment and perception. Applicants' reply to the NCAG Response is supported by affidavits from personnel with first-hand knowledge of the facts, and is entitled to great weight.

Further, the existence of some disputes of fact, even on intriguing questions of public interest outside the context of this NRC proceeding, is not grounds for denying Applicants' Motion. Neither is complexity alone a justification for resort to live testimony. Rather, the question is whether there is a genuine issue as to any fact

material to the contention and to the findings the NRC must consider in deciding this operating license application.

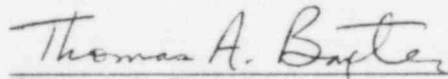
The finding relevant to this contention is whether reasonable assurance exists that the plant, as built, can and will be operated without endangering the public health and safety. Applicants' Motion at 8-9. Addressing more particularly the two-pronged test applied to allegations on construction quality (*id.* at 10), it is undisputed that no safety-significant construction deficiency has been identified as being caused by an employee impaired due to the influence of drugs. Applicants' Material Fact No. 9.

Second, there has been no breakdown in quality assurance procedures, and no pervasive failure to carry out the quality assurance program at the Shearon Harris Nuclear Power Plant. Applicants' Material Fact No. 11. The NRC Staff's numerous inspections and evaluations of the construction effort and the quality assurance program (including SALP and the Construction Appraisal Team) provide independent corroboration of Applicants' evidence on that score. CCNC has had full access to discovery of Applicants and the Staff.¹⁸ If CCNC cannot now identify a specific construction problem, then Applicants' Motion should be granted. An evidentiary hearing is not warranted merely to continue the discovery process in a search for evidence which "may turn up." See Applicants' Motion at 6.

¹⁸There is no discrepancy between the Burch Affidavit and Applicants' discovery responses, as claimed by CCNC. See Tr. 8189-91.

Since the Quality Assurance program has the same capability to identify any safety-significant construction deficiency caused by any employee impaired due to the influence of drugs, as it does to identify such deficiencies from other causes -- there is reasonable assurance that any drug-caused deficiencies have been identified and corrected.

Respectfully submitted,



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