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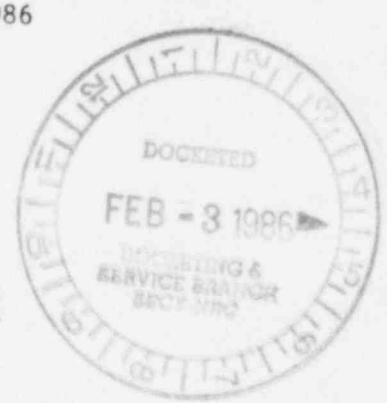
January 30, 1986



UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of:	)	
	)	
Carolina Power & Light Company and NC Eastern Municipal Power Agency	)	Docket No. 50-400 OL
	)	
	)	
(Shearon Harris Nuclear Power Plant)	)	

APPEAL FROM PARTIAL INITIAL DECISION
ON EMERGENCY PLANNING CONTENTIONS

Now come the Joint Intervenors, Wells Eddleman pro se, and the Emergency Planning Joint Intervenors with an appeal from the Partial Initial Decision on Emergency Planning and Safety Contentions dated 11 December, 1985 in the Shearon Harris Operating License proceeding, captioned above.

The Joint Intervenors are Eddleman, CHANGE, Kudzu Alliance, and Conservation Council of North Carolina. The Emergency Planning Joint Intervenors are Dr. Richard Wilson, CHANGE, CCNC and Eddleman.

Notice of Appeal under 10 CFR 2.762 was duly served on 12-23-1985 and a request for extension of time filed and granted by the Appeal Board 1-21-86.

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A table of contents etc is not required for briefs 10 pages long, 10 CFR 2.762(c). Argument therefore follows:

1. THE LICENSING BOARD ERRED IN DISMISSING CONTENTION 41-G. During the preliminaries to a combined hearing on emergency planning contentions and contention 41-G (harassment of persons who raise concerns related to safety issues), the Licensing Board dismissed Contention 41-G because the intervenor could not guarantee that witness Chan Van Vo would appear at the hearing. It was never stated that Van Vo would not appear, nor did the Board seek to compel his attendance, or testimony. In admitting Contention 41-G, the Licensing Board did not refer to Van Vo's availability as a witness in determining the admissibility of the contention or weighing the 5 factors of 10 CFR 2.714(a)(1) concerning it, even though his availability had been argued to the Board in October 1984. TheBoard's dismissal of the contention was arbitrary and capricious in making decisive a factor not even noted in the decision admitting (part of) Contention 41-G, and improper in that the Board took no steps to compel witness Van Vo's testimony, and in error since two other persons had complained of harassment in response to the Board's written notice, but their allegations had not been evaluated completely at the time the Board dismissed 41-G. The Board did not give reasonable detail of its basis, violating ALAB-422 6NRC 73, 77 (1977)

2. THE LICENSING BOARD ERRED IN THE FAILURE TO ADMIT VARIOUS EMERGENCY PLANNING Contentions. All Eddleman contentions rejected by the Licensing Board below are hereby appealed. especially, e.g., those filed 4-12-84 ^Most cite references in the plan, all ^allege specific problems, and all ^comply with the basis and specificity requirements. The Board's rejections reach the merits, improperly apply regulations and case law, and fail to

comply with ALAB-130, 6 NRC 423, 425-6, nor with the requirement of UCS v. NRC, 735 F.2d 1437, 1443 (reversing ALAB 732, 17 NRC 1076, 1103-04, in effect) that in emergency planning as well as other areas of licensing, "once a hearing on a licensing proceeding has begun, it must encompass all material factors bearing on the licensing decision raised by the requester." (citations omitted) UCS, supra, at 1443.

The Licensing board likewise violated the above-cited requirement by specifying "severe snow and ice conditions" in rewording Emergency Planning Joint (EPJ, see Tr. 973-4, Order of 5-10-84 transcript attachment thereto) Contention 1. (Tr. 976) In the area of the Harris plant, as was brought out in oral argument on the contentions EPJ-1 is derived from, virtually all people lack experience driving on snow or ice, at least sufficient experience to prevent rashes of accidents whenever a light snow or an ice storm or frozen water are on the roads. The slick spots in light snow or ice occur randomly and regularly cause numerous accidents in traffic. Heavy snow by contrast is much easier to drive on; uniform ice does not subject drivers to sudden unanticipated loss of steering or traction. By arbitrarily removing this factor from the contention as admitted, the Licensing Board improperly denied a hearing on a specific and important matter, since this area experiences light snow or ice typically 5 or more times a year. Since severe weather can cause or contribute to serious nuclear accidents, accidents are more likely under these conditions than when these conditions do not exist.

THE LICENSING BOARD ERRED IN REJECTING CHANGE Contention 20. (Tr. 977-78, referenced in above paragraph). CHANGE 20 alleged difficulties in evacuating people under the influence of alcohol or drugs who would be present at the lakes near the Harris plant. The Board clearly reached the merits in rejecting the contention. Tr. 978, lines 4-12. People who are "drunk or stoned" (Tr. 978) are obviously harder to evacuate, and whether emergency personnel can deal with all of them, or the extent of their problems, is

patently a matter of the merits of the contention. ALAB-130, 6 AEC 423 at 425-6, clearly requires that this error be reversed. There could be a huge number of people partying at and on the large recreational lakes in the Harris EPZ on a weekend, especially in summer, and use of drugs and alcohol is a problem on these lakes. The N.C. legislature recently outlawed drunken motorboating in recognition, we believe, or the extent of this problem, but enforcement is not sufficient to prevent people drinking (or using drugs) and boating or being on the lakes or their shores or nearby.

The Licensing Board erred in rejecting CHANGE 4 and leaving training to the Staff. ALAB 732, 17 NRC 1076, 1103, points out that "as a general proposition, issues should be dealt with in the hearings and not left over for later (and possibly more informal) resolution." (citations omitted). While the Commission had taken a "slightly different course" (Ibid at 1103) on emergency planning, this was reversed by UCS v. NRC, supra. Training is obviously material and relevant to the licensing decision, (Cf. UCS at 1443, discussing Bellotti). And it thus must not be left "for later" or informal resolution, ALAB 732, supra, 1103. When a statute requires a hearing in an adjudicatory matter such as licensing, the agency must generally provide an opportunity for submission and challenge of evidence as to any and all issues of material fact. UCS, supra, 1444 (citations omitted, emphasis added). The Licensing Board erred in denying this both on CHANGE 4 and on the Eddleman and other contentions argued above. What training could be done (Tr.979) is in the merits.

The Licensing Board also violated the above-cited law and went to the merits in rejecting CHANGE 9 (Tr. 979, esp. lines 19-22). The same is true for rejecting CHANGE 21 (Tr. 981, esp. lines 8-17.) The Board went to the merits in rejecting Wilson 3 and 4 (Tr. 985 -6). Wilson 5(b)(C)(d) & (e) were rejected in violation of UCS and ALAB-732 in the same way CHANGE 4 was. (Tr. 987, lines 8-11).

The Licensing Board erred in rejecting CHANGE 33 under GUARD v. NRC, 753 F.2d 1144 (1985), see especially 1149-50 as to why the NRC's "attempts fail" (right column, 1149) and the critique of the NRC's underlying assumption, 1149-50, and the conclusion at 1150. The same error was made re Eddleman 57-C-7 (Memorandum & Order of

1-07-1986. That order says Eddleman's arguments in his response (of 12-23-85) may be raised on appeal.(p.3) He now does so, incorporating all his arguments re contention 57-C-7 in the response of 12-23-1985 by reference as if fully set out herein. Not to be repetitious, he does emphasize that the NRC did not evidently dare to order the Licensing Boards to continue the Commission's former rule, perhaps for fear of being found in contempt of court; but the Harris Licensing Board did, erroneously, what the Commission dared say they "may".

THE LICENSING BOARD ERRED IN REJECTING CHANGE 23 (Tr. 982 att. to 5-10-84 order, see p.3, supra) and Eddleman 57 (revised) and 57-C-2 (4-12-84 "Wells Eddleman's Contentions on Emergency Plan, 2d set"). The Board rejected Wilson 1 (Tr. 984) because it didn't give a reason to include Cary. But the Board aribtrarily and capriciously did not require the State and local authorities to give a reason for their decisions that set the size and boundaries of the Emergency Planning Zone. Eddleman 57-C (revised) gives the reason to include Cary : prevailing winds from the nuclear plant blow in its direction. In oral argument, rapid growth of population in Cary and Raleigh was cited, we believe. A basis to take the EPZ out to 25 miles, NUREG-CR-2239, was cited in 57-C and 57-C-2(revised) (4-12-84 at 4). If the Board really thought this was a challenge to the rule, it could still have admitted an emergency planning joint contention combining CHANGE 23, Wilson 1, and Eddleman 57/57-C-2 (as revised 4-12-84). Or could have admitted part of either or both Eddleman contentions, to include the city of Cary orthe heavily populated area downwind of the nuclear plant, as was done in Catawba. The Board erred by not allowing a hearing on the material issues raised by these contentions,i.e. that large populations downwind should be taken into account in setting the EPZ boundary, which must be justified. See UCS, supra, at 1444, cf. citation in 1st full paragraph on page 4 above in this brief. See also ALAB-130, 6 AEC 423, 424-5 to the extent the Board reached merits, denied merits of CHANGE 23 or Wilson 1, or denied contentions with adequate basis and specificity (Eddleman 57 and 57-C-2 in 4-12-84 filing).

Under ALAB-130, Applicants and Staff's failure to except to the Licensing Board's admission of contentions now bars them from raising such issues. 6 AEC 423 at 425, "...applicant ...can make (admitting a contention)the subject of an exception to the initial decision. " Neither Applicants nor Staff appealed this Partial Initial Decision.

The Licensing Board erred to the extent it rejected Eddleman 57-D-1,2 or 3 which have adequate basis and specificity per ALAB-130, supra and raise issues material to finding adequate protective measures can and will be taken, 10 CFR 50.47(a)(1), material to licensing per UCS, supra.

3. THE LICENSING BOARD ERRED in not requiring the protection factor data for structures typical of those in the EPZ (non-residential) as shown in Attachments 4,5 and 7, to go into the actual emergency plan. Inclusion of such data in the plan is required, and "in the plan" means in the plan. (PID at all, Finding 6, 12-11-85). The Board admits the typical data is not included, but says it is not necessary. That is ridiculous, especially since the ranges have high ends that are definitely not typical, as the evidence establishes. (See Eddleman proposed Findings on Contention 57-C-10,8-30?,1985)(Finding 12 and related proposed Findings). Words mean what they say. GUARD V. NRC 735 F. 2d 1144 at 1148-49 "agency's interpretation (can) do no violence to the plain meaning of the provision (at issue)" (Citations omitted. "In the plan" means in the plan, and protection factors "typical of those" for "structures" within the EPZ means the typical factors, not just the extremes of ranges that (at the high extreme) are not at all typical. See Tr. 8137, 8139-40, 8142-44, 8146-48 and as cited in Eddleman proposed findings 4-12 on Contention 57-C-10.

4. The LICENSING BOARD ERRED in allowing some information required to be "in the plan" not be in the plan, in summary disposition of contentions, e.g. Eddleman 2 and 30, potassium iodide. The PID of 12-11-85, p.25, cites Applicants' findings 3 thru 5 for these rulings, and we refer the Appeal Board to those findings and the decision documents cited therein. FEMA is prone to interpret the words "plan ... shall include" in NUREG-0654 to mean that the things the plan "shall include" don't have to be in the plan. This violates GUARD V. NRC, supra, 1148-49, and the Licensing Board errs in approving it. It also doesn't help FEMA's credibility.

5. THE LICENSING BOARD ERRED IN REJECTING CONTENTIONS EPX 4,9,10 and 11 (reaching the merits and denying a hearing on matters litigable under UCS v. NRC, 735 F.2d 1437). The Commission (NRC) has not adopted the "fundamental flaw" standard, as the Board acknowledges, PID at 17 in footnote 1 (continued from page 16), and without such a standard, the Licensing Board lacks the authority to apply it. Moreover, the contentions referenced are specific, and 4 and 9 deal with training which the Board wants to leave until later without formal review. This they cannot do, see argument on page 4, 1st full paragraph, supra). For 10 and 11, "correctability"is also the excuse for rejection. FEMA findings, e.g. re EPX-10, are rebuttable, not conclusive. 10 CFR 50.47 (a)(2). The rejections reach the merits, and are thus wrong. The rejection of EPX-5 as premature does not preclude later contentions, but the "correctable" argument is improper there, also. PID at 18-22 deals with these contentions.

Again, Applicants' and Staff's lack of appeal of admission of Contentions EPX-2 and -8 bars their arguing against them now.

6. THE LICENSING BOARD ERRED IN ITS ACCEPTANCES OF PROMISES AND FUTURE INSPECTIONS OR CHECKING RE FIRE PROTECTION (Eddleman Contention 116). Indian Point requires that "(T)he post-hearing approach should be employed sparingly and only in clear cases" (Consolidated Edison Co. of New York, Indian Point Station, Unit 2, CLI-74-23, 7 AEC 947,951 (1974), giving the example of "minor procedural deficiencies"(Id. at 951 n.8, 952: See ALAB-732, supra, 17 NRC 1076 at 1103 for more cases in accord).

But the Licensing Board, e.g. in Findings 14 and 14, PID of 12-11-85 at 31-32, allows testing of "generic" fire barrier assemblies to be performed post-hearing instead of requiring data on the test results. Testing is not a minor procedure for safety related equipment. This is especially true of fire barriers since in a fire, NRC regulations and guidance (see documents described in note 3 to 10 CFR 50.48(a)) require only one redundant train of equipment capable of shutting down the plant. Lose a fire barrier and you can lose the capability to shut down the plant.

The Board likewise approved untested large fire doors (PID findings 20-24, PID at 33-35) but at least here there was an argument that testing was not required. This does not apply to the fire barriers.

The Board approved "analysis" of the effects of fire spreading that evidently does not take adequately into account the equipment located in adjacent areas. (Finding 32, PID at 38-39). It is not good analysis of fire spreading to say, as the Staff does, that it won't spread (id. at 39). And without analysis of what equipment will be knocked out in a spreading fire (e.g. due to as simple a thing as an open door, a fire damper that fails to close, or a defective fire barrier), the analysis cannot be adequate. (Cf. end of Finding 32).

The Board rejected Eddleman findings filed 1/8/85 on Contention 116, (PID at 41, finding 38, ff). Finding 40 (p.42) rejects the questioning of leaving certain material out of the FSAR, Eddleman 1/8/85 proposed findings 16-21. But the omission of this material bears on the trustworthiness of Applicants and the thoroughness of their analysis. This is significant in light of the promises and analysis the Board has accepted. In Long Island Lighting Co. (Shoreham) 20 NRC 1531, the Appeal Board held that even for "relatively minor"matters, the promise to comply is not enough. And a record of questionable housekeeping supported the remand of the housekeeping issue.

This LILCO decision applies, with the other cases cited above, not only to the matters above, but to Board findings 42, 43 ("this won't happen" rejection of scenario without sufficient evidence to support that rejection), and 44 and 45 (things yet to be done, approved without completion). The evidence rejected in Finding 46 (PID at 43) should have weighed in further favor of requiring use of actual results on all the above matters, and better evidence on scenarios and possible accidents due to errors or poor testing or installation. The Conclusion in Finding 47 is unjustified.

7. THE BOARD ERRED IN APPROVING A PIPE HANGER WELDING PROGRAM RIDDLED WITH ERRORS AND ADMINISTRATIVE?MANAGEMENT FAILURES, BASED ON PROMISES TO COMPLY.

It should be noted that discovery on pipe hangers closed in early 1984, thus giving Applicants ample time to fix any specific problems brought out in discovery. The only data later provided to Intervenor on the hangers was not selected by Intervenor examining documents himself.

Intervenor's arguments on this contention (41-Pipe Hanger Welds) and the accompanying evidence are detailed in Wells Eddleman's Proposed Findings (1-08-85) on (inter alia) Contention 41. He incorporates those arguments and proposed findings as if fully set out at this point herein. Since the Appeal Board can substitute its judgment for that of the Licensing Board below, Intervenor requests that the record on Contention 41 be re-examined in light of his proposed findings and arguments and the case law cited above, re Contention 116. In particular, Intervenor calls attention to the LILCO decision, supra, 20 NRC 1531 which emphasizes that even for such "relatively minor" matters as housekeeping, a promise to comply is not enough. This is even more true for major matters such as pipe supports (safety-related), and where there is a clear record of many past failures to comply with applicable regulations (as the evidence on Contention 41 shows and Applicants admit). Further, in a limited appearance statement to alert the Licensing Board to problems, Michael W. Spohn, an engineer with extensive nuclear design background, 13 years, charged loss of design control for safety related pipe supports, Tr. 7990-1,and use of inexperienced designers whose ability was not tested, Tr. 7991-3. This should have alerted the Licensing Board to examine the pipe hanger construction/welding more closely.

Ironically, due to delays in the Harris plant's completion,

there has been ample time to hold more hearings on Contention 41, and this applies to other contentions above, as well.

8. THE BOARD BELOW ERRED IN NOT ADEQUATELY JUSTIFYING ITS DECISION NOT TO REQUIRE ANALYSIS OF MULTIPLE TUBE RUPTURE EVENTS. Over the life of the Harris plant, the probability of such events would be in the range of other events analysed, and multiple ruptures could lead to leaks beyond the design basis analyzed in the FSAR or in testimony. Correct analysis, not "it can't happen" judgments, need to be done on this issue, Joint Intervenors agree.

NOTE on citations: Wells Eddleman apologizes for the citations of some documents he could not locate. He has been forced to move (9/85) to a place where there is not room to arrange and search all Harris case files, and could not locate all the documents cited. (In the previous brief, he was at the CCNC office where he believed a complete file of orders existed, but one did not, and he found out too late to return to Durham, search, and get the brief timely filed.)

CONCLUSION

For these reasons given above, the Joint Intervenors, the Emergency Planning Joint Intervenors, CCNC, and Wells Eddleman urge that the Partial Initial Decision of the Licensing Board dated 11 December 1985, and previous decisions of the Licensing Board on other matters (e.g. admission/rejection of contentions, summary disposition, dismissal of Contention 41-G) herein appealed from, be reversed and remanded to the Licensing Board for further consideration consistent with the positions taken herein.

Wells Eddleman

Wells Eddleman
Intervenor pro se
For himself and the
Joint Intervenors and
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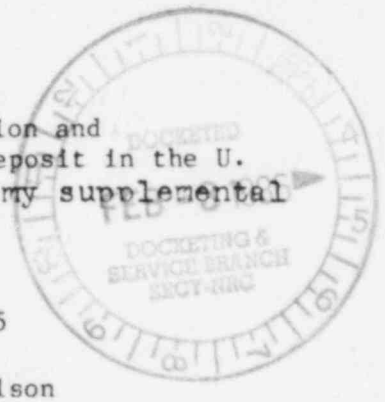
This is the 30th day of January, 1986.

CERTIFICATE OF SERVICE



I hereby certify that this Appeal from Partial Initial Decision and Supplemental Brief were served on the following persons by deposit in the U. S. Mail, postage prepaid, or by hand-delivery, along with my supplemental brief on ocean dumping.

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