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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF BRIEF IN REPLY TO THE APPEAL OF JOINT INTERVENORS, CONSERVATION COUNCIL OF NORTH CAROLINA, AND WELLS EDDLEMAN FROM THE LICENSING BOARD'S PARTIAL INITIAL DECISION ON SAFETY CONTENTIONS

Charles A. Barth
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Janice E. Moore
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I. INTRODUCTION

On August 31, 1985, Joint Intervenors, Conservation Council of North Carolina (CCNC), and Wells Eddleman (Intervenors) filed a Notice of Appeal in this Operating License Proceeding indicating their intention to appeal the Atomic Safety and Licensing Board's (Licensing Board), Partial Initial Decision on Safety Contentions issued on August 20, 1985. 1/ The appellate brief of the Intervenors was filed on October 8, 1985, pursuant to the grant by the Appeal Board of Joint Intervenors' request for an extension of time. "Appeal From Partial Initial Decision on Management

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1/ Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), LBP-85-28, 22 NRC 232 (1985)

Capability And Safety Contentions" [hereinafter Intervenors' Brief]. Carolina Power & Light Company (CP&L) and North Carolina Eastern Municipal Power Agency (collectively "Applicants") filed "Applicants' Brief In Reply To Intervenors' Appeal From The Partial Initial Decision On Safety Contentions" on November 22, 1985 [hereinafter Applicants' Reply]. For the reasons set forth below, the Licensing Board's decision on all matters which are the subject of this appeal should be affirmed.

II. STATEMENT OF THE CASE

On January 27, 1982, a "Notice of Receipt of Application for Facility Operating Licenses; Availability of Applicants' Environmental Report; Consideration of Issuance of Facility Operating Licenses; and Opportunity for a Hearing" was published for the Shearon Harris facility in the Federal Register. 47 Fed. Reg. 3898 (January 27, 1982). A Licensing Board was established to conduct the proceeding. "Establishment of Atomic Safety and Licensing Board to Preside in Proceeding" 47 Fed. Reg. 8705 (March 1, 1982).

The Licensing Board received nine petitions for leave to intervene from individuals and organizations. 2/ Seven petitioners were found to

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2/ The nine petitioners were:

Citizens Against Nuclear Power (CANP), Conservation Council of North Carolina (CCNC), Chapel Hill Anti-Nuclear Group Effort (CHANGE), Mr. Wells Eddleman, Environmental Law Project (ELP), Kudzu Alliance (Kudzu), the Mayor's Task Force to Assess the Effect of the Shearon Harris Nuclear Power Plant on Chapel Hill (MTF), Mr. Daniel Read, and Dr. Richard Wilson. CHANGE and ELP sought and were granted

(FOOTNOTE CONTINUED ON NEXT PAGE)

have standing, and six of those with standing were held to have proposed at least one good contention. LBP-82-119A, 16 NRC at 2070. 3/ The Intervenors filed over 300 contentions. Id. at 2074. Several of the Intervenors proposed "Joint Contentions" for purposes of litigation in the safety area. Id. at 2076. These contentions were admitted by the Licensing Board. Id. Following a second prehearing conference, the Licensing Board listed those admitted contentions which were classified as safety contentions. "Memorandum and Order (Reflecting Decisions Made Following Second Prehearing Conference)" at 7 (March 10, 1983). 4/ Mr. Eddleman thereafter proposed additional safety contentions.

Applicants moved for summary disposition of Joint Contentions IV, V, VI and VII, CHANGE Contention 44, and Eddleman Contentions 11, 45, 64(f),

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

consolidation. Mr. Read also withdrew his petition, and permitted his interests to be represented by CHANGE. MTF ceased to pursue its petition. Instead MTF's Chairman, Dr. Phyllis Lotchin, sought to intervene as an individual. Carolina Power and Light Company and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plants, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2070 (1982).

3/ Ruling on the party status of Dr. Lotchin was deferred, since her proposed contentions related to emergency planning. The emergency plans for the Harris facility were not submitted at the time the contentions were proposed, and rulings on such contentions were deferred. Id.

4/ The contentions designated as safety contentions were: Joint Contentions I, IV, V, VI and VII; CHANGE 44; Wilson III; Eddleman 9, 11, 41, 45, 64(f), 65, 67, 116 and 132.

65, 67, 132 and 132(c)(2). [5/] Motions for Summary Disposition were granted with respect to Joint Contentions IV (in part) and 7 (in part), CHANGE Contention 44, and Eddleman Contentions 11, 45, 64(f), 67, 132 and 132(c)(2). [6/] Hearings were held in September-November, 1984 on those

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5/ "Applicants' Motion For Summary Disposition of Joint Intervenors' Contention IV (Thermoluminescent Dosimeters)" (January 9, 1984);

"Applicants' Motion for Summary Disposition of Joint Intervenors' Contention V (Continuous Air Monitors and Portable Air Samplers)" (February 27, 1984);

"Applicants' Motion for Summary Disposition Of Joint Intervenors' Contention VI (Monitoring Systems)" (March 9, 1984);

"Applicants' Motion For Partial Summary Disposition of Joint Contention VII (Steam Generators)" (May 16, 1984);

"Applicants' Motion for Summary Disposition of Change Contention 44 and Eddleman Contention 132" (December 7, 1983);

"Applicants' Motion For Summary Disposition of Eddleman Contention 11" (May 25, 1984);

"Applicants' Motion for Summary Disposition of Eddleman Contention 45 (Water Hammer)" (May 25, 1984);

"Applicants' Motion For Summary Disposition of Intervenor Wells Eddleman's Contention 64(f) (Spent Fuel Shipping Cask Pressure Relief Valve)" (September 1, 1983);

"Applicants' Motion for Summary Disposition of Eddleman Contention 65" (January 18, 1984);

"Applicants' Motion for Summary Disposition of Eddleman 67 (Waste Disposal)" (May 8, 1984);

"Applicants' Motion For Summary Disposition of Eddleman Contention 132C(II)" (May 9, 1984).

6/ "Memorandum and Order (Ruling on Motions for Summary Disposition)" (April 13, 1984);

(FOOTNOTE CONTINUED ON NEXT PAGE)

contentions for which motions for summary disposition were denied, and on those contentions on which motions for summary disposition were not filed. The Applicants and Staff presented witnesses on all contentions. Aside from presenting one document in their direct case on the management capability contention and Mr. Stokes as their witness on Contention 65 regarding containment concrete, Intervenors relied on cross-examination of Applicants' and Staff witnesses to develop evidence for the record. Proposed findings on the safety contentions were filed by all concerned parties pursuant to the Licensing Board's Order. 7/ The Applicants were

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Conference call of July 12, 1984, Tr. 2167;

"Memorandum and Order (Revision of and Schedule for Filing Written Testimony on Eddleman Contention 9; Rulings on Eddleman Contentions 45 and 67)" (July 24, 1984);

"Memorandum and Order (Ruling on Motions for Summary Disposition of Eddleman Contentions 29/30, 64(f), 75, 80 and 83/84)" (November 30, 1983).

The Licensing Board granted summary disposition of contention 132 c(II) in a telephone conference call among the parties and articulated its reasoning in the PID LBP-85-28, supra, 22 NRC at 295-297 (1985).

7/ "Applicants' Proposed Findings of Fact and Conclusions of Law on Safety Matters" (December 21, 1984);

"Wells Eddleman's Proposed Findings on Contention 41 (Pipe Hangers QA/QC), 116 (Fire Protection) and 9 (Environmental Qualification of Electrical Equipment) (With Conclusions and Orders Included)" (January 2, 1985);

"Joint Intervenors' Proposed Findings on Joint Contentions 1 (Management Capability)" (January 9, 1985);

"NRC Staff Proposed Findings of Fact and Conclusions of Law on Joint Intervenors' Contention I, IV, and VII(4) and Eddleman Contentions 9, 41, and 116" (January 22, 1985).

given an opportunity to file reply findings. 8/ Mr. Eddleman was permitted to file proposed findings on Contention 65, containment concrete, and the Staff and Applicants were permitted to reply. 9/

Based on the record of this proceeding, on August 20, 1985, the Licensing Board issued its second Partial Initial Decision. The safety contentions ruled upon in that decision were resolved in favor of the Applicants and the Staff. The Licensing Board's rulings with respect to a number of these safety contentions are being appealed by Intervenors. 10/ For the reasons set forth below, the Licensing Board's decision on these matters should be affirmed.

8/ Applicants' Reply To The Proposed Findings of Fact and Conclusions of Law On Safety Matters Filed By Other Parties" (January 29, 1985).

9/ "Wells Eddleman's Proposed Findings on Contention 65" (December 21, 1984);

"NRC Staff Reply To Wells Eddleman's Proposed Findings on Contention 65 (Containment Concrete)" (January 11, 1985);

"Applicants' Reply To Wells Eddleman's Proposed Findings on Contention 65" (January 4, 1985).

10/ In their brief on appeal, Intervenors set forth the standard of review they allege applies to the Licensing Board's Decision. Intervenors' Brief at 16, 28. The Staff previously discussed the appropriate standards for Appeal Board review in "NRC Staff Brief In Reply To The Appeal Of Joint Intervenors And Wells Eddleman Of The Licensing Board's Partial Initial Decision On Environmental Matters" dated May 24, 1985, at 6-9. For the reasons stated therein, the Staff finds that Intervenors have incorrectly characterized the standards for Appeal Board review and urges the Appeal Board to reject Intervenors' statement of the standards.

III. QUESTIONS PRESENTED

Intervenors' appeal presents the following questions for resolution by the Appeal Board:

> Whether the Licensing Board correctly applied the provisions of 10 C.F.R. § 2.714 in rejecting certain contentions proffered by the Intervenors;
>
> Whether the Licensing Board correctly applied 10 C.F.R. § 2.749 in granting motions for summary disposition;
>
> Whether the Licensing Board was correct in resolving contested safety issues in favor of the Staff and Applicants;

IV. ARGUMENT

A. The Licensing Board Correctly Applied The Provisions Of 10 C.F.R. § 2.714 Of The Commissions's Regulations In Rejecting Certain Of Intervenors' Contentions

Intervenors argue that the Licensing Board erred in rejecting certain contentions proffered by Intervenors and Kudzu Alliance and CHANGE. Intervenors' Brief at 20-23. On October 28, 1985, Applicants moved to strike this section of Intervenors' Brief [11/] on the grounds that it did not conform to 10 C.F.R. § 2.762 in that it did not identify errors of law or fact made by the Licensing Board and contained little or no citation to the record. The Appeal Board in an Order dated October 31, 1985, denied the motion. The Appeal Board agreed in part with Applicants but expressed the view that Applicants' reply could

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11/ "Applicants' Motion To Strike A Portion of Intervenors' Brief On Appeal From The Partial Initial Decision On Safety Contentions" (October 28, 1985).

address some of Intervenors' arguments, such as rejection of Contention 132A, B, C(1) and D. The Appeal Board also expressed the view that Applicants (and Staff) should address in their Briefs whether Intervenors could appeal on behalf of other parties. The Appeal Board further held, however, that Applicants need only respond to those arguments in Section III of Intervenors' Brief which were "...reasonably identified and understandable." Unpublished Order of October 31, 1985. 12/ We have attempted to comply with the thrust of the Appeal Board's Order of October 31, 1985, and have addressed rejected Contentions 65A and B and 132A, B, C(1), and D, as well as the matter of appealing on behalf of others. 13/

1. Intervenors Cannot Appeal The Licensing Board's Rejection Of Contentions Advanced By Other Parties

Intervenors purport to appeal the rejection of contentions advanced by other parties, Kudzu Alliance and CHANGE. (Intervenors' Brief at 21). 10 C.F.R. § 2.762 does not provide for a party to appeal Licensing Board actions on contentions advanced by other parties. Moreover, in Northern

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12/ Since Applicants filed the motion to strike, the Appeal Board's ruling is directed to Applicants. However, for purposes of this Reply Brief, the Staff has assumed that the Appeal Board's Rulings would apply equally to the Staff.

13/ Applicants in their reply also address rejected contentions 48-51. "Applicants Brief In Reply To Intervenors' Appeal From The Partial Initial Decision On Safety Contentions", at 30-32 (November 22, 1985). As Applicants' discussion demonstrates Intervenors' Argument on appeal with respect to these contentions does not reflect the record of the proceeding. The Staff has reviewed Applicants' discussion of the record and concurs with their arguments on these contentions.

States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175 (1975), aff'd, CLI-75-1, 1 NRC 1 (1975), the Appeal Board held that to appeal, an appellant must establish that it has sustained some discernible injury as a result of the Licensing Board's action. Here, Mr. Eddleman, Joint Intervenors and CCNC make no showing that they have suffered any discernible injury due to Licensing Board actions upon contentions advanced by Kudzu Alliance or CHANGE. 14/ More directly to the point, the Appeal Board has held that the right to appeal accrues only to a party who is aggrieved by the result reached below. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 NRC 903, 914 (1981); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-631, 13 NRC 87, 89 (1981) Rochester Gas & Electric Corporation, et al. (Sterling Power Project, Nuclear Unit No. 1), ALAB-502, 8 NRC 383, 393 at n.21 (1978). Intervenors are not aggrieved by the rejection of another party's contentions. In light of the Commission precedent discussed above, CCNC,

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14/ Joint Intervenors and Mr. Eddleman previously attempted to appeal Licensing Board actions upon the contentions of other parties in their appeal of the Partial Initial Decision On Environmental Matters. See, Appeal From Partial Initial Decision on Environmental Contentions (April 9, 1985). The Staff opposed Intervenors' attempt on the ground that only a party injured by a Board Ruling may appeal that ruling and Intervenors were not injured by the rejection of contentions raised by other parties. See "NRC Staff Brief In Reply To The Appeal of Joint Intervenors and Wells Eddleman of the Licensing Board's Partial Initial Decision On Environmental Matters" at 38-39 (May 24, 1985). This matter is still pending before the Appeal Board. Our response here is in accord with our previous position.

Joint Intervenors and Mr. Eddleman lack standing to appeal rulings of the Licensing Board upon contentions proffered by Kudzu and CHANGE. 15/

2. The Licensing Board Properly Rejected Proposed Contentions 65-A and 65-B

On June 14, 1984 Mr. Eddleman filed new proffered contentions 65-A and 65-B relating to placement of concrete in the containment. 16/ The Staff 17/ and Applicants 18/ filed responses opposing the proffered contentions. The Licensing Board ruled in a telephone conference call on July 12, 1984 that proffered Contention 65-A was rejected as it was within the ambit of admitted Contention 65 and, further, informed Mr. Eddleman and the parties that the substance of proffered Contention 65-A could be litigated under admitted Contention 65. Tr. 2174. In due course testimony was filed on Contention 65 and Mr. Eddleman let the June 12, 1984 affidavit of Charles C. Stokes, to which he referred on

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15/ The Staff notes that the only mention of specific contentions proposed by another party is "CHANGE's 14, 16, 23, 25 and 26" and that the only argument made regarding these contentions is that they are "good contentions." Intervenors' Brief at 21. Such argument is inadequate and does not meet the Appeal Board's test of being an argument "reasonably identified and understandable" which warrants a response. Unpublished Order of October 31, 1985 at 2-3.

16/ "New Eddleman Contentions 65-A etc. (Structural Integrity Questionable Due to Voids from Out of Specification Slump and Improper Vibration Technique and Inadequate Strength of Harris Containment Concrete)" (June 14, 1984).

17/ "NRC Staff Response In Opposition To Wells Eddleman's Proffered Contentions 65A and 65B On Integrity of Containment Concrete" (July 3, 1984).

18/ "Applicants'Response to Eddleman Proposed Contention 65-A and 65-B" (June 29, 1984).

June 14, 1984 as the basis of proffered Contention 65-A and Contention 65-B, stand as his direct case. Thus the Licensing Board did in fact extend to Mr. Eddleman the opportunity to go to hearing on proffered Contention 65-A and Mr. Eddleman did, in fact, present Mr. Stokes' affidavit as his case. 19/ The Licensing Board here did not infringe upon Mr. Eddleman's rights. Admitted contention 65 20/ and proffered contention 65-A 21/ are set forth below in footnotes for comparison.

The Licensing Board viewed proffered Contention 65-B as raising a different issue, damage to a water stop due to faulty cadwelding. The Licensing Board rejected the proffered Contention 65-B as it was late without good cause. The Licensing Board ruled that the information in

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19/ The Stokes affidavit as agreed to by Mr. Eddleman and Mr. Stokes was admitted into evidence with minor corrections and is to be found following transcript page 6177 with those minor deletions crossed out in black ink.

20/ Contention 65:

"Inspection of CP&L concrete core packages has shown that numerous instances of improper concrete placement in the base mat and containment structure. In view of this, a complete examination of the base mat and containment structure for unacceptable voids must be conducted using ultrasonic techniques or, where use of such techniques are not feasible, other appropriate tests."

21/ Proffered Contention 65-A:

"The possibility of extensive voids due to insufficient concrete slump (dry concrete), due to inadequate vibration and/or inadequate strength of concrete in the Harris containment, being known upon the affidavit of structural engineer Charles Stokes, P.E., Applicants have not demonstrated the structural integrity of the Harris containment building is sufficient to protect the health and safety of the public from equipment failure resulting from failure of structures including the base slabs, embeds, pipe supports, piping, pumps, and motors."

the Stokes' affidavit offered in support of the contention was available prior to June 14, 1984 and should have been put forward earlier. Tr. 2175.

Now, upon appeal Mr. Eddleman states:

> "In addition, the rejection of new concrete Contention 65-A and B, filed 6/14/85, was wrong because the problems are identified clearly and it was the Applicants' delaying tactics which withheld the information sought."

Intervenors' Brief at 22.

The Staff observes that despite the Licensing Board's ruling rejecting proffered Contention 65-B, Mr. Eddleman prefiled proposed testimony which addressed the substance of contention 65-B. 22/ This proposed testimony as it related to the alleged water stop damage was voluntarily withdrawn at the hearing by Mr. Eddleman and Mr. Stokes. Tr. 6038-6039, 6107, 6109. At the hearing Mr. Stokes' testimony was admitted into evidence as amended in support of his Contention 65. Tr. 6177. While the Board did not admit Contention 65-B, in fact, Mr. Eddleman was permitted to litigate his concerns at the hearing. The language in the Intervenors' Brief, quoted above, does not address the Licensing Board's actions or rulings or Mr. Eddleman's own actions, and does not reflect the record in this proceeding. Mr. Eddleman's appeal of the Board's rejection of proffered contentions 65-A and 65-B is without merit. The Licensing Board's rulings with regard to these contentions should be affirmed.

22/ For his testimony, Mr. Eddleman relied upon the previously filed affidavit of Mr. Stokes. See, "Wells Eddleman's Notice of Documents Relied Upon (and Previously Served) as Testimony-in-Chief and Case-in-Chief on Joint Contention I (Management) and Contention 65. (August 9, 1985).

3. The Licensing Board Properly Rejected Proposed Contentions 132 A, B, C(1) and D

These contentions relate to the Detailed Control Room Design Review (DCRDR). The Applicants filed their DCRDR on December 7, 1982. Ten days later the Staff imposed additional requirements. On January 8, 1983, Mr. Eddleman filed contentions thereon. Applicants suggested that the proffered contentions were premature. At a prehearing conference held on February 24, 1983, the parties agreed, and the Board ruled, that contentions would be proffered after the supplement to the DCRDR was issued. Tr. 605. The supplement was issued on June 1, 1983 and Mr. Eddleman filed his revised and new contentions upon the DCRDR on July 2, 1983. 23/

On appeal Mr. Eddleman alleges that the "rejection of Contentions 132 A, B, C(1), and D on the grounds that the Staff is to review the matters in question" was error on the part of the Licensing Board because its ruling "violates the public's right to a hearing." Intervenors' Brief at 23. However, none of these contentions was rejected on the ground that the matters would be reviewed by the Staff as discussed below.

Eddleman Contention 132 A was not proffered in Mr. Eddleman's response to the updated DCRDR. It was abandoned by Mr. Eddleman and not

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23/ "Wells Eddleman's Response To 1983 Updated DCRDR Including Revised and New Contentions" July 2, 1983 [hereinafter Eddleman DCRDR Response]. The history of the sequence of events is set forth in the Board's "Memorandum and Order (Ruling on Wells Eddleman's Proposed Contentions Concerning Detailed Control Room Design (DCRDR)," etc., (October 6, 1983) [hereinafter Order of October 6, 1983].

ruled upon in the Licensing Board's Order of October 6, 1983. Thus the appeal on this matter factually is not correct and should be denied.

Contention 132 B alleged that the DCRDR does not provide a Safety Parameter Display System (SPDS). The Licensing Board found that the DCRDR does contain a SPDS and rejected the contention as factually incorrect. Order of October 6, 1983 at 4. Applicants were directed, however, to provide Mr. Eddleman with a copy of the SPDS safety analysis as soon after submittal as possible, so that he could file any contentions concerning its adequacy. Id. 24/ On appeal, Intervenors provide no basis for disputing the Licensing Board's ruling in its Order of October 6, 1983. The Appeal on this matter should be denied.

Contention 132(C)(1) alleged that Applicants' team that prepared the DCRDR was not qualified, yet challenged the credentials of no single individual. The Licensing Board rejected the contention for lack of basis set forth with reasonable specificity, after reading the resumes of the team members. Order of October 6, 1983 at 5. Again, on appeal, Intervenors provide no basis for disputing the Licensing Board's ruling in its Order of October 6, 1983. The Appeal by Intervenors should be denied.

Contention 132 D was withdrawn by Mr. Eddleman. Eddleman DCRDR Response at 7. However, in an abundance of caution we address Contention

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24/ Mr. Eddleman did file new contentions regarding SPDS on January 3, 1984. The Licensing Board indicated that it was inclined to deny admission of these contentions but granted Mr. Eddleman an additional opportunity to support their admission. Tr. 773. Mr. Eddleman never pursued this matter.

132(D)(II). Contention 132(D)(II) refers to the control room for Unit 2. Order of October 6, 1983 at 6. Unit 2 has been formally cancelled by a letter from Carolina Power and Light Company to the Staff dated December 21, 1983. The public knew of the cancellation long before the Intervenors' Brief was filed. The appeal of the Licensing Board's disposition of proffered Contention 132(D)(II) is moot and should be denied.

B. The Licensing Board Has Correctly Applied The Standards Governing Motions For Summary Disposition In Its Rulings

Intervenors address the standards for summary disposition and argue that the Licensing Board held the various Intervenors to an unreasonable standard of proof. (Intervenors' Brief at 24-25). The Staff has set forth a comprehensive memorandum of law upon 10 C.F.R. § 2.749 in its various responses to Applicants' motions for summary disposition. 25/ The Applicants have also addressed the legal standards which apply to summary disposition under the NRC rules. 26/ The Staff's and Applicants' analysis of the applicable law is in agreement. Intervenors cite Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LPB-82-17, 15 NRC 593, 595 (1982) for the proposition that Federal court precedent is applicable to NRC proceedings in regard

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25/ See, e.g. "NRC Staff Response In Support of Applicants' Motion For Summary Disposition of Wells Eddleman's Contention 132(C)(II)" at 2-6, (May 29, 1984).

26/ See, e.g. "Applicants' Memorandum of Law In Support of Motions For Summary Disposition of Intervenor Wells Eddleman's Contentions 64(f), 75, 80 and 83/84" (September 1, 1983).

to summary disposition. Intervenors' Brief at 24. The Staff generally agrees with this Comanche Peak reference.

However, Comanche Peak is important for more than the purpose cited by Intervenors. That case also states:

> "To defeat a motion for summary disposition, an opposing party must present facts in an appropriate form. Conclusions of law and mere arguments are not sufficient. The asserted facts must be material and of a substantial nature, not fanciful or merely suspicious."

Comanche Peak, supra, 15 NRC at 595 and cases cited therein.

Mr. Eddleman's opposition to the motions made for summary disposition were all made by a layman with no demonstrated expertise in the appropriate technical areas. His replies were layman's arguments. For example, with regard to contention 132 he argued that the water level indicator manufacturer could not be trusted rather than addressing the material fact of whether or not there was a water level indicator. For his opposition to a motion for summary disposition of Contention 132(C)(II) he argued that he did not like the blue prints he received from Applicants through discovery rather than addressing the material fact of whether or not the control room design blocked paths of vision important for public health and safety. In some instances Mr. Eddleman did not reply to the motion at all, such as Contention 45 relating to water hammer. In not one single instance did Mr. Eddleman offer affidavits of experts or expert opinion himself to contradict the Affidavits of Applicants' and Staff experts. Mr. Eddleman's responses to the motions clearly failed the Comanche Peak test, a standard correctly cited by Intervenors as applying here.

Intervenors then cite Brunswick Corporation v. Vineberg, 370 F.2d. 605, 612 (5 Cir. 1967) for the proposition that caution should be used in applying Rule 56, FRCP. Intervenors' Brief at 24. Again, the Staff agrees that this is a correct proposition of general jurisprudence. This general proposition is not linked here, or elsewhere, by Intervenors to any of the summary disposition rulings that they appeal. Intervenors then cite Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264 (1980) for the proposition that: "By admitting the contention, the Licensing Board has recognized that there are issues of fact inherent in the contention . . ." Intervenors' Brief at 24. First, the Commission decision in Black Fox does not address the legal or factual import of admitting a contention. It does not relate in any way to Intervenors' allegation contained in their brief. Black Fox addresses whether health effects may be litigated in individual licensing proceedings in view of 10 C.F.R. Part 50, Appendix I. Secondly, even if accurate, the Intervenors' proposition has nothing to do with the proper legal standards to be employed in summary disposition. Intervenors' proposition regarding the import of an admitted contention and their citation to Black Fox are both totally inapposite.

Intervenors then cite National Industries, Inc. v. Republic National Life Insurance Company, 677 F.2d 1258, (9 Cir. 1982) for the proposition that the movant, under Rule 56, must establish the absence of any genuine issues of fact. Intervenors' Brief at 24. Again the Staff agrees with this general statement of well accepted law. Intervenors go on to state "It is not enough [by any means] for the moving party to [simply] present evidence that is legally sufficient to support

a judgment in its favor." Emphasis added. Id. This is an incomplete quotation from National Industries, 677 F.2d at 1265 with the bracketed material added by Joint Intervenors. What has been omitted from that page follows.

> "That formulation of that standard would ignore that a reasonable trier of fact might also construe the same evidence to support a different result. Contradictory inferences may be drawn from undisputed evidentiary facts . . .
>
> Accordingly, the movant's evidence should demonstrate as a matter of law the absence of genuine issues of fact to present to the fact-finder." Citing cases.

In this proceeding we are not faced with affidavits supporting summary disposition from which contradictory inferences could be drawn. In each and every instance where the Licensing Board granted summary disposition, the affidavits of competent experts of the Staff and Applicants established the absence of any factual issues which could materially affect the resolution of the contention. We will elaborate later, but here, for instance, Mr. Eddleman's Contention 132 states there is no selected water level indicator. Applicants and Staff experts state that there is. The Licensing Board then so found. No contrary conclusions could be drawn from the affidavits of Applicant and Staff witnesses upon Contention 132.

Except for Black Fox the Intervenors' law citations are in accord with the Staff's analysis of the law applicable to summary disposition. Intervenors quote from Professor Moore's treatise on federal procedure on page 25 of their brief. A more apt quotation from Professor Moore's treatise than that quoted by Intervenors follows:

> "To satisfy the moving party's burden the evidentiary material before the court, if taken as true, must establish the absence of any genuine issue of material fact, and it must appear that there is no real question as to the credibility of the evidentiary material, so that it is to be taken as true. If the non-existence of any genuine issue of material fact is established by such credible evidence that on the facts and the law the movant is entitled to judgment as a matter of law, the motion should be granted."

6 Moore's Federal Practice 56-473, § 56.15[3], (1976) notes omitted. In substance this is the standard used by the Licensing Board below in ruling upon motions for summary disposition. In the Staff's view it is a correct standard, in accord with NRC precedent and was correctly applied below by the Licensing Board.

1. The Licensing Board Properly Dismissed Joint Contentions V and VI on the Grounds of Abandonment and Did Not Grant Summary Disposition as Alleged by Intervenors

Joint Contentions V and VI were admitted by the Licensing Board in its Order of September 22, 1982. LBP-82-119A, supra, 16 NRC at 2077. Intervenors failed to respond to Applicants' discovery requests. Applicants filed a motion to compel answers to their Interrogatories and Intervenors sought an extension of time from the Board to answer them. 27/ The Licensing Board denied the Motion, and Intervenors did not respond to the interrogatories. Memorandum and Order (on Discovery Disputes between

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27/ "Applicants' Motion To Compel Discovery On Applicants' Interrogatories And Request For Production Of Documents To Joint Intervenors (Fourth and Fifth Sets), (September 17, 1983); Joint Intervenors' Motion For An Extension Of Time And Protective Order With Regard To Applicants' Fourth And Fifth Set Of Interrogatories", (November 16, 1983).

Applicants and Intervenors) November 29, 1983. Applicants subsequently filed motions for summary disposition on both of the contentions. 28/

On appeal Intervenors argue that the Licensing Board should not have granted these motions. Brief at 27. This claim of error is inappropriate, since the Licensing Board did not grant the motions for summary disposition, but rather issued an order dismissing these two contentions on the ground that Intervenors in effect had abandoned these contentions. Order (Ruling on various procedural Questions and Eddleman Contention 15AA) (May 10, 1984). This action was appropriate in the circumstances, and there is authority for Licensing Boards to take such actions. 29/ Intervenors have not appealed The Licensing Board's Order dismissing these contentions. The Licensing Board issued an order later in this proceeding which inadvertently listed motions for summary disposition of these contentions as having been granted "Memorandum and Order (Ruling on Remaining Summary Disposition Motions)" April 24, 1985. However, an errata to this order pointed out the Board's error and indicated that these two contentions were incorrectly numbered, and that they were previously dismissed. Since the Licensing Board had good reason for its action and it was an action within its discretion to perform, the Licensing Board's decision on this matter should be affirmed.

28/ "Applicants Motion For Summary Disposition Of Joint Intervenors' Contention V (Continous Air Monitors And Portable Air Samplers)" (February 27, 1984); "Applicants' Motion For Summary Disposition Of Joint Intervenors' Contention VI (Monitoring Systems)" (March 9, 1984).

29/ Boston Edison Company et al. (Pilgrim Nuclear Generating Station Unit No. 2) LBP-76-7, 3 NRC 156, 157 (1976).

2. The Licensing Board Properly Granted Summary Disposition of Eddleman Contention 11

Eddleman Contention 11 alleges that Applicants' FSAR is deficient because it does not account for the fact that polyethylene used as cable insulation deteriorates much more rapidly under long-term doses of gamma radiation than it does when exposed to the same total dose over a shorter period of time which would be involved in qualification testing. This contention was admitted by the Licensing Board in its order of September 22, 1982. LBP-82-119A, supra, 16 NRC 2091-2092. Discovery was conducted by the parties, and Applicants subsequently filed a motion for summary disposition of the contention. 30/

In their motion Applicants claimed, among other things, that simple polyethylene is not used as electrical cable insulation or as insulation in electrical equipment inside containment at Harris. Applicants' Motion at 6. Applicants also pointed out that Harris will have a maintenance and surveillance program to identify equipment degradation. Id. at 7.

The Staff supported Applicants' motion on the grounds that polyethylene will not be used as cable insulation at Harris, and that Applicants have committed to maintenance and surveillance procedures which will detect age-related degradation and allow corrective action to be taken before a safety problem could arise. "NRC Staff Response In

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30/ "Applicants' Motion For Summary Disposition of Eddleman Contention 11" May 25, 1984 [hereinafter Applicants' Motion].

Support Of Applicants Motion For Summary Disposition Of Wells Eddleman's Contention 11" (June 18, 1984).

Intervenor Eddleman responded in opposition to Applicants' motion. "Wells Eddleman's Response to Summary Disposition on Eddleman Contention 11 (Cable Insulation Degradation)" (June 29, 1984). In his response he argued that since polyethylene was not used at Harris, he had been trying to gather data on degradation of neoprene cable insulation. Id. Intervenor Eddleman admitted that he had been unsuccessful in finding such data, but stated that he had been informed by "nonwitness experts" that dose rate related degradation does exist in neoprene. Id. However, he did not provide any affidavits of these putative experts for the Licensing Board to examine. Finally, Intervenor Eddleman argued that the Licensing Board should consider whether the question of degradation of neoprene insulation should be raised as a board question. Id.

The Licensing Board granted Applicants' motion during a conference call. Tr. 2167. The Licensing Board gave its reasons for this ruling in its Partial Initial Decision. LBP-85-28, supra, 22 NRC at 297. The Licensing Board stated that since discovery determined that polyethylene is not used at Harris, the contention was moot and so should be dismissed. Id. With respect to Intervenor Eddleman's argument that the Licensing Board consider the question of degradation of neoprene, the Board determined that it could not find any significant safety concern. Id. This finding by the Licensing Board is supported by Mr. Eddleman's own submission.

On appeal Intervenors argue that the board "may have erred" in not allowing an amendment to this contention to include neoprene, and that

the evidence on summary disposition was not sufficient to decide the issue in Applicants' favor. Intervenors' Brief at 26. Intervenors' arguments are without merit.

First, Intervenor Eddleman never requested that his contention be amended, but rather requested that the Board consider asking a Board question concerning neoprene insulation. He never attempted to address the five factors of 10 C.F.R. § 2.714 which would have to be balanced in order for the Licensing Board to accept such a late amendment to the contention. Duke Power Company, et al (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983). In raising the possibility of the Licensing Board's looking into the neoprene matter, he did not provide it with any basis to do so. The Licensing Board considered Intervenor's request and determined upon the merits that it could not find a significant safety concern. LBP-85-28, supra, 22 NRC at 297. On appeal Intervenor Eddleman does not demonstrate that there was any information available to the Licensing Board which, had it been appropriately considered, would have raised such a significant safety concern. Therefore, Intervenors' claim of error is not supported by the record in this proceeding and should be rejected.

Intervenors' argument that the evidence on summary disposition was not sufficient to close off the issue is also without merit. The Licensing Board granted Applicants' Motion on the ground that polyethylene, which is the subject of the contention, is not used at Harris. It is difficult to understand, absent any contradictory evidence or even a contradictory allegation by Intervenor Eddleman, how this ground could not be a sufficient ground for summary disposition. The

evidence, even considered in the light most favorable to the party opposing the motion, clearly demonstrates that there is no genuine issue of material fact to be heard with respect to the cable insulation to be used at Harris. In addition, it is also unclear that Intervenor Eddleman actually opposed Applicants' motion. He never contradicted Applicants' and Staff's statements that polyethylene was not used at Harris. See LBP-85-28, supra, 22 NRC at 297. Therefore, Intervenor did not even attempt to show that there was a genuine issue of material fact to be heard with respect to the contention.

The Licensing Board has articulated its reasons for granting Applicants' motion for summary disposition of Contention 11. Intervenor Eddleman has not demonstrated on appeal that the Licensing Board's decision was not, in fact, supported by the record, or that the Licensing Board incorrectly applied the standards for summary disposition to this contention. Based on the record in this proceeding, the Licensing Board's ruling with respect to this contention should be affirmed.

3. The Licensing Board Properly Granted Summary Disposition of Eddleman Contention 29/30

Eddleman Contention 29 was admitted by the Licensing Board in its order of September 22, 1982. LBP-82-119A, supra, 16 NRC at 2095. 31/ The Contention alleges that iodine releases during normal operation of the Harris facility will exceed the limits of 10 C.F.R. Part 50, Appendix

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31/ This Contention has been referred to throughout this litigation as 29/30.

I. A motion for summary disposition was subsequently filed by the Applicants and supported by the Staff. 32/ Intervenor Eddleman did not respond to Applicants' Motion. On November 30, 1983 the Licensing Board granted the motion. 33/

On Appeal Intervenors argue that the Board erred in granting Applicants' Motion on the ground that the evidence on summary disposition was insufficient to dispose of the issue. 34/ Intervenors' Brief at 27. This claim of error should be rejected as untimely or, in the alternative, as not reflective of the evidence before the Licensing Board.

This Contention is clearly an environmental contention. In an order reflecting agreements reached during a prehearing conference, the Licensing Board adopted Applicants' designation of individual contentions as either safety or environmental contentions. "Memorandum and Order (Reflecting Decisions Made Following Second Prehearing Conference) (March 10, 1983). Intervenors never requested a change in the designation of this contention as an environmental contention. In the Partial Initial Decision on Environmental Matters, LBP-85-5, 21 NRC 410, 412

32/ "Applicants' Motion For Summary Disposition Of Eddleman Contention 29/30 (Appendix I Compliance)" (October 5, 1983); "NRC Staff Response In Support Of Applicants' Motion For Summary Disposition Of Eddleman Contention 29/30" (October 28, 1983).

33/ "Memorandum and Order (Ruling On Motions For Summary Disposition of Eddleman Contention 29/30, 64(f), 75, 80 and 83/84)".

34/ In their brief Intervenors make the cryptic statement that the Staff is apparently still checking on iodine pathways and still requiring redesign of detectors. Brief at 27. There is no citation to a document, and the Staff cannot determine what this statament either concerns or is meant to imply. The Staff cannot speculate as to its meaning and importance.

(1985) the Licensing Board notified all parties that motions for summary disposition on environmental contentions were ripe for review. It is now too late for Intervenors to appeal the Licensing Board's ruling granting Applicants' motion for summary disposition of this contention.

In addition, Intervenors' claim that the evidence on summary disposition was insufficient to dispose of the issue is unfounded. Both Applicants and the Staff presented detailed affidavits of experts on the issue of whether iodine releases can be kept below the requirements of 10 C.F.R. Part 50, Appendix I during the normal operation of the Harris facility. Detailed information was provided on the method for determining the Iodine source term as well as a comparison of predicted releases with measured releases at other facilities. No facts were presented by Intervenors to contradict this information. The Licensing Board reviewed all of the evidence before it determined that there was no genuine issue of material fact to be heard. Order of November 30, 1983 at 3-4. Intervenors have made no attempt to indicate in what way the evidence before the Licensing Board was inadequate. The Licensing Board has correctly applied the standards for the granting of motions for summary disposition and its decision with respect to Contention 29/30 should be affirmed.

4. The Licensing Board Properly Granted Summary Disposition of Eddleman Contention 45

Eddleman Contention 45 alleges that the Shearon Harris design cannot comply with the results of reports on water hammer experience. This contention was admitted by the Licensing Board in its order of Septem-

ber 22, 1982 LBP-82-119A, supra, 16 NRC at 2097. At the conclusion of discovery Applicants filed a motion for summary disposition of the contention. "Applicants' Motion For Summary Disposition of Eddleman Contention 45 (Water Hammer)" (May 25, 1984) [hereinafter Applicants' Motion, Water Hammer]. The Staff supported Applicants' Motion. "NRC Staff Response In Support of Applicants' Motion For Summary Disposition of Wells Eddleman's Contention 45 (Water Hammer) (July 2, 1984). Intervenor Eddleman notified the Licensing Board that he would not respond to Applicants' motion. "Memorandum and Order (Revision of and Schedule for Filing Written on Eddleman Contention 9; Rulings on Eddleman Contentions 45 and 67)" at 3 (July 24, 1984).

Applicants in their motion presented the affidavits of experts describing the design of the Harris systems which could be affected by water hammer, and how such possible events were taken into account in the systems' design. In addition, Applicants noted that this previously unresolved generic safety issue had been resolved by the Staff between the time the contention was admitted and Applicants' motion was filed. Applicants' Motion Water Hammer at 5-13. Finally, Applicants indicated that, due to the inherent nature of preoperational and start-up testing, water hammers, should they occur despite design changes, would be revealed. Id. at 16.

The Licensing Board granted the motion on the basis of the Applicants' and Staff's presentations and on Intervenor's failure to raise any issues of fact by failing to oppose the motion. The Licensing Board also noted that it had examined the motion papers and determined

that no serious safety concern existed. Memorandum and Order of July 24, 1984 supra at 4.

On Appeal Intervenor Eddleman apparently claims that the Licensing Board erred in its ruling because the Staff has not resolved the water hammer contention specifically for Shearon Harris, and that there is no assurance that water hammer would be prevented or that it would not harm safety systems. Intervenors' Brief at 27. This argument simply ignores the evidence which was before the Board when it ruled on Applicants' motion for summary disposition. Therefore, it is without merit and should be rejected.

First, Applicants, as discussed above, presented extensive discussions of the Harris systems which might be affected by water hammer and the ways in which they were designed to prevent such events. Applicants' Motion, Water Hammer at 5-13. In its response the Staff confirmed that the Harris design as verified by preoperational testing would mitigate possible water hammer problems. Staff Response at 5. Therefore, Intervenors are simply incorrect that Harris has not been specifically considered by this Board or by the Staff in its response to Applicants' Motion. At this time Intervenor appears to be attempting, without any basis, to contest the Staff's resolution of this previously unresolved generic safety issue and the way it has been accounted for at Harris. Such an attempt is untimely. If Intervenor thought there were indeed genuine issues of material fact to be heard with regard to his contention, the time for him to have raised those issues was in response to Applicants' Motion for Summary Disposition. He did not choose to do so. Even now he presents no information but merely his speculation that

water hammers might occur at Harris. Intervenors' brief provides no basis for this Appeal Board to overturn the Licensing Board's decision on this contention.

The Licensing Board reviewed the papers filed by the Applicants and the Staff and correctly applied the standards governing motions for summary disposition to these papers. The Licensing Board reviewed the record and determined for itself that no serious safety question existed. The Licensing Board has fulfilled its responsibilities on this matter and correctly applied the governing legal principles. Thus, its decision granting Applicants' Motion for Summary Disposition should be affirmed.

5. The Licensing Board Properly Granted Summary Disposition of Contention 64(f) Spent Fuel Cask

This contention alleges that safety valves on spent fuel casks could unseat or melt in a fire. The Applicants moved for summary disposition 35/ and the Staff supported the motion. 36/ The Licensing Board's ruling is set forth in its "Memorandum and Order (Ruling On Motions for Summary Disposition of Eddleman Contention 29/30, 64(f), 75, 80 and 83/84" dated November 30, 1983. The Licensing Board dismissed the contention as being moot because the valve in question would not be used. The Licensing Board based its ruling upon an affidavit of Louis M. Martin, Applicants'

35/ "Applicants Motion For Summary Disposition of Intervenor Wells Eddleman's Contention 64(f) (Spent Fuel Shipping Cask Pressure Relief Valve)" (September 1, 1983).

36/ "NRC Staff Response In Support of Applicants' Motion For Summary Disposition of Wells Eddleman's Contention 64(f)" (September 26, 1984).

manager of nuclear fuel that the valve would not be used and upon the affidavit of Richard M. Odegaarden, an NRC senior Nuclear Process Engineer, that use of the valve in question is not now permitted with wet cask shipment, and that dry cask internal pressure was insufficient to unseat the valve. Mr. Odegaarden also stated that the Rulon-J Teflon valve seat would not melt in a fire condition. On appeal Mr. Eddleman argues that Applicants should have a binding agreement with NRC not to use the referenced fuel cask valve. Mr. Eddleman's argument that at some future time Applicants could apply and NRC could approve use of the valve in question for wet cask shipment is only speculation and does not raise an issue in controversy upon the application for an operating license to be resolved at an evidentiary hearing. The Board's correctly applied the standards governing motions for summary disposition to this contention and its ruling should be affirmed.

6. The Licensing Board Properly Granted Summary Disposition of Eddleman Contention 132

Contention 132 alleged that Applicants failed to provide the design for a direct water level indicator for the reactor vessel. On December 7, 1983 Applicants moved for summary disposition of this contention alleging that they had provided for a water level indicator. The Staff concurred, 37/ enclosing an Affidavit of Dr. George Schwenk,

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37/ "Applicants' Motion For Summary Disposition of CHANGE Contention 44 and Eddleman Contention 132"

"NRC Staff Response In Support of Applicants' Motion For Summary Disposition of . . . Wells Eddleman's Contention 132" December 28, 1983.

Senior Nuclear Engineer in the Thermal-Hydraulics Section of the Core Performance Branch in the Office of Nuclear Reactor Regulation, NRC. Dr. Schwenk's affidavit states that the Applicants had provided the design in an August 11, 1983 letter from M. A. McDuffie (CP&L) to H. R. Denton (NRC). Intervenors on appeal cite no error of fact or law in the Licensing Board's granting of summary disposition of Contention 132 nor do they show any error in the Applicant's Motion therefor or in the Staff response in support. The Licensing Board's ruling appears in its Memorandum and Order (Ruling on Motions For Summary Disposition) dated April 13, 1984, pages 20 and 21. The Licensing Board found, as stated by the Staff and Applicants, that Applicants had provided a direct water level indicator design and that Mr. Eddleman's reply cast no doubt upon this material and significant fact.

Intervenors' Brief on page 27 states, in relation to the positive water level indicator for the pressure vessel, "The confidence of the manufacturer, Staff and the Applicant do not count for much. . . . etc." This is much the same answer Mr. Eddleman proposed below. However, it is a gratuitous remark and no more. It is not remotely relevant to Contention 132 or to the Licensing Board's granting of summary disposition thereof and raises no genuine issue of fact in regard to the contention which could be resolved by an evidentiary hearing. Therefore, the Licensing Board correctly applied the standards governing the grant of motions for summary disposition, and its ruling on this contention should be affirmed.

7. The Licensing Board Properly Granted Summary Disposition of Eddleman Content on 132(C)(II)

On appeal Intervenors' allege as error, again without identification of the error or citation to the record, that the Licensing Board improperly ignored the fact that diagrams and blueprints of the Harris control room provided insufficient information and were not the best. Intervenors' Brief at 26. The wording of Contention 132(C)(II) is as follows:

> "With respect to layout, the proposal arranges control and display cabinets such that they block or impede view of some others (see Fig. 2, p. 12, where view of/from panels 8, 9, 10 & 11 is obscured by #'s 12, 13, 14 and 15 from #'s 6, 7, and 1, 2, 3, 4 and 5. #6 and 7 are hidden from operators by 1 and 2 (as well as 3, 4 and 5) #'s 16 and 17, the incore instrumentation systems are almost totally behind the 2 blocks 1 through 5 and 6-7 with respect to the radiation monitor equipment panels 12 through 15, the 8-11 block (startup and generator) and the 1-5 block's sections i through 4 and possibly 5. Operator inability to see, the information on these panels can imperil public safety."

Order of October 6, 1983 at 7-8.

The Applicants on May 9, 1984 moved for summary disposition of this contention. 38/ The Applicant's Motion was supported by an affidavit of Robert W. Prunty, Jr. who is the Principal Engineer - Electrical in the Harris Plant Engineering Section of the Harris Nuclear Project Department, at the Harris site. The Staff supported the Applicants'

38/ "Applicants' Motion for Summary Disposition of Eddleman Contention 132C(II)," (May 9, 1984).

Motion. "NRC Staff Response In Support Of Applicants' Motion For Summary Disposition Of Wells Eddleman's Contention 132C(II)" (May 29, 1984).

In preparing its response, the Staff's technical reviewer in this area, Mr. Raymond A. Ramirez, reviewed all of the Applicants' papers, blueprints of the control room and visited the Harris control room to analyze Mr. Eddleman's allegations. "Affidavit Of Raymond G. Ramirez In Support Of NRC Staff Response To Applicants' Motion For Summary Disposition Of Wells Eddleman's Contention 132C(II)" at ¶4.

Mr. Prunty concluded that the obstruction of control panels could occur to a single operator as alleged by Mr. Eddleman but that the public health and safety would not thereby be imperiled. Prunty Affidavit at 3. Mr. Ramirez also concluded, based on his personal observation and analysis of the control room, that obstruction would not endanger the public health and safety. Ramirez Affidavit at ¶4. Mr. Ramirez concluded that unobstructed vision of the display panels by a single operator as cited by Mr. Eddleman is not necessary during an emergency situation. Mr. Ramirez also confirmed the correctness of the facts which were set forth in Mr. Prunty's Affidavit. Ramirez Affidavit at ¶7.

The Licensing Board granted summary disposition of Contention 132(C)(II) and set forth its rationale in its Partial Initial Decision on Safety Contentions LBP-85-28, supra, 22 NRC at 295. The Licensing Board, based its conclusion upon the affidavits of Mr. Prunty and Mr. Ramirez that some panels could be blocked from the sight of a single operator in the control room at any one time but that there was more than one operator in the control room at all times and that such blockage as could occur would not have safety significance. Id. at 296. Mr. Eddleman

responded to Applicants' Motion with a discussion of blueprints he received through discovery. 39/ The Licensing Board noted in its PID Safety that Mr. Eddleman's response went beyond the contention LBP-85-28, supra, 22 NRC at 297. Intervenors on appeal principally reiterate Mr. Eddleman's response below that he did not like the blueprints and drawings he got from Applicants of the control room. Contention 132(C)(II) raises a question of fact -- what controls are or are not blocked and whether public health and safety is endangered -- not what are the condition of the blueprints and drawings which Applicants provided to Mr. Eddleman on discovery. Mr. Eddleman's response of June 5, 1984, having put no fact in issue and the affidavits of Applicants' and Staff's experts having not been controverted, the Licensing Board's granting of summary disposition of Wells Eddleman's Contention 132(C)(II) should be affirmed.

C. The Licensing Board Did Not Err In Resolving Contested Safety Contentions In Favor of Applicants and the Staff

1. The Licensing Board did not err in finding the Applicants are qualified to manage the Shearon Harris Nuclear Power Plant, in declining to subpoena James O'Reilly, NRC Regional Administrator as a witness for Intervenors, and in declining to reopen the Record on Joint Intervenors' Contention I

The Licensing Board has described accurately the relevant history of Joint Contention 1 relating to the management capability of Applicants. See LBP-85-28, supra, 22 NRC at 235-36. As indicated by the

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39/ "Wells Eddleman's Response To Summary Disposition On Contention 132(C)(II)" (June 5, 1984).

Licensing Board, all parties stipulated to the language of Joint Contention 1 and it was admitted as a matter in controversy in this proceeding by the Licensing Board in its Order of September 22, 1982. LBP-82-119A, supra, 16 NRC at 2075 (1982). Extensive discovery was conducted by the parties upon this contention. Evidentiary hearings commenced on September 5, 1984. Evidence was presented on this contention by the Applicants, the Staff, and Intervenors. 40/ The record was closed on September 14, 1984. Tr. 3689.

The Licensing Board, in its Partial Initial Decision on Safety Contentions, ruled that "the Applicants, supported by the NRC Staff, have effectively refuted Joint Contention 1." LBP-85-28, supra, 22 NRC at 257. The Intervenors assert that the Licensing Board committed error in the following three principal ways in reaching its ruling:

1) In denying Joint Intervenors' request to subpoena Mr. J. P. O'Reilly, Administrator of NRC Region II; (Intervenors' Brief at 12-13)

2) In denying Joint Intervenors' motion to reopen the record to include an affidavit by Mr. Chan Van Vo and certain other documents; (Intervenors' Brief at 14-16) and

3) In concluding that this contention was resolved in Applicants' favor. (Intervenors' Brief at 16).

40/ The Joint Intervenors' direct case consisted of two pages of an article written by John Clewett which the parties stipulated into evidence. Tr. 3608. The Licensing Board approved the stipulation and received the document into evidence. Tr. 3647.

We discuss below each of Intervenors' bases for appeal. A review of the facts and the law shows that each of these bases lacks merit and that the Licensing Board's decision was proper and should be affirmed.

As their first assignment of error, the Joint Intervenors argue that the Licensing Board erred in denying their request for a subpoena for Mr. James O'Reilly, Regional Administrator, NRC Region II, Atlanta, Georgia. Joint Intervenors correctly assert that the Board relied heavily upon the testimony of Mr. Paul Bemis. They then state on pages 12 and 13 of their Brief:

> . . . The Board did this without any discussion of the clear and convincing conflict of interest Bemis had as a NRC staff member whose two responsibilities were 'managing the performance of the NRC inspection and enforcement program at all of the CP&L facilities,' and secondly as the primary NRC Staff member involved at all phases in the SALP 4 which showed the Applicants had made improvements.
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> The disregarding of Mr. Bemis's potential conflicts was compounded by the Board's unreasonable denial of the Applicants' [sic] requests to issue a subpoena for J. P. O'Reilly, NRC Region II Administrator, Mr. Bemis's immediate supervisor. A subpoena was requested for this witness in order to deliniate the conflicts Mr. Bemis faced in overseeing the Applicants' management and his role in shaping the SALP reports.
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> As the Board relied extensively on Mr. Bemis's testimony and the SALP report he primarily offered to form its decision, the Joint Intervenors in all fairness should have been afforded the opportunity to attack the credibility of that witness and more importantly, to discover the bases for his opinion that the Applicants had made improvements in their management.

This attack upon the honesty and integrity of Mr. Bemis, whose testimony was given under oath, has no basis. Further, as discussed

below, Intervenors never raised below as the reason for requesting that Mr. O'Reilly be subpoenaed their desire to cross-examine him as to the possible bias of Mr. Bemis. Intervenors' Brief at 12. Not having raised this issue below, Intervenors are precluded from doing so for the first time on appeal.

Joint Intervenors moved to subpoena Mr. O'Reilly by Motion dated August 17, 1984. 41/ Their grounds, as stated on pages 2 and 3 of their Motion are quoted immediately below:

> "James P. O'Reilly, as the head of NRC Staff in Region II, receives reports from all of the inspectors and has been able to develop the most complete picture of the Applicants' management. Mr. O'Reilly was also instrumental in recommending the fines, particularly the 1983 fine for $600,000, for various violations at the Applicants' nuclear power plants. Additionally, Mr. O'Reilly can also compare the management ability of the Applicants with other similar companies in the Southeast. Again, Mr. Bemis cannot do this."

The Commission's rules require, inter alia, that a subpoena for an NRC employee may be granted only "upon a showing of exceptional circumstances such as a case in which [the employee] has direct personal knowledge of a material fact not known to the [Staff] witnesses." 10 C.F.R. § 2.720(h)(2)(i). The Staff argued that the regulatory requirement had not been met. Joint Intervenors had not shown special circumstances or that Mr. O'Reilly had personal knowledge of material

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41/ "Joint Intervenors' Request for Subpoenas For Joint Contention 1 (Management Capability)" (August 17, 1984). Intervenors incorrectly refer to the Licensing Board's "denial of the Applicants' requests to issue a subpoena". Intervenors' Brief at 12. Applicants never requested that Mr. O'Reilly be subpoenaed, such request was made only by Joint Intervenors.

facts not known to Mr. Bemis. The Licensing Board indicated that the rule had not been met, but deferred its final ruling until the Staff's evidentiary presentation was completed. Tr. 2365. At the conclusion of the Staff's case, the Licensing Board permitted Mr. Runkle, acting as counsel for Joint Intervenors, to reargue his request for a subpoena for Mr. O'Reilly. Mr. Runkle stated he wanted to question Mr. O'Reilly in regard to (1) a 1982 fine against CP&L, (2) his ratings in SALP's III and IV; (3) why he added an inspector at Harris; and, (4) why CP&L was assigned to Mr. Bemis' supervision for the Regional Office. Tr. 3882-3883. Staff counsel addressed Mr. Runkle's stated grounds (Tr. 3887-3889) and the Board questioned at length Mr. Bemis who was still under oath. Tr. 3889-3895. The Licensing Board ruled that no exceptional circumstances had been shown. Tr. at 3895. 42/

Now, in this Appeal, for the first time, Intervenors put forth as grounds for requesting Mr. O'Reilly that they wanted to have the opportunity to attack Mr. Bemis's credibility and his "conflict of interest." Not having raised this issue below, although full opportunity to do so was present, the Intervenors are precluded from raising it on this appeal. In The Matter of Houston Lighting & Power Company (Allens Creek Nuclear

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42/ We note that the Intervenors say:

> "It is important to note that the NRC Staff did not present motions to quash the subpoenas but only argued that O'Reilly's testimony was not really necessary."

Intervenors' Brief at 13. No subpoena was ever issued by Judge Kelley for Mr. O'Reilly so there was no subpoena to quash.

Generating Station, Unit No. 1), ALAB-629, 13 NRC 75 (1981) and cases cited therein.

In the Staff's view the Licensing Board's denial of a subpoena for Mr. O'Reilly to appear as a witness for the Joint Intervenors was correct and should be sustained.

The second assignment of error by Joint Intervenors in regard to the management qualification contention centers upon the Licensing Board's denial: of Joint Intervenors' Motion to reopen the record to entertain the Affidavit of Mr. Chan Van Vo, [43/] and to receive information requested but not released under the Freedom of Information Act (FOIA).

The motion to reopen for the Van Vo affidavit was served on November 13, 1984, after the record on Joint Contention I was closed. See, Tr. 6644. The Motion was argued by the parties before the Licensing Board on November 15, 1984. Tr. 7279-7305. First, and foremost, this part of the Appeal should be dismissed for a total failure to conform to 10 C.F.R. § 2.762(d). There is not here a single citation to the record, there is not a single citation to law, there is no citation to any error of law or fact supposedly made by the Licensing Board, there is no citation for the Licensing Board's rulings and, most importantly, there is no request for relief. Similarly, the motion below which did not discuss the Wolf Creek [44/] standards for reopening the record or 10 C.F.R. § 2.714 or CLI-83-19 which

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43/ "Motion to Reopen Record on Joint Contention 1 (Management Incapability)" (November 13, 1984).

44/ Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978).

governs late-filed contentions, 45/ all of which have often been discussed a number of times in this proceeding.

Mr. Chan Van Vo was employed at the Harris site. He prepared an affidavit setting forth what he considered to be "concerns" at the Harris site. Joint Intervenors then moved to reopen the record to entertain the Van Vo affidavit. Applicants and Staff opposed Intervenors' motion. 46/ Both the Staff and Applicants argued that the Motion was untimely as the information contained in the affidavit was known earlier to Intervenors, no significant safety or environmental issue was raised by the affidavit, and that the affidavit would not cause a material change in the evidence upon the issue of management competence. The Licensing Board denied the motion to reopen on the basis that the motion was late as the Van Vo information had been available earlier to intervenors and that the information was of marginal safety significance. 47/

The Intervenors have nowhere, below or on this appeal addressed the Commission's legal standards for reopening the record or for filing a late contention. They make no showing of any error of the Licensing Board in expounding its ruling upon this motion. Tr. 7374-7376. The

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45/ Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1043 n.2 (1983).

46/ "Applicants' Response to Joint Intervenors' Motion To Reopen The Record on Joint Contention 1" (November 30, 1984); "NRC Staff Response In Opposition To Motion To Reopen the Record On Joint Intervenors' Contention 1" (November 28, 1984).

47/ "Memorandum and Order (Transmitting Rulings On Certain Motions and Contentions)" (December 7, 1984; Tr. 7373-7376).

Licensing Board's ruling stands uncontroverted as to fact and law and is correct.

Intervenors discuss their FOIA request for the background documents which underlay the SALP reports. Intervenors' Brief at 14-16. Intervenors cite no error of law or fact by the Licensing Board and seek no relief from the Appeal Board in this matter. An appeal (FOIA-84-A-79) was taken by Intervenors from the denial and some 39 additional documents were released on February 6, 1985. Some documents were still witheld. Intervenors have made no effort to have additional documents included in the record, nor did they seek judicial relief to compel release of the withheld documents. There is no request by Intervenors for action to be taken by the Appeal Board in conjunction with the present FOIA request. Intervenors only offer the FOIA request "as an example of the NRC Staff's involvement in the resolution of this contention in Applicants' favor." Intervenors' Brief at 16. Since no wrong is alleged and no remedy sought, further discussion of the Intervenors' FOIA request is unnecessary in this appeal.

Finally, Joint Intervenors assert that the Licensing Board's conclusion that Applicants are qualified to operate the Harris facility was arbitrary and capricious and should be reversed by the Appeal Board. Intervenors' Brief at 16. We cannot agree.

The oral and prefiled written testimony of Applicants and Staff personnel is that Carolina Power and Light Company is qualified to operate the Harris facility if, and when, an operating license is granted. Tr. 2451-3936. None of the cross-examination by the Intervenors detracted from this conclusion. The Joint Intervenors introduced into

evidence the SALP reports which show a trend of improving management. 48/ The Joint Intervenors brought up the CRESAP report and extensively questioned Mr. Utley, Executive Vice President of CP&L, upon it. Tr. 2779-2818. CRESAP made an overall general conclusion:

> "In many respects, CP&L is one of the best managed utilities we have audited in the past several years."

Tr. 2796. Moreover, the record of this proceeding establishes that Carolina Power and Light Company has made very substantial increases in commitment of resources to nuclear facilities in terms of money, equipment, people and technical qualifications and that they are qualified to operate the Harris facility if it is licensed. See LBP-84-28, supra, 22 NRC at 237-57. There simply exists no merit to Intervenors' contention to the contrary.

We address the salient points that the Intervenors put forward in the order in which they occur. Specifically, in their Brief Intervenors assert that Brunswick, a nuclear power plant owned and operated by the Applicant, was not well managed in 1981. Intervenors' Brief at 8. Intervenors then state that:

> "... [in] 1981 with almost the identical management in place as today [October 8, 1985], the Applicants had demonstrated a complete lack of effective management at their nuclear plant."

Intervenors fail to cite the record, as required by 10 C.F.R. § 2.762(d)(1), to support their claim. In fact, the record indicates that both Mr. Utley, Executive Vice President of the Applicant, Tr. 3095,

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48/ Joint Intervenors' Exhibits 19, 20 and 21, the most recent SALP was a part of Mr. Bemis' testimony.

and Mr. Paul Bemis for the NRC Staff, Tr. 3701, testified that the Brunswick management had completely changed since 1981. (See also, Tr. 2954, 3287, 3656, 3701, 3856). Intervenors ignore the detailed history of the very large commitment of personnel, management and resources, which occurred at Brunswick since 1981 (see Bemis Testimony at 17, 18, 23, 24 ff. Tr. 3660; Bemis Tr. 3707, 3780, 3856; Utley Tr. 2536-38, 2593; Howe Tr. 3125, 3240; Deitz Tr.3240). A major portion of the hearing was devoted to a discussion of the enforcement history at Brunswick and the changes which have taken place both at the Brunswick site and at the corporate level. As the Licensing Board pointed out in its decision, the latest SALP report indicates a marked improvement at the Brunswick Plant, as well as improvements at Harris and Robinson. LBP-85-28, supra, 22 NRC at 252. The Licensing Board noted that SALP IV found CP&L had progressed from a "poor performer" to a "significantly improved utility." See, LBP-85-28, supra, 22 NRC at 253. Intervenors have ignored this evidence of continuing improvement. The Licensing Board's decision on the question of whether Applicants are capable of safely managing the Harris facility, presents a detailed discussion of the evidence presented by Applicants and Staff. The evidence presents a clear pattern of improvement in management, and of increased management attention to Applicants' nuclear facilities. See, LBP-85-28, supra, 22 NRC at 253-254, 257. The Board also discussed evidence presented by the Intervenors. The Licensing Board correctly pointed out that Intervenors' evidence is based on data which is no more recent than 1982. Id. at 257. The Board was correct in focusing on the more recent evidence presented by the Applicants and the

Staff in reaching it's determination that Applicants will, in the future, be capable of operating the Harris facility safely.

The Intervenors' Brief at 10 states:

> "The recurring management issues of inadequate corporate oversight and lack of nuclear program consolidation were again raised by an audit ordered by the North Carolina Utilities Commission in June of 1983 which had as its first recommendation that the Company 'should consider adding one or more outside directors to its Board who are experienced in or knowledgeable about nuclear operations.' PID, p.6. At the time of the hearing this step for strengthening Applicants' management had not been accomplished."

Again, there is no citation to the record by Intervenors for their assertion of "The recurring management issues of inadequate oversight..." The audit to which Intervenors refer was performed by Cresap, McCormick and Paget, Inc. (CRESAP) in 1982, Tr. 2779. At the insistence of Intervenors, Mr. Utley read from the conclusion of the CRESAP report: "In many respects, CP&L is one of the best-managed utilities we have audited in the past several years." Tr. 2796. See, Staff Proposed Findings at 46. Mr. Sherwood A. Smith, Jr., President of Applicant, Carolina Power and Light Company, appeared and testified at the request of the Licensing Board. CRESAP recommended that Applicants have on their Board of Directors, a Director with outside nuclear experience. This was only one of some 55 recommendations. Utley, Tr. 2786, 3106. The tenor of the CRESAP report was to compliment Applicants' management and its Board of Directors. Tr. 2787. The matter of a Director with outside nuclear experience was discussed at length by Mr. Utley, Tr. 2779-2807. This CRESAP recommendation was originated by Mr. Smith. Tr. 3910. Mr. Lee Sillin, former Chief Executive of Northeast Utilities and Chairman

of the Board of the Institute of Nuclear Power Operations, serves as a consultant to CP&L's Board of Directors and meets with the Board at its regular meetings and committee meetings. Utley Tr. 2797; Smith Tr. 3912-13. Mr. Smith's discussion cited supra explains why there is not now a member of the Board of Directors who has outside nuclear experience.

There is nothing adverse to the competence of the management of Carolina Power and Light Company to manage the Shearon Harris Nuclear Plant in not now having a Director with outside nuclear experience. In their appeal Intervenors have not pointed to any evidence in the record that the lack of such an outside director makes Applicants not qualified to operate the Harris facility.

The Intervenors' Brief at 11 states, in conclusionary form: "Documents and testimony described ... the Brunswick units to be in many ways the worst in the country ...." Yet nowhere in the record are there comparisons of the performances among various nuclear power plants. Moreover, the Joint Intervenors incorrectly used a Systematic Appraisal of Licensee Performance (SALP) report for July 1, 1980-December 31, 1981 for Brunswick in seeking to demonstrate that Applicants would not be qualified to manage the Harris Plant when and if it operated in 1986. Tr. 3591 ff. The relevance of the status of the 1980 Brunsick facility to the 1986 Harris facility is totally lacking and in addition, the Joint Intervenors assumed that all of the SALP rating categories were of equal value, a theory disavowed by Mr. Bemis. Tr. 3655. The Intervenors' argument is thus completely lacking in merit.

For the reasons set forth above, Intervenors' claims of error concerning this contention should be rejected and the Licensing Board's ruling in its Partial Initial Decison on this contention should be affirmed.

2. The Licensing Board Did Not Err in Resolving Joint Contention IV in Applicants' Favor

Joint Contention IV was originally admitted by the Licensing Board in its Order of September 22, 1982. LBP-82-119A, supra, 16 NRC at 2077. A motion for summary disposition was subsequently filed by Applicants and supported by the Staff. 49/ Joint Intervenors opposed Applicants' Motion. 50/ The Licensing Board granted Applicants' Motion in part and denied it in part. 51/

Applicants moved for reconsideration of or clarification of the Licensing Board's summary disposition ruling, and the Staff supported

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49/ "Applicants' Motion For Summary Disposition of Joint Intervenors' Contention IV (Thermoluminescent Dosimeters)" (January 9, 1984); "NRC Staff Response In Support of Applicants' Motion for Summary Disposition of Joint Intervenors' Contention IV (Thermoluminescent Dosimeters)" (February 2 1984).

50/ "Joint Intervenors' Response to Summary Disposition on Joint Contention IV - Thermoluminescent Dosimeters and Update to Discovery of J.I. on Joint IV" (February 6, 1984).

51/ "Memorandum and Order (Ruling On Motions For Summary Disposition)" at 20 (April 13, 1984).

Applicants' Motion. 52/ Joint Intervenors opposed the Motion. 53/ In a conference call the Licensing Board granted that motion in part and denied it in part. Tr. 2218. The Licensing Board determined that only one issue remained for litigation with respect to this contention. The issue was: "Whether the TLDs and measuring equipment and processes to be used at the Harris facility can measure occupational doses with sufficient accuracy to comply with the NRC regulations." Tr. 2218.

At the hearing on this contention testimony was presented by Applicants and the Staff. Intervenors did not present any direct evidence. In its Partial Initial Decision, the Licensing Board reviewed the record thoroughly. The Board discussed the Applicants' and Staff's positions, the issues raised on cross-examination by Joint Intervenors, the Board's own examination of the witnesses, and the Joint Intervenors' proposed findings. LBP-85-28, supra, 22 NRC at 258-266. The Licensing Board found that the record provides clear and uncontroverted evidence that this contention should be decided in favor of the Applicants. Id. at 53. Specifically, the Licensing Board found Applicants' program controls the sources of error in dosimetry processing and is commendable. The Licensing Board refused to adopt Joint Intervenors' request that what

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52/ "Applicants' Motion For Reconsideration Or Clarification Of Board Memorandum and Order on Joint Contention IV" (July 18, 1984); "NRC Staff Response In Support Of Applicants' Motion For Reconsideration Or Clarification Of Board Memorandum And Order Of April 13, 1984" (July 31, 1984).

53/ "Joint Intervenors' Response to Applicants' 'Motion for Reconsideration or Clarification ...' on Joint Contention IV (TLDs)" (July 30, 1984).

amounts to a License condition be imposed on Applicants' operating license, should it be issued, to account for possible dosimeter inaccuracy. LPB-85-28, supra, 22 NRC at 266. It appears that the Intervenors' claim of error relates to this refusal by the Licensing Board to adopt their proposed limitation. Intervenors' Brief at 16-19. 54/ As part of this claim of error, Intervenors point out that under the ANSI Standard which the Board stated must be complied with at a minimum, the regulations regarding limitations on occupational exposures would be violated 50% of the time. Intervenors' Brief at 18-19. Intervenors' arguments are without merit and ignore the evidence of record in this proceeding.

The Staff testified that the regulations do not contain accuracy standards which the TLDs and associated equipment must meet. "NRC Staff Testimony of Ross H. Albright Concerning Joint Contention IV." ff. Tr. 6567 at 4. The Licensing Board also noted in its Decision that the regulations do not contain an explicit standard for accuracy in measurements of radiation doses to workers. LBP-85-28, supra, 22 NPC at 259. Rather, the regulations provide dose limits to workers of one and a quarter rem to the whole body per calendar quarter or, in certain circumstances, three rem per calendar quarter. Albright, Tr. 6622;

54/ Intervenors merely mention, without elaboration or citation to the record, that they contested the adequacy of Applicants' program. They do not claim that the Licensing Board erred in any of its findings with respect to the ability of Applicants to conduct reliable dosimetry processing. Therefore, the Staff must assume that the only portion of the Licensing Board's decision on this contention which is being appealed is that portion discussed above.

10 C.F.R. § 20.101. In enforcing this regulation the Staff relies on the reported dose. Albright, Tr. 6626-6627. The Staff considers the accuracy of the dosimeters and equipment employed in the program for the processing of dosimeters to the extent that it reflects upon the requirement that Applicants conduct reasonable surveys. Albright, Tr. 6623. The Commission has issued a proposed rule which incorporates the ANSI Standard for measuring the performance of dosimetry processors. 49 Fed. Reg. 1205-1211 (January 10, 1984).

As mentioned above, Intervenors do not contest the adequacy of Applicants' quality control program to ensure the adequacy of their dosimeters and equipment. Intervenors also do not contest the ability of Applicants' dosimetry program to satisfy either the accuracy standards of the American Nuclear Standards Institute, or those of the International Committee on Radiation Protection. They are claiming, in effect, that different regulatory limits for exposure of workers should be imposed upon these Applicants in order to account for any inaccuracies in dosimetry which might occur. Intervenors' Brief at 19.

In their argument Intervenors pointed out that use of the ANSI Standard which involves a tolerance limit of 50%, would allow the dose limits in the regulations to be violated by Applicants 50% of the time. Id. It should be noted that the Licensing Board did not review Applicants' program only for compliance with the ANSI Standard, but rather reviewed it to determine whether it would meet both the ANSI Standard and the more restrictive standard recommended by the ICRP. LBP-85-28, supra,

22 NRC at 261-262. 55/ The Licensing Board found, upon reviewing results of tests of Applicants' dosimetry processing capability, that the results presented clear evidence to refute Intervenors' allegation of dosimeter inaccuracy. LBP-85-28, supra, 22 NRC at 263. Intervenors do not contest this finding. In discussing the ANSI Standard, Intervenors have, therefore, ignored the evidence of record that Applicants' dosimetry processing program meets both the ANSI and ICRP Standards.

The Licensing Board correctly held that the imposition of any different regulatory limits on individual exposures than those already present in the regulations would be beyond its authority and would, in effect, constitute a challenge to the Commission's present regulations. LBP-85-28, supra, 22 NRC at 266. Joint Intervenors did not present any evidence on this record which would support a challenge to 10 C.F.R. Part 20. They have not made the special circumstances showing required by 10 C.F.R. § 2.758 for such challenges. The Licensing Board's decision on this contention is amply supported by the record in this proceeding. The evidence weighs heavily in favor of resolving this contention in Applicants' favor. The Licensing Board has clearly and cogently addressed all of the issues involved in the litigation of the contention, and Intervenors have not raised any arguments on appeal which would show that the Licensing Board's decision was made against the preponderance of the

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55/ It was the Staff's position below, and it remains the Staff's position on appeal, that the Licensing Board should not adopt a different standard than that involved in the proposed rule. Tr. 6507. However, the Staff agrees with the Licensing Board that Applicants' program also satisfies the ICRP Standard.

evidence in this record. Therefore, the licensing Board's decision on this contention should be affirmed.

3. The Licensing Board Did Not Err In Deciding Contention 9G in Applicants' Favor

Eddleman Contention 9G states as follows:

> There is inadequate assurance that failure to report all results of environmental qualification tests, including failures, has been brought to light in connection with electrical equipment installed in Harris. This includes past test failures of equipment which subsequently passes an EQ test and test failures of equipment which is said to be qualified by similarity. (Ref. Item 2, Page 5, L.D. Bustard et al., Annuals Report: Equipment Qualification Inspection Program, Sandia National Laboratories, FY83.)

Evidence on this contention was presented by the Applicants and the Staff. The Licensing Board found that this subpart of Contention 9, like the rest of the contention, should be resolved in Applicants' favor. This ruling was based on a detailed review of the record before the Board. LPB-85-28, supra, 22 NPC at 285-288.

On appeal Intervenor claims first that the Licensing Board misinterpreted Contention 9G and second, that the Applicants failed to meet their burden of proof on the issue. Intervenors' Brief at 28-29. These claims of error are without merit, and the Licensing Board's decision should be affirmed.

Contention 9G as filed by Intervenor Eddleman sets forth as its sole basis a reference to a specific portion of an annual report issued by

Sandia National Laboratories. 56/ An examination of that report and the underlying inspection reports by Applicants demonstrated that item 2 related to inspections of the Rockbestos company. Therefore, Applicants presented testimony concerning the steps taken by Applicants to qualify the Rockbestos cable used at the Harris facility.

Intervenors now claims that Contention 9G was misinterpreted and that it relates to "fraudulent testing or qualification by similarity." Intervenors' Brief at 28. First, the Licensing Board was correct in limiting its consideration to the incident quoted as the sole basis for the contention. See Tr. 5662-5664. If Mr. Eddleman wished other issues to be considered, it was incumbent upon him to put the parties on notice of exactly what he wished to litigate at the time he formulated the contention. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). In any event, the issue of whether Rockbestos engaged in fraudulent testing or

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56/ Item two of this report, referenced by Intervenor Eddleman, states as follows:

> Another company started to qualify a product line by testing five different products in that line. By completion of the test program, four of the products had substantially degraded. A qualification report was written describing only the successful qualification of the one product that did not degrade. A second qualification report was then generated arguing that other members of the product line were qualified by similarity. The degradation observed during testing for four members of the product line was never discussed in the similarity report. Interestingly, the one product that successfully performed throughout this test had substantially degraded during previous qualification attempts. These previous efforts were never mentioned in the qualification report. The qualification test parameters had been successively changed until qualification success was achieved.

qualification by similarity is irrelevant, since Applicants did not use the Rockbestos qualification reports to qualify their Rockbestos cable. See LBP-85-28, supra, 22 NRC at 276. Applicants obtained test reports from another vendor and from Sandia to qualify their cable. Id . Therefore, any claim by Mr. Eddleman that the Board should have considered whether Rockbestos engaged in fraudulent testing should be rejected.

Mr. Eddleman's claim that Applicants have failed to meet their burden of proof with respect to this contention seems to rest on his opinion that qualification of a vendor through the CASE system is somehow inadequate. Intervenors' Brief at 29. 57/ This claim ignores the evidence of record in this proceeding. First, Applicants noted that it is common industry practice for a utility to use the CASE system to qualify vendors. Tr. 5529. In addition, Applicants testified that Ebasco, Applicants' architect engineer also reviewed Conax's quality assurance program and found it acceptable. "Applicants Testimony of Robert W. Prunty, Richard M. Bucci, Edwin J. Pagan and Kumar V. Hate in Response to Eddleman Contention 9G (Type Test Reporting), ff. Tr. 5515 at 4. No evidence was elicited on cross-examination which would

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57/ Mr. Eddleman's claim that the Board seemed to place the burden-of-proof on Intervenors in the Partial Initial Decision is without merit. See Brief at 29. The Licensing Board in Finding 112 merely stated that the Intervenors did not present any evidence which would raise questions as to the adequacy of Applicants' Environmental Qualification Program to deal with concerns regarding Rockbestos cables. PID at 97. This Finding represents the Board's conclusion after reviewing all of the evidence before it, including issues raised by Intervenor on cross-examination.

demonstrate that either the qualification activities performed by the utility auditing Conax for the CASE system, or the steps taken by Ebasco to qualify Conax was inadequate. Intervenors apparently believe that merely because someone other than Applicants performed the qualification of Conax, it is somehow suspect. See Intervenors' Brief at 29. There is no evidentiary support for this belief. 58/

Intervenors claim that Applicants have not carried their burden of proof, since environmental qualification was not complete. Intervenors' Brief at 29. As the contention was framed for litigation, it was not necessary that each cable be shown to be environmentally qualified. Rather, the contention concerned the manner in which the Applicants' environmental qualification program addressed each of Intervenor's concerns. See, LBP-85-28, supra, 22 NRC at 268-269, 288. Therefore, this argument should be rejected.

Finally, Intervenors note in passing that in addition to Applicants' failure to carry their burden of proof, the Staff has not conducted much of an investigation. Intervenors' Brief at 29. With respect to Rockbestos the Staff suggested in an information notice those steps which could be taken to qualify Rockbestos cable. "NRC Staff Testimony of

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58/ It should be noted that although Mr. Eddleman asked questions on cross-examination concerning who reviewed Conax's quality assurance program, he did not make an issue of Applicants' use of the CASE system in his proposed findings. Therefore, this argument against a favorable finding on Contention 9G is being raised for the first time on appeal. The consideration of such arguments is disfavored under Commission case law. Puerto Rico Electric Power Authority, (North Coast Nuclear Power Plant, Unit 1), ALAB-648, 14 NRC 34 (1981); Tennessee Valley Authority, (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978).

Armando Masciantonio on Eddleman Contention 9", ff. Tr. 5567 at Attachment 3. Applicants described the suggestion they had adopted, and the Staff determined that since they had selected one of the Staff's suggestions, their environmental qualification program was appropriately addressing the Rockbestos problem. Tr. 5785. It is unclear what further investigation Intervenor would have the Staff perform on the Rockbestos matter.

The Applicants presented detailed testimony on the Rockbestos issue. The Licensing Board reviewed both the Applicants' and Staff's testimony and the cross-examination conducted by Intervenor on this issue. The Licensing Board set forth its reasoning in the Partial Initial Decision. That reasoning is supported by more than a preponderance of the evidence of record in this proceeding. Therefore, the Licensing Board's decision with respect to Contention 9G should be affirmed.

4. The Licensing Board Did Not Err In Resolving Contention 65 in Favor of Applicants

Intervenors appear to be appealing Licensing Board finding 15, wherein the Licensing Board relied on Staff testimony that clearance between an asbestos board and a cadweld was noted in pour ICBSL 216001, was corrected prior to placement of the concrete, and was documented. LBP-85-28, 22 NRC at 293-294. Intervenors' Brief at 30. Intervenors claim that the "records" (which are part of the pour package) cannot be relied upon because Mr. Eddleman does not agree the documents say what the Staff found them to say and because the inspection personnel were not produced as witnesses. Id. The record indicates that all spacing

violations, including the clearance between asbestos board and cadweld, were corrected and verified. Tr. 6069-73. The fact that Mr. Eddleman is not convinced by the evidence is not relevant to a review of the evidence unless Mr. Eddleman provides a persuasive argument that the Licensing Board made some error. Mr. Eddleman's statement that he reaches another conclusion from review of the records, without further explanation, is not such an argument. Further, having failed to object to the testimony below regarding the Staff's discussion with inspection personnel, Intervenors objection now on appeal is out of time and without merit, especially in light of the other available evidence.

Intervenors also contest Licensing Board finding 17, LBP-85-28, supra, 22 NRC at 294, seeming to allege that the American Concrete Institute Code (ACI) was violated in regard to pour ICBXW 29001. Intervenors' Brief at 31. They do not specify in what manner the ACI Code was vilated, nor do they cite the code section with which the alleges the Applicants do not comply.

The adequacy of the concrete in pour ICBXW 29001 was verified by the 90-day breaks from cylinder set 9265 which represents placement ICBXW 29001. The 28-day breaks had an average strength of 4865 psi and the 90-day breaks had an average strength of 5660 psi. "NRC Staff Testimony of John R. Harris, Joseph J. Lenahan and Paul R. Bemis on Eddleman Contention Number 65, Concrete Placement" ff. Tr. 6320 at 26-27; Tr. 6324. Thus, the 90-day strengths which are above design requirements (Eddleman Exhibit 10, Ebasco specification CAR-SH-CH-6, Concrete Rev. 11), verified that the concrete was adequate. The Staff's expert, Mr. Harris testified that the placement met design and specification

requirements. Harris, ff. Tr. 6320 at 17. Mr. Eddleman's cross-examination of Staff's and Applicants' witnesses upon this matter did not elicit any evidence which would affect Mr. Harris' conclusion.

Mr. Eddleman raised this issue below in his proposed findings and the Staff in their reply findings detailed why pour ICBXW 29001 did conform to the ACI Code. 59/ Mr. Eddleman has had the Staff's analysis of the ACI Code requirements for some nine months and has still not been able to identify any ACI Code provision to which the Applicants have not conformed. The evidence of the Staff and Applicants 60/ is that pour ICBXW 29001 conformed to applicable specifications. The Licensing Board's consideration of this matter in paragrpah 17 of its Partial Initial Decision discusseses the evidence before it in detail. LBP-85-28, supra, 22 NRC at 294. This Licensing Board's finding is supported by the evidence of record and should be affirmed.

As the Licensing Board noted, Mr. Eddleman brought these matters up in his proposed findings. LBP-85-28, supra, 22 NRC at 293-294. He was in error below as noted by the Licensing Board and remains in error in this appeal. The Licensing Board reviewed the record before it and determined that Mr. Eddleman's Proposed Findings were without merit. The Licensing Board clearly articulated its reasons for this decision. As

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59/ "NRC Staff Reply To Wells Eddleman's Proposed Findings on Contention 65 (Containment Concrete)" at 5-7 (January 11, 1985). See also,Tr. 6081-6088 where Applicants discuss the ACI Code requirements.

60/ Kanakaris, et al. ff. Tr. 5764 at 18; Tr. 6082.

the Board has demonstrated, the record amply supports its finding. Therefore, the Licensing Board on Contention 65 should be affirmed.

VI. CONCLUSION

For the reasons set forth above, the Staff concludes that all of the Licensing Board's rulings which are the subject of the instant appeal should be affirmed.

Respectfully submitted,

Charles A. Barth
Counsel for NRC Staff

Janice E. Moore
Counsel for NRC Staff

Dated in Bethesda, Maryland
this 2nd day of December, 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	)	Docket Nos. 50-400 OL
POWER AGENCY	)	50-401 OL
	)	
(Shearon Harris Nuclear Power Plant, Units 1 and 2)	)	

I hereby certify that copies of "NRC STAFF BRIEF IN REPLY TO THE APPEAL OF JOINT INTERVENORS, CONSERVATION COUNCIL OF NORTH CAROLINA, AND WELLS EDDLEMAN FROM THE LICENSING BOARD'S PARTIAL INITIAL DECISION ON SAFETY CONTENTIONS" 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 2nd day of December, 1985:

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