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October 28, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY	)	Docket No. 50-400 OL
	)	
	)	
(Shearon Harris Nuclear Power Plant)	)	
	)	

APPLICANTS' MOTION TO STRIKE A PORTION OF INTERVENORS' BRIEF ON APPEAL FROM THE PARTIAL INITIAL DECISION ON SAFETY CONTENTIONS

Pursuant to 10 C.F.R. § 2.762(g), Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency ("Applicants") hereby move the Atomic Safety and Licensing Appeal Board to issue an order which strikes Section III of "Appeal from Partial Initial Decision on Management Capability and Safety Contentions," dated October 8, 1985 (cited hereafter as "Intervenors' Brief"), and filed by the Conservation Council of North Carolina ("CCNC"), Wells Eddleman and the Joint Intervenors.1/ As grounds for the motion, Applicants state that the

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1/ The portion of Intervenors' Brief subject to the instant motion is entitled, "THE LICENSING BOARD ERRED IN WHOLLY DEPRIVING THE INTERVENORS THE OPPORTUNITY FOR HEARING ON IMPORTANT SAFETY-RELATED CLAIMS, INCLUDING THE IN REJECTING CONTEN-

(Continued next page)

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identified portion of Intervenors' Brief is not in substantial compliance with the provisions of 10 C.F.R. § 2.762(d)(1).

Applicants further move that the Appeal Board promptly issue an order suspending the deadline for appellees to file briefs in reply to Section III of Intervenors' Brief, pending Appeal Board ruling on the instant motion to strike. Applicants propose that their brief in reply to Section III of Intervenors' Brief be due within fifteen (15) days, and that the NRC Staff's brief on the same matters be due within twenty-five (25) days, after service of any Appeal Board order which denies in whole or in part Applicants' motion to strike.2/

Governing Standards

The Commission's regulations, at 10 C.F.R. § 2.762, govern appeals from initial decisions. They provide that each appellant shall file a brief supporting its position on appeal. 10 C.F.R. § 2.762(b). In a sub-section entitled "Brief Content," the Commission requires that:

(Continued)

TIONS BY NOT ADHERING TO THE PROPER STANDARD FOR THE ADMISSION OF CONTENTIONS," and is found at pages 20 through 23 of Intervenors' Brief. (Note that a somewhat different title appears in the TABLE OF CONTENTS.)

2/ The schedule for briefs in reply to the remainder of Intervenors' Brief is unaffected by this motion.

> An appellant's brief must clearly identify the errors of fact or law that are the subject of the appeal. For each issue appealed, the precise portion of the record relied upon in support of the assertion of error must also be provided.

10 C.F.R. § 2.762(d)(1). In a sub-section entitled "Failure to Comply," the Commission provides that:

> A brief which in form or content is not in substantial compliance with the provisions of this section may be stricken, either on motion of a party or by the Commission on its own initiative.

10 C.F.R. § 2.762(g); see also § IX(d)(7), Appendix A to 10 C.F.R. Part 2.

In 1983, the Commission proposed an amendment to section 2.762, to eliminate the requirement for an appellant to file, in advance of its brief, detailed exceptions, and to replace that requirement with one to file a simple notice of appeal. When the Commission adopted the current version of the regulation, it noted the following as to its proposal:

> Some of the commenters expressed reservations about the elimination of the requirement to file exceptions because the current rule requires that appellants specify the precise error of fact or law which they are appealing. In the proposed rule there was no requirement that an appellant in its notice of appeal or in its brief in support of its appeal clearly identify the error of fact or law that is being appealed.

Deletion of Exception Filing Requirement for Appeal from Initial Decision; Consolidation of Responsive Briefs, 48 Fed. Reg.

52282, 52283 (1983). The Commission responded to these comments as follows:

> In response to the comments the Commission has made one modification to the rule that was proposed. The Commission agrees with the commenters that it is important that the appellant clearly spell out the errors of fact or law so that the other parties and Appeal Board understand the nature of the dispute. In response to this concern, the Commission has revised 10 CFR 2.762(d) to provide that, in its brief, an appellant must clearly specify the errors of fact or law that are being advanced on appeal.

Id. at 52284. Consequently, while in 1983 the requirement was transferred from the appellant's exceptions to the appellant's brief, the Commission has consistently required that on appeal claimed errors must be clearly specified.

The Appeal Board long ago held that the appellant's brief not only must identify the precise portion of the record relied on in support of each assertion of error, but also must present the Appeal Board with sufficient information or argument to allow an intelligent disposition of the issues. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-270, 1 N.R.C. 473, 475 (1975). The Appeal Board has also recognized that an appellant's brief in compliance with the Commission's regulations is necessary to provide fairness to the appellees:

> We have observed before that briefs are necessary to "flesh out" the bare bones of the exceptions, not only to give us sufficient information to evaluate the basis of objections to the decision below, but

> also to provide an opponent with a fair opportunity to come to grips with the appellant's arguments and attempt to rebut them. The absence of a brief not only makes our task difficult but, by not disclosing the authorities and evidence on which the appellant's case rests, it virtually precludes an intelligent response by appellees. For these reasons we generally follow the course charted by the Federal courts and disregard unbriefed issues as waived. We do so here.

Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 N.R.C. 313, 315 (1978) (footnotes omitted), quoted with approval in Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 N.R.C. 1245, 1255 (1982), and ALAB-719, 17 N.R.C. 387, 395 (1983).

While the Midland and Marble Hill decisions discussed above involved the failure by appellants to file a brief, the same reasoning applies to a filed brief which is not in substantial compliance with 10 C.F.R. § 2.762(d)(1). See Point Beach, supra, ALAB-719, 17 N.R.C. at 395 (1983). A brief which does not provide the Appeal Board with sufficient information or argument to allow an intelligent disposition of the issues, and which does not provide an opponent with a fair opportunity to come to grips with the appellant's arguments and attempt to rebut them, is scarcely better than no brief at all.

In Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 N.R.C. 490 (1985), the appellant filed a brief, but the Appeal Board

treated five of the twelve assertions advanced as waived or abandoned because the appellant's brief on those subjects did not comply with section 2.762(d)(1). Among the deficiencies cited are a failure to supply any record references or the provision of only general references such as "to the evidence in the record," and a failure to provide any explanation as to why a claim of error is correct. Id. at 496 n.30, citing 10 C.F.R. § 2.762(g) and Midland, ALAB-270, supra. In another case where the appellant filed a brief, the Appeal Board, citing section 2.762(d)(1), refused to pursue further serious, but broad claims, where the brief did not refer to any evidence of record that might support them. Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 N.R.C. 59, 65-66 (1985).

Section III of the Intervenors' Brief Does Not Even Identify the Issues Appealed or the Licensing Board Decisions from Which the Appeals are Taken

The proceeding before the Licensing Board generally has been segmented into three phases by broad categories of issues: environmental contentions, safety contentions and emergency preparedness contentions.3/ The current appeal is from Carolina Power & Light Company, et al. (Shearon Harris Nuclear Power Plant), LBP-85-28, 22 N.R.C. ____ (Aug. 20, 1985). That

3/ See Carolina Power & Light Company, et al., LBP-85-5, 21 N.R.C. 410, 412 (1985).

decision resolved all but three of the safety contentions heard to date, and also has the effect of making other dispositive Licensing Board rulings on safety contentions -- i.e., rulings granting summary disposition motions or rejecting proposed contentions -- ripe for appellate review. LBP-85-28, supra, slip op. at v.

Section III of Intervenors' Brief purports to appeal Licensing Board rulings rejecting proposed contentions at the outset for failure to meet the requirements of 10 C.F.R. § 2.714(b). Yet, there is only one citation to a Licensing Board ruling. See Intervenors' Brief at 22 (reference to a Memorandum and Order of September 22, 1982, in connection with Eddleman Contentions 47 through 51). It is clear, moreover, that this one citation does not apply to all of the contentions identified. See id. (Contentions 65 A and B, filed June 14, 1984).[4/] Thus, the most elementary ingredients of an appellant's brief -- citations to the decisions being challenged -- are missing here. Presumably, it is left to the Appeal Board and appellees to locate the relevant Licensing Board rulings which are the subject of appeal.

4/ Other contentions mentioned in Intervenors' Brief were deferred by the Licensing Board's September 22, 1982 Memorandum and Order for later amendments, responses and rulings. See, e.g., LBP-82-119A, 16 N.R.C. 2069 (1982), 2096 (Eddleman 34, in part), 2100 (Eddleman 64, in part), 2105 (Eddleman 103), 2106 (Eddleman 107).

In addition, Intervenors' Brief fails to identify adequately the contentions rejected and now appealed. In most cases where a contention number is provided, the sponsoring party is not identified. On occasion, no identifying number is provided, and there is a mere reference to a general subject matter. See Intervenors' Brief at 22 ("The rejection of contentions on equipment qualification other than 9, 11 and a duplication of 11, was capricious."). Other contention numbers are identified as examples of some presumably larger group. Id. ("Risk assessment and accident analysis and failure modes and effects analysis, e.g. contentions 4, 7, 108 . . ."). See also id. at 23 (contention "132(D) et al.").

Most egregious, however, is the attempt to appeal, with no identification whatsoever, ". . . each and every safety contention raised by CCNC, Eddleman, or others of the Joint Intervenors, i.e. Kudzu Alliance and CHANGE, or any combination of them, e.g., as Joint Intervenors, or individually." Intervenors' Brief at 21. Over 500 contentions have been proposed in this proceeding. Carolina Power & Light Company, et al. (Shearon Harris Nuclear Power Plant), LBP-85-5, 21 N.R.C. 410, 413 (1985). While a fair number of those address environmental and emergency preparedness issues, a large number (a conservative estimate would be 200) raise safety issues. It is patently absurd, if not contemptuous, to purport to appeal Licensing Board rulings on these unidentified proposed contentions.

Section III of Intervenors' Brief Fails to Identify, for Each Issue Appealed, the Precise Portion of the Record Relied Upon in Support of the Assertion of Error

Applicants have already stated that Intervenors' Brief fails to identify the Licensing Board rulings being challenged. Even if that fatal deficiency did not exist, however, Intervenors' Brief still would violate section 2.762(d)(1) because it does not specify other portions of the record relevant to any appeal.

The record below which underlies Licensing Board rulings on proposed contentions is substantial. In the case of the 334 contentions initially proposed in 1982, that record includes the amended petitions to intervene with contentions and asserted bases/argument; the written replies of Applicants and the NRC Staff; three subsequent petition amendments by Mr. Eddleman and one by CCNC; Applicants' written responses to these amendments; the transcript of a two-day oral argument (special prehearing conference); post-conference written submissions by Applicants (three), CHANGE (two) and Mr. Eddleman; the Licensing Board's Memorandum and Order; written objections/responses to the Licensing Board's Memorandum and Order; and a subsequent Licensing Board ruling on those objections/responses. Intervenors' Brief is devoid of any citations to this record (let alone to a precise portion of it) upon which it may rely in support of each assertion of error.

Neither the Appeal Board nor the appellees should be required to research this record -- ignored by the intervenors -- in order to ascertain: first, what the proposed contention actually was; second, what arguments were presented in opposition; and third, what the Licensing Board held.

Section III of Intervenors' Brief Does Not Contain Sufficient Information and Argument to Allow an Intelligent Response by Appellees or to Allow the Appeal Board to Make an Intelligent Disposition of the Issues

Section III of Intervenors' Brief begins with a generic legal argument on the "basis with specificity" standard for admitting proposed contentions under 10 C.F.R. § 2.714(b), as construed by several decisions. This opening argument concludes with the unfulfilled promise that "[o]ther specific arguments will also be raised for each [contention] if appropriate in light of the rationale advanced by the Licensing Board in rejecting each contention." Intervenors' Brief at 21. What follows over the next two pages of the brief, however, is a series of brief references to approximately forty contentions, almost no discussion of the rationale for the Licensing Board rulings, and no explanation as to why, in the intervenors' view, the proposed contentions meet the requirements of 10 C.F.R. § 2.714(b).

It is not adequate simply to state that the rejection of contentions "was capricious,"5/ that the denial of hearing on a

5/ Intervenors' Brief at 22 (contentions on equipment qualification).

contention "was not proper,"6/ or that other contentions "are also important and were rejected without any chance to go on."7/ If a proposed contention were rejected for lack of a basis asserted with reasonable specificity, then it is incumbent upon the appellants to describe the asserted bases for the contention and the Licensing Board's rationale in rejecting them, and to explain specifically why that rationale is erroneous. While it is acceptable practice to set forth the legal standard once, as intervenors did here, it must be applied to each challenged decision in view of the particular record developed below.

If the intervenors had provided a contention-by-contention application of their generic argument on the "basis with specificity" standard, it would have become obvious that the generic argument does not even apply in many instances. The Licensing Board rejected many of the identified proferred contentions on other grounds. See, e.g., LBP-82-119A, 16 N.R.C. 2069, 2107 (1982) (rejecting Eddleman 115 because it is the subject of an ongoing rulemaking), 2090 (Eddleman 4 rejected as an attack on Commission regulations), 2096 (Eddleman 34 deferred in part, and rejected in part as an attack on a Commission regulation and in part as redundant to another

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6/ Id. (Contention 107).

7/ Id. (Contentions 4, 7, 108, 111, 34, 58, 83, 105, 119, 125).

contention), 2105 (Eddleman 125 ruled to be an attack on Commission regulations; Eddleman 102 held to be superseded by several Joint Contentions), 2108 (Eddleman 123 and 127 held to be superseded by Joint Contention I). Had the intervenors taken the trouble to advance contention-specific arguments, they might also have realized that they have attempted an untimely appeal of at least one rejected environmental contention,8/ that they have needlessly repeated one rejected environmental contention which has already been briefed and argued and is now before the Appeal Board,9/ and that they have appealed the threshold rejection of another environmental contention which actually was admitted and, following discovery, decided on summary disposition.10/

Intervenors' Brief totally fails to provide the requisite contention-by-contention argument. As a result, appellees would be forced in essence to guess (where the generic argument applies at all) at what the intervenors consider to be the

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8/ Compare Intervenors' Brief at 22 (Contention 126 "X") with LBP-82-119A, 16 N.R.C. 2069, 2108 (1982).

9/ Compare Intervenors' Brief at 22 (Contention 2) with "Appeal from Partial Initial Decision on Environmental Contentions" at 21 (April 9, 1985).

10/ Compare Intervenors' Brief at 22 (Contention 83), with LBP-82-119A, 16 N.R.C. 2069, 2104 (1982) (accepting Eddleman 83 and 84) and Licensing Board Memorandum and Order (Ruling on Motions for Summary Disposition . . .) at 20-28 (Nov. 30, 1983) and Licensing Licensing Board Memorandum and Order (Ruling on Summary Disposition of Eddleman Contention 83/84B), April 27, 1984.

adequately specific asserted basis which was improperly rejected by the Licensing Board. Where the generic argument is not even relevant, appellees are even more in the dark. In short, Intervenors' Brief utterly fails to put the appellees on notice of the grounds for the appeal, thereby precluding an intelligent response in a reply brief. For the same reasons, Intervenors' Brief does not contain sufficient information and argument to allow the Appeal Board to make an intelligent disposition of the issues.

CCNC and Mr. Eddleman May Not Appeal from the Rejection of Contentions Proposed by Other Parties

CCNC and Mr. Eddleman purport to appeal the Licensing Board's rejection of contentions proposed individually by intervenors Chapel Hill Anti-Nuclear Group Effort ("CHANGE") and Kudzu Alliance, and which were not advanced by CCNC or Mr. Eddleman on a consolidated or any other basis. See Intervenors' Brief at 21. Such appeals are not authorized.

The Licensing Board endorsed the advancement of certain contentions, entitled "Joint Contentions" on a consolidated basis by intervenors Eddleman, CCNC, CHANGE and Kudzu Alliance, each of which also proposed other contentions individually. See LBP-82-119A, 16 N.R.C. 2069, 2075-78 (1982). Applicants do not challenge the assertion that "Mr. Eddleman and Counsel for CCNC are authorized to argue on behalf of the Joint Intervenors

as appropriate in this appeal." Intervenors' Brief at 1. The only appropriate circumstance for such argument, however, is in connection with the Joint Contentions.

CHANGE and Kudzu Alliance are each represented in this proceeding by their own counsel. CCNC and Mr. Eddleman are not authorized to appeal from Licensing Board rulings rejecting contentions proposed only by CHANGE or Kudzu Alliance, where those parties did not file a notice of appeal or file a notice that their counsel have been replaced.

The Relief Sought by Applicants is Warranted

Applicants have demonstrated above that, for all practical purposes, Section III of Intervenors' Brief is a mess. Among other shortcomings, it purports to appeal the rejection of unidentified proposed contentions in unidentified Licensing Board rulings, without citations to the precise (or any) portions of the record relied upon in support of the assertion of error, and without sufficient information and argument on the specific proposed contentions rejected. Never has so much been attempted on the basis of so little. If the Commission's requirements in 10 C.F.R. § 2.762 have any meaning, then Section III of Intervenors' Brief should not be entertained on appeal.

Further, a motion to strike is particularly appropriate in this situation. In this section of their brief, the

intervenors request that the Appeal Board admit for adjudication previously rejected proposed contentions. The consequences to Applicants of even a single reversal of such a Licensing Board ruling are serious. Thus, Applicants cannot afford to save the foregoing arguments for their reply brief. If the Appeal Board did not agree with those arguments, it might then proceed to rule on the merits without a substantive response by Applicants. Yet, Applicants cannot now advance a substantive response. While it would be unfair, Applicants could now expend the time and resources to research the record below on each of the roughly forty contention numbers identified by the intervenors in two pages of their brief. Where the intervenors' "basis with specificity" generic argument is relevant, however, Applicants still would be guessing as to what portion of the record is relied upon by the intervenors. Where the generic argument clearly is not relevant, Applicants have absolutely no basis for speculating on the grounds for the appeal.11/

11/ Section IV of Intervenors' Brief, which appeals from Licensing Board decisions granting summary disposition of eight contentions, suffers from many of the same deficiencies as Section III -- i.e., a generic argument followed by a discussion with no citations to the record. See Intervenors' Brief at 24-27. The only improvements are the absence of an attempt to appeal wholly unidentified Licensing Board rulings, and the presence of discussion, albeit extremely unenlightening, of each contention. Applicants note that the Appeal Board is authorized to strike briefs sua sponte. 10 C.F.R. § 2.762(g).

By authorizing a motion by a party to strike a brief which is not in substantial compliance with section 2.762, the Commission has recognized, as has the Appeal Board in the decisions discussed above, that compliance is a matter of providing fairness to other parties, as well as of assisting the Appeal Board in the performance of its functions. Fairness to Applicants requires that the motion to strike be granted.12/

Finally, Applicants note their opposition to any suggestion that the intervenors be provided with another opportunity to file a brief which complies with the regulations. CCNC has been represented by the same counsel since the beginning of this proceeding, and Mr. Eddleman has extensive experience with NRC and other administrative proceedings.13/ They previously filed a brief on appeal from the Licensing Board's environmental decision. The Licensing Board rulings in question here are as much as three years old, so there was ample time for the preparation of any intended eventual appeal. An extension of time was also provided to the intervenors for the filing of the

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12/ Section III of Intervenors' Brief is insufficient on its face, and the assessment of the validity of the instant motion will entail little or no scrutiny by the Appeal Board of the underlying record. Cf. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-409, 5 N.R.C. 1391, 1396-97 (1977).

13/ Mr. Eddleman participated in part of the construction permit proceeding before the NRC on the Shearon Harris Nuclear Power Plant, and has requested and participated in NRC rulemaking proceedings. In addition, he has considerable experience in ratemaking and other adjudicative proceedings before the North Carolina Utilities Commission.

October 8, 1985 brief. There is no credible excuse for Section III of Intervenors' Brief, which does not even approach minimally acceptable standards.

Respectfully submitted,

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Dated: October 28, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion to Strike a Portion of Intervenors' Brief on Appeal From the Partial Initial Decision on Safety Contentions" were served this 28th day of October, 1985, by deposit in the U.S. mail, first class, postage prepaid, to the parties identified on the attached Service List.

Thomas A. Baxter

Thomas A. Baxter, P.C.

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