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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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OFFICE OF SECRETARY DOCKETING & SERVICE BRANCH

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Glenn O. Bright
Dr. James H. Carpenter
James L. Kelley, Chairman

In the Matter of CAROLINA POWER AND LIGHT CO. et al. (Shearon Harris Nuclear Power Plant, Unit 1)	Docket 50-400 OL ASLBP No. 82-468-01 OL

Wells Eddleman'S Response on Contention 57-C-7
(Contaminated Injured Persons)

In response to the Licensing Board's order of December 9, and an extension of time from December 20 (Friday) to today to respond, Wells Eddleman hereby responds to the Board's questions and re other pertinent matters (Cf. Order at pp 2,3).

Question 1. The contention should be admitted, but not as drafted since the GUARD v. NRC decision specifies it better.

Question 2. The contention should read,

"The plan, except for a list of hospitals, does not provide medical treatment of for contaminated injured persons as required by NRC and other applicable rules, e.g. 10 CFR 50.47(b)(12), GUARD v. NRC (753 F.2d 1144 (1985). The plan does not provide for training or protection from contamination for emergency personnel transporting these victims to medical treatment. There may well be more early radiation injuries and contaminated injured persons than the plan or existing medical treatment arrangements for contaminated injured persons can handle. All these problems need to be solved in order to assure effective protective action for contaminated injured people and protection from spreading contamination via injured persons requiring medical treatment."

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Question 3. The Commission's statement of policy does not require Boards to act as it says they "may" ("Interim Guidance, 50 FR 20893) or "could"(ibid at 20894, at least twice). The GUARD v. NRC decision means that Contention 57-C-7 is litigable. As will be addressed further below, the "statement of policy" on the GUARD v. NRC decision is evidently an attempt to avoid that decision, and should have no force because (1) the fact of noncompliance with the rules is litigable and must be resolved before licensing, 10 CFR 50.57(a)(1), etc; (2) the NRC's former interpretation was invalid all the time it was in effect, and without that illegal interpretation of 10 CFR 50.47(b)(12), the contention would have been litigated in all its aspects, if admitted (and since the part that was denied was barred by the Commission's interpretation of the rule, it is fair to assume it would have been admitted absent that decision in San Onofre); (3) there was no notice and comment on the Commission's Statement of Policy, which attempts to do (or encourage Boards to do, though the Commission evidently dare not order them to, a significant fact) what the Court of Appeals in GUARD v. NRC barred the Commission from doing, namely, to vitiate 10 CFR 50.47(b)(12). Once an issue is accepted for hearing (57-C-7 was, except for the major part barred by the Commission's illegal action which the Appeals Court reversed in GUARD V. NRC), it cannot be avoided by action in which the affected parties are not allowed notice and comment, or the Administrative Procedure Act is violated.

To turn to the sub-questions,

(a) Of course discovery is required. This is a litigable contention, and any lateness is due to dilatory action by the Nuclear Regulatory Commission and others, not to any delays by me. I filed for admission of the contention under the GUARD V. NRC decision promptly, on 1 March 1985. I believe I also renewed my motion at a later date. To limit discovery now is fundamentally unfair, especially since the Harris plant

is now being delayed yet again (CP&L Board of Directors action on 12/18/85. CP&L Counsel Hollar informs me that a letter will go out to the Board and parties concerning this delay.).

(b)The Atomic Energy Act, Section 189(a), requires a hearing on any issue that is a material factor bearing on a licensing decision and raised by the requester of the hearing. 42 USCA 2239(a), Union of Concerned Scientists v. NRC, 735 F.2d 1437 (1984). Adequacy of arrangements to treat contaminated injured persons is not determinable solely by a (single) test or inspection, and does not qualify for exemption from hearing under Section 189(a) of the Atomic Energy Act, 42 USCA 2239(a). UCS v. NRC at 1437, 1442-3,1445-8. If a claim raises genuine issues of material fact, summary disposition may not be done, and a hearing is required. Cf. UCS at 1448, citing Westinghouse, North Anna, and Siegel (citations omitted). Resolving this contention is not an "on the spot decision by a qualified inspector" (UCS at 1449 , fn 23 and language citing the Attorney General's report on the APA revision 5 USC 554(a)(3). This exemption "does not encompass all decisions which are based on evidence derived from tests or inspections" (even if any tests or inspections of ability of medical facilities to treat contaminated injured persons from a Harris accident had been done, which they evidently have not), UCS at 1449.

Moreover, facts are needed to resolve this contention, and if it were to survive summary disposition it would be clear that more than affidavits are required to resolve its material issues of fact. Without discovery, those material issues of fact may not even be uncovered. Obviously, resolution by affidavit would violate the right to a hearing (unless summary disposition motion(s) succeeded) and lack of discovery would be extreme prejudice to the party (e.g. me) trying to fend off summary disposition by affidavit.

As to the Commission's position that a commitment to full compliance with whatever the Commission decides, would be OK for supporting a license, this is not the case. The Commission cannot, without notice andcomment, establish a binding precedent. It cannot accept a promise as dispositive of a material issue in deciding whether or not to license a power plant (UCS v. NRC, supra, 1437: When statute calls for hearing in adjudication, hearing is presumptively governed by "on the record" procedures of 5 USCA 554,556,557. Exceptions don't apply. Ibid.) This is true even for "predictive" emergency plan findings. UCS at 1441, n.5, and See at 1444. Hearing at NRC is required by 42 USCA 2239(a). 5 USC 553(b) then forces the Commission, if a hearing is granted, must generally provide an * opportunity for submission and challenge of evidence as to any and all issues of material fact. UCS at 1444; cases cited there, at 1444,1445. The hearing procedure is mandatory where there are issues of material fact (Cf. NRC rules, 10 CFR 2.749). The Public's right to participate in the hearings does not unduly limit the NRC's "wide discretion to structure its licensing hearings in the interest of speed and efficiency" UCS at 1448, cf. 1447. If a party's claim survives summary disposition, expedited procedures may be used (ibid, 1448) but a hearing may not be denied on the basis of time pressure. UCS at 1447-8.

Another UCS v. NRC case shows that the Commission cannot change its rules without notice and comment. UCS v. NRC 711 F.2d 370, 381382,citing NRC's own rules, 10 CFR 2.804 and 2.805(a): "When the Commission proposes to adopt, amend, or repeal a regulation it will cause to be published * * * (t)he manner and time within which interested members of the public may comment" (Court's emphasis); "The Commission will afford interested persons an opportunity to participate in rulemaking * * * in the manner stated in the notice" which contains the proposed rulemaking. (ibid, Court's emphasis).

For the above reasons, Contention 57-C-7 as revised should be admitted at once and discovery begun immediately, allowing hearing if summary disposition fails or is not filed.

Wells Eddleman

* Guardian Federal, 589 F.2d 656,664 cites this law.