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USNRC

January 21, 1988

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ADMINISTRATIVE JUDGE

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of	)	
	)	
DAVID W. HELD	)	Docket No. 55-60402
	)	
(Senior Operator License for	)	
Beaver Valley Nuclear Power	)	
Station, Unit 1)	)	

NRC STAFF MOTION FOR RECONSIDERATION

I. THE MOTION

The NRC staff hereby moves the Administrative Judge for reconsideration of that part of his January 11, 1988, Decision dismissing this proceeding which retains jurisdiction of the proceeding for two years.

II. DISCUSSION

A. The Decision

On January 11, 1988, the Administrative Judge issued a Decision which dismissed this proceeding as moot. Decision at 4. The Decision explained that Mr. Held, who holds a Senior Reactor Operator (SRO) license for Unit 2 of the Beaver Valley Nuclear Station, and who in this proceeding, contests his failure of a simulator examination for an SRO license for Unit 1, cannot now utilize more than one license at the Beaver Valley Nuclear Power Station. Decision at 1. However, the Decision states that "... there is a possible circumstance in which the mootness of

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this case would be self-reversing." Decision at 3. This circumstance is described as (NRC) agreement for Duquesne Light Company (DLC) to initiate procedures to dual-license personnel for both units of its Beaver Valley plant. <sup>1/</sup> Id. The Decision states that if this event occurs within the next two years, Mr. Held should notify the Administrative Judge and "the case will be automatically reactivated because it would then be ripe for adjudication." Decision at 4. The Decision orders:

That the case is dismissed as moot, subject to the condition that Mr. Held may move to reopen the case within two years should a circumstance arise in which the issuance of Senior Operator License for Beaver Valley Nuclear Power Station, Unit 1 is necessary for Mr. Held to obtain a dual license for Units 1 and 2.

The Staff believes that NRC case law precludes the Administrative Judge from retaining conditional jurisdiction of this proceeding. Accordingly, for the reasons set forth below, the Staff requests that the recent Decision be modified to delete the provision for two years of continuing jurisdiction by the Administrative Judge.

B. Legal Standards Governing Licensing Board Jurisdiction

It is well established that adjudicatory boards are delegates of the Commission and, as such they may exercise authority over only those matters that the Commission commits to them by the hearing notice.

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<sup>1/</sup> Section 13 of Supplement 4 to the Safety Evaluation Report for Beaver Valley Nuclear Station, Unit 2 indicates that the licensee has no plan to dual-license any reactor operator, and that the two units at Beaver Valley will be operated by two separate organizations. In accord with this situation, by letter dated November 28, 1987 the licensee asked that the Unit 1 licenses be terminated for those operators also holding Unit 2 licenses who are employed at Unit 2. By letter dated December 28, 1987 (attached), NRC Region I informed

Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985). Licensing boards "can neither enlarge nor contract the jurisdiction conferred by the Commission." Id., See also: Commonwealth Edison Company et al. (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980).

In a proceeding in which a Licensing Board sought to retain jurisdiction after issuing a final decision on the issues, the Appeal Board determined that while licensing boards have authority to impose conditions on construction permits or licenses,

[T]hat authority has never been held to allow a condition which, in effect, triggers the initiation of a new and independent adjudicatory proceeding at a later date. Indeed, it is well-settled that licensing boards are not empowered to take such a step.

Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), ALAB-577, 11 NRC 18, 29 (1980), citing, Florida Power and Light Company (Turkey Point Nuclear Generating Units 3 and 4), 4 AEC 9, 15 (1967). This finding was affirmed by the Commission. CLI-80-12, 11 NRC 514, 516-17 (1980). Shearon Harris involved a situation in which a Licensing Board, assigned to address the issuance of a construction permit, attempted to retain jurisdiction and provide for a future hearing concerning the operating license. However, the rationale of the Appeal Board is equally applicable to the present situation. In

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

the licensee that nine operator licenses for Beaver Valley Unit 1 had been terminated because the operators were employed at Unit 2.

both cases the presiding officer determined that the existing facts warranted a termination of the proceeding, but that upon a future event a new hearing would be triggered. In the Shearon Harris proceeding it was the application for an operating license while in the present proceeding it is the determination to dual license the Beaver Valley units. In either event it does, as the Appeal Board noted in Shearon Harris, "prescribe future procedural action of an extraordinary character on the basis of a present set of facts which may materially change in the interim." Shearon Harris, supra at 28.

The Appeal Board pointed out that licensing boards have no independent authority to initiate any form of adjudicatory proceeding, and what is required is the prior issuance, by some other component of the Commission, of one of the five types of orders or notices specified in 10 C.F.R. § 2.700. Shearon Harris, supra at 30, citing, Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-381, 5 NRC 582, 592 (1977). The Appeal Board explained that while the Commission may have inherent authority to order an evidentiary hearing on a license application in circumstances not within the specific contemplation of the Rules of Practice, licensing board action must be founded upon either express or implicit delegation of authority to it. Id. In regard to future hearings, the Appeal Board stated:

Needless to say, an authorization to conduct an adjudicatory proceeding pursuant to a notice of hearing issued by the Commission does not carry with it by necessary implication the power to order the initiation at a later date of a separate and distinct proceeding.

Id. The Staff believes that the recent Decision which both dismisses the proceeding for mootness and also retains jurisdiction over the proceeding

for a period of two years in the event that certain present circumstances change, is inconsistent with the case law cited above. In addition, the Decision exceeds the authority granted to the Administrative Judge by the Commission in its Order, dated August 7, 1987.

C. The Authority Granted to the Administrative Judge by the Commission

By Order dated August 7, 1987, the Commission granted Mr. Held's request for hearing on denial of his application for an SRO license for Unit 1 at Beaver Valley due to his failure of a simulator examination. Order at 1-2. The Order directed the Chairman of the Atomic Safety and Licensing Board Panel to designate a single member of that Panel to act as the presiding officer. Order at 2. The Order also directed the proceeding to be conducted under informal procedures and that the presiding officer's decision be in writing based on written submissions and oral presentations by the parties, and other technical or factual information publicly available in the docket file. Order at 3. Thus, the Commission's Order granted jurisdiction to the Administrative Judge (in lieu of a three-member Licensing Board) to decide the issue raised by Mr. Held's request for hearing.

The Decision recently issued dismisses the proceeding as moot in that Mr. Held's employer no longer wishes to use his services on Beaver Valley, Unit 1 so that an SRO license, even if issued, could not be used. Thus, the issue delegated by the Commission to the Administrative Judge has become moot. The Decision has, therefore, decided the delegated issue. Nothing in the Commission's Order explicitly or implicitly granted the Administrative Judge authority to retain jurisdiction to institute a new, future proceeding in the event that Mr. Held's employer might

obtain permission from NRC to institute a dual-licensing program for some reactor operators, and that Mr. Held's lack of a Unit 1 license might somehow exclude him from consideration for this possible future program. <sup>2/</sup> The Commission delegated to the Administrative Judge, the authority to decide the issue of the denial of a license to Mr. Held in the present factual and legal circumstances, not speculative future ones.

In Staff's view, the Shearon Harris decision precludes the conditional retention of jurisdiction set out by the Administrative Judge in the Decision. The Decision anticipates initiation of a "new and independent adjudicatory proceeding at a later date" based on a speculative and entirely different factual situation than the present one. For this reason, the Staff urges modification of the Decision to delete the portion which retains jurisdiction over this proceeding.

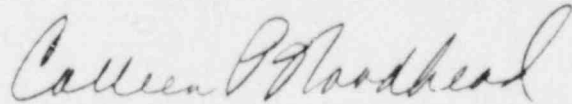
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<sup>2/</sup> It is important to note that by terminating this proceeding Mr. Held is not disadvantaged in the event that it is determined to dual-license operators for the Beaver Valley plant. As indicated by the attached letter, the nine operators who had licenses for both units at Beaver Valley have had the Unit 1 licenses terminated. Thus, no operator now holds licenses for both units. Consequently, under a possible dual-license program at Beaver Valley, Mr. Held, and any other operator who would seek such a dual license, would have to successfully complete a special program designed for dual licensed operators, apply for a dual-license in accord with applicable Commission regulations and, if such a license were denied, would be entitled to a hearing under the existing regulations. 10 C.F.R. § 2.103(b). Thus, Mr. Held's lack of an SRO license for Unit 1 is no impediment to participation in future dual-license programs.

III. CONCLUSION

For the reasons stated, the January 11, 1988, Decision in this proceeding should be modified to delete the provision for a two year conditional jurisdiction.

Respectfully submitted,

A handwritten signature in cursive script, reading "Colleen P. Woodhead".

Colleen P. Woodhead  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 21st day of January, 1988

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR RECONSIDERATION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk by use of express mail service, this 21st day of January, 1988:

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