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UNITED STATES OF AMERICA

BEFORE THE ATOMIC SAFETY LICENSING AND APPEALS BOARD

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| IN THE MATTER OF<br><br>Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency<br><br>(Shearon Harris Nuclear Power Plant) | January 10, 1987<br><br>DOCKET NO.<br>50-400 OL |

CONSERVATION COUNCIL OF NORTH CAROLINA, WELLS EDDLEMAN, PRO SE, AND COALITION FOR ALTERNATIVES TO SHEARON HARRIS' MOTION TO STAY EFFECTIVENESS OF LICENSING OF SHEARON HARRIS NUCLEAR POWER PLANT

NOW COME the Conservation Council of North Carolina (CCNC), Wells Eddleman, pro se, and the Coalition for Alternatives to Shearon Harris (CASH), collectively referred to herein as "Movants," to move the Board for a stay of the final Licensing and Appeals Board decision issued in docket number 50-400 OL, on December 31, 1986, pursuant to 10 CFR § 2.788, for the reasons stated herein and on grounds that Movants herein demonstrate a strong likelihood that they will prevail on the merits, that they will be irreparably harmed unless the stay is granted, that the granting of the stay will not harm other parties, and, that the public interest lies in favor of Movants and supports the issuance of the stay. 10 C.F.R. § 2.788(e). See, Public Service Co. of New Hampshire, (Seabrook Power Station Units 1 & 2, 4 NRC





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10 (1976); Washington Area Transit v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir., 1977).

I. APPLICANTS HAVE NOT COMPLIED WITH THE EMERGENCY PLANNING EXERCISE RULES AND ARE NOT ENTITLED TO AN EXEMPTION.

Applicants have not met all requirements under the law for an operating license. To obtain a license, Applicants must either satisfy or obtain a lawful exemption from the requirement of 10 CFR 50, Appendix E, IV, F.1, which dictates that Applicants conduct a full scale exercise of the Shearon Harris Emergency Response Plan (SHERP) within one year prior to operation of the plant above five percent of rated power.

All parties concede that the last full-scale exercise of the SHERP was conducted in May 1985, more than nineteen months prior to the Commission's January 8, 1987 authorization that Applicants be granted a license to exceed five percent power.

In authorizing the staff to consider and issue the exemption in its discretion (CLI-86-24, December 5, 1986), the Commission clearly erred by ignoring the procedural requirements of its own rules, and by failing to consider material factual issues raised by movants (Intervenors therein), which entitled movants to a hearing on Applicants' exemption request and compelled denial of the exemption request.

Rather than repeat the arguments and facts set out therein, Movants hereby incorporate and attach for the Appeals Board the Brief of Intervenors Wells Eddleman, CCNC and CASH dated September 12, 1986, including attachments thereto, hereafter referred to as "Exemption Brief", to this Motion.

Intervenors (Movants herein) demonstrated therein that the appropriate standard and procedure for exemption requests, such

as Applicants', is that set out in 10 CFR § 2.758, not that found in 10 CFR § 50.12, (see, Exemption Brief at 7-10). Rather than refuting Intervenors' arguments or considering the merits of their claims, the Commission simply noted that deciding which standard is applicable "depends upon the circumstances of each case." However, the Commission's Memorandum Order (CLI 86-24, December 5, 1986) includes no rational basis for determining what circumstances of this case compel the application of the more lax 10 CFR § 50.12 standards rather than the 10 CFR § 2.758 standard Movants contend should be applied in this case. (See, CLI 86-24, n. 5 at page 7.)

It is plain that the standard for exemptions under 10 CFR § 50.12 is to be applied only in cases of special circumstances, none of which have been contended to exist or made to appear in this case. And, the revisions to 50.12 alluded to by the Commission do not alter this rule in any way. Moreover, the suggestion that the distinction may turn on whether an exemption request is "directly related to a contention," (Id.), would make a practical nullity of 10 CFR § 2.758, since it is impossible for a party to raise a contention directly related to challenging an exemption until the exemption has actually been requested.

Even if the § 50.12 standard were appropriate, Applicants would have to show "special circumstances," i.e., circumstances compelling a finding that Applicants were in a situtaion materially and substantially different from other Applicants. Here, no such showing has been even seriously attempted, much less established. Nor has the Commission even attempted to justify its determination on the basis of any such circumstances.

Instead, the Commission simply endorsed the Staff's recommendation that the underlying purpose of the one-year exercise rule is generally to assure that emergency preparedness is adequate, (CLI 86-24, at 5-6), and that an exercise within one year of commercial operation is not necessary. That argument is little more than a renunciation of the one-year rule.

Of course, if the purpose of the rule is so broadly defined, wholesale exemptions could be granted with little limitation other than the Staff's unbridled discretion. For example, if the purpose of a thirty inch cable separation rule is defined as "ensuring that cable separation is adequate," exemptions to allow fifteen inch or even five inch separations could be granted upon any Staff finding of adequacy. In the face of so specific a rule, and absent specific standards provided for deviations which might be allowed by the Staff, the rule becomes meaningless, and such discretion is contrary to law. See, Safety-Kleen Corp. v. Deiser Industries, 518 F.2d 1399 (Cust. and Pat. App. 1975).

In fact, the underlying purpose of the one-year rule is to provide a "snapshot" which is current in time, specifically, within one year prior to plant operation exceeding five percent power, sufficient to ensure that the ERP is adequate within one year prior to commercial operation of the plant. And, on its face, an exercise held nineteen months prior to the Commissions' consideration of issuance of a full power license cannot demonstrate that the ERP is adequate within one year prior to operation of the plant above five percent power.

Considering factors such as personnel turnover and the effects of training staleness, the agency deliberately decided

upon a one-year exercise rule, thus establishing an outer limit of one year as the boundary within which any exercise might be used to demonstrate current adequacy of an ERP, i.e., that the ERP can and will be implemented. See, e.g., 46 Fed. Reg. 61134, 61135, December 15, 1981. "The Commission's objective in the 1982 amendment (putting in place the one-year rule) was to improve the conduct of exercises by placing them as close in time to commercial operation as possible..." 48 Fed. Reg. 16691, 16693, col. 3, April 19, 1983. That purpose is not met by this exemption, nor has any special circumstance been shown to justify the exemption, except for Applicants' desire to obtain a full power license before it has even completed low power licensing, and before the full-scale exercise presently scheduled for February 1987.

For the reasons stated in Movants' Exemption Brief, the Commission also erred in ruling that Intervenors were not entitled to the hearing they requested on the exemption issue. The Commission's ruling that Intervenors had the burden of proving the existence of material issues of fact as a prerequisite to such a hearing is a bizarre and unlawful mutation of the Applicants' burden of establishing grounds for the exemption, which showing was the purpose in fact of the hearing Intervenors sought.

Nevertheless, Intervenors, in their Brief, demonstrated the existence of numerous issues surrounding the staleness of the May 1985 exercise and intervening circumstances necessitating a hearing to resolve. And, by dismissing these issues without a hearing, the Commission violated Intervenors' rights to contest

the substantive issues (summarized at Parts V, VI and VII found in pages 12-42 and the attachments to Intervenors' Brief), raised by the exemption request. (See, e.g., the Affidavits of Ryan, Witherspoon, Davis, Creamer and Jernigan to the effect that essential emergency workers have received no training either before or since the 1985 exercise; Exemption Brief.)

Moreover, apart from the question of Intervenors' right to a hearing on the exemption request, the Commission has erred in leaving to the Staff the decision as to whether to grant the exemption, for 10 CFR 2.758 does not empower the NRC Staff to grant such exemptions, but rather, requires that such determinations must be made by the Commission itself.

II. THE COMMISSION'S ACTION IN AUTHORIZING ISSUANCE OF A FULL POWER OPERATING LICENSE (FPOL) ON JANUARY 8, 1987, WAS ARBITRARY AND CAPRICIOUS AND VIOLATED THE PROVISIONS OF 5 USC § 706(2)(a).

The January 8, 1987 decision of the Commission to authorize issuance of a FPOL for the SHNPP was arbitrary and capricious in light of the outstanding, unresolved, material issues of fact and law raised by the October 16, 1986 Petition under 10 CFR § 2.206 to Show Cause, and in view of the fact that low power testing of the SHNPP had not been completed at that date.

An administrative decision will be arbitrary and capricious where the agency has not examined the relevant data and articulated a reasoned explanation for its action, including a rational connection between the facts found and the determination made. Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S.CT 239, 246 (1962).

The Commission's own rules require that, in making final determinations, that the Commission consider "... all relevant

information in the administrative record whether or not it is part of the adjudicatory record." Oystershell Alliance v. U.S. Nuclear Regulatory Commission, 800 F.2d 1201, 1204 (D.C. Cir. 1986.)

In its hearing on January 8, 1987, Commission Staff acknowledged that it had not completed its investigation of the safety allegations contained in the 2.206 Petition. Moreover, the Staff acknowledged that it had verified the accuracy of much of the information provided by the 2.206 alleger. And, in previous conversations with the alleger, NRC Staff, including Mr. Harold Denton, had been informed by the alleger and his Counsel that the alleger had other important safety information to provide the NRC, and that he was willing to provide such information if the NRC staff would provide him with ongoing updates of its findings resulting from its investigation of the alleger's initial information. In response, NRC Staff, including Mr. Harold Denton, assured the alleger and his Counsel that photographs taken during the investigation and supplemental information from the investigation would in fact be provided to the alleger to clarify the NRC's findings and to assist in informing the alleger as to the nature and scope of what other information would be needed by the NRC. (See, e.g., Transcript of NRC Staff Interview of the Alleger, dated December 18, 1986, at page 57, lines 9-13.)

Notwithstanding these assurances, and the Staff's clear understanding that the alleger had further information to provide the NRC, the NRC never provided alleger or his Counsel with any further information about the investigation, nor did the Staff seek in any way to cooperate with the alleger to obtain any other

information from alleger.

Before a license may be issued, the Commission must find reasonable assurances that the public health and safety will not be endangered by operation of the plant. Power Reactor Development Co., 1 AEC 10, 12 (1956).

Action on the full power license, in the face of such an incomplete investigation, without resolution of the 2.206 allegations or any effort fully to obtain the information referred to by alleger, fails to satisfy the requirement that the NRC base its licensing decision on a careful and thorough investigation of all safety related information, within or outside the adjudicatory record. Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 735 F. 2d 1437, 1443 (D.C. Cir., 1984). This deficiency is hardly cured by plenary, unexplained findings of non-safety significance, especially where absolutely no information supporting such a conclusion was made available to the parties prior to the Commission's January 8, 1987 full power licensing hearing.

III. THERE IS A STRONG PROBABILITY THAT MOVANTS WILL PREVAIL ON APPEAL; A STAY IS NECESSARY TO PRESERVE THE STATUS QUO; NEITHER THE APPLICANTS NOR THE NRC WILL BE HARMED BY A STAY; AND A STAY IS NECESSARY TO SERVE THE PUBLIC INTEREST.

While Movants make a strong showing that they will prevail on the merits, there is no necessity to show such probability with mathematical precision. Rather, when weighing the equities, a stay should issue when necessary to preserve the status quo where, as here, material issues of law and fact remain unresolved before the Commission. See, Washington Metropolitan Area Transit v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977). In this case, the unresolved 2.206 safety issues bear directly upon the NRC's

ability to determine that the plant is constructed in accordance with NRC specifications and preclude a finding by the Commission that the SHNPP will operate without endangering the public health and safety. The Commission's determination to let the Staff determine whether or not to exempt Applicants from the one-year, full-scale exercise requirement under 10 CFR 50, Appendix E, effectively deprives Movants of their right to a hearing on this issue, and leaves without resolution the issues presented in their Exemption Brief. A stay is necessary to preserve the status quo pending proper and lawful resolution of these issues.

Furthermore, Movants would risk irreparable harm of potentially destructive magnitude unless the stay is issued. The risk is the more real in this case because the unresolved material issues of law and fact preclude any rational finding by the Commission of reasonable assurance that the SHNPP will in fact operate safely or that the SHNPP ERP is currently adequate and feasible to provide reasonable assurances of the public health and safety in the event of an emergency at the plant.

And, such a stay to preserve the status quo will cause no harm to the Applicants or the NRC. No claim of economic hardship by Applicants is cognizable or may be contrasted with or weighed against the public health and safety interests which are this Commission's paramount charge to protect. Power Reactor Development Co. v. International Union, 367 U.S. 396 (1961). Indeed, any economic harm would be speculative because the rate case and the audit of construction costs has yet to be completed and will certainly be contested by intervenor groups.

Finally, it is clear that protection of the public interest compels a stay of these proceedings for the reasons set out above. The Commission's paramount concern is to assure and protect the public health and safety, not the expeditious licensing of nuclear power plants. And, until the Commission has duly considered the outstanding issues so as to be in a position to make a rational judgment as to the bearing of all the safety related issues before it either upon or outside its official record, the public interest compels a stay of the effectiveness of any full power license for the SHNPP.

SUMMARY

For the foregoing reasons, Movants respectfully petition the Atomic Safety Licensing and Appeals Board to stay, for an indefinite time, the licensing of the SHNPP pending compliance with the provisions of its regulations, and in particular, until Movants have been provided with information showing the completion and results of the Staff's investigation of the allegations of the 2.206 Petition, until Movants have been provided a reasonable opportunity to prepare and present their response thereto to the Appeals Board and/or the Commission, until the conclusion of low power testing of the SHNPP, and until after the Applicants have conducted a full scale exercise of the SHNPP ERP in compliance with the provisions of the rule requiring such an exercise within one year prior to operation of the SHNPP at greater than five percent of rated power.

This the 10th day of January, 1987.

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UNITED STATES OF AMERICA

BEFORE THE ATOMIC SAFETY LICENSING AND APPEALS BOARD

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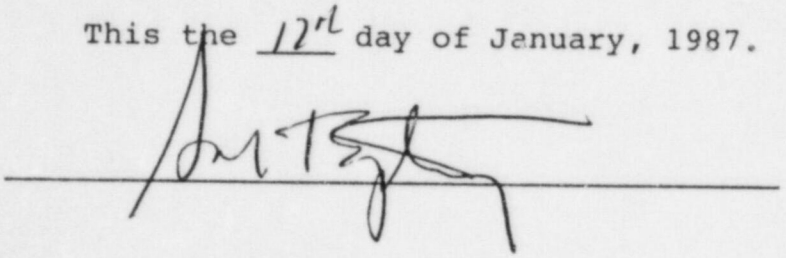
| IN THE MATTER OF<br><br>Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency<br><br>(Shearon Harris Nuclear Power Plant) | January 12, 1987<br><br>DOCKET NO.<br>50-400 OL |

CERTIFICATE OF SERVICE

This is to certify that on this date copies of the Motion to Stay Effectiveness of Licensing of Shearon Harris Nuclear Power Plant filed by the Conservation Council of North Carolina, Wells Eddleman, pro se, and the Coalition for Alternatives to Shearon Harris were served upon the individuals listed on page 1 of the attached Service List by hand delivery to the office of the Secretary of the Nuclear Regulatory Commission, Docketing and Service Section, Washington, D.C., with a separate copy being addressed to each of those individuals.

The individuals listed on page 2 of the attached Service List were this day served with the above-entitled Motion by depositing them, first class postage prepaid, in the U.S. Mail, addressed as indicated on page 2.

This the 12th day of January, 1987.



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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| 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) | ) | |

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