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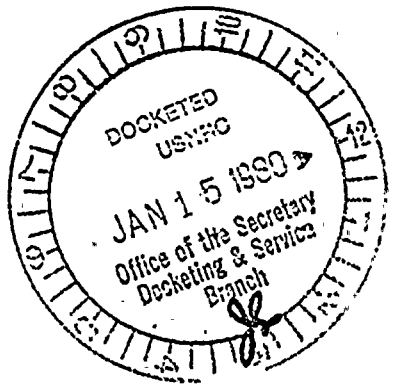
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING BOARD

Ivan W. Smith, Chairman
Glenn O. Bright
Dr. J. Venn Leeds

In the Matter of	)	Docket Nos. 50-400
	)	50-401
CAROLINA POWER & LIGHT COMPANY	)	50-402
	)	50-403
(Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4)	)	

MEMORANDUM
(January 14, 1980)

On July 13, 1979 this board issued a supplemental initial decision adding a condition to the Shearon Harris construction permit which would require an evidentiary hearing during the review of the application for an operating license on the issue of management capability and technical qualifications to operate the facility. LBP 79-19, 10 NRC 37, 98 (1979). The NRC staff filed exceptions to portions of the supplemental initial decision stating, inter alia, that this board exceeded its jurisdiction and authority in ordering a mandatory operating license hearing. The Appeal Board noted that we had not discussed jurisdiction in the supplemental initial decision and that, because none of the parties submitted a brief in response to the staff's

exception brief, the staff's attack on our action has gone unanswered. Memorandum dated October 12, 1979. The Appeal Board invited us to furnish our views on those considerations which led us to conclude that we had the authority to impose the condition. Id.

Our report is in two phases. First we will explain why at the time we issued the supplemental initial decision, we believed we had the authority to impose the condition, and second, what our views are now that we have considered the points made by the staff in its brief. We do not address the staff's position that, even assuming jurisdiction, there is insufficient basis for our action. The premise of our view is that there is sufficient basis and that the evidentiary record establishes that the condition is appropriate.

The staff points to the scheme of bifurcation of proceedings set out in Sections 185 and 189(a) of the amended Atomic Energy Act and the differing approaches under 10 CFR §2.104(a) and 2.105(a). The staff observes that, where there is no request for a hearing or intervention petition filed, no hearing is ordinarily held on an operating license application. Staff brief, pp. 11 and 12. We were aware of this practice and we considered the historical precedent of noticing operating license hearings only under 10 CFR §2.105 upon a request for hearing. In fact, we know of no case where

an operating license proceeding was initiated directly under the provisions of §2.104(a). But §2.104(a) clearly authorizes an operating license hearing where "... the Commission finds that a hearing is required in the public interest ...." We concluded then, as we do now, that consideration of 10 CFR §2.105 is irrelevant to whether a hearing should be ordered. It is only remotely relevant, if at all, to the issue of this board's jurisdiction.

Our final conclusion of law and fact in the supplemental initial decision was that an operating license hearing on the relevant issues will be required in the public interest. Paragraph 202, 10 NRC at 98. This was studied language intended to satisfy the requirements of 10 CFR §2.104(a). This conclusion is the natural product of our findings of fact.

We began our consideration with the premise that this agency, through its valid regulation, could and should order the operating license hearing. We do not believe that there is any real dispute that the Commission may do what we have attempted to do. This issue is whether the licensing board may do so as the Commission's delegate.

We considered the fact that §2.104(a) provides that the "Commission" must make the required finding of public interest. Regulation 10 CFR §1.1(b) defines the "Commission"

as the collegial body of Commissioners or a quorum of Commissioners. Only "Nuclear Regulatory Commission" is defined as including agency representatives authorized to act in any case or matter. This could suggest that the use of the word "Commission" in §2.104(a) excluded authorized representatives, but the term "Commission" is used throughout Title 10 where the agency, not the collegial body of Commissioners, is intended. In any event, §191(a) of the amended Atomic Energy Act provides that the "Commission" may establish Atomic Safety and Licensing Boards to conduct hearings and to make decisions. In implementing §191 of the Act, 10 CFR §2.721 states again that it is the "Commission" who authorizes Atomic Safety and Licensing Boards to "... perform such other adjudicatory functions as the Commission deems appropriate." We did not read the statute and the rules to necessarily preclude presiding officers from exercising the authority of 10 CFR §2.104(a), if the presiding officer is the Commission's authorized agent in the matter.

The staff does not directly address this point and we remain of the opinion that we may exercise the powers of §2.104(a) if our designation as the construction permit licensing board can reasonably be regarded to include that authority. We think it can, but we were also aware that a fair question exists whether licensing boards may initiate an adjudicatory proceeding.

In search of the answer we read Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167 (1976). The Appeal Board in that case affirmed the determination by a licensing board, designated to hear radiological health and safety and environmental matters, that it was not authorized to hear antitrust matters under §105(c) of the Atomic Energy Act. In Marble Hill the Appeal Board stressed three material circumstances not present in this proceeding. The subject matters (antitrust compared to health, safety and environment) were not related in any way. Below we review why the subject matter of the imposed condition is closely related to the issues in the construction permit proceeding. pp. 16, 17, infra.

The Marble Hill Appeal Board also noted that the Commission's expressed policy and Rules of Practice provide for separate hearings on antitrust matters, citing 10 CFR Part 2, App. A, Sec. X(e) and 10 CFR §2.104(d). This consideration is irrelevant to the issue presented in Shearon Harris. The Appeal Board also noted that the Commission had previously noticed the opportunity for a separate antitrust hearing on the Marble Hill facility, another indication that antitrust was excluded from the delegation to the construction permit licensing board. This consideration doesn't apply here. Finally the Appeal Board noted in dicta that,

as a practical matter, licensing boards in antitrust matters may have members selected for expertise in that subject. Nothing in Marble Hill indicates that the delegation to us in this proceeding excludes authority for the action we have taken.

Houston Lighting and Power Company, (South Texas Project, Units Nos. 1 and 2) ALAB-381, 5 NRC 582 (1977) is also an antitrust case but the scope of jurisdiction discussion is relevant to our matter. In South Texas the Appeal Board ruled that a licensing board designated to rule upon antitrust intervention petitions under §2.714(a) is precluded from reopening a construction permit proceeding when the (earlier) presiding officer's jurisdiction had been terminated under §2.717(a), and that, in the absence of either a pending construction permit or operating license proceeding, the petitions review licensing board had no jurisdiction to order the antitrust hearing. 5 NRC at 589-92. We considered South Texas and understood its teaching that "... licensing boards have no independent authority to initiate any form of adjudicatory proceeding." Id. p. 592. The Appeal Board stated further that this must be done by "some other component of the Commission" under one of five procedures specified in the rules, including the rule authorizing a hearing which, in the public interest, should be heard under §2.104.

We recognized that, in South Texas, the "some other component of the Commission" authorized to order hearings was contrasted to the licensing board improperly attempting to do. But we regard our board to be the delegate of the "other component" -- the Commission itself. The Appeal Board in employing the "other component" language was not addressing a situation where, as here, the action ordering the hearing was in furtherance of achieving the results clearly mandated in the construction permit notice of hearing -- protection of the health and safety of the public.

The staff cites National Bureau of Standards, 2 NRC 323-24 (1963). This case does not discuss jurisdiction at all. In that case the presiding officer's "observations" as to the desirability of holding a further hearing prior to the issuance of the operating license were deemed by the Commission not to be a condition or qualification affecting the validity of the provisional construction permit. In fact, the Commission refused to grant the staff's petition to review the aspects of the presiding officer's decision relating to his order for a further hearing. The Commission instead elected to have the presiding officer consider reopening the construction permit proceeding to hear the unresolved issues. National Bureau of Standards is a rudimentary and summary form of early Atomic Energy Commission memorandum and order. It is ill-suited to provide guidance in the subtle and complex issue of licensing board jurisdiction.

However, we may not so easily dispose of the Commission's holding in Florida Power and Light Company, (Turkey Point Nuclear Generating Plant, Units 3 and 4) 4 NRC 9 (1967). There the licensing board conditioned the construction permit to require subsequent meteorological monitoring and other information to be considered at a later hearing. As quoted by the staff in its brief, the Commission stated:

> ... the Commission has not delegated to atomic safety and licensing boards the authority to direct the holding of hearings following the issuance of a construction permit.

Id. at 15.

We were not aware of Turkey Point when we conditioned the Shearon Harris permit. If we had been, we would have discussed our reasons for asserting jurisdiction because we concede that the cited language fairly raises questions about our authority. We appreciate the opportunity to do so now.

The language relied upon by the staff in Turkey Point is dicta. No other part of the decision refers to the board's jurisdiction. The case actually turned upon a finding by the Commission that the matter does not involve a substantial safety problem; that the information can be developed during remanded construction permit proceedings while the provisional construction permit remains in force. The Commission in Turkey Point clearly expressed the desire to adjudicate as much of the unresolved factual issue as possible during the

construction permit proceeding rather than deferring matters unnecessarily to the operating license stage. Id. p. 17.[1/] We would prefer to do this too, but, as we stated, this option was not practical in the Shearon Harris proceeding.

The staff has identified the foundation for our jurisdiction in this proceeding. We are bound by the notice of hearing on the application for construction permits.[2/] By extension and by regulation we must also apply the standards of §50.35(a) and §2.104(b)(1)(i). The staff is correct in stating that the Commission did not enlarge upon the notice of hearing in its

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1/ In Florida Power Corporation (Crystal River Unit 3 Nuclear Generating Station), 5 NRC 318 (1970) the licensing board (at 5 NRC 173) qualified its order by recommending that the Commission condition the permit to require a later hearing on a safety issue. The Commission granted exceptions on the grounds there was no basis nor need to direct a future hearing. 5 NRC at 322. The Commission ruled that it could order a public hearing on the operating license application if it found that one was desirable or if an interested member of the public requests one. Id. There is a superficial similarity between Crystal River and this proceeding. Crystal River is cited by the staff in another context. However Crystal River does not discuss jurisdiction of a CP board to order a hearing based upon a considered conclusion that the public interest requires one.

2/ 37 Federal Register 20,344, September 29, 1972.

remand order, nor did we request an enlargement. We have no more authority than do other licensing boards in usual construction permit proceedings. Staff brief, p. 14.

The staff hypothesizes that the board relied upon the common language in §2.104(b)(1)(d) and §50.35(a)(4)(ii) as support for our asserted jurisdiction. Staff brief, p. 16. This was not the case.

The question under §50.35(a)(4)(ii) is whether, "...

> taking into consideration the site criteria contained in Part 100 of this chapter, the proposed facility can be constructed and operated at the proposed location without undue risk to the health and safety of the public. [Emphasis added.]

The notice of hearing also references Part 100 in this particular. We read §50.35(a)(4)(ii) to permit an inquiry into facility operation but only to the extent that the site criteria are met. Therefore we believed that the "can be ... operated" language of §50.35(a)(4)(ii) probably does not grant authority to the board to inquire generally, as we have, into applicant's management capability. Nor is there any other language of §50.35(a) expressly permitting such an inquiry.

We found our basic grant of authority to consider the question of management capability and technical qualifications

to operate Shearon Harris to rest in the general provisions of §50.35(a)(3) and (4)(i)[3/] and the implementing provisions of §50.34(a)(6). How the analysis goes from §50.35(a) to §50.34(a) is well explained by the Appeal Board in Gulf States Utilities Company (River Bend Station, Units 1 and 2) ALAB-444, 6 NRC 760, 776-78 (1977) where we learn:

> Whether every one of the first three of these findings [Sec. 50.35(a)(1)(2) and (3)] will be possible in a given case obviously will depend in large measure upon whether the applicant has furnished the information explicitly required by other provisions of 10 CFR Part 50--such as Section 50.34(a) which specifies what must be set forth in the PSAR submitted as part of the permit application (see p. 765, supra). If it has not been supplied, the findings cannot be made. [Citation omitted] If it has been supplied, the licensing board's task becomes one of determining whether, on the basis of the totality of the record before it (which will include not merely the revelations in the application itself but, as well, all other information elicited either during the prehearing review or in the course of the hearing itself), the [Section 50.35(a)(4)] finding can be made. Stated otherwise, in the last analysis whether the absence of information not explicitly required to be supplied at the construction permit stage will stand in the way of permit issuance authorization hinges upon the ability of the licensing board to find, without more than has been placed before it, the existence of reasonable assurance both (a) that there will be a satisfactory resolution of the outstanding safety questions prior to operation of the facility, and (b) that that operation will not present undue risk to the public health and safety. [footnotes omitted ; emphasis in original]

Id. at 777-78.

3/ §50.35(a) provides that the Commission may issue a construction permit if it finds, inter alia that: (3) safety features of components, if any, which require research and development have been described by the applicant and the applicant has identified, and there will be conducted, a research and development program reasonably designed to (footnote continued)

It was by this reasoning that we arrived at the conclusion that, before the licensing board can make the favorable finding required under §50.35(a)(4)(i), applicant must include in its preliminary safety analysis report the information required under §50.34(a)(6); i.e. a preliminary plan for the applicant's organization, training of personnel, and conduct of operations.

The next step in our analysis was to consider whether the board is authorized under §50.35(a)(3) and (4) as implemented by §50.34(a)(6), to make a thorough inquiry into applicant's management capability and technical qualifications to operate Shearon Harris. The board originally thought so when we submitted such question to the staff before the hearing and when we received the responding testimony. Any doubts that we were authorized to conduct an inquiry in such depth were removed in ALAB-490 when the appeal board in this proceeding indicated in very certain terms that the licensing board had not explored the issue sufficiently. 8 NRC 234, 243. By remanding the matter, the Commission implicitly agreed with the licensing board and the appeal board that management

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3/ Continued:
resolve any safety questions associated with such features or components; and that (4) on the basis of the foregoing, there is reasonable assurance that, (i) such safety questions will be satisfactorily resolved at or before the latest date stated in the application for completion of construction of the proposed facility, ...

capability and technical qualifications to operate the facility were appropriate issues to be heard in a construction permit proceeding. 8 NRC 293-94.

We do not believe that it reasonably can be disputed that the law of this case and the law of the Commission is that the details of an applicant's ability and technical qualifications to operate the proposed facility may be considered under § 2.104(b)(1)(i), § 50.35(a) and §50.34(a). This is true no matter how many cases the staff can cite to the effect that the standard is limited to whether the plant "can be" operated without undue risk. Brief 16-18.

We believe the staff misreads §50.35(a)(4). As we stated above, we have not relied upon subpart 4(ii), ("can be ... operated") because it is relevant only to Part 100 considerations. p. 10 supra. The staff erroneously applies the "can be" standard to this case.

The Appeal Board and the Commission, having determined that management capability and technical qualifications are properly considered in a construction permit proceeding, it necessarily follows that this board, by virtue of the notice of hearing, is the Commission's delegate on the issue. This is so, not only for the purpose of hearing and deciding the issue, but for ordering any appropriate license condition. This is what

we believe to be the essence of the issue; it is a question of remedy, not jurisdiction. As the Commission's delegate we have whatever jurisdiction to order appropriate remedies the Commission itself has, unless Commission rule or regulation otherwise limits that delegation. It does not.

Section 183 of the amended Atomic Energy Act authorizes the Commission to condition licenses as it may prescribe by rule or regulation. Similarly, §105(c)(6) of the Act permits the Commission in an antitrust proceeding to issue a "... license with such conditions as it deems appropriate." The similarity between the Commission's authority to condition licenses under §105(c) and under §183 of the Act is significant because of the parallel Appeal Board discussion of licensing board jurisdiction in South Texas, supra. There the Appeal Board observed that, in no respect (present in that case) does an antitrust review stand on a different footing than a safety review. Both antitrust and safety reviews are conducted in connection with the adjudication of a construction permit. Id. 5 NRC at 592-93. A licensing board's authority to impose remedies in health, safety and environmental proceedings differs in no way that we can discern from an antitrust licensing board's respective authority. The statutes and South Texas indicate that the Commission's conditioning power is the same and that the licensing board's delegated authority is parallel.

Antitrust decisions have been very instructive concerning the jurisdiction of licensing boards to impose conditions. In Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-450, 6 NRC 887 1099 (1977) the Appeal Board remanded that antitrust matter to the licensing board to consider licensing conditions. The licensing board was instructed:

> In fashioning a remedy, we offer the Licensing Board one further caution. We believe that no type of license condition [examples omitted] is necessarily foreclosed as a possible form of relief.

Id.

The appeal board went on to warn, however, that the condition imposed "... may not be divorced from the purposes of the legislation." Id. at 1100. This was the only limitation upon the licensing board's jurisdiction, and we readily accept this limitation as controlling here.

The appeal board in the Toledo Edison Company, et al. (Davis Besse Nuclear Power Station, Units 1, 2, & 3) ALAB-560 10 NRC ___, (Slip Opinion September 6, 1979) put into effect the earlier teaching of Midland when it approved broad antitrust license conditions imposed by the licensing board. Id., pp. 42 et seq. n. 60.

The authority of licensing boards to condition construction permits does not stop at the door of the operating license. The Davis Besse, supra, Appeal Board approved and, in fact, broadened conditions which will continuously affect

the operation of the five plants involved in that proceeding. Id.

Even closer to our situation, in Arkansas Power and Light Company (Arkansas Nuclear One, Unit 2), ALAB-94, 6 AEC 25, 28, 29 (1973), the Appeal Board affirmed a decision by a construction permit licensing board placing upon the construction permit an environmental condition (effluent restrictions) upon the operation of the facility.[4/]

There is a very practical reason why the delegation of authority to licensing boards to fashion relief has not been and should not be restricted more than would further the purposes of the statute. It is impossible in advance to predict and to provide for the infinite combinations of factual problems and their solutions. Licensing boards must have the authority to solve identified problems or the hearing process becomes pointless. The Commission recognizes the need for a broad delegation of authority to presiding officers conducting hearings. Pursuant to §2.718(l), presiding officers have the power to take any action consistent with the Atomic Energy Act, Chapter 1 of Title 10, and sections 551-558 of the Administrative Procedure Act. The delegation under the Administrative Procedure

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4/ The staff cited Arkansas One in support of Crystal River supra, to the effect that a licensing board may not require a hearing before the issuance of an operating license. Staff Brief, p. 17. We can find no such support in Arkansas One. There the licensing board recognized, as we do, that there is no mandatory operating license hearing. 6 AEC at 26. Indeed, that is why we ordered one. The Appeal Board did not have before it the question of licensing board jurisdiction to proceed as we have.

Act embraces virtually every power possessed by the Commission itself in the conduct of administrative procedures.

Having satisfied ourselves that the Commission delegated to us the authority to fashion whatever relief is required to further the purposes of the statute, the notice of hearing, and §50.35(a), we considered our options.

We had doubts about the adequacy of applicant's showing required under §50.34(a)(6) for the reasons we explain in the supplemental initial decision. 10 NRC at 96, 97, paragraphs Nos. 197-200. It would have been neater to retain jurisdiction as a construction permit licensing board to resolve our doubts later on a reopened record. But these doubts are not precisely quantifiable and we did not believe that they were sufficient to disturb the conclusion of the initial decision (Paragraph No. 197, 7 NRC at 143) that the four requirements of §50.35(a) had been met. We recognize that there is some inconsistency in finding that doubts persist under §50.34(a)(6)[5/] but that §50.35(a) standards have been met, but that is how we viewed the state of the record. It was balanced between perhaps suspending the construction permit (because our §50.35(a) findings were invalid) or moving on to a more practical and equitable solution.

5/ The staff misunderstood our Paragraph No. 198, 10 NRC 97. As a result, it has miscited the finding opposite to its intended meaning. Staff brief, p. 18. In Paragraph No. 198 we stated "... the remedy might have been to suspend the construction permit until the requirements of §50.34(a)(6) have been complied with." This is not the same as saying that the section has been satisfied. Our very next paragraph, No. 199, explains that doubts remain, and we go on to say that licensee still has the burden to address them.

Among the remedies we considered was a condition which would require the applicant to produce a better preliminary plan for the organization, training of personnel and conduct of operations as required under §50.34(a)(6). This was strongly opposed by applicant and the staff. We didn't think much of the idea either as we explained in Paragraph No. 200, (10 NRC 97). The condition we imposed was easier for the applicant to meet and was better suited to determine whether there would be reasonable assurance that this safety question has been or will have been resolved within the time framework required under §50.35(a)(4).

But what is equally important is that the condition we imposed avoids an absurd result; one which certainly was not intended in the Commission's delegation to us.

Here there is a statutorily authorized licensing board, two members of which have technical nuclear expertise. The board was charged by the notice of hearing and by law to act impartially in the public interest. It had the benefit of an extensive evidentiary record. We did not believe it was carefully considered Commission law that this board could not under any circumstance have the delegated authority to find under §2.104(a) that a hearing on the operating license is required in the public interest. Virtually any person demonstrating interest, residing, say fifty miles from the

facility, can request and be granted the very hearing we have ordered. §2.714.

Conclusion and Summary

We have reviewed our original position and have inquired further into the question of board jurisdiction. We still believe that we have the authority to order an operating license hearing. The relief we order is closely related to the problem to be solved. The situation requiring the remedy was one properly cognizable under the Act, regulations and notice of hearing. The Commission has granted licensing boards broad authority to act as its delegates in furtherance of statutory purposes. Antitrust cases are good examples of this broad grant. Licensing boards in radiological health and safety proceedings require no less jurisdiction than do antitrust boards. There is no regulation denying boards the authority to order the relief required to protect the health and safety of the public. The only argument against the existence of jurisdiction is the dicta in Turkey Point, supra, and the NRC practice where presiding officers have not ordered hearings to be held after their jurisdiction terminates.

We don't believe that either Turkey Point or traditional practice reflects the controlling law because the facts of this case are different in that there is no other practical remedy for the unresolved safety issue in this case. However, even if

Turkey Point does reflect the status of Commission policy, the Appeal Board or the Commission should, by decision, change its policy to meet the modern requirements of the NRC's mission to serve the public. The Commission noted this need in its mandate to licensing boards in its Suspension of 10 CFR §2.764 and Statement of Policy on Conduct of Adjudicatory Proceedings, (November 5, 1979): "In reaching their decisions the Boards should interpret existing regulations and regulatory policies with due consideration to the implications for these regulations and policies of the Three Mile Island accident." Id. p.4.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ivan W. Smith, Chairman

Bethesda, Maryland
January 14, 1980