

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF RESPONSE TO APPEAL OF DENIAL OF INTERVENOR  
STATUS TO KUDZU ALLIANCE AND WELLS EDDLEMAN

The NRC Staff asks that the Appeal Board affirm the Licensing Board's Memorandum and Order Denying Intervention Petition dated January 10, 1979, which denied Intervenor status to the Kudzu Alliance and Wells Eddleman (Petitioners).

Petitioners filed a series of letters, the first being November 7, 1978, treated together as a petition to intervene, requesting that they be made parties to the remanded hearing. Petitioners proposed as contentions to be litigated at the remand hearing a number of issues beyond the scope of NRC's license authority, i.e., the civil liberties of Mr. Eddleman, CP&L's financial relation to its stockholders, the propriety of nuclear power (a matter for Congress), and the work history and financial holdings of NRC and CP&L personnel. As to these contentions no further discussion is necessary.

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Petitioners also sought to have accepted as contentions issues beyond the jurisdiction of the Licensing Board which is limited to the scope of review directed by the Commission in its order of September 5, 1978, which states:

This proceeding is remanded to the Atomic Safety and Licensing Board for a further hearing on the management capabilities of CP&L to construct and operate the proposed Shearon Harris facility without undue risk to the health and safety of the public.

Petitioners now also seek additionally to raise as contentions such matters as radioactive waste disposal, benefit-cost analysis, radiation protection, "and other issues" (Appeal Brief, page 5), financial qualifications (Appeal Brief, page 12), and others. As to those contentions, the Petitioners are fundamentally trying to reopen the record to relitigate issues previously litigated and to reopen the initial decision. This they may not do.

When a matter is remanded for a particular issue only that issue may be considered, the prior determination on all other issues is dispositive. See Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 750-751 (1977). With the exception of the Commission's order of September 5, 1978, this administrative proceeding is closed.

The legal standards for reopening a hearing are quite specific. There must be a significant unresolved safety issue, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-124, 6 AEC 358 (1977) or a major change in facts material to the resolution of major environmental issues, Commonwealth Edison Co. (La Salle County Nuclear Station, Units 1 and 2), ALAB-153, 6 AEC F.2d (1973). The proponent of

such a motion has a heavy burden to bear, Kansas Gas and Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320 (1978). None of the aforesaid affirmative requirements are met in Petitioners' filings, including the Appeal Brief. Further, there has been no change in any material facts relating to the issues before the remand hearing Board since the issuance of the Initial Decision (ID) on January 23, 1978, LBP-78-4, 7 NRC 92 (1978) and its affirmation by the Appeal Board on August 29, 1978, ALAB-490, 8 NRC 234 (1978).

The Petitioners assert some contentions such as "inadequate verification of pipe cracks which may arguably be within the scope of the remanded proceeding as they may relate to the management capability of Carolina Power and Light Company to design, construct and operate the proposed facility. However, even as to those matters, Petitioners are late in filing for intervention. The management capability of Carolina Power and Light to design and construct the facility has been at issue since the Notice of Hearing appeared in the Federal Register on October 21, 1972. That Notice of Hearing (32 Fed. Reg. 20344) issued by the Commission provided that petitions to intervene must be filed no later than October 21, 1972. The Licensing Board convened to preside over the construction permit proceedings by Order dated June 17, 1977, invited further petitions to intervene, to be filed

no later than July 8, 1977, upon conditions substantially changed between October 21, 1972, and June 17, 1977, subject to the requirements of 10 CFR §2.714 for late petitions. No petitions to intervene were received pursuant to the Licensing Board's June 17, 1977, order; and Petitioners first filed their letters seeking intervention in November, 1978. Plainly they were out of time.

The rules for intervention have recently been amended to provide that one seeking to intervene in a proceeding after the time allowed in the rules must first demonstrate interest and good cause or justification for such late filing addressing the four factors set out in 10 CFR §2.714a(1)(ii-v) and then, if admitted, set forth contentions and the basis thereof. No showing is made in the petition to intervene as to how the interests of Mr. Eddleman or the Kudzu Alliance could be affected by the proceeding. The November 7, 1978, letter-petition does not even purport to set forth good cause for filing some six years late (§2.714 (a)(1)(i)) nor do the Petitioners discuss the four factors of 10 CFR §2.714a(1)(ii-v). In order to intervene the Petitioner must make a substantial showing of good cause for failure to file on time or a particularly strong showing that the four factors of §2.714 weigh in

his favor.<sup>1/</sup> Here there is little attempt to even address these factors. In considering these factors it should be noted:

- (1) There have been complete environmental and safety hearings which encompassed Petitioners' concerns as set forth in their letters-petition, except for those concerns which are beyond the scope of NRC's license authority.
- (2) There is no showing of any special expertise which would assist in the development of a sound record in regard to the matters which will be heard at the remand proceeding.
- (3) The particular parochial interests of the members of Kudzu Alliance may not have been represented during the course of the license proceeding--but if so, this is due to their having sat silent for six years while the Harris application was being processed through the issuance of construction permits.

1/ Those factors are:

- (1) The availability of other means whereby the Petitioners' interest will be protected.
- (2) The extent to which the Petitioners' participation may reasonably be expected to assist in developing a sound record.
- (3) The extent to which Petitioners' interest will be represented by existing parties.
- (4) The extent to which the Petitioners' participation will broaden the issues or delay the proceeding.

See Duke Power Company, (Perkins Nuclear Station Units 1, 2, and 3) ALAB-431, 6 NRC 460 (1977) at pages 462 and 463 for a dispositive discussing late petitions and the Commission's Ruling.

(4) To admit the Kudzu Alliance now as Intervenors will both broaden the issues and delay the proceeding--which has been remanded for the sole purpose of accepting evidence in the "management capabilities of CP&L to construct and operate the proposed Shearon Harris facility without undue risk to the health and safety of the public;

(5) The special concern and involvement of the Commission and the Licensing Board in the management capabilities of CP&L to construct and operate the proposed Shearon Harris facility provides assurance that the public health and safety interests of the local population will be adequately explored and addressed at the hearing.


Mr. Eddleman argues (Appeal Brief, page 20) that since he did not live in North Carolina when the Harris project started and intervention was appropriate, that this constitutes "good cause." If this were so then no NRC licensing proceeding would ever terminate since we know that daily, year after year, people move in and out of North Carolina. There must be an end and finality to administrative litigation. A citizen who moved into North Carolina takes the state as he finds it. He has no rights ex post facto to relitigate the past. His rights are present and prospective. In the Staff's view the Licensing Board was correct in holding

that never-ending litigation was incompatible with administrative due process. The Appeal Board has also adopted and approved the judicial principle that "litigation has to end sometime" (Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741 at 750 (1977)).

Here a showing of interest, good cause or justification under 10 CFR §2.714a(1)(ii-v) are all absent and, in substance, the contentions are largely beyond the scope of NRC's license authority or the authority of this particular Licensing Board. In addition, the Petitioners fail to make out a case for reopening the proceeding.<sup>2/</sup>

For all of the foregoing reasons, the NRC Staff urges that the petition to intervene by Kudzu Alliance and/or Mr. Wells Eddleman be denied, and that the Licensing Board's Memorandum and Order Denying Intervention Petition dated January 10, 1979, be affirmed.

Respectfully submitted,

  
Charles A. Barth  
Counsel for NRC Staff

Dated at Bethesda, Maryland,  
this 9th day of February, 1979.

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<sup>2/</sup> Denial of intervention status in the remanded hearing does not, of course, preclude the Petitioners from raising safety concerns before the Commission. There is always available to the general public 10 CFR §2.206 which permits them to petition the Commission to institute a proceeding addressed to real and significant safety concerns.

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Plant, Units 1, 2, 3 and 4 )

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPEAL OF DENIAL OF INTERVENOR STATUS TO KUDZU ALLIANCE AND WELLS EDDLEMAN" 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 by deposit in the Nuclear Regulatory Commission internal mail system, this 9th day of February, 1979:

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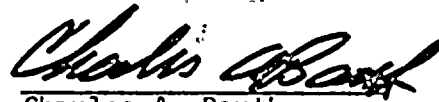
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