UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Joseph M. Hendrie, Chairman
Victor Gilinsky
Richard T. Kennedy
Peter A. Bradford
John F. Ahearne

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

ORDER

Intervenors Conservation Council of North Carolina and Wake Environment, Inc., have moved the Commission to reopen and remand one aspect of this proceeding to the Licensing Board. In their brief motion, Intervenors argue that the Licensing Board decision in 1978 to permit construction of the Shearon Harris plants is implicitly, if not explicitly, premised on the soundness of the Reactor Safety Study (WASH-1400), otherwise known as the Rasmussen Report. Intervenors point out that the Commission withdrew its support for certain aspects of WASH-1400 by the adoption of a report by the NRC Risk Assessment Review Group in 1979, known as the Lewis Report. Based on this decision, the Intervenors seek the opportunity to litigate unspecified contentions "relating to the effects of the Lewis Report upon the Shearon Harris proceeding." Both the NRC staff and the applicant have filed oppositions to this motion. As the Commission decided in response to another request for a remand, "the Shearon

Harris proceeding is now concluded except for the radon question pending before the Appeal Board and the management qualification issue which we remanded to the Licensing Board." Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-79-5, 9 NRC ____ (May 2, 1979) (slip opinion p. 4). Consequently the appropriate remedy in this case is for intervenors to request action under 10 CFR 2.206. However, since that opinion was issued after this motion was filed, we will address the motion for remand on the merits.

We understand the Intervenors' argument to be that adoption of the Lewis Report has somehow altered, in a manner not identified in the motion, the basis for the Harris Initial Decision. Even assuming this connection to have been squarely presented, it is not supported by the record in this case. No reference is made to the Rasmussen Report in the Initial Decision. See LBP-78-4, 7 NRC 92 (1978). Similarly, no such reference appears in the Appeal Board affirmation. ALAB-490, 8 NRC 234 (1978). In fact, our attention is called to only two instances where the Rasmussen Report is mentioned: in the Final Environmental Statement (by reference to the fact that the study leading to the Report was in progress) and in prepared staff testimony about the comparative health effects of the nuclear vs. the coal fuel cycle. In the latter instance, the staff testimony noted the uncertainties in the Rasmussen Report. Most significantly, the staff noted this prepared testimony (which became draft NUREG-0332) in its review of regulatory actions referencing the Rasmussen Report after the adoption of the Lewis Report; the staff found that no reconsideration of the individual licensing actions was necessary. The Commission agreed.

In the instant proceeding, Intervenors have failed to make a showing that the Harris Initial Decision was in any way dependent upon the Rasmussen Report and that adoption of the Lewis Report represented a change in material fact so as to warrant litigation anew. See ICC v. Jersey City, 322 U.S. 503, 514 (1944). Consequently, we deny the Intervenors' motion on the merits.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this 2d day of November, 1979.

SEPARATE COMMENTS OF COMMISSIONER BRADFORD

I concur with the result in this decision. However, I would have addressed the standard to be applied to motions to reopen licensing proceedings. The Commission's most recent pronouncement in this regard requires the proponent of such a motion to establish "that 'a different result would have been reached initially had [the material submitted in support of the motion] been considered.' (citations omitted)." Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit 1), ALAB-462, 7 NRC 320, 328 (1978).

This inordinately strict standard has masqueraded as being similar to that applied by the Federal courts. See Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1, ALAB-227, 8 AEC 416 (1974), citing Unarco Industries, Inc. v. Evans Products Company, 403 F.2d 638 (7th Cir. 1968) and Knight v. Hersh, 313 F.2d 879 (D.C. Cir. 1963). However, it is clear that Wolf Creek in fact exaggerates this standard. As applied to NRC, Unarco indicates that the proponent of a motion to reopen and remand a licensing proceeding should not be required to make more than a prima facie showing that a different result would have been reached had the new evidence been available. The result in Knight is consistent with this approach.

The Commission has agreed that a generic review of this issue is appropriate, and, accordingly, has so directed the staff. However, until that review is completed, litigants and hearing boards must interpret an unduly burdensome and possibly transitory standard, a result which would have been avoided had the Commission decided to address this issue directly in this case.

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	)	
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	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
5th day of Nov 1979.

Peggy L. Dawring
Office of the Secretary of the Commission

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Plants, Units 1-4)	)	50-403
	)	

SERVICE LIST

Ivan W. Smith, Esq., Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Glenn O. Bright
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. J.V. Leeds, Jr.
Rice University
P.O. Box 1892
Houston, Texas 77001

Counsel for NRC Staff
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Alan S. Rosenthal, Esq., Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. John H. Buck
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Michael C. Farrar, Esq.
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard E. Jones, Esq.
Carolina Power and Light Company
P.O. Box 1551
Raleigh, North Carolina 27602

George F. Trowbridge, Esq.
Ernest L. Blake, Jr., Esq.
Shaw, Pittman, Potts & Trowbridge
1800 "M" Street, N.W.
Washington, D.C. 20006

Thomas S. Erwin, Esq.
P.O. Box 928
Raleigh, North Carolina 27602

Dennis P. Myers, Esq.
Attorney General's Office
P.O. Box 629
Raleigh, North Carolina 27602

Mr. O. Gene Abston, Acting Director
Office of Inspector and Auditor
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Wells Eddleman
Route 1, Box 183
Durham, North Carolina 27705

Kudzu Alliance
Box 3036
Chapel Hill, North Carolina 27514

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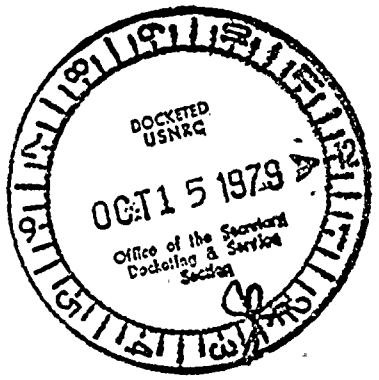

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Dr. John H. Buck
Michael C. Farrar

In the Matter of		
CAROLINA POWER AND LIGHT COMPANY	Docket Nos.	50-400
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MEMORANDUM

October 12, 1979

In its supplemental initial decision issued on July 13, 1979,[1] the Licensing Board concluded that the construction permits previously issued for the four units of the Shearon Harris nuclear facility "should be conditioned to require that [the applicant Carolina Power and Light Company] demonstrate in a public hearing during the operating license proceeding that it is then or timely will be technically qualified to operate Shearon Harris safely". 10 NRC at ___ (slip opinion, p. 9). In other words, the Board determined that, with respect to the management capability or technical qualifications issue,

1/ LBP-79-19, 10 NRC ___.

the public interest required a hearing at the operating license stage. Id. at ___ (slip opinion, p. 124); see 10 C.F.R. 2.104(a). It embodied its determination in the following condition (id. at ___ (slip opinion, p. 125)):

> At an appropriate time during the review of the application for the operating license of the Shearon Harris Nuclear Power Plant, the Staff shall implement the necessary actions to enable the Secretary to issue a notice of hearing on said application to be published in the Federal Register required under 10 CFR §2.104. In addition to the other requirements of §2.104, the notice of hearing shall state that the presiding officer will consider (in addition to any other matter which may be in controversy) whether the Applicant has the management capability and is technically qualified to engage in the activities to be authorized by the operating license in accordance with the regulations of 10 CFR Chapter 1.

The NRC staff filed an exception to that condition on the ground that it was in excess of the Licensing Board's "jurisdiction and authority". The brief in support of that exception was filed and served on September 4, 1979.[2/]

The time provided by 10 CFR 2.762(b) for the filing and service of responsive briefs has now expired. None of the

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2/ In that brief, the staff also discussed (as requested by us in an August 2 order) its standing to complain of the condition in issue. We have now tentatively concluded that the staff does have such standing. We will address that point in our later opinion devoted to the merits of the appeal.

other parties to the proceeding chose to submit such a brief (although the applicant did advise us by letter, without elaboration, that it regards the staff's exception to be well-taken). Thus, the staff's attack upon the Licensing Board's action has gone unanswered.

It does not necessarily follow, of course, that the staff is right in arguing that the Board below exceeded its authority. Contest or not, it remains our obligation to decide the question. In discharging this responsibility (and particularly in light of the absence of a contest), it would be helpful to have at hand the considerations which led the Licensing Board to conclude that it possessed the authority to impose the condition in issue. Although the Board did not explicitly so state in the supplemental initial decision, it obviously must have been satisfied that such authority existed. Indeed, it may reasonably be inferred from the Board's election not to address specifically the authority question that it thought the matter to be free of all doubt.

Accordingly, we now invite the Board to furnish us with its views. In recognition of the fact that its members may well have existing commitments of a pressing nature,[3/] and

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3/ Among other things, the Chairman of the Board below is also the Chairman of the Licensing Board recently convened in the new proceeding involving Unit No. 1 of the Three Mile Island facility.

the additional fact that the appeal before us seemingly need not receive urgent resolution,[4/] we do not ask for those views by any particular date. We have no doubt that the Board will supply them as soon as practicable given the other matters which require the prompt attention of its members.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the
Appeal Board

4/ It likely will be some time before the Shearon Harris facility will be ready for consideration for an operating license.