



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

October 26, 1978

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In the Matter of
Carolina Power and Light Company
(Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4)
Docket Nos. 50-400, 50-401, 50-402, 50-403

Gentlemen:

Enclosed are memoranda dated October 19, 17, 10, 5 and 2 and September 28, 1978, which relate to the Commission's Order of September 5 remanding the Harris CP proceeding to the Licensing Board for further evidence on the capability of CP&L to design, construct and operate the proposed facility.

Sincerely,

Charles A. Barth
Charles A. Barth
Counsel for NRC Staff

Enclosures
As Stated

cc w/encl: Ivan W. Smith, Esq., Chairman
Mr. Glenn O. Bright
Dr. J. V. Leeds, Jr.
Wake County Public Library
Mr. Jessie C. Brake
Atomic Safety and Licensing Board Panel
Atomic Safety and Licensing Appeal Board
Docketing and Service Section
Mr. Edward L. Jordan
James P. O'Reilly
Charles E. Murphy

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October 19, 1978

50-400/403

Barth/Cutchin
Reis *FK*



MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne

FROM: *James R. Yore*
James R. Yore, Chairman, ASLBP

SUBJECT: IMPLICATIONS OF OIA INTERVIEW OF
SHEARON HARRIS LICENSING BOARD

I am bringing this matter to your attention because of its serious impact on the functions performed by the Commission's adjudicatory boards. I have attached a copy of the transcript and papers relating to the interview of the Shearon Harris licensing board conducted on October 12 by representatives of OIA. OIA felt this interview necessary to the inquiry of the propriety of the Staff's conduct in the Shearon Harris proceeding which the Commission's Order of September 5, 1978, directed it to carry out. The negotiations leading to the interview and the ground rules under which it was conducted are reflected in the opening pages of the transcript.

As is evident from the transcript, the stated purpose of OIA in conducting the interview was to determine the seriousness of the omission from certain Staff testimony of the concerns of a line inspector with regard to the technical qualifications of Carolina Power and Light Company to construct and operate the Shearon Harris facility. This issue was remanded to the Licensing board by the Commission's Order of September 5, and to some extent may be intertwined with the inquiry being conducted by OIA (see Mr. Eilperin's memorandum to the Commissioners of September 5, 1978, pp. 9-10).

While the Shearon Harris board was most reluctant to meet with the OIA representatives, it did so with my endorsement and with the knowledge that the appeal board had agreed to an interview. It did so because it felt that it might be able to assist their investigation by clarifying its August 30 letter to the Commissioners and in turn might be assisted in the conduct of the remand hearing if OIA could suggest possible areas of inquiry to it. But during the interview despite the fact that the board repeatedly indicated to the OIA representatives that it could not fully evaluate the seriousness of the omission until it had an opportunity to hold a hearing and take evidence (Tr. 22, 23, 32, 33, 35, 36, 37, 39-40), these representatives persisted in attempting to probe the board's thought process and force it to explain and defend its action in communicating its concerns to the Commissioners by its letter of August 30.

The Commission has emphasized that these boards must independently exercise their authority to receive evidence, ask questions, and reach decisions. The Commission's regulations prohibit ex parte communications, require that adjudicatory boards remain separate from and independent of other Commission functions, require that decisions be reached on the record, and provide for formal appeals from those decisions. While the Panel recognizes, as did the Shearon Harris board, its obligation to cooperate with OIA representatives in the discharge of their duties, these representatives must also recognize that their duties may tread on sensitive areas of the adjudicatory process, possibly infringing provisions of the Administrative Procedure Act as well as the Commission's regulations.

There is no better way to destroy the independence and credibility of the Commission's adjudicatory boards than to permit inspectors to probe the thought processes of and require justification from a board with regard to an action taken in an adjudication. All actions of a licensing board are subject to intensive review by the appeal board, and may be reviewed by the Commission itself. However, if board actions are subjected to investigation and report outside the adjudicatory process, then that process as a

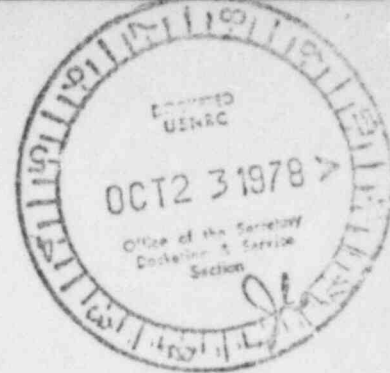
means for fairly determining on the record the matters placed before the board by the parties will be seriously jeopardized.

Enclosures: As stated

cc w/o encls:

Alan Rosenthal
James L. Kelley
O. Gene Abston

October 17, 1978



MEMORANDUM TO: James R. Yore, Chairman, ASLBP

RE: SHEARON HARRIS REMAND

A situation has arisen which I think falls within the scope of your standing request to be advised of matters which could have an effect upon the responsibilities of the Panel.

We thought we had an agreement for appropriate conditions under which the Shearon Harris Board would be interviewed by the Office of Inspector and Auditor. The conditions were:

1. Questions or subject matter of the interview would be submitted to the Board in advance.
2. The Board would be interviewed together as a collegial body.
3. There would be a continuing recognition of the Board's responsibility to decline to answer inappropriate questions.
4. The parties to Shearon Harris may be present.
5. A transcript of the interview would be filed on the public record.

Subsequently OIA submitted a memo outlining two subjects to be covered in the interviews. OIA proposed to ask about the seriousness of the omission of the line inspector's views from the hearing testimony, and, in general, how do we believe dissenting views should have been presented at the time of the Shearon Harris hearing. Fortunately OIA dropped their demand that we comment upon the Appeal Board's decision.

While we had reservations about the extent that we could comment upon the significance of the omission of the inspector's views from the testimony we recognized that some clarification of our letter might be helpful. Furthermore general inquiries as to how dissenting opinions should surface in a hearing are appropriate. So we met with OIA's Messrs. Fortuna, Foster and Gamble in our conference room on October 12. Mr. Fortuna was in charge of the OIA contingent and was assisted by Mr. Foster.

Several minutes before the time set for the start of the interview Mr. Fortuna attempted to begin his questioning. When I pointed out that it was early and that all of the parties were not yet present, very forcefully he said that he would control the interview and would proceed immediately with his questions. I told him that, before his questions began, I had a preliminary statement to read into the transcript. He replied that I may not read a statement and that there would be no transcript made. I resolved that impasse simply by waiting until 3:30 when I ordered the reporter to record the interview. I read the statement, which included our understanding of the conditions of the interview.

Mr. Fortuna made a statement in response in which he stated that contrary to the Board's understanding, members of the board would be interviewed individually but that the others may be present. He also stated that the Board members would be required to answer each question put to them except for answers that are constitutionally protected. He did not again object to the transcript.

The interview lasted for one hour and forty-five minutes. The tenor was accusatory, as if we were under investigation for misconduct. In fact Mr. Fortuna believed it was necessary to remind us of our rights under the Privacy Act and the United States Constitution. (He later tempered his reference to the Constitution.) With the exception of one question about dissenting professional opinions in general, every question was designed to demonstrate that our letter to the Commission was irresponsible and without basis.

There was a fundamental error in the theory of his interview. OIA assumes that we have accepted the line inspector's views as being the best evidence in the dispute. Under that assumption the questions were for the purpose of demonstrating that the line inspector's notes were not reliable. For example, on Page 3 of our letter to the Commission we quote the line inspector as stating, "As a result persons have been promoted or reassigned to positions for which they are not qualified as the Tech. Spec. or FSAR may imply." Mr. Fortuna made a pointed issue of the use of the rather inept phrase "... as the Tech. Spec. or FSAR may imply."

In answer to these and similar questions we tried repeatedly to explain that we have made no judgment as to the reliability of the inspector's notes; that it would not be appropriate for us to do so now. We explained that, to us, the inspector's notes were only an important indication that the matter should have been fully developed on the evidentiary record.

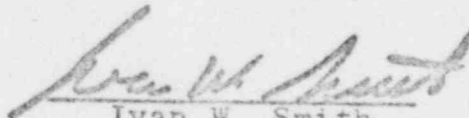
Our explanations were useless. None of the I & A people seemed to understand that we function as an adjudicative body. It seems that they viewed us as irresponsible accusers with questionable motives. They seemed to think that the only issue presented by their interview was related to ex parte communications. They pointed out that the Acting General Counsel said ex parte would not be a problem (based upon his very narrow assumption of the scope of the interview). In fact, with notice to the parties and a public transcript of the interview, ex parte was not a problem. But other problems relating to the integrity of the adjudicative process were involved and it didn't seem that any of the OIA investigators recognized any of those problems. For example, the principle that the mental processes of adjudicating officers may not be probed where those processes are not revealed by the opinion itself is universal and time-honored in the Western system of jurisprudence. (See e.g., Ernest Gellhorn, Administrative Law and Process in A Nutshell, page 224, West Publishing, 1975).

Several issues were raised by OIA's actions which I believe to have important implications to the panel.

If it were not for the strong rule in the NRC and under the Administrative Procedure Act that licensing boards have a very high degree of independence, the effect of the OIA interview could be intimidating. It seems clear that OIA has a position on the merits of the issue and believes that our letter to the Commission was inappropriate. The effect of a similar interview on personnel who do not enjoy our independence could in fact be intimidating, and could distort the evidentiary record. Such interviews certainly do not encourage differing professional opinions.

It was wrong for OIA to expect us to defend the line inspector's views. We cannot preserve the appearance of impartiality if we argue now that his notes are reliable evidence in the controversy, then later decide the facts of the controversy after the remand hearings. It could be said that the more we argue now for the line inspector the more we might feel inclined to find that our concerns were justified. Other than recognizing that the line inspector's notes were a basis for further inquiry it is our responsibility not to prejudge the reliability and correctness of his views. OIA simply does not understand this point.

Which raises another point. Why is it that these gentlemen, exercising the power of the Commissioners themselves, are so insensitive to the adjudicative process. OIA doesn't seem to understand what licensing boards do and what our responsibilities are. Some training is needed. The members of the board went very far to cooperate with OIA recognizing that they have a job to do, but OIA was impatient with us when we did our job.


Ivan W. Smith



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555



October 10, 1978

MEMORANDUM FOR: John H. Frye, III, Legal Counsel, ASLBP
FROM: O. Gene Abston, Acting Director
Office of Inspector and Auditor
SUBJECT: SHEARON HARRIS MATTER

Abston

This memorandum is in response to your telephonic request of October 6, 1978, to which OIA agreed to provide you with the general areas to be covered in our interview with members of the ASLB that sat for the Shearon Harris hearing. These areas which were previously communicated telephonically to Mr. Smith on October 3 are as follows:

1. Explore in detail with the ASLB members their views with respect to the seriousness of omission of the line inspector's views from the written and oral testimony.
2. Explore in detail with the ASLB members how they believed dissenting views should have been presented in licensing proceedings at the time of the Shearon Harris hearing.

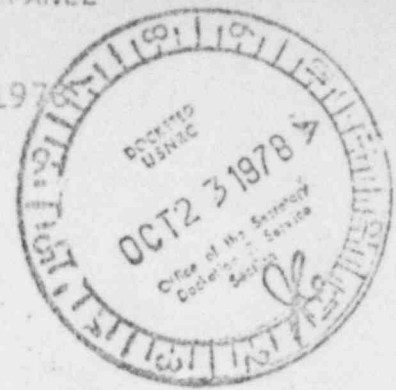
As we previously discussed with you on October 4, it is impossible to supply you with a detailed list of questions because our questions for the most part will be predicated on the responses received from the ASLB members during the course of the interview.

cc: J. Kelley
J. Yore
A. Rosenthal

CONTACT: W. Foster, OIA, 49-27051
D. Gamble, OIA, 49-27170

ASLBP.....
Rec'd.....
for.....

October 5, 1978



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

Dear Mr. Abston:

On October 3, 1978, Mr. William Foster of the Office of Inspector and Auditor called Ivan Smith for the purpose of arranging interviews with the members of the Shearon Harris licensing board concerning the Commission's Order of September 5, 1978. Your Office also provided us with copies of the memorandum dated September 28, from you to Acting General Counsel Kelley, and the responding memorandum dated October 2 from Mr. Kelley to you. For completeness we are attaching copies of these memoranda.

At Mr. Smith's request Mr. Foster briefly outlined three areas he proposed to cover in the interviews. These are:

- 1) In addition to the reasons set forth in our letter to the Commission dated August 30, 1978, provide information as to why we believe the omission of the line inspector's views from the testimony was relevant. Explain our basis for writing to the Commission because our reasons are not clear in the letter.
- 2) Answer questions about our views of the Appeal Board decision in the Shearon Harris proceeding.
- 3) In separate interviews each board member would be asked his opinion of how he thought the supervisory inspectors should have testified in light of the line inspector's notes.

October 5, 1978

In considering OIA's request, the members of the board decided that the request for interviews should be made in writing because we did not wish to rely upon Mr. Smith's notes and memory of Mr. Foster's informal comments. We understand now that OIA has advised the Panel's Legal Counsel, John Frye, that OIA will not make its request in writing nor in advance so that the board members may not prepare "canned" answers. Therefore, we must depend upon Mr. Smith's understanding of Mr. Foster's request.

The members of the board must decline to be interviewed on the subjects proposed by Mr. Foster. The nature and tenor of your proposed investigatory interviews would require us to defend and explain our judicial actions, mental processes, and attitudes outside of the adjudicative process. While it may not be your intent, the effect would be to threaten the independence of this Commission's adjudicative process. We are, of course, required to uphold that process.

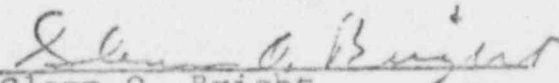
For the members to submit to investigatory interviews would violate the Commission's Regulations, the Administrative Procedure Act, and the American Bar Association's Code of Judicial Conduct with respect to separation of functions and ex parte communications.

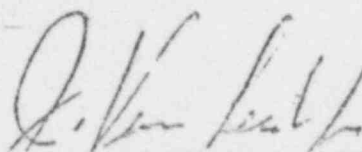
While it may be true that OIA is not a formal "party" to the proceeding, this fact does not remove your proposed communication from the ex parte rule. Indeed the problem is exacerbated by the fact that, under the Commission's Order, OIA is required to file the results of its inquiry with this board. We must then consider whether these results have a bearing on the merits of the remanded issue. Your proposed interviews would create inherent conflicts. We would be simultaneously the investigated, the investigators, and the judge of the results of the investigation. Our position on this consideration is mandated in particular by 10 CFR §2.719, §554 of the Administrative Procedure Act, and Canon 3 A (4) of the Code of Judicial Conduct.

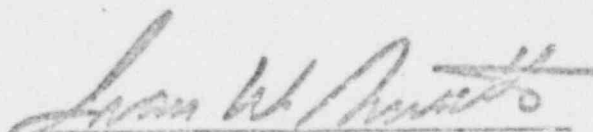
October 5, 1978

In addition we note that the subject of your proposed interviews significantly exceeds the scope of the inquiry assumed in the memorandum from the Acting General Counsel.

Very truly yours,


Glenn O. Bright


J. Venn Leeds


Ivan W. Smith

Attachments:
As stated

cc: Docketing and Service Section
for Service
Mr. Eilperin, Solicitor
Mr. Kelley, Acting General Counsel
Mr. Rosenthal, Chairman, ASLABP
Mr. Yore, Chairman, ASLBP

October 2, 1978

MEMORANDUM FOR: O. Gene Abston, Acting Director
Office of Inspector and Auditor

FROM: *cf* James L. Kelley, Acting General Counsel

SUBJECT: INQUIRY INTO STAFF TESTIMONY AT THE SHEARON
HARRIS CONSTRUCTION PERMIT HEARING

This is in response to your memorandum to me of September 28, 1978, on the above subject. I do not believe that the interviews with the Licensing Board members, as described in your memorandum, would violate the ex parte rule. For one thing, you are not a "party" to the proceeding within the meaning of the rule, since you are an office reporting directly to the Commission. Secondly, although it may be impossible to totally separate the subject of your inquiry from the merits issue remanded to the Board, I believe that the two subjects are sufficiently distinct that you can proceed without seriously compromising this aspect of the rule. Finally, the results of your interviews will ultimately be placed in the public record of the proceeding and the parties will have an opportunity to comment. That proposed procedure is fully inconsistent with the spirit of the ex parte rule. In view of the foregoing considerations, I believe that your proposed interviews of Board members will be consistent with the Commission rules, including the ex parte rules, and that, indeed, such interviews are necessary in order for you to carry out the Commission's directive.

SEP 28 1978



MEMORANDUM FOR: James L. Kelley, Acting General Counsel
Office of the General Counsel

FROM: O. Gene Abston, Acting Director
Office of Inspector and Auditor

15/8 Messenger

SUBJECT: INQUIRY INTO STAFF TESTIMONY AT THE SHEARON HARRIS
CONSTRUCTION PERMIT HEARING

During our conduct of the subject inquiry in response to the Commission's September 5, 1978, order (Attachment), we contacted a member of the Atomic Safety and Licensing Board Panel, Dr. J. Vann Leeds, to set up an interview appointment. Dr. Leeds declined to speak to us because in his view there was a possible ex parte problem.

The purpose of our interview of Dr. Leeds and all other involved members of the Atomic Safety and Licensing Board Panel and Atomic Safety and Licensing Appeal Panel will be to elicit all relevant information from these individuals pertaining to the basis for and seriousness of the alleged omission of concerns of the line inspector from the testimony given at the Shearon Harris hearing. We do not plan to touch upon the issue to be raised on remand, i.e., the management capabilities of Carolina Power and Light Company to construct and operate the proposed Shearon Harris facility.

Accordingly, we request your determination as to whether the ex parte rule precludes Panel members, the NRC staff, or other parties to this matter from speaking to us. Our opinion is that these contacts would be permitted since, by the Commission's order, the report of our inquiry will become part of the public record in this matter. The obvious effect of precluding these contacts would be the frustration of OIA's ability to conduct a complete inquiry in compliance with the Commission's order.

Attachment:
As stated

CONTACT: D. Gamble, OIA
49-27170
W. Foster, OIA
49-27051