

October 15, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
CAROLINA POWER & LIGHT COMPANY) Docket Nos. 50-400 OL
AND NORTH CAROLINA EASTER) 50-401 OL
MUNICIPAL POWER AGENCY)
)
(Shearon Harris Nuclear Power)
Plant, Units 1 and 2))

APPLICANTS' RESPONSE TO CHANGE
SUPPLEMENTAL STATEMENT REGARDING
PSYCHOLOGICAL STRESS CONTENTIONS

On September 27, 1982, intervenor CHANGE filed a "Supplemental Statement Regarding Psychological Stress Contentions," dated September 17, 1982. The Supplemental Statement constitutes further argument in support of CHANGE Contentions 39 and 40. CHANGE anticipates, and argues against, a Licensing Board ruling rejecting those contentions on the basis of the Commission's Policy Statement, Consideration of Psychological Stress Issues, 47 Fed. Reg. 31762 (July 22, 1982), which was issued subsequent to the special prehearing conference.^{1/} Applicants Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency herein submit their response to the CHANGE Supplemental Statement.

1/ In its Memorandum and Order, September 22, 1982, at 25-26, the Licensing Board did in fact reject CHANGE Contentions 39 and 40.

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CHANGE's lengthy statement boils down to the simple argument that the Commission's Policy Statement violates the Administrative Procedure Act and is therefore not binding upon the Licensing Board, and that the Commission has misread the court's decision in People Against Nuclear Energy ("PANE") v. NRC, 678 F.2d 222 (D.C. Cir. 1982), petition for cert. filed. CHANGE thus invites the Licensing Board to disregard the Commission's Policy Statement and to adopt a contrary interpretation of the PANE decision. The simple answer to the CHANGE Supplemental Statement is that whether or not the Licensing Board believes that the Commission is right or wrong in its analysis of PANE v. NRC, supra, or in the procedures followed in promulgating its Policy Statement, the Licensing Board is obligated to follow the express dictates of the Commission. See Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 & 2), Licensing Board Memorandum and Order (Motion for Reconsideration or Certification), August 30, 1982, Docket Nos. 50-440-OL, 50-441-OL (denying motion to reconsider the exclusion of psychological stress contentions). In addition, it is clear that the Commission was correct procedurally in promulgating the Policy Statement.

At the core of CHANGE's dissatisfaction with the Commission's Statement of Policy lies a substantial misapprehension of the Commission's role in supervising the type and scope of issues that can be litigated before licensing boards. Licensing boards are arms of the Commission and possess only such powers as have been conferred upon them by the Commission. See Carolina Power & Light Company (Shearon Harris Nuclear

Power Plant, Units 1, 2, 3, and 4), ALAB-577, 11 N.R.C. 18, 25-26 (1980), rev'd in part on other grounds, CLI-80-12, 11 N.R.C. 514 (1980); Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 N.R.C. 167, 170-171 (1976). The Commission retains the power, however, to supervise how that delegated authority is used and, where necessary, to provide guidance to licensing boards carrying out the Commission's statutory mandate.

That the Commission retains such authority was made plain in its opinion in United States Energy Research and Development Administration, et al. (Clinch River Breeder Reactor Plant), CLI-76-13, 4 N.R.C. 67 (1976). There, intervenors argued that the Commission could only review adjudicatory matters pursuant to its powers under 10 C.F.R. § 2.786(a). The Commission rejected the argument as without merit, and described its supervisory authority in the following terms:

While 10 CFR 2.786(a) states the ordinary practice for review, it does not - and could not - interfere with our inherent supervisory authority over the conduct of adjudicatory proceedings before this Commission, including the authority to step in and rule on the admissibility of a contention before a Licensing Board A contrary view would seriously dislocate the adjudicatory process within this agency and would imply a delegation of authority by the Commission difficult to justify.

. . . In the interest of orderly resolution of disputes, there is every reason why the Commission should be

empowered to step into a proceeding and provide guidance on important issues of law and policy.

Id. at 75-76.

These views were reiterated by the Commission in Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), CLI-77-8, 5 N.R.C. 503 (1977). The Commission quoted from its earlier decision in Clinch River, and made the following additional observations:

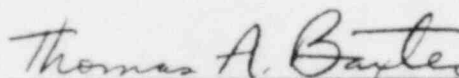
While we may deal with matters before us in adjudicatory hearings only on the basis of the record which has been compiled, the Nuclear Regulatory Commission is not a court constrained to the "passive virtues" of judicial action, which can afford in every instance to wait for the better-framed issue or fully developed argumentation. We have a regulatory responsibility which includes the avoidance of unnecessary delay or excessive inquiry in our licensing proceedings. Nor can we regard the proceedings of our appellate and hearing tribunals with the detachment the Supreme Court may bring to trial and intermediate appellate action; the analogy is imperfect. Ultimately the members of the Commission are responsible for the actions and policy of this agency, and for that reason we have inherent authority to review and act upon any adjudicatory matter before a Commission tribunal -- subject only to the constraints of action on the record and reasoned explanation of the conclusions -- constraints imposed on all agencies by the Congress.

Id. at 516.

These decisions clearly indicate that the Commission has the power and the responsibility of providing guidance to its licensing boards where guidance will eliminate "unnecessary delay or excessive inquiry." It was this inherent power that the Commission exercised in issuing its Statement of Policy.

The decision in Seabrook also establishes that the Commission acted properly in its procedures associated with promulgation of its Policy Statement. Its actions were "on the record" and a "reasoned explanation of the conclusions" was provided. The Licensing Board, as a Commission adjudicatory tribunal of delegated authority, is bound to follow the Commission's guidance. Accordingly, the Board properly rejected CHANGE Contentions 39 and 40.

Respectfully submitted,



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