

04/05/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
CAROLINA POWER AND LIGHT COMPANY
(Shearon Harris Nuclear Power
Plant, Units 1 and 2)

Docket Nos. 50-400
50-401

NRC STAFF ANSWER TO ENVIRONMENTAL LAW PROJECT'S
MOTION TO POSTPONE OR SEPARATE PROCEEDINGS



I. INTRODUCTION

On March 16, 1982, the Environmental Law Project ("ELP"), a petitioner for leave to intervene in this proceeding, filed a "Motion to Postpone or Separate Proceedings or Other Relief." ("Motion") In this Motion, ELP requests that the Atomic Safety and Licensing Board ("the Board"):

- (1) "take notice" of a Petition for Rulemaking (PRM-2-11), 47 Fed. Reg. 4310 (January 29, 1982), filed by another petitioner for leave to intervene (Wells Eddleman), which requests that the Commission amend its regulations in 10 C.F.R. Part 2 to require a separate operating license hearing for each power reactor unit at a nuclear plant site;
- (2) "take notice" of a "list furnished by the NRC to the United States Congress on or about March 13, 1982, which . . . contained the names of nineteen nuclear power plants under construction which the NRC Staff predicted would be cancelled, which included Shearon Harris Unit No. 2";

8204070560 820405
PDR ADOCK 05000400
G PDR

DESIGNATED ORIGINAL
Certified to [Signature]

DS073/1

(3) "take notice" of a December 18, 1982 letter filed by Carolina Power & Light Company (the Applicant) which requested that only Unit 1 be considered for an operating license;

(4) (a) "recognizing from the foregoing that consideration of an operating license at this time for Shearon Harris Unit No. 2 is premature, separate these two dockets pursuant to 10 C.F.R. § 2.402 and postpone the proceedings for Unit No. 2 until such time as it appears likely that said power reactor will in fact be put into operation; or in the alternative"

(b) ". . . postpone further proceedings on . . . Unit 2 until . . . the NRC has taken action on the PRM . . . or in the alternative"

(c) ". . . grant such other relief, which may include conducting hearings on unit No. 2 under the condition that such hearings may be reopened on motion by a party or intervenor after a certain period if the plant is not nearing completion . . ." (Motion, at 1-2).

For the reasons set forth below, while the NRC Staff has no objections to the Board "taking notice" of the various documents cited by ELP, the Staff objects to the remainder of ELP's Motion and urges that it be denied.

II. DISCUSSION

On January 27, 1982, the Nuclear Regulatory Commission published in the Federal Register (47 Fed. Reg. 3898) a notice of "Receipt of Applications for Facility Operating Licenses for Shearon Harris Nuclear Power Plant, Units 1 and 2; Availability of Applicant's Environmental Report; Consideration of Issuance of Facility Operating Licenses; and Opportunity for Hearing." Pursuant to that notice, ELP filed a timely petition for leave to intervene. Answers to that petition were filed by the Applicants and the Staff on March 3, 1982 and March 9, 1982, respectively. The Atomic Safety and Licensing Board designated to rule

on petitions for leave to intervene has not yet ruled upon the petitions. Consequently, ELP has not as yet been admitted as a party to the proceeding.

A. ELP's Motion Should Be Denied For Lack of Standing

Only a party to a proceeding is entitled to file a motion under 10 C.F.R. § 2.730.^{1/} As stated in 10 C.F.R. § 2.715(a), "A person who is not a party may, in the discretion of the presiding officer, be permitted to make a limited appearance . . . but he may not otherwise participate in the proceeding." Thus, a petitioner is limited in his or her participation to those matters provided by 10 C.F.R. § 2.714. Accordingly, ELP's motion should be denied for lack of standing.

B. There Is No Merit To ELP's Motion and It Should Be Denied

Even assuming, for argument's sake, that the absence of standing is not considered sufficient for denial of ELP's motion, ELP's arguments are without merit. As shown below, ELP's motion is based on ELP's mere assertion that "it is premature to consider licensing Unit 2" (Motion, at 3). Moreover, none of the provisions of 10 C.F.R. Part 2 cited by ELP expressly provide for the relief sought by ELP.

According to ELP, it is premature to consider granting an operating license for Unit 2 and the Board, pursuant to 10 C.F.R. §§ 2.402, 2.711

^{1/} See the Board's Order, March 16, 1982, at 2, in which the Board considered a motion filed by another petitioner.

and 2.718, should "separate the two dockets" and "postpone the proceedings for Unit 2." (Motion, at 2-3). In this regard, the Staff notes that 10 C.F.R. § 2.402 is inapposite. That section of the regulations allows for separate hearings on applications filed pursuant to Appendix A of Part 50, which concerns "situations in which applications are filed by one or more applicants for licenses to construct or operate nuclear power reactors of essentially the same design to be located at different sites." [footnote omitted, emphasis added]. 10 C.F.R. Part 50, Appendix N. The Shearon Harris reactors are not located at different sites and thus, 10 C.F.R. § 2.402 is not relevant. 10 C.F.R. § 2.711, "Extension and Reduction of Time Limits," does not pertain at all to the relief sought by ELP, namely, postponement of the proceedings on Unit 2 or separation of the proceedings on the two units. Rather, 10 C.F.R. § 2.711 empowers a licensing board to extend or shorten the time provided for taking such actions as (to give an example) filing contentions. See Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-574, 11 NRC 7, 13 (1980).^{2/} Although the Board has a duty, pursuant to 10 C.F.R. § 2.718, to, inter alia, conduct a fair hearing, the Staff believes that, for the reasons set forth herein, that provision does not provide a proper basis for granting the relief ELP seeks.

^{2/} The Appeal Board in ALAB-574, citing ALAB-565, 10 NRC at 523-524, noted that the Licensing Board, pursuant to 10 C.F.R. § 2.711(a), was expressly empowered there, given the large number of intervention petitions filed, to provide that contentions should be filed one month before the special prehearing conference. ALAB-574, at 13 fn. 15.

As ELP states, the Applicant originally asked in its December 18, 1981 letter transmitting its application that only Unit 1 be considered for an operating license. However, as ELP admits, (Motion, at 3), in a January 7, 1982, letter, the Applicant "determined that it is more appropriate to consider both units at the same time for an operating license." (Letter, at 1). While it is correct that Shearon Harris Unit 2 is included in a list containing the Staff's "best estimate as to how many more cancellations (or indefinite deferrals) there will be of the plants in the U.S."^{3/}, that list is merely an estimate and as indicated in a footnote:

"...this information is based on conjecture, newspaper articles, conversations with financial houses, and hearsay rather than any official announcement from the Applicant." Id.

In opposing ELP's Motion, Applicant stated that "it has no intention of cancelling Shearon Harris Unit 2."^{4/} The Staff, for its part, is continuing its review of the application for operating licenses for both Shearon Harris units and has no intention of severing its review of the application for an operating license for Unit 2 from its review of the application for an operating license for Unit 1.

ELP cites the need for power issues "litigated in the present proceeding," (Motion, at 3), as an example of an issue which "may no

^{3/} Memorandum for Commissioner Ahearne from William J. Dircks, Executive Director for Operations, March 8, 1982, "Attachment 1."

^{4/} See "Applicant's Answer to Environmental Law Project's Motion to Postpone or Separate Proceeding or other Relief," March 31, 1982, at 4.

longer be governed by the same facts or conditions by the time Unit No. 2 actually nears completion." (Id.) The need for power issue provides no basis for severing or postponing consideration of Unit 2 since the Commission recently amended its regulations in 10 CFR Part 51, "Licensing and Regulatory Policy and Procedures for Environmental Protection" to provide that for National Environmental Policy Act (NEPA) purposes, need for power (and alternative sites) will not be considered in operating license proceedings for nuclear power plants. See Federal Register Notice, "Need for Power and Alternative Energy Issues in Operating Licensing Proceedings," 47 Fed. Reg. 12,940 (March 26, 1982).

The Staff also disagrees with ELP's assertion that the pending petition for rulemaking of Wells Eddleman (PRM-2-11), warrants the relief sought. The Commission has taken no action on this petition and its mere pendency does not warrant a determination by the Board that the relief there sought (by way of amendment of the Commission's regulations), should be granted individually in this proceeding. In fact, the pendency of this petition is one additional reason not to grant ELP's motion, since a determination on that petition may shed some light on the question of conducting separate operating license hearings for each unit at a nuclear plant site.

The Staff also objects to ELP's proposal that the Board conduct hearings on Unit 2 upon the condition that the hearings "may be re-opened on motion by a party or intervenor after a certain period if the plant is not nearing completion." (Motion, at 2). In order to reopen a licensing proceeding, an intervenor must show a change in a material fact which warrants litigation anew. Shearon Harris Nuclear

Power Plant, Units 1, 2, 3 and 4), CLI-79-10, 10 NRC 675, 677 (1979).

It cannot be determined now that at the conclusion of the proceedings, there will be a basis for reopening such proceedings.

In addition to the foregoing, insofar as ELP seeks a postponement of the proceeding on Unit 2, its motion is in the nature of a request for a stay.^{5/} ELP argues that to proceed, would be, "if not a violation of the letter of the Fifth and Fourteenth Amendments to the U.S. Constitution, certainly in violation of the spirit of those amendments." (Motion, at 3). More than such general allegations of harm are required before ELP's request for postponement, which is in the nature of a request for a stay, can be granted. This Commission has formally recognized that the criteria established in Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921 (D.C. Cir. 1958), must be satisfied to warrant issuance of a stay. 10 C.F.R. § 2.788. Metropolitan Edison Company, et al. (Three

^{5/} It is clear that licensing boards have jurisdiction regarding the scheduling of proceedings, which may or may not involve the postponement of issues involving separate reactors. Wisconsin Electric Power Company (Koshkonong Nuclear Plant, Units 1 and 2), CLI-75-2, 1 NRC 39, 42 (1975); Illinois Power Company (Clinton Power Station, Units 1 and 2), LBP-81-56, 14 NRC 1035 (1981). In addition, licensing boards have the inherent authority to dismiss those matters placed before them which have been mooted by supervening developments. Puerto Rico Electric Power Authority (North Coast Nuclear Power Plant, Unit 1), ALAB-605, 12 NRC 153, 154 (1980). However, we do not believe that the Board can properly preclude hearings on matters previously noticed in the Federal Register absent a determination of mootness. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 646-647 (1974); North Coast, ALAB-605, supra. While it is less than clear whether ELP in its present motion is simply seeking a scheduling change or an impermissible termination of a portion of the proceeding, we nonetheless think for the reasons set forth herein, that the motion should be denied.

Mile Island Nuclear Station, Unit 2), CLI-78-3, 7 NRC 307, 308 (1978); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-338, 4 NRC 10, 13 (1976). These factors are:

- (1) has the movant made a strong showing that it is likely to prevail upon the merits of its appeal;
- (2) has the movant shown that, without the requested relief, it will be irreparably injured;
- (3) would the issuance of a stay substantially harm other parties interested in the proceeding; and
- (4) where does the public interest lie?^{6/}

The strength or weakness of any of these factors determines how strong a showing must be made on the other factors. Seabrook, ALAB-338, supra.

Most importantly, there ordinarily must be a showing of substantial irreparable injury to the movant absent the stay. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-347, 6 NRC 630, 632 (1977); Davis Besse, ALAB-385, supra. Although the "level or degree of possibility of success" on the merits necessary to justify a stay varies according to the tribunal's assessment of the other factors; where there is no showing of irreparable injury, the showing of likelihood of success on the merits must be overwhelming to justify a stay. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Unit 2),

^{6/} These factors are incorporated in 10 C.F.R. § 2.788(e), dealing with stays of initial decisions. In the Staff's view, they can be applied to stays of proceedings prior to initial decisions.

ALAB-404, 5 NRC 1185, 1186-89 (1977); See also, Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit 2), ALAB-456, 7 NRC 63, 68 (1978).

ELP has not even attempted to address these factors, save for the aforementioned unsupported allegations of harm. The allegations, on which the request for relief is predicated, are very general ones which, according to prior decisions, e.g. Davis-Besse, ALAB-385, supra, are of no moment.

Even beyond its failure to satisfy the legal requirements for a stay, ELP has not recognized that in view of "this changing economic, engineering, and regulatory environment" (Motion, at 3) it may be possible to show good cause for amendment of contentions with leave of the Board. As stated by the Commission:

Insofar as petitioners may be precluded from adding to their original contentions should an unforeseen issue present itself further on in the proceeding, we can only answer that a petitioner for intervention, like any other pleading in modern practice, is not etched in stone. Leave to amend petitions for intervention will be granted where a petitioner shows that good cause exists for the belated assertion and where such amendment will assist the Board in resolving the issues before it without undue delay. Cf. also 10 CFR § 2.752(a)(2). Wisconsin Electric Power Company, et al. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-75-45, 8 AEC 928, 929 (1974).

III. CONCLUSION

Based on the foregoing, the Staff believes that ELP's motion may properly be denied on the basis of ELP's lack of standing. In addition, no basis exists for the Board to sever or postpone this proceeding. Accordingly, ELP's motion should be denied.

Respectfully submitted,

Marjorie Ulman Rothschild

Marjorie Ulman Rothschild
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 5th day of April, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO ENVIRONMENTAL LAW PROJECT'S MOTION TO POSTPONE OR SEPARATE PROCEEDINGS" 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, through deposit in the Nuclear Regulatory Commission's internal mail system, this 5th day of April, 1982:

*James L. Kelley, Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Travis Payne, Esq.
723 W. Johnson St.
P.O. Box 12643
Raleigh, N.C. 27605

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

Daniel F. Read, President
CHANGE
P.O. Box 524
Chapel Hill, N.C. 27514

*Dr. James H. Carpenter
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Daniel F. Read
100-B Stinson St.
Chapel Hill, N.C. 27514

Wells Eddleman
325 E. Trinity Ave.
Durham, N.C. 27701

Patricia T. Newman, Co-Coordinator
Slater E. Newman, Co-Coordinator
Citizens Against Nuclear Power
2309 Weymouth Ct.
Raleigh, N.C. 27612

George Jackson, Secretary
Environmental Law Project
School of Law, 064-A
University of North Carolina
Chapel Hill, N.C. 27514

Richard D. Wilson, M.D.
729 Hunter St.
Apex N.C. 27502

John Runkle, Executive Coordinator
Conservation Council of North Carolina
307 Granville Rd.
Chapel Hill, NC 27514

George F. Trowbridge, Esq.
Thomas A. Baxter, Esq.
John H. O'Neill, Jr., Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

*Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555 *

Dr. Phyllis Lotchin
108 Bridle Run
Chapel Hill, North Carolina 27514

Marjorie Rothschild

Marjorie Rothschild
Counsel for NRC Staff