UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
Glenn O. Bright
Dr. James H. Carpenter
James L. Kelley, Chairman

In the Matter of CAROLINA POWER AND LIGHT CO. et al. (Shearon Harris Nuclear Power Plant, Units 1 and 2)	Dockets 50-400 OL 50-401 OL September 17, 1982

SUPPLEMENTAL STATEMENT REGARDING PSYCHOLOGICAL STRESS CONTENTIONS

1. Introduction

On May 14, 1982 Chapel Hill Anti-Nuclear Group Effort (CHANGE)/Environmental Law Project (ELP) filed with this Board its "Supplement to Petition for Leave to Intervene," at page 14 of which were included contentions numbered 39 and 40, alleging inadequacy of the Applicants' Environmental Report (ER), for failure to consider (1) psychological stress upon people living near the Shearon Harris plant(s) occasioned by its operation and (2) long-term psychological disturbances in children living near the plant. At the special prehearing conference held at Raleigh, North Carolina on July 13 and 14, 1982, Daniel F. Read, acting in his capacity as representative for CHANGE/ELP, asked that the Board "defer" these contentions. Since then, the Atomic Safety and Licensing Appeal Board has ruled on "deferral" of contentions, Duke Power Company et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, ___ N.R.C. ___ (August 19, 1982). For the reasons set out below, CHANGE/ELP believes that the contentions as drafted are valid issues, properly within the jurisdiction of this Board, and

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that the question of deferral is moot with respect to these issues.

CHANGE/ELP now files this supplemental statement of reasons why it believes the psychological stress contentions are valid. As no new contentions are being advanced, and as this statement is not in the nature of adding basis or specificity (which is not really at issue, since no information has been advanced by the Applicants or Staff on which to base contentions) but rather in the nature of legal argument, CHANGE/ELP believes the late filing criteria of 10 C.F.R. 2.714(a) are not applicable, and that the Board's duty under 10 C.F.R. 2.718 to conduct a fair hearing should encompass allowing CHANGE/ELP to advance these arguments as to the applicable law. In the alternative, CHANGE/ELP hereby moves, pursuant to 10 C.F.R. 2.730, that the Board consider these arguments in ruling on the proffered contentions, by allowing them in as amendments to the originals pursuant to 10 C.F.R. 2.714(a), for the following reasons in satisfaction of the criteria of that section:

(1) CHANGE/ELP is not represented by counsel. The arguments herein are essentially of a legal nature, involving matters which only recently came to the attention of CHANGE/ELP. Also, the Commission's policy statement complained of did not appear in the Federal Register until July 22, 1982, after the conference. Finally, the Board has earlier shown its willingness to entertain legal argument after expiration of the "normal" filing deadlines, e.g., CHANGE/ELP's and CCNC's "Brief Concerning Spent Fuel Transshipment."

(2) The issues controverted will not be raised elsewhere. No other agency has authority to consider these issues, People Against Nuclear Energy v. N.R.C., ___ F.2d ___, slip op. at 6 (D.C. Cir. 1982) (citing opinion of Commissioner Bradford), nor has any other party to this proceeding had such contentions admitted by the Board.

(3) Based on the PANE v. N.R.C. case cited above, the contentions raise issues cognizable under the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 et seq., and there-

fore litigation of them in the present proceeding will contribute to the development of a full, hence sound, record.

(4) As noted above, no other party has had similar contentions admitted, nor have any parties, based on information and belief, advanced similar arguments to those advanced herein.

(5) Due to the vital nature of the issues involved, and the direct impact of the proposed license activities on the health of CHANGE/ELP and its members, CHANGE/ELP's participation with respect to these issues will not unduly enlarge the scope of this proceeding, particularly in light of the Board's statutory mandate under NEPA to assess "any adverse environmental impacts which cannot be avoided should the proposal be implemented," 42 U.S.C. 4332(2)(C)(ii) (emphasis added).

Therefore CHANGE/ELP asks that the Board admit the proffered contentions. Should the Board in its discretion order the Applicants or the Staff to prepare studies and/or analysis of psychological stress phenomena caused or likely to be caused by the operation of the plant(s), CHANGE/ELP will withdraw this request subject to the right to formulate contentions based on the analyses advanced when such analyses are available.

2. The Contentions

The contentions allege inadequacy of the Applicants' ER. As such they do not directly allege inadequacies in the statutory analysis required by NEPA, 42 U.S.C. 4332(2)(C). However, it is beyond cavil that the environmental impact statement (EIS) required by NEPA for the proposed licensing action will be based on the ER. Preparation of the draft EIS does not, by Commission regulation, 10 C.F.R. 51.22, even begin until receipt of the ER, and it is required to discuss the matters covered as directed by regulation in the ER, 10 C.F.R. 51.23(a) (EIS must include matters required to be in the ER by 10 C.F.R. 51.20(a), (e) and (g)). Similarly, the cost/benefit analysis required in the EIS by 10 C.F.R. 51.23(c) is evaluated on the

same basis as the ER, see 10 C.F.R. 51.20(c). The near-perfect congruence between the criteria required by 42 U.S.C. 4332(2)(C) and those enumerated at 10 C.F.R. 51.20(a)(1)-(5) as requirements for the ER bear out this close connection. Inescapably, an adequate ER is essential to an adequate EIS, particularly since the Applicants are the sole source of reliable information as to many of the proposed license activities. In addition, the ER cost/benefit balance required by 10 C.F.R. 51.20(b) cannot be drawn if it omits a major health effect of the activity on the local population. Therefore, the alleged inadequacies in the ER go to the assessments required by NEPA, and the contentions are properly framed. As a matter of public policy it is to the Applicants' and the Commission's advantage in building public confidence that these issues be analyzed and dealt with as early as possible; admitting them for litigation at this stage will further this goal.

3. The Procedural Background

At the time of the hearing in this docket in July the PANE case had only recently been decided by Court of Appeals for the District of Columbia Circuit: the amended judgment was filed April 2, 1982, and opinions were filed May 14, 1982. The NRC did not publish its "Statement of Policy: Consideration of Psychological Stress Issues" until July 22, 1982, 47 F.R. 31762-3. At the time of the hearing, then, NRC policy on psychological stress contentions was unclear. The Board stated that when that policy did issue, that it would determine the admissibility of such contentions according to it, including the CHANGE/ELP contentions at issue here.

The policy statement sets stringent requirements for the admissibility of psychological stress contentions, generally requiring some "catastrophe" similar to that at Three Mile Island as the cause of the stress, which would if applied here require the rejection of the proffered contentions. For the reasons outlined in section 4 following, CHANGE/ELP believes that the policy statement is not binding in this proceeding. For the reasons outlined in section 5 following,

CHANGE/ELP believes that the reasoning of the policy statement is also faulty. Therefore, the Board must allow the proffered contentions to be litigated, or in the alternative compel the analyses requested to be performed.

4. Effect of the Policy Statement

Under the Atomic Energy Act, 42 U.S.C. 2011 et seq., the Commission is empowered to issue rules and regulations regarding, among other matters, licensing proceedings and their conduct, 42 U.S.C. 2201(p), B.P.I. v. A.E.C., 502 F.2d 424 (D.C. Cir. 1974), and to establish licensing boards and appeal boards, 42 U.S.C. 2241. In establishing such rules and regulations regarding adjudicatory procedures before it, the Commission is by law expressly bound, 42 U.S.C. 2231, to follow the dictates of the Administrative Procedure Act, 5 U.S.C. 551 et seq. The APA establishes procedures for the development of such rules, which may have the effect of law, through informal and formal rulemakings and through adjudicatory proceedings. An extensive case law has developed since the APA's passage in 1946, clarifying and defining its procedural requirments.

Under section 4 of the APA, the Commission may develop and promulgate binding rules of general applicability by informal rulemaking, 5 U.S.C. 553. For rules governing licensing proceedings generally, this is the preferred method, "designed to assure fairness and mature consideration of rules of general application," National Labor Relations Board v. Wyman-Gordon Co., 394 U.S. 759, 764, 89 S.Ct. 1426, 1429 (1969). Additionally, the Commission may develop rules of general application through its adjudicatory process, Id. at 765-6, 89 S.Ct. at 1429-1430, see also Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194 (1947), as for example the NRC has attempted to do with respect to defining what is in fact an acceptable contention. This latter approach is obviously fraught with the difficulties of interpretation (and likelihood of subsequent litigation) inherent in the "common law" approach.

It is clear, however, that policy statements have no binding effect: section 4(b)(A) of the APA, 5 U.S.C. 553(b)(A), specifically excludes "interpretative rules" and "general statements of policy" from rulemaking. A rule arrived at via a rule making is a "statement of general or particular applicability and future effect" designed among other things to describe the "organization, procedure, or practice requirements of an agency," 5 U.S.C. 551(4). 5 U.S.C. 553 requires that such rules must be promulgated following traditional notice and comment procedures. Generally, rules which are not promulgated by this procedure (or by adjudication) are invalid: to the extent that the policy statement of of July 22 purports to have a binding effect on licensing Boards, it is invalid.

This view is substantiated by Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33 (D.C. Cir. 1974) and the many cases which have followed it. In Pacific Gas an order of the FPC attempting to set forth a policy giving guidance and uniformity to companies unsure of the proper means of implementing end use scheduling was challenged by non-priority users. Although there was some question in the case as to exactly what the challenged order was, the Court decided that it was in fact a policy statement, published without the notice and comment procedures required by the APA. Before reaching that result, and in essence rendering the order of no effect, the Court discussed at length the differences between a policy statement and a "properly adopted substantive rule":

> A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.

* * *

> The critical distinction between a substantive rule and a general statement of policy is the different practical effect these two types of pronouncements have in subsequent administrative proceedings. [Citations] A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency.
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> A general statement of policy, on the other hand, does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely on a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy, 506 F.2d at 38-39 (emphasis added) (footnotes omitted).

To allow the agency to adopt rules and apply them when they are not based "upon substantial and extensive record evidence," 506 F.2d at 39, not only deprives the public of its right to participate in the decisionmaking process as safeguarded by the APA but also creates intolerable problems for the reviewing courts, 506 F.2d at 39-40. Thus the rule in Pacific Gas represents good law and has been followed consistently, see for example Consolidated Edision of New York, Inc. v. FPC, 511 F.2d 372 (D.C. Cir. 1974); Regular Common Carrier Conference of the United States v. U.S., 628 F.2d 248 (D.C. Cir. 1980). There have been some exceptions to the rule: for example, in the Con Ed case cited above the Court held that the emergency conditions of the national gas crisis made the

burden of justification on the agency somewhat less "elaborate." Waivers to general policies have been offered to attempt to cure their defects: however, in Guardian Federal Savings & Loan v. Federal Savings & Loan Insurance Corp., 589 F.2d 658 (D.C. Cir. 1978), it was held that the policy statement must leave the administrator free to exercise his informal discretion, that the mere presence of some discretion in the form of a waiver is not enough to satisfy the APA, 589 F.2d at 666-67. On the other hand, a policy guideline was "entitled to a presumption of applicability" in Alabama Power Co. v. Costle, 636 F.2d 323, 384-86 (D.C. Cir. 1979), because it did allow waivers, but also because it had been made available for public comment and the agency had advanced reasons for declining to adopt the industry proposals. The basic rule of law remains, however, and must be applied also to the Commission's July 22, 1982 statement.

If the policy statement is without binding effect, then the Board must remain "free to exercise its informal discretion," Guardian Federal, supra, and, although it may be guided by the Commission's tentative statement of policy, it must supply valid reasons for rejecting the proferred contentions.

5. Effect of the PANE Decision

However, the PANE decision does not supply such justification for rejecting the CHANGE/ELP contentions. To the contrary, it supports those contentions and requires that the psychological effects on health of the proposed license activities be considered in the environmental evaluations of the plant(s).

In deciding the PANE case, the Court of Appeals had before it two major issues, (1) that potential harms to psychological health were cognizable under NEPA and (2) that potential harms to psychological health must be taken into account by the Commission as part of its responsibility for the public health and safety under the Atomic Energy Act, slip op. at 3. The Court rejected the Atomic Energy Act contention, but agreed with PANE with respect to the NEPA contention, with the opin-

ion by Circuit Judge Wright, concurred in by Senior Circuit Judge McGowan, representing the opinion of the Court on that issue, see slip op. at 2. Judge Wilkey dissented as to NEPA, while his rejection of the AEA contention was adopted as the majority position, Id. In summarizing his opinion, Judge Wright did not limit the scope of the holding, only whether or not the finding that psychological stress is cognizable under NEPA required preparation of a supplemental EIS:

> PANE contends that...the Commission must take into account potential harms to psychological health and community well-being. We hold that these environmental impacts are cognizable under NEPA. Therefore, the Commission must make a threshold determination, based on adequate study, whether the potential psychological health effects of renewed operation of TMI-1 are sufficiently significant that NEPA requires preparation of a supplemental environmental impact statement, Slip op. at 3.

After summarizing the case's procedural development, slip op. at 3-9, Judge Wright proceeded to a NEPA analysis. It should be noted here that this analysis was not a pre-action analysis of the sort contemplated by 42 U.S.C. 4332(2)(C), but one required as part of the Commission's ongoing duty to adjust to changed circumstances, slip op. at 9. Further, it should be noted that the Court was deciding between two positions, one of which would have denied any responsibility to consider psychological stress, and the other which requested the full panoply of procedures associated with the preparation of a full EIS, slip op. at 9 and 11. It is not surprising that the Court merely found that the impacts were cognizable, and remanded for a decision as to whether or not an EIS was required. CHANGE/ELP would point out here that it is not asking for an EIS on this question, but that these cognizable impacts be considered in the environmental analyses evaluating the effects of the plant's operation: the contentions allege inadequacy for lack of consideration, not lack of a separate document.

Judge Wright first considered the position advanced by the Commission in its brief opposing the PANE contention:

> [T]he Commission's brief contends that the psychological effects alleged by PANE, which were caused by the TMI-2 accident and would assertedly be perpetuated by restart of TMI-1, are beyond the scope of NEPA....This assertion is far-reaching. Regardless of the severity of psychological health effects, the position taken in the Commission's brief would exclude them from consideration at any stage of the NEPA procedures relating to any proposed federal action. We find this interpretation of NEPA unpersuasive. The Commission's brief ignores the simple fact that effects on psychological health are effects on the health of human beings, slip op. at 11-12.

Judge Wright proceeded to review the overriding legislative concern with human health expressed in NEPA, summarizing as follows:

> ...In short, "[n]o subject to be covered by an EIS [or to be considered under NEPA] can be more important than the potential effects of a federal program upon the health of human beings," Citizens Against Toxic Sprays, Inc. v. Bergland, 428 F.Supp. 908, 927 (D. Ore. 1977)
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> We conclude that, in the context of NEPA, health encompasses psychological health, slip op. at 12-13 (footnote omitted) (phrase added).

Judge Wright also pointed to the interdisciplinary approach required by NEPA, 42 U.S.C. 4332(2)(A), to justify this position. He then went on to discuss and refute the Commission's extensively supported arguments (1) that the issue of psychological stress is beyond the scope of NEPA because it is not readily quantifiable, slip op. at 14-15, and (2) that the case law establishes no requirement for consideration of the issue, slip op. at 15.

In summing up his NEPA analysis, Judge Wright fit it to the facts before the Court:

> ...In our view, Congress intended to include psychological health within the meaning of "health" for purposes of NEPA. NEPA does not encompass mere dissatisfactions arising from social opinions, economic concerns, or political disagreements with agency policies. It does apply to post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe. Therefore, the severity of a psychological effect is not only relevant to whether an EIS is required under NEPA, as

> Judge Wilkey concedes, Wilkey dissent at 13, but also to the cognizability of the impact under the statute.
>
> We need not attempt to draw a bright line in this case. Three Mile Island is, at least so far, the only event of its kind in the American experience. We cannot believe that the psychological aftermath of the March 1979 accident falls outside the broad scope of the National Environmental Policy Act, slip op. at 16-17.

In its policy statement, the Commission seizes upon these last two paragraphs, effectively ignoring the entire body of the opinion. Rather than reading the Court's failure to devise a "bright line test" as merely a recognition that the facts "in this case" were sufficiently compelling as to make such fine procedural distinctions unnecessary, the Commission reads out of this language a strict three-part test, policy statement at 3, which in effect requires that a nuclear accident at least as severe as the one at Three Mile Island have already occurred in the area affected by proposed license activities to justify admission of psychological stress contentions, policy statement at 3-4. Only where post-traumatic anxieties caused by fears of recurring catastrophe and accompanied by physical effects are present and alleged would the Commission allow their admission into litigation, policy statement at 3-4. The Commission thus hopes to render the judgment virtually meaningless, by conditioning NEPA consideration of psychological stress issues not upon the implicitly future "environmental impact of the proposed action," 42 U.S.C. 4332 (2)(C)(i), but on past disasters in the area around the plant under consideration.

The Court's opinion leads to a different result: "The key to our decision is the potential effect on health," slip op. at 16 (emphasis added), indicates the Court's concern for future events, not the past. Similarly, the Court found that "the holocaust potential of an errant nuclear reactor," slip op. at 15 (emphasis added), justified departing from the body of case law under NEPA. The discussion of cognizability based on the severity of effects, slip op. at 16-17, must be seen against

this background: instructive in this regard is footnote 10, slip op. at 16-17,

> [I]n the esthetic realm Judge Leventhal recognized that some effects were intended by Congress to be considered and that others, pertaining "essentially to issues of individual and potentially diverse tastes," were outside the scope of NEPA. [Citation] He referred to psychological factors as an analogy; in both realms, he wrote, some questions are "not readily translatable into concrete measuring rods." [Citation] But the difficulty of measurement does not exclude the beauty of scenery in the national parks from consideration under NEPA, nor should it exclude the medically diagnosed effects of traumatic accidents on the human mind, (emphasis added).

Surely no one would dispute that the beauty of park scenery is to be considered before taking action that would damage it or establishing conditions that might imperil it, and it follows that psychological stress ought to be considered before allowing operation of a nuclear reactor with its attendant "holocaust potential." PANE was challenging the proposed operation of the otherwise undamaged TMI-1, not TMI-2: other than its location, there is nothing to separate TMI-1 from many other reactors around the country, each with its own "holocaust potential" and the ensuing psychological stress. The Court was considering case law dealing with housing, Job Corps centers, postal service facilities, slip op. at 15, not other nuclear plants, and it is not surprising that it found that NEPA required consideration of psychological problems before operation. In light of the above, it follows that the Court certainly envisaged that psychological stress would be considered in NEPA analysis of all nuclear plant operations.

The Commission's policy statement chooses to ignore this analysis and tries to circumvent it. Even Judge Wilkey in his dissent recognized that under the majority opinion that NEPA consideration should be mandatory in all licensing decisions, Wilkey dissent at 18:

> Consideration of the potential for harm from exposure to radiation is not postponed until actual exposure takes place; it is the potential harm that is to be considered. If, as PANE

> alleges, the TMI-2 accident caused severe psychological harm, then any nuclear accident has the potential for "causing" such harm. NEPA consideration therefore should be mandatory in all licensing decisions, if psychological stress is cognizable at all, Wilkey dissent at 18.

Both Judge Wilkey's dissent and the Commission's policy statement note that it will better serve the public interest by concentrating on reducing the underlying safety and other defects that create the accident potential that causes the psychological stress, policy statement at 4-5. As the Commission itself has only recently reiterated, however, the complexity of nuclear power plant systems and the necessity of constant careful control mean that these problems will be virtually impossible to eliminate:

> [U]nanticipated circumstances can occur during the course of emergencies. These circumstances may call for responses different from any considered during the course of licensing--....Special circumstances requiring a deviation from license requirements are not necessarily limited to transients or accidents not analyzed in the licensing process. Special circumstances can arise during emergencies involving multiple equipment failures or coincident accidents where plant emergency procedures could be inconflict, or not applicable to the circumstances, Proposed Rule, "Applicability of License Conditions and Technical Specifications in an Emergency," Federal Register, Vol. 47, No. 160, August 18, 1982, p. 35996, (emphasis added).

Congress recognized this problem as early as 1957:

> Notwithstanding comprehensive testing and study, the uniqueness of this form of energy production made it impossible totally to rule out the risk of a major nuclear accident resulting in extensive damage. Private industry and the AEC were confident that such a disaster would not occur, but the very uniqueness of nuclear power meant that the possibility remained, and the potential liability dwarfed the ability of the industry and private insurance companies to absorb the risk. [Citation] Thus, while repeatedly stressing that the risk of a major nuclear accident was extremely remote, spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation. [Citation]
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> Congress responded in 1957 by passing the Price-

Anderson Act, 71 Stat. 576, 42 U.S.C. 2210 [et seq.], Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 64, 98 S.Ct. 2620, 2625-26, 57 L.Ed.2d 595 (1978).

Despite assurances that Price-Anderson would only be a temporary enactment, it has been continued twice since 1957. Despite further assurances that the nuclear power industry is now mature, and many of the problems have been worked out, it is clear from the rule-making cited and continued industry support of Price-Anderson that the underlying problems remain: in fact, this may be one of the main sources of psychological stress, that despite vast investment and billions spent in safety research these problems remain and with them the "holocaust potential" of nuclear accident.

6. Conclusion

For the foregoing reasons, CHANGE/ELP believes that this Board, in carrying out its duty to "consider every significant aspect of the environmental impact of a proposed action," Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 553, 98 S.Ct. 1197, 1216, 55 L.Ed.2d 460 (1978) (emphasis added), must allow litigation of the psychological stress contentions proffered, or in the alternative, order that the Applicants and the Staff consider such stress in their environmental analyses. CHANGE/ELP reiterates here that it is not asking for a supplemental EIS, but for consideration of this environmental impact, as required by 42. U.S.C. 4332(2)(C)(ii) and 10 C.F.R. 51.20(a)(2).

Respectfully submitted,

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