



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

OCT 18 1978

MEMORANDUM FOR: File

FROM: William H. Foster, Inspector/Auditor *WHF*
Office of Inspector and Auditor

SUBJECT: SHEARON HARRIS MATTER

On October 17, 1978, I contacted by telephone Charles Barth, Attorney, Office of Executive Legal Director. Barth advised that he provided the Shearon Harris ASLB with copies of the testimony of Hugh Dance and Virgil Brownlee in late September 1977, at least a week before Brownlee and Dance testified orally on October 4, 1977. Barth stated he "assumed" the Board read the written testimony prior to October 4, but did not have any evidence to this effect.

Barth stated he was aware of cases where an ASLB did not read the written testimony before a licensing hearing. Barth advised that there were no written procedures requiring Board members to read written testimony before a hearing, adding that there should be.

Barth stated that prior to the Shearon Harris hearing he advised Brownlee and Dance to "soft peddle" their testimony with respect to CP&L's capabilities to operate Shearon Harris. He added he made this advisement to Brownlee and Dance because it would be ridiculous to make detailed projects on a utility's capabilities to operate a plant "6 years in the future."

11-4
A-11

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

15/9 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. Venn 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

Attachment I

~~28104-0091~~

16



October 2, 1978

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

FROM: *cy* 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.

Attachment II

~~9510440125~~

16



UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D. C. 20555

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.

Attachment III

~~7510140090~~

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.

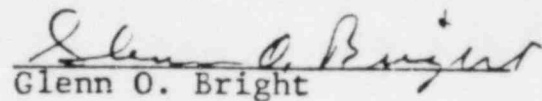
Mr. O. Gene Abston

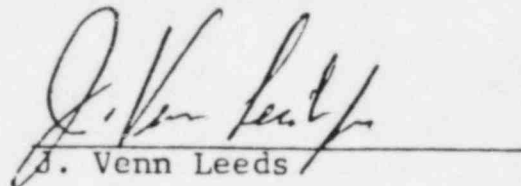
- 3 -

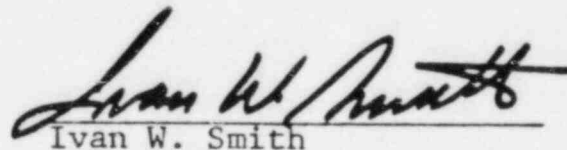
October 5, 1978

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 10, 1978

MEMORANDUM FOR: John H. Frye, III, Legal Counsel, ASLBP

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

O. Gene Abston

SUBJECT: SHEARON HARRIS MATTER

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

Copy to: H. Foster, OIA, 43-27351
D. G. Ste, OIA, 43-27170

Dupe of

IV

~~8104210148 XA~~