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February 6, 1985

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
CAROLINA POWER & LIGHT COMPANY)	
and NORTH CAROLINA EASTERN)	Docket No. 50-400 OL
MUNICIPAL POWER AGENCY)	
)	
(Shearon Harris Nuclear Power)	
Plant))	

APPLICANTS' RESPONSE TO CCNC'S
REQUEST FOR ADMISSION F NEW CONTENTION
WB-3 (DRUG USE DURING CONSTRUCTION)

I. Introduction

On January 18, 1985, intervenor Conservation Council of North Carolina ("CCNC") filed with the Board a pleading entitled "Request for Admission of a new Contention WB-3 (Drug Abuse During Construction)." CCNC proposes the admission of a new contention, conceded to be untimely, which asserts as follows:

WB-3 Drug and alcohol use at the Harris Plant is widespread (see the attached newspaper article for details and basis). Construction workers under the influence of drugs are less able to follow proper procedures and tech specs for the installation of electrical systems, pipefitting, and other safety-related work. Applicants' management

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has failed to control drug use during the construction and further, has failed to reinspect all safety-related work done by known drug abusers.

CCNC addresses the five factors to be considered in weighing the admission of late-filed contentions (see 10 C.F.R. § 2.714(a)(1)), and attaches, as basis for the new proposed contention, a newspaper article from the January 11, 1985 edition of the Raleigh News & Observer.

Applicants herein submit their response in opposition to the admission of late-filed CCNC Contention WB-3. As set forth below, Applicants submit that CCNC has not pleaded an issue cognizable in this proceeding, that the contention in substantial part is lacking in basis and specificity, that CCNC may not reasonably be expected to contribute to a sound record on this issue, and that admission of the contention would substantially broaden the issues and delay the proceeding.

II. Standards Governing Late-Filed Contentions

The Commission's Rules of Practice, at 10 C.F.R. § 2.714, require that a petitioner set forth the basis for each contention with reasonable specificity. This standard requires that a contention state a cognizable issue with particularity, Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 A.E.C. 210, 216-17 (1974), and that a petitioner provide a "reason" for its concern. Houston Lighting

and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 N.R.C. 542, 548 (1980).

As a general proposition, a Licensing Board should not address the merits of a contention in determining admissibility. Id. However, a contention and its basis may be scrutinized to determine if a litigable issue has been pleaded. Two purposes of the basis with specificity requirement are "to help assure at the pleading stage that the hearing process is not improperly invoked," and "to assure that the proposed issues are proper for adjudication in that particular proceeding."

Philadelphia Electric Company (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20-21 (1974). In this regard, a contention must be material to those findings which precede licensing, as set forth in 10 C.F.R. § 50.57.

See Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 N.R.C. 1649, 1654-55 (1982).

With respect to the issues raised by CCNC in proposed Contention WB-3, we note that error-free construction is not a precondition for an operating license under either the Atomic Energy Act or the Commission's regulations. What is required instead is a finding of reasonable assurance that the plant, as built, can and will be operated without endangering the public health and safety. 42 U.S.C. §§ 2133(d), 2232(a); 10 C.F.R. § 50.57(a)(3)(i); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, 18 N.R.C. 1340,

1345 (1983), aff'd, Deukmejian v. NRC, No. 81-2034, slip op. at 56-63 (D.C. Cir., Dec. 31, 1984); Union Electric Company (Callaway Plant, Unit 1), ALAB-740, 18 N.R.C. 343, 346 (1983), reconsideration denied, ALAB-750, 18 N.R.C. 1205 (1983), as modified, ALAB-750A, 18 N.R.C. 1218 (1983). Accordingly, a contention in an operating license proceeding about the adequacy of construction is not litigable unless it would cast doubt on this finding.

In addition to the normal pleading requirements, 10 C.F.R. § 2.714 sets out five factors that must be balanced in admitting a late-filed contention, and a contention is untimely if it is filed later than fifteen days prior to the 10 C.F.R. § 2.715a special prehearing conference. 10 C.F.R. § 2.714(b); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 N.R.C. 1041, 1043 n.2 (1983). The five factors are:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.

- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceedings.

10 C.F.R. § 2.714(a)(1)(i)-(v).

III. Application of the Standards

A. The Proposed Contention Fails to State a Litigable Issue with the Requisite Basis and Specificity.

Applicants first address the standards required for timely-filed contentions, since the application of those standards to CCNC's proposed Contention WB-3 clearly warrants rejection of the contention, and, thus, obviates the need for a careful analysis and balancing of the five factors which govern the consideration of good cause for the untimely filing.

First, CCNC inconsistently comingles allegations of drug and alcohol abuse. The first sentence of the contention refers to both drugs and alcohol, while the second and third sentences refer only to drugs. Aside from the fact that CCNC asserts no consequence of the alleged alcohol use, the attached newspaper article -- the sole asserted basis for the contention -- uses the word "alcohol" only twice: once in reference to a CP&L policy forbidding use of alcohol or illegal drugs on plant property; and once in reference to the newspaper reporter's interviews with a dozen construction workers, several of whom indicated they would turn in their co-workers if they noticed

them using alcohol, drugs or similar stimulants. Consequently, on its face the CCNC pleading fails to assert a basis for the allegation that alcohol use at the Harris Plant is widespread.

Turning to the gravamen of the contention -- drug use at the site -- the contention appears to make three points: (1) drug use at the plant is widespread; (2) construction workers under the influence of drugs are less able to perform their work properly; and (3) CP&L has failed to control drug use and to reinspect safety-related work done by known drug abusers. Applicants address each of these points in turn.

As to drug use at the plant, the facts as described in the newspaper article, and which Applicants do not dispute, are that a two-month investigation by two undercover police agents on the Harris site led to warrants for the arrest of eight employees who sold to the agents drugs with a total street value of \$3,000. The article also recites a statement by Major Lanier of the Wake County Sheriff's Department that drug use at the plant was "widespread," and that he conservatively estimated 100 of the 6,000 workers at the plant used drugs on the site.

While the arrests involved drug sales on the site, not use, for pleading purposes Applicants assume here that in some quantity drugs have been used on site by 100 workers.^{1/} Drug

^{1/} Applicants are in fact aware of possible drug involvement by others than the eight recently arrested. Over time, CP&L

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abuse whether on or off the job is a serious concern to Carolina Power & Light Company, and we should not be read as dismissing the emphasis placed by the Company, through its policies and programs, on preventing the use, possession or sale of controlled substances by employees or contractor employees while on CP&L business or on CP&L property. Nevertheless, this CCNC contention must be assessed in the context of the use of drugs within the American society at large. One hundred workers represent one and two-thirds percent of the 6,000 workers on site.^{2/} If true, this use of drugs by construction workers at Harris is not "widespread," but, to the contrary, is substantially below the level of drug use within the population as a whole.^{3/}

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has identified other employees suspected of drug involvement and has taken appropriate personnel action as well as steps to ensure the integrity of the construction work.

^{2/} The actual number of construction workers at the Harris Plant site is 6,600.

^{3/} "More than 20 million Americans use marijuana at least once a month. One out of 18 high school seniors use marijuana daily. Over four million people, half of whom are between the ages of 18 and 25, are current users of cocaine. Approximately one-half million Americans are heroin addicts." Drug Abuse Policy Office, Office of Policy Development, The White House, "1984 National Strategy for Prevention of Drug Abuse and Drug Trafficking" (September 1984) at 3. The trend in cocaine use is on the rise. The National Institute on Drug Abuse estimates that, in 1982, 18.8 percent of the population in the 18-25 age group used cocaine at least once in the past year and 6.8 percent used it once in the past month. NIDA Capsules (September 1984).

CCNC next asserts that workers under the influence of drugs may not perform properly. Applicants are willing to concede as much. However, construction workers do not perform in isolation. They are observed by security personnel entering and leaving the work place,^{4/} they work most frequently in the company of others who have the opportunity to observe their work, and they have supervisors who oversee their performance.^{5/} More significantly, CP&L has in place a construction quality assurance program, approved by the NRC when the construction permit was issued, which provides for the independent inspection of safety-related work at various stages of its completion. In addition, the inspections by Quality Control and Construction Inspection personnel are subject to QA surveillances and audits, as well as the oversight of NRC Inspection and Enforcement personnel. Finally, safety systems are subject to a vigorous series of preoperational tests to confirm quality construction and the safety of plant operation.

^{4/} Routine checks of lunch box contents are made almost daily by security personnel. In addition contractor superintendents monitor individuals as they enter the gates. If anyone presents himself obviously under the influence of drugs or alcohol, that person will be pulled aside.

^{5/} Fellow workers also observe their performance. The newspaper article cited by CCNC indicates workers would be willing to turn in a fellow worker who used drugs on the job. This could be done anonymously through the QA Quality Check Program.

These diverse and redundant means to confirm quality should be well known to CCNC and are amply described in publicly available documentation, including the evidentiary record of this proceeding. Yet, CCNC has advanced no factual assertions, or even a theory, upon which to base a concern that any sub-standard performance by a construction worker under the influence of drugs could have led to a safety-significant construction deficiency which has been undetected and will remain so prior to plant operation.

The NRC has no specific regulation governing the use of drugs at nuclear facilities, Tr. 2901 (Kelley), but the agency is not indifferent to the potential adverse effect on the public health and safety attributable to drug use on site by workers at nuclear facilities. See South Carolina Electric & Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 N.R.C. 25, 27 (1983). The Commission has pending a rulemaking to consider requirements for operating licensees with respect to the fitness for duty of personnel with unescorted access to protected areas. 47 Fed. Reg. 33980 (1982). In addition, allegations of widespread drug abuse and improper security practices at operating plants have been investigated by the Office of Inspection and Enforcement. See Commonwealth Edison Company (Dresden Nuclear Power Station; Zion Nuclear Plant), DD-83-8, 17 N.R.C. 1183 (1983). With respect to a plant under construction, however, the NRC's concern

with the public health and safety goes to the sound construction of the plant. Absent a contention, specific and with basis, that the quality program is inadequate to ferret out safety-significant construction deficiencies resulting from drug use, CCNC has failed to plead a cognizable issue for the Board to decide.

The third point asserted by CCNC in proposed contention WB-3 is that CP&L management has failed to control drug use during construction and further, has failed to reinspect all safety-related work done by known drug abusers. The newspaper article filed as basis for the contention, however, flatly contradicts this assertion. The article states that: (1) CP&L has a policy which forbids the use of illegal drugs on plant property; (2) CP&L periodically conducted searches of employees' property if there was probable cause to believe drug activity was occurring; (3) under CP&L policy employees have been asked to take urine tests if probable cause existed to suspect that drugs were being used; (4) CP&L contacted the Wake County Sheriff's Department late in 1984 because CP&L had uncovered evidence upon which to suspect drug activity; (5) CP&L cooperated in a subsequent investigation on site by police authorities which led to the arrests cited by CCNC. In stark contrast to CCNC's assertion, these facts establish that CP&L is actively implementing appropriate controls to detect drug sales and use, and took the initiative to involve legal authorities when potentially illegal activity was suspected.

As to reinspection of safety-related work, CCNC offers no basis for its assertion that reinspections are necessary. In fact, however, CP&L is applying its existing site Procedure CQA-7, "Evaluation of Program Effectiveness" to determine what, if any, reinspections are appropriate for the work of suspected drug sellers and/or users, including the seven electricians and one pipefitter who were the subjects of the recent arrest warrants.^{6/} This procedure is designed to provide methods for the evaluation of the effectiveness of, among other things, the performance of individual craftsmen.

B. The Five Lateness Factors

1. Good Cause for Failure to File on Time

Applicants do not contest the fact that CCNC did not have previous access to the specific public information described in the newspaper article, and that CCNC promptly filed its contention after the information became available.^{7/}

^{6/} The review for these eight employees showed that they worked in crews and that the majority of their work was not safety-related. The safety-related work performed by these workers either has been or will be subject to QC or CI inspections.

^{7/} That is not to say that the newspaper article cited by CCNC as basis for proposed CCNC WB-3 is the first publicly available evidence of drug use by a construction worker at the Harris Plant site. Indeed, Joint Intervenors' Exhibit 17 in this proceeding (part of Applicants' response to Joint Intervenors')

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2. Availability of Other Means Whereby CCNC's Interest Will Be Protected

This factor would weigh in favor of the contention, although it is to be given less weight than the others.

3. Extent to Which CCNC's Participation May Reasonably be Expected to Assist in Developing a Sound Record

CCNC has not been a party to the adjudication of the two contentions to date, Eddleman 41 and 65, which have addressed quality of construction at the Harris site. The fact that the contention pleaded does not even address the programs in place to detect and to correct faulty construction work bespeaks a lack of familiarity with the issues on the part of CCNC, and

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nors' interrogatories) notes that a worker was terminated because of evidence of use of cocaine. A series of articles in the Western Wake Herald in 1980 (March 20, March 27 and April 10) discussed, among other items, allegations of drug use at the Harris Plant site. However, CP&L has in the past dealt with suspected drug use by individuals on a case by case basis and without attendant publicity. Applicants are willing to concede that there has been little publicly available information on drug use at the Harris Plant site. CP&L's willingness to cooperate with local law enforcement agencies to ferret out drug dealing and provide a more effective deterrent to those who might consider drug use in the future gives rise to the information now publicly available. It would be unsound public policy to send a message to the nuclear utility industry that cooperating with law enforcement officials regarding evidence of criminal activity on a nuclear construction site is to invite litigation of the impact of such activity on construction of the nuclear plant.

calls into question that intervenor's ability to contribute to the record on this issue.

Further evidence of CCNC's confusion and inability to contribute to the record is reflected in the CCNC statements addressing this factor. While CCNC asserts that the issue is not overly complicated and technical because it addresses Applicants' ability to safely build nuclear power plants -- a naive proposition in itself -- CCNC proceeds to express hope that the Sheriff's Department will cooperate with details of their investigation. Leaving aside the public policy implications of injecting criminal proceeding matters into an NRC licensing hearing, the Sheriff's personnel cannot conceivably contribute to the Board's assessment of whether the plant is being built in a safe manner. CCNC implies here that the Board would hear facts as to individual drug cases -- an inquiry which is not the function of the NRC and which would not assist in resolving any of the ultimate issues in this operating license proceeding. Thus, CCNC's ability to contribute to the record here is at best problematic when CCNC cannot even clearly focus upon the potential issue.

Finally, CCNC is involved in the ongoing emergency preparedness phase of the proceeding as the sole sponsor of two contentions, CCNC 2 and 8, and as the lead intervenor for the joint contentions EPJ-1 and EPJ-3.

4. Extent to Which CCNC's Interest Will
be Represented by Existing Parties

Like factor (ii), this factor weighs in favor of the contention, but is to be given less weight than the others.

5. Extent to Which CCNC's Participation Will
Broaden the Issues or Delay the Proceedings

CCNC concedes that admission of its proposed contention WB-3 necessarily would broaden the issues. While CCNC is not precise about the course the litigation might follow, CCNC appears alternatively to call into question the entire construction effort -- an issue of unique breadth -- or the investigation of work performed by each and every worker suspected of drug involvement -- a likewise time-consuming and broad inquiry which could entail disputes over which workers should be included in the inquiry and complications resulting from personnel rights to privacy, the potential for libel, and interference with criminal law enforcement activities.

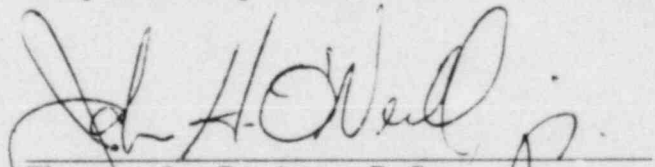
On the question of delay, CCNC concludes that "litigating this contention will not unduely [sic] delay the plant's operation." CCNC here misses the mark of the standard for a late-filed contention. Any delay in plant operation is to be avoided, consistent with a fair hearing and a sound record. Admission of this contention undoubtedly would delay the proceeding. Except for the recently admitted Eddleman 41-G, which

the Board has placed on an expedited schedule, all safety contentions have been tried and briefed. CCNC Contention WB-3 could not easily be heard on the schedule set for the emergency planning issues, and -- contrary to CCNC's repeated predictions -- there is no "whistleblower hearing" on the horizon.

IV. Conclusion

Factors (iii) and (v) of the lateness factors weigh heavily against CCNC and, in view of the lesser weight given to factors (ii) and (iv), warrant rejection of the contention. In any event, Applicants submit that the Board may dispose of the proposed contention because CCNC has not asserted a cognizable issue with basis and specificity. Proposed contention WB-3 should not be admitted.

Respectfully submitted,



Thomas A. Baxter, P.C.
John H. O'Neill, Jr., P.C.
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202)822-1000

Richard E. Jones, Esquire
CAROLINA POWER & LIGHT COMPANY
411 Fayetteville Street Mall
Raleigh, North Carolina 27602
(919)836-6517

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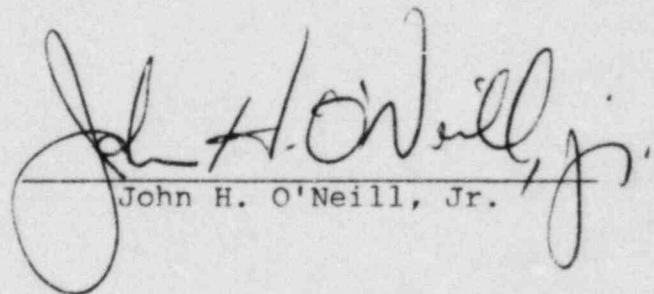
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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Response to CCNC's Request for Admission of New Contention WB-3 (Drug Use During Construction)" were served by deposit in the United States mail, first class, postage prepaid, this 6th day of February, 1985, to all those on the attached Service List.


John H. O'Neill, Jr.

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SERVICE LIST

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

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

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

Charles A. Barth, Esquire
Janice E. Moore, Esquire
Office of Executive Legal Director
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

Mr. Daniel F. Read, President
CHANGE
P.O. Box 2151
Raleigh, North Carolina 27602

John D. Finkle, Esquire
Conservation Council of
North Carolina
307 Granville Road
Chapel Hill, North Carolina 27514

M. Travis Payne, Esquire
Edelstein and Payne
P.O. Box 12607
Raleigh, North Carolina 27605

Dr. Richard D. Wilson
729 Hunter Street
Apex, North Carolina 27502

Mr. Wells Eddleman
718-A Iredell Street
Durham, North Carolina 27705

Richard E. Jones, Esquire
Vice President and Senior Counsel
Carolina Power & Light Company
P.O. Box 1551
Raleigh, North Carolina 27602

Dr. Linda W. Little
Governor's Waste Management Board
513 Albemarle Building
325 North Salisbury Street
Raleigh, North Carolina 27611

Bradley W. Jones, Esquire
U.S. Nuclear Regulatory Commission
Region II
101 Marrietta Street
Atlanta, Georgia 30303

Steven F. Crockett, Esquire
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Robert P. Gruher
Executive Director
Public Staff - NCUC
P.O. Box 991
Raleigh, North Carolina 27602

Administrative Judge Harry Foreman
Box 395 Mayo
University of Minnesota
Minneapolis, Minnesota 55455