

February 7, 1985

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED

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

Docket Nos. 50-400 OL  
50-401 OL

OFFICE OF SECRETARY  
LOCKER 700 WEST VILL

NRC STAFF RESPONSE IN OPPOSITION TO  
CONSERVATION COUNCIL OF NORTH CAROLINA'S MOTION  
TO ADMIT PROFFERED CONTENTION WB-3 REGARDING DRUG USE

I. INTRODUCTION

By filing dated January 18, 1985 Conservation Council of North Carolina (CCNC) proffered for admission into this Operating License Proceeding a contention regarding drug use at the Harris site. The Staff's reply in opposition follows.

II. BACKGROUND

The Raleigh News and Observer on January 11, 1985 published an article which stated that six workers at the Harris site had been arrested on drug charges. Citing this newspaper article, Mr. Runkle on behalf of CCNC, proffered the following contention:

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 has failed to

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

### III. ARGUMENT

#### A. NRC Standards Applicable To Proffered Contentions

In order for Intervenor's proffered contention relating to alleged drug use at the Harris site to be admitted as a matter in controversy in this proceeding, it must satisfy two standards. First, the contention must satisfy the Commission's requirement that the basis for the contention be set forth with reasonable specificity. 10 C.F.R. § 2.714(b). Second, since it is a late filed contention, under the Commission's decision in Duke Power Compan, et al (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983), balancing of the five factors of 10 C.F.P. § 2.714(a) must favor admission of the contention.

In order for the proposed contention to be found admissible, it must fall within the scope of the issues set forth in the Notice of Hearing initiating the proceeding, <sup>1/</sup> and comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units Nos. 1 and 2), ALAB-107, 6 AEC 188, 194 (1973), aff'd, BPI v. Atomic Energy Commission, 502 F.2d 424, 429 (D.C. Cir. 1974); Duquesne Light Co. (Beaver Valley Power Station,

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<sup>1/</sup> Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976). See also, Commonwealth Edison Company (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980); Portland General Electric Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-290, n. 6 (1979).

Unit No. 1), ALAB-109, 6 AEC 242, 245 (1973). Under 10 C.F.R. § 2.714(b) a petitioner for intervention in a Commission licensing proceeding must file a supplement to its petition:

... [w]hich must include a list of the contentions which petitioner seeks to have litigated in the matter, and basis for each contention set forth with reasonable specificity.

The purpose of the basis requirements of 10 C.F.R. § 2.714 are (1) to assure that the contention in question raises a matter appropriate for litigation in a particular proceeding, <sup>2/</sup> (2) to establish a sufficient foundation for the contention to warrant further inquiry into the subject matter addressed by the assertion and, (3) to put the other parties sufficiently on notice " ... so that they will know at least generally what they will have to defend against or oppose." Peach Bottom, supra at 20. From the standpoint of basis, it is unnecessary for the petition to detail the evidence which will be offered in support of the contention. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2),

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2/ A contention must be rejected where:

- (a) it constitutes an attack on applicable statutory requirements;
- (b) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
- (c) it is nothing more than a generalization regarding the intervenor's views of what applicable policies ought to be;
- (d) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
- (e) it seeks to raise an issue which is not concrete or litigable.

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

ALAB-130, 6 AEC 423, 426 (1973). Furthermore, in examining the contention and the bases therefor, a licensing board should not reach the merits of the contention. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NPC 542, 548 (1980); Duke Power Co. (Amendment to Materials License SNM-1773 - Transportation of Spent Fuel From Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 NRC 146, 151 (1979); Peach Bottom, supra, at 20; Grand Gulf, supra at 426.

As the Appeal Board instructed in Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, 216-217 (1974), in assessing the acceptability of a contention as a basis for granting intervention:

[T]he intervention board's task is to determine, from a scrutiny of what appears within the four corners of the contention as stated, whether (1) the requisite specificity exists; (2) there has been an adequate delineation of the basis for the contention; and (3) the issue sought to be raised is cognizable in an individual licensing proceeding. (Footnotes omitted)

This applies equally to a contention proffered by an intervenor as well as by a petitioner to intervene. If a contention meets these criteria, the contention provides a foundation for admission "irrespective of whether resort to extrinsic evidence might establish the contention to be insubstantial." <sup>3/</sup> The question of the contention's substance is for

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<sup>3/</sup> Farley, supra, at 217. In addition, the proposed contention should refer to and address relevant documentation, available in the public domain, which is relevant to the Harris plant and the proffered contention. See, Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-24, 14 NRC 175, 181-184 (1981).

later resolution - either by way of § 2.749 summary disposition prior to the evidentiary hearing ... or in the initial decision following the conclusion of such a hearing." Farley, supra, 7 AEC at 217. Thus, it is incumbent upon CCNC to set forth its contention and bases therefore with sufficiently detailed and specific facts to demonstrate that the issues it purports to raise are admissible.

On June 30, 1983 the Commission, reviewing ALAB-687, 16 NRC 460 (1982), issued its decision in Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NPC 1041 (1983). This decision considered the standards to be applied to contentions premised upon information contained in licensing-related documents not required to be prepared early enough so as to enable an intervenor to frame contentions in a timely manner in accord with the provisions of 10 C.F.R. § 2.714(b). In Catawba the Commission determined that it is reasonable to apply the late-filing criteria in 10 C.F.R. § 2.714(a)(1) and the Appeal Board's three-part test for good cause <sup>4/</sup> to contentions that are filed late because they depend solely on information contained in institutionally unavailable licensing-related documents. <sup>5/</sup> Id. at 1045. Further, the Commission determined that the institutional unavailability of a

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<sup>4/</sup> 17 NRC 1045. See also ALAB-687, 16 NRC 460, 469 (1982).

<sup>5/</sup> The Commission believes that the five factors together are permitted by Section 189a of the Act and are reasonable procedural requirements for determining whether to admit contentions that are filed late because they rely solely on information contained in licensing-related documents that were not required to be prepared or submitted early enough to provide a basis for the timely formulation of contentions. Id. at 1045, 1050.

licensing-related document does not establish good cause for filing a contention late if information was otherwise available early enough to provide the basis for timely filing of that contention. <sup>6/</sup> Id., at 1048. Although the drug use charge in the newspaper cited by CCNC is not a licensing-related document, the rationale of the Commission's decision and analysis applies here.

The factors which must be balanced in judging the admissibility of a late-filed contention 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 proceeding.

10 C.F.R. § 2.714(a)(1)

With respect to the good cause factor the Commission adopted the Appeal Board's test to determine whether good cause exists for late filing of a Contention. Catawba, supra, 17 NRC at 1045. Under that test good cause exists if a contention: 1) is wholly dependent upon the content of a particular document; 2) could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that

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<sup>6/</sup> The Commission set out in its decision the fundamental principles upon which it bases its conclusion that Intervenor's are required diligently to uncover and apply all publicly available information to the prompt formulation of contentions. Id. at 1048-1050.

document; and 3) is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination. Id. at 1043-1044. The Appeal Board has recently discussed the showing necessary to cause the third factor of 10 C.F.R. 2.714(a)(1) to weigh in favor of the admission of a late petitioner for leave to intervene. Washington Public Power Supply System, et al. (WPPSS Nuclear Project No. 3) ALAB-747, 18 NRC, 1167 (1983). In WPPSS the Appeal Board reasserted a standard it had set forth in Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). As the Appeal Board stated:

Almost a year ago, we observed that, because of the importance of the third factor, "[w]hen a petitioner addresses this criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.

WPPSS, supra, 18 NRC at 1177. This standard is instructive in determining whether an intervenor has satisfied the third factor with respect to a late-filed contention.

B. The Proffered Contention

To have its proffered contention admitted CCNC must first establish that the contention qualifies under 10 C.F.R. § 2.714, basis and specificity, and relates to a safety concern cognizable under the Atomic Energy Act or to an environmental concern cognizable under the National Environmental Policy Act. If the contention qualifies under § 2.714 as described immediately above, then CCNC must then satisfy the late-file contention requirements of the Commission as set forth in Catawba cited above.

In its contention CCNC does not cite any NRC regulation which has been breached. The proffered Contention is a broad generalization, without specificity or basis, that there were at Harris workers who were under the influence of drugs and thereby less able to work. However, no specific item of work is identified which is alleged to be deficient. There is no showing that if work identified by CCNC were deficient, it would not be caught by Applicants and Staff in the normal OA/QC inspection processes. The contention is little more than Mr. Runkle's speculation of what might be at the site. For the above reasons the contention should be denied.

Assuming for purposes of this argument that the basis and specificity requirements discussed above could be met, we turn to consideration of the regulatory requirements relating to the admission of late-filed contentions discussed above.

10 C.F.R. § 2.714(a)(1)(i) Good cause -- CCNC alleges that it did not know of possible drug use at the site until January 10, 1985 when Mr. Runkle was called by a newspaper reporter. During the hearings on Joint Intervenors Contention 1, Mr. Runkle, as their attorney, on September 7, 1984 introduced into evidence JI Exhibit 17 (Tr. 2958) which on the first page indicates that one or more employees of the Applicants was discharged for involvement with cocaine at the Harris site. Mr. Runkle explained at the hearing that the JI Exhibit 17 was an Applicants response to interrogatories propounded by Joint Intervenors on May 1, 1984 (Tr. 2956). Thus, prior to the commencement of the hearings on management competence in September 1984 Mr. Runkle knew that the use of drugs at the Harris site had occurred. The alleged use of drugs at the site certainly was



not new information to Mr. Runkle on January 10, 1985. There is no good cause for filing this proffered contention late.

10 C.F.R. § 2.714(a)(1)(ii). The availability of other means whereby the petitioner's interest will be protected. -- No other party to this proceeding has raised as an issue the possible use of drugs at the Harris site.

10 C.F.R. § 2.714(a)(1)(iii). The extent to which CCNC's participation may reasonably be expected to assist in developing a sound record. -- In responding to this requirement, the Intervenors state on the second page of their filing:

5. Ability to compile a sound record--the contention does not address overly complicated and technical matters but rather the Applicants ability to safely build nuclear power plants. Again, it is highly likely that the Sheriff's Department will cooperate in providing details of their investigation of the Harris construction workers.

This statement totally fails to address the requirements of the regulation and fails to respond to the Appeal Board's interpretation thereof set forth in WPPSS ALAB-747 above. CCNC has identified no member or advisor or consultant who has any expertise in the matters they seek to raise in the proffered contention, nor have they identified any technical or managerial experts who can support their assertions. CCNC does not set out with particularity the precise issues it plans to cover. CCNC does not provide summaries of the proposed testimony of its prospective witnesses. These are the Appeal Board requirements set forth in WPPSS ALAB-747, cited supra.

The second sentence of CCNC's response to 10 C.F.R. § 2.714(a)(1)(iii) is somewhat puzzling. The regulatory requirement goes to CCNC's ability

to develop a sound record. The CCNC comment upon the Sheriff's Department seems not to be related to the regulation.

10 C.F.R. § 2.714(a)(1)(iv). The extent to which the petitioner's interest will be represented by existing parties. As noted above, no party has raised the use of drugs as an issue to litigate in this proceeding.

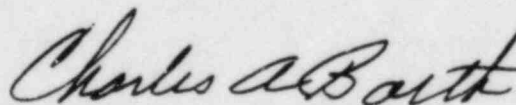
10 C.F.R. § 2.714(a)(1)(v). The extent to which the petitioner's participation will broaden the issues or delay the proceeding. Certainly admission of the proffered contention will broaden the scope of the proceeding by injecting new issues and also will delay the proceeding.

Balancing the five factors of 10 C.F.R. § 2.714(a)(1) the Staff is of the view that Factors i, iii, and v weigh so strongly against the Intervenors that the proffered contention should not be admitted.

#### IV. CONCLUSION

For the reasons cited above, the Staff believes that the proffered contention lacks specificity and basis and further its late filing cannot meet the Commission's standards as set forth in the regulations and Catawba cited above. Admission of the contention should be denied.

Respectfully submitted,



Charles A. Barth  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 7th day of January, 1985

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OFFICE OF SECRETARY  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE IN OPPOSITION TO CONSERVATION COUNCIL OF NORTH CAROLINA'S MOTION TO ADMIT PROFFERED CONTENTION WB-3 REGARDING DRUG USE" in the above-captioned proceeding have been served by the Staff on the following by deposit in the United States mail, first class, or deposit in the Nuclear Regulatory Commission's internal mail system (\*), this 7th day of February, 1985.

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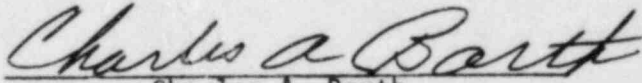
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