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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
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BRANCH

In the Matter of)
)
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

NRC STAFF RESPONSE TO INTERVENOR EDDLEMAN'S PROPOSED
CONTENTIONS 178-AA AND 179-AA CONCERNING DIESEL GENERATORS

I. INTRODUCTION

On February 4, 1985, Intervenor Wells Eddleman proposed two new contentions concerning the diesel generators to be used at Harris. "Diesel Generator Contentions and Information" [hereinafter Contentions]. The Staff's response opposing admission of these proposed contentions is set forth below.

II. BACKGROUND

On January 17, 1984, Intervenor Eddleman proposed Contentions 178 and 179. These two proposed contentions were very broad, and concerned the diesel generator issue. "Wells Eddleman's New Contentions and Amended Deferred Contentions in Response to Staff SER." The Board ruled that the contentions were timely, but deferred ruling on whether they met the requirements of 10 C.F.R. § 2.714 for basis and specificity, on the ground that the diesel generator issue was a constantly developing issue on which more specific information was yet to become available. Tr. 771.

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Applicants moved the Board to require Mr. Eddleman to particularize these two proposed contentions. Tr. 6848. The ground for this motion was that sufficient information was now available for Mr. Eddleman to raise particular concerns with regard to the way in which Applicants proposed to determine the reliability of their diesel generators. Tr. 6847. Applicants provided Mr. Eddleman with copies of the resolution of generic problems applicable to V-16 engines, and offered to meet with him to discuss the diesel generator issue. Tr. 6844, 6847.

In a conference call held on December 5, 1984, the Board granted Applicants' Motion. Tr. 7400. The Board ruled that there was now sufficient information available with regard to the Harris program for qualifying the diesels to allow Mr. Eddleman to propose specific contentions. Tr. 7400-7401. The Board rejected original proposed Contentions 178 and 179, stating that what the Board wished to hear was what is wrong with the Shearon Harris diesels. Tr. 7402. The Board also ordered the holding of a meeting between Mr. Eddleman and Applicants' experts to discuss his concerns about the diesels as a prerequisite for the filing of any proposed contentions on this matter. Tr. 7402-7403. This meeting was held on January 22, 1985. The Staff was invited and attended the meeting.

In its ruling the Board also made it clear that it was incumbent on Mr. Eddleman to show that he could indeed contribute to a sound record on this matter. This was to be done by a showing that Mr. Eddleman has someone who is an expert on the matter who will actively participate in helping him present his case. The Board also wanted to see a clear commitment that this expert would be available to testify at the hearing.

Tr. 7404. Mr. Eddleman filed his proposed contentions on February 4, 1985, pursuant to an extension of time approved by the Board from the ordered date of February 1, 1985.

III. ARGUMENT

A. NRC Standards Applicable To Proffered Contentions

In order for Intervenor Eddleman's proffered contentions relating to diesel generators to be admitted as matters in controversy in this proceeding, they must satisfy two standards. First, each contention must satisfy the Commission's requirement that the basis for the contention be set forth with reasonable specificity. 10 CFR § 2.714(b). Second, since they are late filed contentions, under the Commission's decision in Duke Power Company et al (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983), balancing of the five factors of 10 CFR § 2.714(a) must favor admission of the contentions.

In order for proposed contentions to be found admissible, they must fall within the scope of the issues set forth in the Notice of Hearing initiating the Proceeding,^{1/} and comply with the requirements of 10 CFR § 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

^{1/} 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).

424, 429 (D.C. Cir. 1974); Duquesne Light Co. (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 242, 245 (1973). Under 10 CFR § 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 CFR § 2.714 are (1) to assure that the contention in question raises a matter appropriate for litigation in a particular proceeding, ^{2/} (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 each

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).

contention. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973). Furthermore, in examining the contentions and the bases therefor, a licensing board should not reach the merits of the contentions. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 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." ^{3/} The question of the contention's substance is for 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 Intervenor Eddleman to set forth contentions and bases therefore which are sufficiently detailed and specific to demonstrate that the issues they purport 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 NRC 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 CFR § 2.714(a)(1) and the Appeal Board's three-part test for good cause ^{4/} to contentions that are filed late because they depend solely on information contained in institutionally

^{3/} 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).

^{4/} 17 NRC 1045. See also ALAB-687, 16 NRC 460, 469 (1982).

unavailable licensing-related documents. ^{5/} Id. at 1045. Further, the Commission determined that the institutional unavailability of a 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. ^{6/} Id., at 1048.

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

^{5/} The Commission states 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.

^{6/} The Commission set out in its decision the fundamental principles upon which it bases its conclusion that Intervenors are required diligently to uncover and apply all publicly available information to the prompt formulation of contentions. Id. at 1048-1050.

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 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 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. Proposed Contentions 178-AA and 179-AA Do Not Satisfy Either The Board's Order or 10 C.F.R. § 2.714 of the Commission's regulations and the Case Law Interpreting Those Regulations

Proposed Contentions 178-AA and 179-AA state as follows:

178-AA: CP&L has not established by appropriate operational testing, and analysis of the results thereof (including results of inspections after teardown after testing, analysis of tested engine

oil, and other appropriate tests) that the TDI DSRV-16 diesel engines at Shearon Harris have the capability to meet the loads they will be called on to meet in emergencies. Without emergency power available on a reliable basis, the health and safety of the public against serious nuclear accidents resulting from loss of offsite power or other failures cannot be assured. (Harris diesels untested for operation, see Attachment 1 of CP&L letter to NRC MLS 84-522, 1/16/85, item 2, p.1; requirement of appropriate testing to assure the diesels can meet required loads is the expert opinion of Dr. Robert N. Anderson.)

179-AA: CP&L's vendor (and other) inspection and QA is inadequate to assure that the TDI DSRV-16 diesels at Shearon Harris have the requisite quality and operability characteristics to perform their required functions. This is because variability of individual castings and tolerances effectively makes each DSRV-16 a custom unit. Any quality review or analysis based on other engines is therefore inadequate to assure the quality and operability of the Harris DSRV-16s. For use of information based on other engines, see TDI Owner's Group submissions. The inadequacy of such analysis and the variability of the DSRV-16s are opinion of Dr. Robert N. Anderson.

As can be seen from the above quotations, both of these contentions are very broad.

Contention 178-AA merely alleges that the Harris diesels have not been tested, and thus that it has not been demonstrated that the engines have the capability to meet the loads they will be called upon to meet in an emergency. This contention does not make use of any of the information which has been provided to Mr. Eddleman. It is well known that the diesels have not yet been tested. The Board in the discussion of its ruling requiring the particularization of Mr. Eddleman's proposed diesel generator contentions made reference to the fact that testing and inspections would continue into late 1985. Tr. 7403. This contention does not allege anything specifically wrong with the Harris diesels. It does not allege any specific defect in Applicants' program to demonstrate the reliability of their diesels. Therefore, this contention should be

rejected on the grounds that it lacks the specificity and basis required by 10 C.F.R. § 2.714 of the Commission's Regulations, that it does not set forth an issue which could be litigated in a hearing as required by Peach Bottom, supra, and it completely fails to comply with the Board's Order of December 5, 1984.

Contention 179-AA suffers from the same fatal flaws as Contention 178-AA. It merely states that since the engines are cast separately, one cannot rely on information about other engines when speaking of the Harris diesels.

The contention ignores the large amount of information which has been presented to Mr. Eddleman. Applicants have provided Mr. Eddleman with information which outlines the program they intend to follow to demonstrate the reliability of the Harris diesels. See Tr. 6847. Mr. Eddleman also had an opportunity through his participation in the meeting with Applicants' and Staff's experts, to gain information pertinent to any concerns he had about the Harris diesels or the program to demonstrate their reliability. ^{7/} Therefore, there is no reason why certain specific contentions could not have been proposed concerning the information contained in the documents provided to Mr. Eddleman by Applicants' or from information gained as a result of Mr. Eddleman's meeting with Applicants and Staff. A general statement that no analysis

^{7/} It should be noted that on December 20, 1984, Applicants' Phase II DR/QR report was submitted to the Staff, as was also Letter from A.B. Cutter to Harold R. Denton. This letter indicated that Mr. Eddleman would be a recipient of that report. The DR/QR report specifically concerns the Harris diesels.

which relies on information concerning other engines is adequate is too broad a generalization to be litigated in this proceeding. The contention does not address any of the information concerning the

Applicants' program to demonstrate the reliability of these diesels. For the above reasons proposed Contention 179-AA should be rejected on the grounds that it does not comply with the Commission's regulations, its case law, or the specific ruling of this Board.

C. The Five Factors

The Five Factors to be considered in ruling on any late filed contentions would balance against the admission of these two particular contentions. In the case of Contention 178-AA, Mr. Eddleman has been aware since July of 1984 that the diesels for Shearon Harris would not be tested until 1985. This particular contention is not based on any of the information recently provided to Mr. Eddleman. Therefore, he lacks good cause for its late filing. It is correct that the second and fourth factors, that is, whether his interests are being represented in any other way or whether another party is already representing his interests, would weigh in favor of the admission of a contention which meets the other requirements of the Commission's regulations.

With respect to Contention 179-AA, Mr. Eddleman has not relied on any specific portions of the information provided to him by Applicants. He makes only a general reference to Applicants' submittals. However, all parties have been aware for some time that the resolution of the diesel generator issue involved in part a generic program. If Intervenor

Eddleman had concerns about the use of a generic program, that concern could have been raised earlier, and is not related to the recently obtained information. Therefore, Mr. Eddleman lacks good cause for filing this particular contention.

The third factor -- whether Mr. Eddleman can contribute to the development of a sound record -- is in some doubt. It is clear that Mr. Eddleman has obtained the services of a person in Dr. Anderson who has been involved with the diesel issue before. It is not clear, however, that Dr. Anderson has the expertise to address the subject of the preoperational testing of diesel generators. See, Attachment at p.3. It is not clear, therefore, that Mr. Eddleman, even with the services of Dr. Anderson, would be able to contribute to a sound record on Proposed Contention 178-AA. In addition, Mr. Eddleman makes the statement that Dr. Anderson will testify at the hearing "if necessary and feasible." Contentions at 1. Mr. Eddleman does not give any explanation of the meaning of this phrase. It was the Staff's understanding that a clear commitment of Dr. Anderson's willingness and ability to testify at the hearing, with the obligations attendant on such an appearance such as the filing of written direct testimony, was necessary for Mr. Eddleman's proposed contention to be accepted. Therefore, without some further explanation on the part of Mr. Eddleman of Dr. Anderson's exact availability, this factor should weigh against the admission of any contentions which would otherwise satisfy the Commission's regulations.

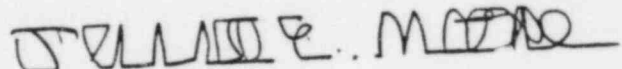
The fifth factor concerns whether the admission of these proposed contention would broaden the issues or delay the proceeding. Since there are no issues relating to diesels, it would broaden the issues. The

addition of such contentions would also delay the proceeding, since it could involve the conduct of additional hearings. Therefore, the five factors weigh against the admission of these two proposed contentions as formulated.

IV. CONCLUSION

For the reasons set forth above, Intervenor Eddleman's proposed Contentions 178-AA and 179-AA should be rejected on the grounds that they do not satisfy either the Commission's regulations, or the Board's Ruling of December 5, 1984.

Respectfully submitted,



Janice E. Moore
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day, of February, 1985

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENOR EDDLEMAN'S PROPOSED CONTENTIONS 178-AA and 179-AA CONCERNING DIESEL GENERATORS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or deposit in the Nuclear Regulatory Commission's internal mail system (*), this 25th day of February, 1985:

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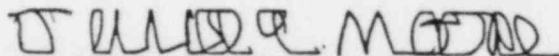
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