

August 26, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

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)

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Docket Nos. 50-400 OL
50-401 OL

OFFICE OF SECRETARY
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NRC STAFF RESPONSE IN OPPOSITION TO
CONTENTIONS PROFFERED BY WELLS EDDLEMAN RELATING
TO A SPILL OF REACTOR WATER AT BRUNSWICK UNIT 1

I. INTRODUCTION

On August 6, 1985, Mr. Eddleman filed a document seeking to raise three late-filed contentions relating to notification of State and local emergency management agencies. ^{1/} The basis for these proposed contentions appears to be an article published on August 2, 1985 in the Raleigh News and Observer which related to a spill of reactor water at Applicants' Brunswick facility. For the reasons discussed below, the Staff opposes the admission of the three-late filed contentions.

II. BACKGROUND

Mr. Eddleman read a short article in the Raleigh News and Observer published on August 2, 1985. The article is attached to his filing and it states, in essence, that a spill of a reactor water occurred at

^{1/} "Eddleman Contentions on Notification of State and Local Emergency Management Agencies" 6 August 1985, (hereinafter "Spill Contentions").

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Brunswick Unit 1 and that Applicants notified the county and state some eleven hours later of an unusual event." Mr. Eddleman called the North Carolina Division of Emergency Management (NCDEM) and reports that he was informed that Applicants notified the MCDEM of an unusual event at 9:41 a.m., Wednesday, July 31, 1985. Mr. Eddleman then proceeded to file the pleading which is the subject of this Staff response. The three proffered contentions are set forth below.

EM-1. CP&L fails to assure that the requirement of 10 C.F.R. 50.47(a)(1) that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency by failing to promptly notify local and state emergency response agencies of the occurrence of an event that was later classed as an "unusual event" for emergency response purposes. Delays as large as approximately 11 hours in notification are not acceptable. In the light of the events of July 30-31, 1985 at the Brunswick plant, CP&L has demonstrated unreliability in prompt notification and must therefore re-demonstrate assurance of prompt notification on some basis more credible than the Company's claims, before its Harris facility can be deemed to have an adequate emergency plan.

EM-2. CP&L fails to meet the criteria of 10 C.F.R. 50.47(a)(1) (assurance that adequate protective measures can and will be taken in the event of a radiological emergency) due to its evident failure to meet the criterion II.D.1 at the Brunswick plant for declaring an unusual event. Evidently, insufficient parameters, instruments or equipment status were established for unambiguously identifying an unusual event promptly, and the unusual event was only declared nearly 11 hours after the actual radioactive water spill through ductwork, and from the spent fuel pool, had occurred. This type of error is likely to be reproduced at Shearon Harris, especially in the light of CP&L's claims of improved operations and management at Brunswick (which should mean that Brunswick is as up-to-snuff as CP&L can make it). Moreover, CP&L's failure to notify promptly the responsible agencies means criterion II.E.5 (NUREG-0654 can't be met).

EM-3. CP&L's management capability for emergency response does not meet the requirements of 10 C.F.R. 50.47(a)(1) in that it is not assured that State and local emergency response agencies will be promptly notified of the occurrence of events (e.g. the radioactive water spill from

the spent fuel pool and through ductwork at CP&L's Brunswick plant, July 30, 1985 and following) which have potential for radiological releases or impairing the function of plant safety systems. CP&L's failure to meet the requirements of NUREG-0654 II.D.1 is a management failure which is likely to be reproduced at Harris, especially since Brunswick has been receiving so much CP&L management attention, e.g. to adequacy of procedures, and still failed to have adequate procedures to unambiguously and promptly identify an emergency even (e.g. this "unusual event".)

III. DISCUSSION

A. NRC Standards Applicable To Proffered Contentions

In order for Intervenor Eddleman's proffered contentions 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 C.F.R. § 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 C.F.R. § 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, ^{2/} and comply with the requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law. Northern States Power Co.

^{2/} 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).

(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, 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, ^{3/} (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

3/ 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).

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 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." ^{4/} 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 Mr. Eddleman and CCNC 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 C.F.R. § 2.714(a)(1) and the Appeal Board's three-part test for good cause ^{5/} to contentions that are filed late because they depend solely on information contained in institutionally

^{4/} 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).

^{5/} 17 NRC 1045. See also ALAB-687, 16 NRC 460, 469 (1982).

unavailable licensing-related documents. ^{6/} 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. Id., at 1048. Although the reporting of a spill of reactor water at Brunswick Unit 1 on July 30, 1985 is not a licensing-related document, the rationale of the Commission's decision and analysis applies here.

The basic principle which underpins the Commission's Catawba decision is set forth at length:

We start with the basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation. See, e.g., Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897 (1982). And as a corollary, since intervenors have the option to choose the issues on which they will participate, it is reasonable to expect intervenors to shoulder the same burden carried by any other party to a Commission proceeding. While we are sympathetic with the fact that a party may have personal or other obligations or possess fewer resources than others to devote to a proceeding, this fact does not relieve that party of its hearing obligations. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981) ("Statement of Policy"). Thus, an intervenor in an NRC proceeding must be taken as having accepted the obligation of uncovering information in publicly available documentary material. Statements that such material is too voluminous or written in too abstruse or technical language are inconsistent with the responsibilities

^{6/} 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.

connected with participation in Commission proceedings and, thus, do not present cognizable arguments. [emphasis supplied]

17 NRC at 1048.

Mr. Eddleman has failed to comply with this basic intervenor duty and his proffered contentions should not be admitted into this proceeding. His failure to comply with the Commission's mandate has made his contentions incomplete as to the facts and misleading.

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 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. Mr. Eddleman's filing does not provide the information required by the Appeal Board.

B. The Contentions Do Not Meet The Requirement of 10 C.F.R. § 2.174(b)

The Commission's regulations, as noted above, require that the basis for the contention be set forth with reasonable specificity. 10 C.F.R. § 2.714(b). The proposed three contentions all appear to raise the same complaint; namely that Applicants failed to timely classify the incident that occurred at the Brunswick Steam Electric Plant as an "unusual event" and failed to promptly notify state and local emergency response agencies of the occurrence of the incident. Based on this complaint, Mr. Eddleman contends Applicants fail to meet the requirements of 10 C.F.R. § 50.47(a)(1). No basis is provided to support Mr. Eddleman's complaint.

First, Mr. Eddleman claims that Applicants failed to timely classify the incident as an "unusual event." However, Mr. Eddleman does not indicate any NRC requirements which specify a time period within which an incident must be classified as an "unusual event" and which period was exceeded by Applicants. In fact, there are no Commission requirements specifying a time period within which an incident must be classified as an "unusual event."

Next, Mr. Eddleman does not identify any of Applicants' procedures dealing with emergency classification and notification of State and local emergency response agencies which are inadequate at Brunswick. Further, and more relevant to this proceeding, he does not allege how similar procedures in place for the Shearon Harris plant are inadequate or provide any basis for suggesting that Applicants' personnel will not follow the procedures.

In sum, the broad allegations in Mr. Eddleman's proposed contentions have not been supported with any basis. The proposed contention should be rejected for failure to comply with 10 C.F.R. § 2.714(b).

C. The Balance of the Five Factors of 10 C.F.R. § 2.714(a)(1)
Do Not Tip In Favor Of Admitting The Late-Filed Contentions

Factor 1. (Good Cause)

Mr. Eddleman promptly filed the proposed contentions after reading the account of the Brunswick spill described in the August 2, 1985 newspaper article in the Raleigh News and Observer. Further, he did not have previous access to the specific public information stated in the article.

Factors 2. and 4. (Availability of Other Means and the Extent to Which Mr. Eddleman's Interests Will be Represented by Existing Parties)

These factors would weigh in favor of admitting the late-filed contention, although they should be given less weight than the others.

Factor 3. (Extent to Which Mr. Eddleman's Participation May Reasonably Be Expected To Assist in Developing a Sound Record)

Mr. Eddleman does not identify any expert witness upon whom he proposes to rely although he makes the vague assertion such witnesses can be located and made available and that he proposes to do so. He suggests likely witnesses include Mr. Logan (emergency management coordinator of Brunswick County) and other state emergency response officials and unidentified Applicants' personnel involved in the cited Brunswick incident. However, he does not indicate what contribution these individuals may be able to make regarding Applicants' emergency classification and notification capabilities at the Shearon Harris Plant. This factor weighs heavily against admission of the proposed contention.

Factor 5. (Exhibit to Which Mr. Eddleman's Participation Will Broaden the Issue or Delay the Proceedings)

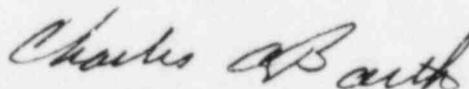
Admission of new contentions clearly broaden the issues to be litigated and have the potential to delay the proceeding. Mr. Eddleman concedes this impact. He argues some delay is justified because of the importance of the issue of prompt notification of State and local emergency management agencies. However, as noted above he has not identified any deficiencies in the Shearon Harris emergency classification or

procedures to implement notification. To delay the proceeding while the parties engage in all the prehearing and hearing activities involved in litigating an issue based on an incident with a tenuous relationship to this proceeding is not in the public interest. Accordingly, this factor weighs heavily against admission of the proposed contentions.

CONCLUSION

The balance of the five factors to be considered in weighing the admissibility of late-filed contentions weigh against admission of the proposed contentions. Further, the proposed contentions lack the requisite basis set forth with reasonable specificity required by 10 C.F.R. § 2.714(b). Accordingly, the proposed contentions should not be admitted.

Respectfully submitted,



Charles A. Barth
Counsel for NRC Staff

Dated in Bethesda, Maryland
this 26th day of August, 1985

UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO CONTENTIONS PROFFERED BY WELLS EDDLEMAN RELATING TO A SPILL OF REACTOR WATER AT BRUNSWICK UNIT 1" 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 26th day of August, 1985:

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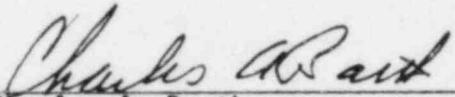
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