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January 21, 1986

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
Carolina Power & Light Company and) Docket No. 50-400 OL
North Carolina Eastern Municipal)
Power Agency)
)
(Shearon Harris Nuclear Power Plant))

EXCEPTIONS AND OBJECTIONS TO ORDER DATED JANUARY 10, 1986

Now comes the Conservation Council with Exceptions and Objections to the Order (Concerning Ex Parte Communication), dated January 10, 1986. This Order was served on all the parties to this proceeding and had attached to it a copy of a letter dated January 1, 1986, from Ms. Patty Miriello to Judge Kelley. This letter was marked at the top "TO BE KEPT CONFIDENTIAL." I BELIEVE THE USNRC DOES KEEP SOME THINGS OUT OF THE HANDS OF THE POWER COMPANIES," making it clear that Ms. Miriello expected the letter to be confidential, specifically that the allegations raised in the letter be kept from the Applicants until fully investigated.

Per Judge Kelley's request in the Order, Counsel for the Conservation Council notified Ms. Miriello of the Order and the regulatory prohibitions

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against ex parte communications when she called Counsel on January 17, 1986. A copy of the Order is being sent to her, along with a copy of this filing. However, we do not agree with Judge Kelley's finding that the letter from Ms. Miriello was apparently an ex parte communication. We strongly object to the issuing of the Order and the service of this letter on the parties to this proceeding, particularly in light of the expressed intent of Ms. Miriello to keep it confidential.

Ms. Miriello's letter was not an ex parte communication pursuant to 10 C.F.R. 2.780. Neither branch of the two-prong ex parte communication test was reached in this instance. First of all, although Ms. Miriello was a witness for the Conservation Council at the October 3, 1985, hearings on Contention WB-3 (Drug Abuse During Construction), she is not and never has been a "party...or...officer, employee, representative, or any other person directly or indirectly acting in behalf of" the Conservation Council. 10 C.F.R. 2.780(a)(2). Ms. Miriello is not an agent of any kind or even a member of the Conservation Council, and is not authorized to speak for the Conservation Council in this proceeding. She voluntarily testified for the Conservation Council on the contention concerning drug abuse as a "whistle-blower" raising safety-related matters. She did not notify or consult Counsel for the Conservation Council before sending her letter to Judge Kelley.

Secondly, an ex parte communication is limited to communications "regarding any substantive matter at issue in a proceeding." 10 C.F.R. 2.780(a)(2). The only matter which Ms. Miriello testified concerned drug abuse by workers at the Harris facility. Even if portions of the letter in fact related to matters raised (or which could have been raised) on the

record on Contention WB-3, other allegations raised in the letter concern the following:

- (1) improper inservice inspection of welds;
- (2) falsification of records;
- (3) questionable practices related to health physics practices;
- (4) notification by NRC Staff of so-called "unannounced inspections;"
- (5) intimidation and retribution of a former employee who had raised safety-related matters.

These are the substantive sections of the letter and clearly do not fit into the fairly narrow subject matter test of an ex parte communication and as such must be excluded from the provisions of 10 C.F.R. 2.780(b).

In the Order, Judge Kelley stated that he did "not read Ms. Miriello's letter except to determine its general nature." In light of the request to keep the letter confidential, we submit that Judge Kelley's duty was to read the letter closely, serve any portions concerning matters at issue in the proceeding (i.e. drug abuse by workers at the Harris facility), and treat any other matters in confidence. It is obvious that Ms. Miriello erred by misdirecting her letter to an inappropriate person within the Nuclear Regulatory Commission bureaucracy, but as a layperson not either an attorney or knowledgeable of NRC practice she certainly cannot be held to understand the multifaceted nature of the NRC--that is, licensing proceedings, investigations, Staff review of operations, etc. Her error could have been easily remedied by Judge Kelley by either returning the letter to her, forwarding it directly to the appropriate NRC office (such as the Office of Investigation), or consulting with counsel for the parties before acting.

The ex parte rule requires disclosure of communications which have the potential to unfairly influence matter in issue. This policy is similar to restraints on judges in most legal proceedings and is without question a

wise policy. There are however countervailing policies and obligations for the handling of confidential information, especially that which might have serious safety-related significance. They are as follows:

(1) Pursuant to 10 C.F.R. 2.715, a person not a party may make a limited appearance in a licensing proceeding to raise any matter relating to the licensing. In fact, two such limited appearance hearings have been held relating to the Harris plant, one on emergency planning and an earlier one on covering quite varied matters of concern. The encouragement of public comment through limited appearance statements illustrates the obligation of the licensing board to allow the public access to at least some level of the NRC to raise concerns about the facility.

(2) There is an expressly stated statutory and regulatory framework to protect from discrimination those employees who blow the whistle on violations of nuclear safety laws. These include complaints before the Department of Labor pursuant to 29 C.F.R. 24.3 ff. or "public policy" tort claims for wrongful discharge. These are just two of the more apparent avenues to protect whistleblowers, but beyond these is the primary purpose of the NRC is to protect public health and safety from the release of radiation from nuclear power plants. Employees who work at the plant are often the best sources for this kind of information and should be and in fact are encouraged by the NRC. This includes responding to requests for confidentiality, routinely done by some NRC investigative personnel and inspectors at the nuclear plants. This Board, in connection with contentions concerning employee harassment, has itself allowed workers to raise contentions and retain confidentiality. In the instant matter, any reading beyond a cursory one would have pointed out the need to keep Ms. Miriello's allegations confidential until they could be properly

investigated. Her own safety from harassment and retaliation, let alone embarrassment, has been greatly compromised by the premature revealing of these allegations.

(3) Although the regulations at 10 C.F.R. 2.719(a) state that the presiding officer in a licensing proceeding is separate from the agency's investigative and prosecuting functions, this does not preclude the presiding officer from taking actions required of all federal employees. There are express regulatory and statutory sanctions against the disclosure of confidential information. 18 U.S.C. 1905 (expressly referred to in 10 C.F.R. 0.735-30 as a positive duty for all NRC employees to follow) provides criminal sanctions for the disclosure of any confidential information "to any extent not authorized by law." We submit that this restraint along with the others above must be considered before the disclosing of any ex parte communications.

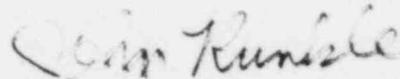
It is apparent from the policies regarding the disclosure of ex parte communications and those protecting confidentiality that there should have been a balancing of the different interests involved before the serving of the entire letter on the Applicants. There is an apparent lack of concern about the effects that disclosure of the allegations will have on future and ongoing criminal and safety-related investigations. Provided that the allegations are true, the Applicants have been afforded the opportunity to destroy any incriminating evidence. Ms. Miriello, like other employees who have raised safety-related matters, should be encouraged by all employees of the NRC and the allegations raised in her letter should not be ignored. In this instance, her reasonable request for the confidentiality of the allegations was passed over completely without due attention.

Based on the above, we strongly urge the Board to refrain from further compounding the problems which may have arisen from distributing Ms.

Miriello's letter to the Applicants. The allegations, at this time, do not need to be publicized in the press or even more widely distributed than it has already been.

For the information of the Board and the other parties, we are sending the attached letter to Chairman Palladino of the Nuclear Regulatory Commission, copies to the other Commissioners, with a copy of the January 10 Order (including Ms. Miriello's confidential letter) and this filing.

Respectfully submitted,



John Runkle
General Counsel
Conservation Council of NC
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THE CONSERVATION COUNCIL OF NORTH CAROLINA

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January 20, 1986

Chairman Nunzio J. Palladino
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Sir:

We have attached an Order from Judge James Kelley of the Atomic Safety and Licensing Board dated January 10, 1986, and the letter attached to it from Ms. Patty Miriello, an ex-employee at the Shearon Harris Nuclear Plant. This letter raised safety-related matters and is clearly marked "CONFIDENTIAL." We are also including our response to the Order.

We are deeply concerned about the propriety of the act of serving this letter on the Applicants in this proceeding over the express request for it to remain out of their hands until properly investigated.

We are submitting this to you because we are not aware of alternative ways of getting this matter reviewed. We appreciate any consideration of the matter which you are able to give it. We look forward to hearing from you.

Respectfully submitted,

John Runkle
Counsel for the Conservation Council
Intervenor in Docket No. 50-400 OL

Enc.

cc. Lando W. Zech
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Service List, Docket No. 50-400 OL

CERTIFICATE OF SERVICE

I hereby certify that this Exceptions and Objections to Order Dated January 10, 1986, and Letter to Chairman Palladino were served on the following persons by deposit in the U. S. Mail, postage prepaid, or by hand-delivery.

Thomas S. Moore, Chairman (appeals only)
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This is the 21st day of
January, 1986.



John Runkle
for the Conservation Council