UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Thomas S. Moore, Chairman
Dr. Reginald L. Gotchy
Howard A. Wilber

July 11, 1986

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

MEMORANDUM AND ORDER

We have before us a June 9, 1986 petition for leave to intervene filed by the Coalition for Alternatives to Shearon Harris (CASH) and a similarly dated joint motion for a stay of the license authorization for the Shearon Harris facility filed by CASH and Wells Eddleman. Although by its terms the intervention petition appears to be directed to the Commission, the petitioner filed it with us and the applicant and the NRC staff have treated it as filed here. The stay motion, on the other hand, is clearly directed to us.[1] Accordingly, we shall resolve both filings. For the

[1] Like the petitioner's intervention papers, the NRC staff answer to the stay motion is also misdirected. The cover of the staff's June 25, 1986 response states that it
(Footnote Continued)

reasons that follow, both the petition and the motion are denied.

I. The CASH Intervention Petition

The petitioner, Coalition for Alternatives to Shearon Harris, apparently was formed only this past April and now seeks to be "recognized as a party in the appellate proceedings concerning the granting of a final operating license . . . for the Applicant's Shearon Harris Plant."[2] CASH did not intervene in the operating license proceeding before the Licensing Board and, before us, does not seek to reopen the record to raise any new contentions. Although the Commission's Rules of Practice do not specifically address the circumstance we are presented with here, it is clear that CASH's attempt to intervene in the proceeding at this very late stage must fail.

All operating license proceedings before the Licensing Board pertaining to the Shearon Harris facility have been completed and most of the case is now before us. To the extent that CASH now seeks to participate at the appellate

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(Footnote Continued)
is before the Atomic Safety and Licensing Board, although the first page of the response recites that it is directed to us. The staff compounded the error by serving their response on each member of the Licensing Board, so the individual members of this Board did not receive it directly.

[2] Petition for Leave to Intervene (June 9, 1986) at 2.

level, its petition must be denied for the simple reason that one may not appeal matters in which one did not participate below.[3] CASH did not participate in any of the Licensing Board hearings (indeed, CASH did not exist at the time those hearings were being conducted),[4] and hence, has no right to appeal any of the Licensing Board's procedural rulings or any issues litigated below. Moreover, under the Rules of Practice an appeal (other than from the denial of intervention) may only be taken by a party to the proceeding[5] and CASH was never accorded that status.[6]

II. The Motion for a Stay

Inasmuch as we have denied their intervention petition, CASH is not a proper party to seek a stay of any Licensing

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[3] See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-583, 11 NRC 447, 448-49 (1980).

[4] See Petition for Leave to Intervene, Appendix VI.

[5] See Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-433, 6 NRC 469, 470 (1977).

[6] CASH also seeks to intervene pursuant to 10 C.F.R. § 2.715(a) which deals with limited appearance statements. This section, however, carries with it no appellate rights. See Metropolitan Edison Co. (Three Mile Island Nuclear Generating Station, Unit 2), ALAB-454, 7 NRC 39 (1978) (a person who has made only a limited appearance before the Licensing Board may not appeal from that Board's decision); cf. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 333 (1983) ("[L]imited appearance statements may be permitted at the discretion of the presiding officer, but the appearee 'may not otherwise participate in the proceeding.'").

Board action in this operating license proceeding. Accordingly, we shall treat the stay motion as being sponsored solely by Mr. Eddleman, an intervenor in the proceeding.

Mr. Eddleman's motion recites that he seeks "a stay of the immediate effectiveness of the Final Licensing Board Decision (CBP-86-11) [sic]."[7] Thus, it appears that the intervenor seeks to stay the Licensing Board's final decision authorizing the issuance of an operating license for the Shearon Harris plant.[8]

Mr. Eddleman appears to base his request for a stay on two matters: the recent resolution by one of the counties in the Shearon Harris emergency planning zone (Chatham County) to rescind its prior approval of the Shearon Harris emergency response plan pending further examination of certain unspecified unresolved issues; and allegations by a former employee of one of the applicants regarding alleged deficiencies in the applicants' health physics, radiation protection and on-site emergency preparedness programs (the Miriello allegations).

Insofar as Mr. Eddleman's motion is premised on the Chatham County issue, that foundation no longer exists.

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[7] Stay Motion (June 9, 1986) at 1.

[8] LBP-86-11, 23 NRC 294 (1986).

This is because it appears that Chatham County is once again fully involved in the Shearon Harris emergency planning effort. In a letter dated July 8, 1986, counsel for the applicants enclosed a copy of a resolution adopted by the Chatham County Board of Commissioners on July 7, 1986, endorsing the Shearon Harris emergency plan and affirming the County's commitment to participate in the plan.[9] Hence, there is no Chatham County issue on which to base a motion for a stay.

Insofar as the stay motion is based on the Miriello allegations, Mr. Eddleman must show that he is entitled to the requested relief based on an analysis of four factors:

1. Whether the moving party has made a strong showing that it is likely to prevail on the merits;
2. Whether the party will be irreparably injured unless a stay is granted;
3. Whether the granting of a stay would harm other parties; and
4. Where the public interest lies.[10]

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[9] See Letter Thomas A. Baxter to the Secretary to the Appeal Board (July 8, 1986) and Supplement to Applicants' Response to CCNC and Eddleman Request to Continue Stay Indefinitely (July 8, 1986) (filed with the Commission).

[10] 10 C.F.R. § 2.788(e); Philadelphia Electric Co. (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 270 (1986).

Here such an analysis demonstrates that a stay is totally unwarranted.

It is established that the second factor, irreparable injury, is often the most important in determining if a stay is warranted.[11] It is equally settled that the movant for a stay "is required to demonstrate that the injury claimed is 'both certain and great.'"[12] With regard to the Miriello allegations, Mr. Eddleman characterizes the irreparable injury as harm that Ms. Miriello will suffer as a result of her inability to obtain her complete radiation protection record from Carolina Power and Light Co. (CP&L) (one of the applicants) which in turn is preventing her from gaining employment. Plainly, this claim is insufficient to establish irreparable injury. For Mr. Eddleman does not spell out, and we do not see, any connection between the issuance or nonissuance of a stay and Ms. Miriello's ability to obtain her complete records from CP&L.

As to the first factor, the intervenor attempts to show that he will prevail on the merits regarding the Miriello allegations. But this matter was not a contested issue before the Licensing Board, and is not before us on

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[11] See Limerick, ALAB-835, 23 NRC at 270.

[12] Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 747 (1985).

appeal.[13] Rather, Mr. Eddleman apparently seeks to interject a new issue into the case without first filing a motion to reopen the record. Because no formal motion to reopen has been made (let alone granted), it appears Mr. Eddleman has, so to speak, put the cart before the horse. Moreover, even were we disposed to viewing the motion as one to reopen the record, we could not find that the motion meets the test for reopening on the Miriello issue.[14]

Similarly, the intervenors have failed to demonstrate that granting a stay would not harm the applicants or be in the public interest. Consequently, the motion for a stay must be denied.

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[13] The substance of the Miriello allegations was placed before the Licensing Board in the form of a late-filed contention (sponsored by intervenors Eddleman and Conservation Council of North Carolina) which the Board rejected. Memorandum and Order (June 13, 1986). This decision has not been appealed.

[14] See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 4-5 (1986).

In its June 13 Memorandum and Order, the Licensing Board determined that the late-filed contention based on the Miriello allegations did not satisfy the standards for reopening a closed record.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board