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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

BEFORE THE COMMISSION

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

APPLICANTS' RESPONSE TO
JOINT CASH/EDDLEMAN PETITION
FOR HEARING ON EXEMPTION REQUEST

I. Introduction

A full participation emergency preparedness exercise was conducted for the Shearon Harris Nuclear Power Plant plume exposure pathway Emergency Planning Zone on May 17-18, 1985. The NRC inspection team reported no violations or deviations, and characterized the exercise as "fully successful."^{1/} Similarly, FEMA concluded that the exercise demonstrated that "the state and local emergency plans are adequate and capable of being implemented..."^{2/} The results of the exercise were litigated before

^{1/} NRC Inspection Report No. 50-400/85-20 (June 5, 1985).
^{2/} Memorandum, for E. Jordan (NRC) from R. Krimm (FEMA) (August 7, 1985) (transmitting FEMA report on exercise).

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the Atomic Safety and Licensing Board, which in March 1986 resolved the contentions in favor of Carolina Power & Light Company ("CP&L" or, with North Carolina Eastern Municipal Power Agency, "Applicants"), finding no evidence of a fundamental flaw.^{3/}

By letter of March 4, 1986, to the Director of the Office of Nuclear Reactor Regulation, Mr. Harold Denton, CP&L requested an exemption from that part of 10 C.F.R. Part 50, Appendix E, § IV.F.1 which requires that the full participation exercise be conducted within one year of issuance of the full power license and prior to operation above 5% of rated power. In a letter to Mr. Denton dated April 3, 1986 ("Eddleman Petition"), Mr. Wells Eddleman commented on the hearing requests and sought a hearing on the issue. The NRC Staff forwarded Mr. Eddleman's request for a hearing to the Commission for its consideration.^{4/}

Applicants and the NRC Staff responded to the Eddleman Petition, both concluding that Mr. Eddleman is not entitled to a hearing on the exemption request.^{5/} The Eddleman Petition is

^{3/} "Order (Concerning Emergency Planning Contentions)" (March 19, 1986); LBP--86-11, 23 N.R.C. 294, 397-407 (1986).

^{4/} See Memorandum for S. Chilk, Through V. Stello, From E. Christenbury (May 15, 1986); Memorandum for S. Chilk, From E. Christenbury (July 17, 1986).

^{5/} See "Response By Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency To Wells Eddleman's Request for Hearing on Emergency Preparedness Exercise Exemption Request" (April 22, 1986) ("Applicants' Response"); "NRC Staff Response To Wells Eddleman's Request For A Hearing On Applicants' Request For Exemption From the Requirement For an Emergency Preparedness Exercise" (July 24, 1986) ("Staff Response").

presently pending before the Commission.^{6/}

By letter to the Commissioners dated July 31, 1986 (the "Joint Petition"), Mr. Eddleman and the Coalition for Alternatives to Shearon Harris ("CASH") jointly petition for a hearing on the exemption request.^{7/} Applicants herein respond to the Joint Petition, supplementing and incorporating by reference Applicants' Response to the Eddleman Petition.

For the reasons set forth below, Applicants agree with the Staff that there is no independent right to a formal adjudicatory hearing on an exemption request. See Staff Response at 3-5. Applicants further concur in the Staff's view that the successful May 1985 full participation exercise should be considered the "exercise of record," which serves as the basis for licensing action, with any subsequent exercise deemed confirmatory. Under this construction, the pending exemption request does not concern a requirement for initial licensing; thus, no hearing rights

^{6/} The NRC Staff has taken a preliminary position that Applicants' exemption request should be granted. See Staff Response at 7 n.5.

^{7/} Mr. Eddleman, who is a member of CASH but not an attorney, signed the filing with the Commission twice -- once on his own behalf, and once for Mr. Steven Katz, whom Applicants believe also to be a member of CASH but not an attorney. While the Joint Petition is purportedly filed on behalf of a number of individuals in addition to CASH and Mr. Eddleman (i.e., Calvin Ragan et al.), under Commission regulations Messrs. Eddleman and Katz have no authority to represent the other individuals. See 10 C.F.R. § 2.713(l); Consolidated Edison Co. of New York (Indian Point, Unit No. 2), LBP-82-25, 15 N.R.C. 715, 726 (1982).

attach to the exemption request.^{8/} See Staff Response at 6-8. In addition, Applicants present an alternative basis for denial of the hearing requests. As discussed more fully below, even if construed as a late-filed contention in the operating license proceeding, the Joint Petition fails to raise an issue which would be cognizable in a hearing on Applicants' exemption request. Accordingly, the Commission should deny the requests for a hearing on the exemption, resting its decision on both the reasoning advanced by the Staff and Applicants' alternative set forth herein.

II. There Is No Independent Right
To A Formal Hearing
On An Exemption Request

Like the Eddleman Petition, the Joint Petition asserts that section 189(a) of the Atomic Energy Act accords an independent right to a formal adjudicatory hearing on an exemption request. That statute provides for a right to a hearing in any proceeding "for the granting, suspending, revoking, or amending of any license...." 42 U.S.C. § 2239(a). Citing Sholly, Deukmejian, and Brooks,^{9/} Petitioners argue that an exemption is itself a

^{8/} Nor would an opportunity for hearing be associated with any confirmatory exercise.

^{9/} Sholly v. Nuclear Regulatory Commission, 651 F.2d 780 (D.C. Cir. 1980), vacated, 459 U.S. 1194 (1983); San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 751 F.2d 1287 (D.C. Circuit 1984), vacated in part and rehearing en banc

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license or a license amendment, and therefore must be subject to a formal hearing. There is no merit to this argument.

Section 189(a) of the Atomic Energy Act is to be construed narrowly and not to confer hearing rights where they have not been expressly granted. See Three Mile Island Alert, Inc. v. Nuclear Regulatory Commission, 771 F.2d 720, 728-30 (3d Cir. 1985), cert. den. sub nom. Aamodt v. Nuclear Regulatory Commission, 106 S.Ct. 1460 (1986) (rejecting similar argument that conditions imposed by Commission in lifting order suspending TMI-1 operations effectively constituted license amendments, entitling petitioners to a formal § 189(a) hearing). In passing on an exemption, the Commission engages in informal agency adjudication. Duke Power Co. v. Nuclear Regulatory Commission, 770 F.2d 386, 389 (4th Cir. 1985).^{10/} In such cases, the Commission is "authorized to proceed on the basis of an informal hearing in which it may consider written materials, including factual and

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granted, 760 F.2d 1320 (D.C. Cir. 1985), on rehearing, 789 F.2d 26 (D.C. Cir. 1986) (which Petitioners refer to as Deukmejian); Brooks v. Atomic Energy Commission, 476 F.2d 924 (D.C. Cir. 1973).

^{10/} The Commission regulation pursuant to which the exemption request was filed does not provide an independent opportunity for hearing on such a request. See 10 C.F.R. § 50.12(a). Further, it has been longstanding Commission policy and practice that no mandatory hearing rights attach to the granting or denial of an exemption. The Commission's policy and practice is consistent with that of other federal agencies. See Staff Response at 4, incl. n.1.

legal statements, without holding a formal hearing with traditional trial-type procedures." Id.11/ Accordingly, Petitioners' claim of an independent right to a formal adjudicatory hearing on the exemption request lacks any legal basis and must be rejected.

III. Petitioners' Concerns Fail To Meet The Standards For Consideration In The Operating License Proceeding

The Commission need not limit the basis for its decision to the statutory argument advanced by Petitioners. Although both Mr. Eddleman and CASH expressly disavow any intent to contest the exemption request in the pending section 189(a) proceeding,12/

11/ Here, both Mr. Eddleman and CASH have filed comments -- including factual and legal arguments -- on the exemption request. Presumably those comments will be considered in the disposition of the request.

12/ See, e.g., "Memorandum and Order" (Appeal Board July 11, 1986) at 2 (rejecting CASH petition to intervene in OL proceeding, noting that CASH professes no intent to raise new contentions, but only to participate in appellate process); Eddleman Petition (asserting right to hearing "outside the licensing hearing procedures of the NRC"); Joint Petition (contending that instant hearing request "cannot be handled in that [OL] proceeding").

Like the Eddleman Petition, the Joint Petition criticizes Applicants for filing their exemption request with the NRC Staff rather than the Licensing Board. Joint Petition at 2. However, as discussed more fully at pages 3 to 4 of Applicants' Response to the Eddleman Petition, the function of passing on requests for exemptions from 10 C.F.R. Part 50 has been delegatd by the Commission to the Director of Nuclear Reactor Regulation, and not to adjudicatory boards. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-77-35, 5 N.R.C. 1290 (1977); see also 50 Fed. Reg. 50764 (Dec. 12, 1985). In an operating license hearing, a board passes only on issues put into

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their requests for a hearing could most charitably be construed as a petition for admission of a late-filed contention in the operating license proceeding. Even so, their requests fail to meet the requisite standards. Indeed, because Petitioners' requests do not raise an issue which would be cognizable in a hearing on the exemption request, the Commission need not reach either the criteria for reopening the record or the "five factors" test for admissibility of a late-filed contention -- both of which would be applicable here.^{13/}

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contest. All other matters to be addressed prior to issuance of the license are decided by the Commission and the Staff outside of the adjudicatory context. Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 N.R.C. 1, 7 n.5 (1986). Thus, Applicants' exemption request was properly lodged with the NRC Staff. See generally, Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-85-33, 22 N.R.C. 442 (1985), aff'd, ALAB-841, 24 N.R.C. ____ (July 25, 1986) (slip op. at 64-67).

In the operating license proceeding, Mr. Eddleman has proposed hundreds of contentions, including untimely ones. Thus, he is well aware of the procedure for contesting issues in the case. Mr. Eddleman decided not to attempt to place the substance of the exemption request before the Licensing Board as a proposed contention, even though the Licensing Board had not disposed of the proceeding at the time the Eddleman Petition was filed with the Staff.

^{13/} See, e.g., Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 N.R.C. 1, 4-5 (1986); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-831, 23 N.R.C. 62, 64 (1986); 10 C.F.R. § 2.714(a)(1)(i) - (v).

The Joint Petition simply fails to raise a contention which would be cognizable in a hearing on Applicants' request. The proper focus of any hearing on Applicants' request would be the substance of the exemption -- the timing of the full participation exercise. According to the Commission, the purpose of the one year requirement is to assure that

* * * the licensee personnel who will be responsible for the commercial operation of the facility will be present at the site, familiar with the plant and its environs, and trained to carry out the emergency plan. * * * In addition, certain instrumentation to be relied on in emergencies may not be fully operational or calibrated. The safety of the plant would be better served by an exercise utilizing those licensee personnel who would have to carry out emergency procedures once the plant is licensed for commercial operation.

Union of Concerned Scientists, DPRM-83-1, 17 N.R.C. 719, 723-24 (1983). However, Petitioners do not appear to dispute that the May 1985 full participation exercise fulfilled the purpose of the one year requirement -- i.e., that "the operating and management staff of the plant -- who are central figures in an exercise -- [were] in place and trained for an emergency." 47 Fed. Reg. 30233 (July 13, 1982).

Fairly read, the Joint Petition asserts that a second full-participation exercise should be required prior to licensing "in light of the numerous deficiencies the public has found in the present emergency plans, and the concerns of participants in

the exercise of 1985 that the exercise did not show the plan would work, that they were not clear on what to do, and did not know clearly what their responsibilities were, and were inadequately trained." Joint Petition at 2. This contention has no nexus to Applicants' exemption request. Petitioners would have had the same complaint about the May 1985 exercise even if the plant had commenced full power operation within one year of the May 1985 exercise (obviating the need for the exemption). In essence, Petitioners seek to relitigate the May 1985 full participation exercise. And any alleged "deficiencies" in the Emergency Plan which were not related to the May 1985 exercise should have been timely raised before the Licensing Board. Such issues plainly are not cognizable in this procedural context. Accordingly, the hearing requests must be denied.

IV. Conclusion

Contrary to Petitioners' assertions, there is no independent right to a formal adjudicatory hearing on an exemption request. Further, as the Staff points out, the successful May 1985 full participation exercise should be considered the basis for licensing, with any subsequent exercise deemed confirmatory. Thus, the pending exemption request does not concern a requirement for initial licensing, and no hearing rights attach. Alternatively, the Joint Petition could be construed as a petition to file a late contention on the exemption in the operating license proceeding.

Even so, the Joint Petition fails to raise an issue which would be cognizable in a hearing on the exemption request.

For all of the foregoing reasons, Applicants respectfully request that the Commission act swiftly to adopt both the position of the NRC Staff and the alternative reasoning advanced by Applicants, denying the Joint Petition as well as the Eddleman Petition.^{14/}

Respectfully submitted,

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Dated: August 28, 1986

^{14/} See Letter to Commissioners from E. Utley (CP&L), dated August 1, 1986 (requesting expeditious and definitive Commission disposition of request for hearing on exemption).

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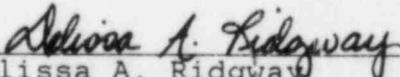
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to Joint CASH/Eddleman Petition For Hearing on Exemption Request" were served this 28th day of August, 1986, by deposit in the U.S. mail, first class, postage prepaid, to all those listed on the attached Service List.



Delissa A. Ridgway

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