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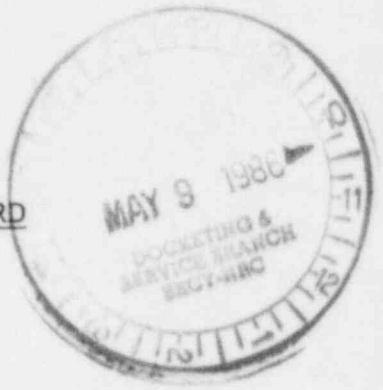
May 8, 1986



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 REQUEST BY CCNC AND WELLS EDDLEMAN FOR ADMISSION OF NEW CONTENTION WB-4 (FALSIFICATION OF EXPOSURE RECORDS)

I. Introduction

On April 22, 1986, intervenors Conservation Council of North Carolina ("CCNC") and Wells Eddleman filed[1/] a "Request...for Admission of New Contention WB-4 (Falsification of Exposure Records)" (hereafter the "Request"). The proposed contention is nearly four years late, and preceded by only six days the issuance of the Final Licensing Board Decision, which resolved all remaining contested issues in favor of issuing an operating license for the Shearon Harris Nuclear Power Plant. See LBP-86-11, 23 N.R.C. ___ (April 28, 1986). Applicants submit this reply in opposition to the Request, which clearly fails every applicable standard and should be denied.

1/ A filing by mail is deemed to be complete as of the time of deposit in the mail. 10 C.F.R § 2.701(c).

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II. Overview of Applicable Standards

The Commission's Rules of Practice, at 10 C.F.R. § 2.714, require that a petitioner set forth the basis for each contention with reasonable specificity. This standard requires that a contention state a cognizable issue with particularity, Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 A.E.C. 210, 216-17 (1974), and that a petitioner provide a reason for its concern. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 N.R.C. 542, 548 (1980).

In addition to the normal pleading requirements, 10 C.F.R. § 2.714 sets out five factors that must be balanced in admitting a late-filed contention:

i) Good cause, if any, for failure to file on time.

ii) The availability of other means whereby the petititoner'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 proceedings.

10 C.F.R. § 2.714(a)(1)(i) - (v).

Proposed Contention WB-4 must clear yet further hurdles to be admitted for adjudication at this stage. Applicants understand the record on safety issues (other than emergency planning) to have been closed in November, 1985, with the conclusion of hearings on CCNC Contention WB-3 (Drug Abuse During Construction). The record on all contested issues was closed with the issuance of the Board's Order (Concerning Emergency Planning Exercise Contentions), dated March 19, 1986, which determined that no further evidentiary hearings would be held in this proceeding. Consequently, the request filed by CCNC and Mr. Eddleman must also be judged by two of the three factors applicable to a motion to reopen a closed record: (1) whether the motion to reopen is timely; and (2) whether the information advanced in the motion raises a significant safety or environmental concern.[2/] See, e.g., Louisiana Power & Light Co.

2/ It is clear from NRC precedent that after an initial decision has issued, a motion to reopen that raises previously uncontested issues must also satisfy the Commission's standards for admitting late-filed contentions. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-39, 16 N.R.C. 1712, 1714-15 (1982); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 N.R.C. 5, 14 (1985), review declined, CLI-86-1, 23 N.R.C. 1, 3 n.1 (1986). Conversely, it seems apparent that a pleading entitled "new contentions," but which constitutes a motion to reopen would be judged by both sets of criteria as well. The fact that the intervenors' request here to litigate previously uncontested matters preceded the initial decision (and notice of appeal thereof) affects the jurisdictional posture, but should not affect the governing standard -- whether applied by the Licensing Board or the Appeal Board. At least one licensing board, however, has held that where a motion to reopen is filed before the initial decision has issued, the movant need not address the third factor applied to motions to reopen --

(Continued next page)

(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). Applicants address factor (1) below in conjunction with contention lateness factor (i) on good cause, if any, for failure to file on time. Factor (2) is addressed in conjunction with the "basis with specificity" requirement for contentions.

III. Application of the Standards

A. No Cognizable, Significant Safety Issue with Specific Basis has been Raised

As pleaded, Contention WB-4 does not raise a cognizable issue for this proceeding. The contention alleges that CP&L's "program for maintaining radiation exposure as low as reasonably achievable for workers at its Brunswick and Robinson nuclear power plants has been ineffective." The intervenors, however, have not asserted an adequate nexus between their allegations about Brunswick and Robinson, and the regulatory standards which govern the operating license application for the Harris Plant. There is no assertion that the "moral character" or "ability" of those responsible for operating the

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(Continued)

i.e., whether the information might have led the Licensing Board to reach a different result. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-83-50, 18 N.R.C. 242, 248 (1983). Applicants have not addressed that factor here.

Harris Plant is involved in the practices alleged.[3/]

Leaving aside the pleading deficiencies, however, it is clear that the only basis for the contention -- the Affidavit of Patty S. Miriello -- is incorrect, unreliable, and does not raise a substantial safety issue.[4/] The enclosed Affidavit of Stephen A. Browne analyzes the Miriello Affidavit, and demonstrates that her assertions are baseless.

Licensing boards are expected to scrutinize a proposed contention to determine if the basis advanced is credible or arguable. Where no attempt is made to identify with specificity a credible or arguable basis for a proferred contention, dismissal by a licensing board is justified. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-765, 19 N.R.C. 645, 652-56 (1984). In evaluating the five lateness factors which govern this contention, the Board may consider affidavits as to the claims made. Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), CLI-78-12, 7 N.R.C. 939, 948-49 (1978).[5/] Affidavits routinely are considered in

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3/ If the intervenors had intended to reopen Joint Contention I (Management Capability), we assume they would have gone to the Appeal Board, which now has jurisdiction over that contention, and so identified their request for relief. Viewed as the "new contention" it purports to be, WB-4 is irrelevant here.

4/ Intervenors refer to the Miriello Affidavit as "partial basis," yet no other basis is advanced.

5/ Evidence on the significance of the issue has been evaluated as a part of assessing lateness factors (iii) and (iv). Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 N.R.C. 1132, 1141-44 (1983).

assessing motions to reopen. See, e.g., Waterford, supra, ALAB-812, 22 N.R.C. 5 (1985).

> At a minimum...the new material in support of a motion to reopen must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. 2.714(b) for admissible contentions. Such supporting information must be more than mere allegations; it must be tantamount to evidence...[and] possess the attributes set forth in 10 C.F.R. 2.743(c) defining admissible evidence for adjudicatory proceedings. Specifically, the new evidence supporting the motion must be "relevant, material, and reliable."

Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 N.R.C. 1361, 1366-67 (1984), aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287 (D.C. Cir. 1984), vacated in part and reh'g en banc granted on other grounds, 760 F.2d 1320 (1985) (footnote omitted), quoted in Waterford, supra, CLI-86-1, 23 N.R.C. 1, 5 (1986).

The Licensing Board relied upon Mr. Browne's testimony to resolve Joint Contention IV (Thermoluminescent Dosimeters). LBP-85-28, 22 N.R.C. 232, 258-66 (1985). In stark contrast, the Board gave "very little weight" to Ms. Miriello's testimony on CCNC Contention WB-3 (Drug Abuse During Construction), finding it "unusually inconsistent." LBP-86-11, supra, slip op. at 47-48. The Board found that Ms. Miriello had misstated her qualifications, and that other statements in her testimony were "difficult to credit" and "subject to question." Id. at 46-47.

The Board also took note of Ms. Miriello's retaliatory motivation, and hostility toward CP&L. Id. at 48. As the accompanying Browne Affidavit explains, Ms. Miriello's affidavit of April 3, 1986 is similarly unreliable.

Ms. Miriello alleges that records of her radiation exposure while employed by CP&L were falsified to reflect less dose than she actually received while working at the Harris and Brunswick plants. Before explaining the lack of basis for this allegation, Applicants note that on its face it does not support the sweeping and reckless language CCNC and Mr. Eddleman have drafted for their Contention WB-4. Apparently the intervenors overlooked the fact that Ms. Miriello has not worked at the Robinson plant and does not mention that facility in her affidavit. Further, to charge CP&L with the systematic falsification of exposure records to workers -- on the basis of one six-month employee's statement about only her records -- is irresponsible.

Ms. Miriello's allegation of record falsification is based on two asserted beliefs: (1) that her self-reading pocket dosimeter (SRPD) reading for one exposure period at Brunswick was clandestinely reduced in her records; and (2) that several thermoluminescent dosimeter (TLD) readings were not entered into her records at the Brunswick Plant and the Harris Plant, as evidenced by a written report she received from CP&L. These beliefs are in error, and Ms. Miriello either knows or should know they are in error.

Ms. Miriello's brief exposure history at CP&L is unremarkable except for one unusual SRPD reading on August 9, 1985 at Brunswick, which was investigated and documented. On that occasion her SRPD read higher than expected based on the dose rates in the work area and the amount of time spent in the area. Her TLD was promptly read to confirm whether or not the SRPD reading of 360 mrem was valid.[6/] The TLD reading was 29 mrem.[7/] The TLD reading was accepted as the official dose for this monitoring period (August 5 - 9, 1985). SRPD dose is not used as official unless the TLD reading is unavailable or unreliable.[8/] In this case, the TLD was available and considered reliable.[9/] Browne Affidavit, ¶¶ 7, 13, 14. The Board previously has found that at Harris "self reading dosimeters are used to provide an estimate of the worker dose on a real time basis, and TLDs are used for the dose of record." Memorandum and Order (Ruling on Motions for Summary Disposition) at 3 (April 13, 1984). The Board has also approved CP&L's TLD program as adequate for assessing compliance with NRC

6/ This is the SRPD reading referred to by Ms. Miriello repeatedly as among the 400 mrem missing from her records. Miriello Affidavit, ¶5 (pp. 2-3).

7/ As Ms. Miriello states, the TLD and SRPD are worn together at all times. Miriello Affidavit, ¶5 (p.2).

8/ TLDs are more accurate than SRPDs, which are prone to false high readings, especially when bumped. Browne Affidavit, ¶¶ 4, 7.

9/ This TLD badge was tested and found to be reliable. Browne Affidavit, ¶ 7.

regulations on occupational doses. LBP-85-28, 22 N.R.C. 232, 258-66 (1985).

There is no mischief here. In rejecting the unofficial SRPD reading, CP&L was simply following its established procedures. Further, while Ms. Miriello may not agree with the dose she was assigned during work at the Brunswick Plant, she was fully informed and aware of the dose assigned. Attachment D to the Browne Affidavit is the Personnel Exposure Investigation form for this incident, which Ms. Miriello signed. Yet, in the affidavit filed with this Board, Ms. Miriello does not refer to the possibility of technical disagreement. Rather, she accuses CP&L of record falsification behind her back, when she knows or should know that she was assigned 29 mrem and why. Browne Affidavit, ¶ 11 and Attachment D.

The written report of August 20, 1985, provided to Ms. Miriello by CP&L, is the source of her allegation that TLD readings from Brunswick and Harris are missing. (The report is Attachment 2 to Miriello Affidavit, Attachment B to Browne Affidavit.) The report, which was especially prepared in response to Ms. Miriello's request, only covered TLDs processed from February 25 through August 9, 1985. Since at the time of her request her employment with CP&L had not terminated, two TLDs assigned to her (one at Brunswick and one at Harris) had not yet been processed.[10/] This report was generated manually,

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10/ These last two TLDs were not processed until August 30, 1985, which was her official termination date. Browne Affidavit, ¶9.

using data retrieved from the computer system. The report contains the correct total dose, but through an inadvertent clerical error the doses for the second and third periods of time shown on the report were switched.[11/] Browne Affidavit, ¶¶ 9, 10.

On September 10, 1985, a final termination report was forwarded to Ms. Miriello. See Attachment C to Browne Affidavit. This report covered her entire period of employment from February 25 through August 30, 1985, and was generated directly by the computer system, with no clerical errors. The report clearly indicates that the 29 mrem (whole body) and 33 mrem (skin) doses were recorded for the Brunswick Plant during the latest quarter (not the second quarter as indicated in the August 20 letter). The September 10 report also includes the results of the last two TLDs (not shown in the August 20 letter), both of which read 0 mrem. Browne Affidavit ¶¶ 10, 15, 17 and Attachment C. Thus, there are no "missing" doses.

The September 10 report was mailed to Ms. Miriello at the same address as the August 20 letter. It corrects the clerical error, and reports on all TLDs processed. The September 10 letter, the official termination report, should have eliminated any confusion on Ms. Miriello's part. Yet, she deceptively

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11/ The report should show a dose of 0 mrem for the whole body and 0 mrem for the skin during the period from April 1 to June 30, 1985, and should show a dose of 29 mrem for the whole body and 33 mrem for the skin during the period from July 1 through August 9, 1985. Browne Affidavit, ¶ 9.

makes no mention of it in the affidavit filed with the Board. Instead, CP&L is wrongly accused of "record tampering and destruction with malice." Miriello Affidavit, ¶ 2.

In sum, proposed Contention WB-4 is lacking in credible asserted basis, and certainly does not raise a substantial safety issue. The extravagant generalizations presented in the contention itself do not follow from the only basis presented -- the Miriello Affidavit. That affidavit itself is misguided, deceptively incomplete, and replete with error.

B. The Request Fails to Demonstrate Good Cause For Its Untimely Submission

Ms. Miriello's employment with CP&L terminated on August 30, 1985. LBP-86-11, supra, slip op. at 46. The asserted facts in her affidavit filed in support of proposed Contention WB-4 arise from her employment. Ms. Miriello has been in contact with counsel for CCNC since at least two days after her dismissal. Id. at 48. She testified in this proceeding in early October, 1985, and presumably became at least somewhat familiar with the process by which intervenors raise contentions in this proceeding. If she did not raise these issues with Mr. Runkle seven months ago, she certainly could have.

In any case, it is clear that CCNC (through its counsel Mr. Runkle) and Mr. Eddleman were alerted to these claims of Ms. Miriello when they received from the Board a copy of her January 1, 1986 ex parte letter to the Board Chairman. In a pleading entitled "Exceptions and Objections to Order Dated

January 10, 1986," dated January 21, 1986, at p. 3, CCNC identified "falsification of records" and "questionable practices related to health physics practices" as among the allegations in Ms. Miriello's letter.

Intervenors weakly assert that they did not have the specific basis upon which to formulate a contention until they received the Miriello Affidavit. Request at 2. If that is so, it is only because they waited for the information to fall into their laps, without the slightest effort to ferret it out on much earlier indications of its existence.12/

The Commission has stated that "[i]t is well established in our case law that this first factor is a crucial element in the analysis of whether a late-filed contention should be admitted." Commonwealth Edison Co. (Braidwood Station, Units 1 and 2), CLI-86-8, 23 N.R.C. ___, slip op. at 2 (April 24, 1986). Here it is plain that the intervenors did not diligently pursue and uncover information they knew was available. Under standards applicable either to motions to reopen or to late-filed contentions, the request is inexcusably late.

C. Extent to Which Intervenors Can Contribute to the Development of a Sound Record

> Our case law establishes both the importance of this third factor in the evaluation of late-filed contentions and the

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12/ That Mr. Runkle and Mr. Eddleman claim, without elaboration, to have been too busy to file the contention earlier displays contempt for NRC's Rules of Practice.

> necessity of the moving party to demonstrate that it has special expertise on the subjects which it seeks to raise.

Braidwood, supra, CLI-86-8, slip op. at 5.

Over two years ago the Board found that these intervenors suffered from a misunderstanding of health physics practices. April 13, 1984 Memorandum and Order, supra, at 3. Ms. Miriello's contribution has not improved the situation. Here, the intervenors could not even draft a contention which accurately reflects the supporting affidavit (e.g., the discussion of the Robinson plant; no mention of practices at Harris). The only prospective witness identified is Ms. Miriello.[13/] Request at 3-4. Her testimony on the drug abuse contention, discussed above, was found to be essentially unreliable. In the instant affidavit, Ms. Miriello tells a uniquely one-sided and incomplete story, and in the process reveals her own misunderstanding of good health physics practices and personnel monitoring devices.

Intervenors have completely failed to show that they could meaningfully contribute to the development of a sound record on proposed Contention WB-4.

13/ Prospective witnesses are to be identified and a summary of their proposed testimony is to be included in a request to admit a late contention. Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 N.R.C. 1725, 1730 (1982).

D. Extent to Which Admission Would Broaden the Issues and Delay the Proceeding

The Board has resolved all contested issues in this proceeding. The admission of a new contention, then, clearly would broaden the issues, as well as delay the proceeding -- which is over except for appeals.

CP&L plans to load fuel at the Harris Plant in late July, 1986.[14/] Adjudication of a new contention at this stage undoubtedly would delay the NRC's licensing decision. In any case, the issue here is whether there will be a delay in the proceeding. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 17 N.R.C. 1760, 1766 (1982). Since the proceeding is otherwise concluded, this factor clearly weighs against the intervenors.

E. Other Lateness Factors

Lateness factors (ii) (availability of other means to protect petitioners' interest) and (iv) (the extent to which other parties will represent petitioners' interest) are accorded less weight, under established Commission precedent, than the three factors just discussed. Braidwood, supra, CLI-86-8, slip op. at 4; South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 N.R.C. 881, 895 (1981),

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14/ The June, 1987 expiration date for the construction permit is irrelevant, and the intervenors know that it is. See Request at 3-4.

aff'd sub nom. Fairchild United Action v. NRC, 679 F.2d 261 (D.C. Cir. 1982).

Applicants would concede factor (iv) to the intervenors, except for the fact that its relevance is questionable in the context of a concluded proceeding.

As to factor (ii), intervenors state they have so far determined that the NRC Staff has not addressed "this issue" in depth in any reports or analysis done to date. Request at 3. Intervenors must not have looked very far. The Staff routinely inspects in the areas of dosimetry, ALARA compliance and health physics practices. Radiological controls is an evaluation category in the SALP review process.

Ms. Miriello clearly has or had means other than this operating license proceeding to pursue any concerns about her exposure records. First, the CP&L Brunswick procedure "Personnel Exposure Investigations" (Environmental & Radiation Control Procedure: E&RC-0460) provides for an orderly evaluation where TLD data or test reports are contested by an individual.15/ In addition, NRC regulations provide that any worker "who believes that a violation of the Act, the regulations in this chapter, or license conditions exists or has occurred in license activities with regard to radiological working conditions in which the worker is engaged, may request an inspection...". 10 C.F.R. § 19.16(a). Finally, in this circumstance, a petition

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15/ Workers at the Harris Plant may pursue such a contention as well.

pursuant to 10 C.F.R. § 2.206 would provide a sufficient vehicle to protect the intervenors' limited interest (as judged by the factual allegations in the supporting affidavit). See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 N.R.C. 13, 21-22 (1986). Factor (ii) weighs against the intervenors.

IV. Conclusion

Intervenors have failed woefully in their attempt to demonstrate good cause for the last-minute filing of proposed Contention WB-4 after the record closed and just prior to issuance of the Final Licensing Board Decision. If the proponents of a late-filed contention fail to satisfy this element of the test governing such proposals, they must make a "compelling" showing with respect to the other four factors. Braidwood, supra, CLI-86-8, slip op. at 2. However, as demonstrated above, the other lateness factors weigh heavily against the intervenors. It is unusually evident that the intervenors could not contribute to the development of a sound record on the proposed contention, and that its admission would broaden the issues and delay the proceeding. In addition, other means are available to protect the intervenors' interest.

Moving beyond the five lateness factors of 10 C.F.R. § 2.714(a)(1), it becomes clear that the Request fails other applicable requirements. The contention as written does not establish a nexus to the regulatory findings which must precede

licensing of the Harris Plant. The only asserted basis for the contention -- the Miriello Affidavit -- does not support the broad allegations drafted into the contention. Finally, the Miriello Affidavit does not support its own narrow claims about her personnel exposure records. Proposed Contention WB-4, then, is not supported by a credible asserted basis, and demonstrably does not raise a significant safety issue.

For all of the foregoing reasons, the motion to reopen the record to admit newly proposed WB-4 should be denied.16/

Respectfully submitted,

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Dated: May 8, 1986

16/ Applicants request that the Board direct intervenors CCNC and Eddleman to file any response to the replies of Applicants and the NRC Staff expeditiously.

May 8, 1986

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Plant)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response To Request By CCNC and Wells Eddleman for Admission of New Contention WB-4 (Falsification of Exposure Records)" and "Affidavit of Stephen A. Browne" with Attachments A through D were served this 8th day of May, 1986, by hand delivery to the parties identified with one asterisk, and by deposit in the U.S. mail, first class, postage prepaid, to the other parties on the attached Service List.

Thomas A. Baxter

Thomas A. Baxter, P.C.

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