

STEVE C. GRIFFITH, JR.
LEWIS F. CAMP, JR.
RAYMOND A. JOLLY, JR.
W. EDWARD POE, JR.
ELLEN T. RUFF
WILLIAM LARRY PORTER
JOHN E. LANSCH
ALBERT V. CARR, JR.
WILLIAM J. BOWMAN, JR.
ROBERT M. BISANAR
W. WALLACE GREGORY, JR.
RONALD V. SHEARIN
EDWARD M. MARSH, JR.
RONALD L. GIBSON
JEFFERSON D. GRIFFITH, III
JEFFREY M. TREPEL
GARRY S. RICE
LISA A. FINGER

OF COUNSEL
WILLIAM I. WARD, JR.
GEORGE W. FERGUSON, JR.

DUKE POWER COMPANY

LEGAL DEPARTMENT

P. O. Box 33189

CHARLOTTE, N. C. 28242

Musky
Cy Taylor
Thompson
Blake
Leiberman
(704) 373-2570
Scuto

July 31, 1989

Denny C.

VIA HAND DELIVERY

Victor Stello, Jr.
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Subject: April 27, 1989, Directive from Executive Director
for Operations

Dear Mr. Stello:

This is in response to the NRC directive issued on April 27, 1989, by the Executive Director for Operations. The directive was communicated to Duke Power Company ("Duke") by letter addressed to William S. Lee, Chairman of the Board of Directors and Chief Executive Officer. The directive requires all NRC Licensees to review settlement agreements in cases arising under Section 210 of the Energy Reorganization Act, as well as other agreements which affect compensation, terms, conditions and privileges of employment, to determine whether they contain any clauses that restrict the ability of employees or former employees to provide information about potential safety issues to the NRC. The April 27 directive further requires licensees to notify their respective licensing contacts at NRC headquarters if agreements with such clauses are found and to take steps to inform employees who are parties to such agreements that such restrictions will not be enforced.

Pursuant to the directive, Duke has reviewed its files. No agreements were found that are within the scope of concern sought to be addressed in the directive.

In light of the sensitivity of the issue, however, Duke believes that one matter should be brought to the attention of the Commission. On April 21, 1988, Duke entered into a Settlement Agreement with Howard Samuel Nunn, Jr., a former Duke employee whose employment was terminated in October, 1983. That Agreement resolved matters raised in a civil action Mr. Nunn filed on June 2, 1986, in Mecklenburg County Superior Court against Duke and other co-defendants alleging, among other things, breach of physician/patient privilege and (essentially) inducement to breach. Mr. Nunn had, in November, 1983, also filed a Section 210 complaint with the Department of Labor, and an extensive pre-trial record had been developed in that proceeding. Shortly before he entered into the April 21, 1988, Settlement, however, Mr. Nunn had withdrawn his Section 210 complaint.

Duke does not believe that the Settlement for which Mr. Nunn's state court action was concluded can, given the facts and circumstances leading up to,

A01A
11

8905070386 890731
PDR ADOCK 05000413
PNU

and culminating in, the Settlement, fairly be viewed as having been intended to limit NRC's access to information about potential safety concerns. Nevertheless, out of an abundance of caution, Duke deems it is prudent to identify Paragraphs 4 and 9 of the April, 1988, Settlement.

Paragraph 4 provides:

"Mr. Nunn, GAP, and the law firm further covenant that none of them will seek to induce any government agency or court to take any action against Duke or Eastover based on any information acquired during Mr. Nunn's employment at Duke or during the course of either the Section 210 case or the state court action."

Paragraph 9 provides:

"GAP and the law firm hereby agree that none of them will call Mr. Nunn as a witness in, join Mr. Nunn as a party in, or otherwise involve Mr. Nunn in or contact him regarding any administrative or judicial proceeding in which either GAP or the law firm is now, or in the future may be, counsel or parties in any matter in which Duke is a party in interest; nor will GAP or the law firm do anything to suggest or otherwise induce any other attorney, party, administrative agency, or administrative or judicial tribunal to contact, involve or call Mr. Nunn as a witness or to join Mr. Nunn as a party in such a proceeding. Further, Mr. Nunn hereby agrees that he will not voluntarily appear as a witness or a party in any judicial or administrative proceeding in which Duke is a party in interest; and Mr. Nunn further agrees that if served with compulsory process seeking to compel his appearance or joinder in such a proceeding, he will immediately notify the undersigned representative of Duke, or his successor, in writing and thereafter take all reasonable steps, including any such reasonable steps as may be suggested by the representatives of Duke, to resist such compulsory process. Notwithstanding any other provision in this Agreement, activities otherwise proscribed in the preceding language of this paragraph shall not be deemed to constitute a breach of the Agreement if such activities arise out of, relate to and concern only events that occur after the date on which this Agreement is executed and any contact, activity, appearance or testimony is strictly confined to events occurring after the execution of this Agreement. Except as otherwise provided in this Agreement, neither Mr. Nunn, GAP, the law firm nor Duke shall make any public statement to third parties concerning any claims or allegations arising out of Mr. Nunn's employment with Duke, the termination of that employment, and/or his referral to and treatment by Eastover."

Duke understands the purpose of the NRC's April 27th directive is to identify and eliminate provisions in the enumerated agreements which have the effect of preventing an individual from bringing safety concerns to the agency. The Settlement in the Nunn matter never was intended to have that effect, nor could it have had. As will be discussed in more detail below, for more than a year - from October 1983, to October 1984 - Mr. Nunn took full advantage of the NRC's processes to raise his safety concerns regarding

the construction and operation of Duke's Catawba Nuclear Station.^{1/} See Duke Power Company et al. (Catawba Nuclear Station, Units 1 and 2) 19 NRC 1418 (1984); 20 NRC 1484 (1984).

Specifically:

- On October 14, 1983, Mr. Nunn met with NRC regional inspectors regarding his safety concerns. See Affidavit of Howard Samuel Nunn, Jr., filed with the NRC's Atomic Safety & Licensing Board empanelled to hear the Catawba OL Application on January 24, 1984, referenced in 19 NRC 1418, 1554 (1984).
- On October 20, 1983, Mr. Nunn raised his safety concerns regarding the Catawba Plant in camera before the Licensing Board. Id.
- On November 9, 1983, Mr. Nunn testified, in camera, before the Catawba Licensing Board as to his concerns. I.C. Tr. 153 - 294. Mr. Nunn's counsel stated at that time, in response to Applicant's direct question, that this testimony, coupled with a soon to be filed affidavit, comprised all of his safety concerns. See I.C. Tr. 208 - 211.
- In mid-November, 1983, Mr. Nunn again met with NRC regional inspectors regarding his concerns. Tr. 12,159 - 12,160.
- On November 16, 1983, Mr. Nunn furnished an affidavit of his safety concerns to the NRC. See 19 NRC 1418, 1554 (1984). This affidavit, coupled with Mr. Nunn's November 9, 1983 in camera testimony, served as a complete listing of his safety concerns. See I.C. Tr. 208 - 211.
- On December 15, 1983, Mr. Nunn again testified in camera before the Catawba Licensing Board as to his concerns. I.C. Tr. 898 - 939. He represented that he had brought to the Board's attention the essence of all his safety concerns. I.C. Tr. 919 - 920.
- On January 24, 1984, Mr. Nunn furnished another affidavit to the Licensing Board. See 19 NRC 1418, 1554 (1984).
- On January 30-31, 1984, Mr. Nunn both testified before the Catawba Licensing Board on his safety concerns and acted as an expert questioner. Tr. 11,925 - 12,421.
- On June 22, 1984, the Licensing Board issued a decision which discussed each of the safety concerns raised by Mr. Nunn and ruled in Applicant's favor on each. 19 NRC 1418, 1554 - 1556.
- On September 15, 1984, Mr. Nunn filed another affidavit with the Licensing Board. See Tr. 14,251.
- In October 1984 Mr. Nunn sought again to testify before the Catawba Licensing Board as to his safety concerns. Applicant objected, arguing, inter alia, that Mr. Nunn had already brought all his safety concerns to

^{1/} The application for the Catawba Operating License ("OL") was filed in June of 1981. Contested hearings were held for approximately 75 days during the time from October 4, 1983 to October 12, 1984. The full-power license for Unit 1 was issued in January of 1985, and for Unit 2 in May of 1986.

the Board and that they had been addressed by all the parties and nothing further would be gained by hearing further from Mr. Nunn on these issues. See Tr. 14,249 - 14,251. The NRC Staff joined in the Applicant's objection, specifically recognizing that Mr. Nunn had previously stated that he had raised all his safety concerns. See Tr. 14,251. The Licensing Board concurred with Applicant and Staff that Mr. Nunn had raised all his safety concerns, but permitted the testimony to go forward. See Tr. 14,253 - 14,255.

- On October 12, 1984, Mr. Nunn again testified before the Catawba Licensing Board as to his concerns. Tr. 14,256 - 14,269.
- On November 27, 1984 the Licensing Board issued another decision which further considered a safety concern initially raised by Mr. Nunn and ruled in Applicant's favor. 20 NRC 1484.

The above facts are best summed up in a February 1988 Joint Prehearing Stipulation of Facts submitted to the Administrative Law Judge in Mr. Nunn's Section 210 Department of Labor case:

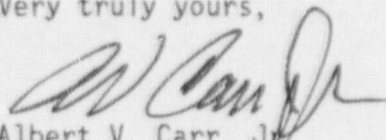
"Following his termination by Duke, Mr. Nunn provided both written and oral testimony to the Atomic Safety Licensing Board ("ASLB"), an arm of the Nuclear Regulatory Commission then presiding over the operational licensing of Catawba. In this testimony Mr. Nunn discussed at length his "technical" concerns regarding the quality of the construction work at Catawba, including those concerns that Mr. Nunn had articulated prior to his discharge. The parties agree that in providing this testimony to the ASLB and its agents, Mr. Nunn was engaged in activities protected by Section 210. The parties agree, further, that each of Mr. Nunn's technical concerns was thoroughly investigated and considered by the responsive organs of the NRC. Finally, the parties agree that the ASLB and its agents have fully and finally adjudicated the substantive merit of Mr. Nunn's concerns....

As the above recitation shows, by the time the Nunn Agreement was concluded, there was no safety concern of Mr. Nunn that had not already been communicated to the Licensing Board as well as to the NRC Staff, and that had not been evaluated in a full adjudicatory proceeding. Indeed, since he had already fully exhausted every available avenue for raising concerns with the NRC at the time the Agreement was concluded, the notion of limiting NRC access to information about those concerns was never an issue. Rather, the provisions in the Agreement dealing with limitations on raising issues in future litigation were directed to ending the litigation of Mr. Nunn's allegations and precluding their repetition in other cases or forums. However, the Agreement clearly left Mr. Nunn free, even though he had not been a Duke employee for about five years prior to the Settlement, to bring any concerns to the NRC that thereafter came to his attention if he so desired.

Nevertheless, should there be any confusion on the matter, Duke has expressly informed Mr. Nunn that under the Settlement Agreement he is in no way barred from bringing any safety concern to the NRC's attention. A copy of Duke's letter communicating its position on this subject, dated July 13, 1989, is attached.

If you have any further questions, please contact the undersigned.

Very truly yours,



Albert V. Carr, Jr.
Associate General Counsel

AVC/sjr

cc: Lawrence J. Chandler, Esq.
Richard S. Goddard, Esq.
Darl S. Hood
K. Jabbour
Leonard A. Wiens

LAW OFFICES

BISHOP, COOK, PURCELL & REYNOLDS

1400 L STREET, N.W.
WASHINGTON, D.C. 20005-3502
(202) 371-5700

WRITER'S DIRECT DIAL

(202) 371-5776

TELEX: 440574 INTLAW UI
TELECOPIER: (202) 371-5850

July 13, 1989

HAND DELIVERED

Joseph B. Kennedy, Esquire
Government Accountability Project
25 E Street, N.W.
Suite 700
Washington, DC 20001

RE: Settlement Agreement with
Duke Power Company

Dear Mr. Kennedy:

On April 27, 1989, the Nuclear Regulatory Commission issued a letter to all NRC licensees with power-generating facilities. In pertinent part the letter states:

The purpose of this letter is to reemphasize to licensees their responsibilities to assure that they, and their contractors and subcontractors permit their employees to contact, without restrictions, the NRC with concerns about potential safety issues. In particular, this letter notifies licensees that it is not acceptable to include in settlement agreements for discrimination matters arising under Section 210 of the Energy Reorganization Act of 1974, as amended, or in any labor agreements or other agreement affecting compensation[,] terms, conditions and privileges of employment, any restrictions on employees or former employees providing information to any members of the NRC including staff, inspectors, investigators, Administrative Law Judges, Boards, or the Commission.

Joseph B. Kennedy, Esquire
July 13, 1989
Page 2

At a later point in the letter, licensees are directed to take action with regard to any agreements that contain restrictive clauses such as provisions "prohibiting or in any way limiting an employee, or an attorney for such employee, from coming to and providing safety information to an NRC staff member."

Licensees should examine their current and previous agreements to assure that restrictive clauses are not present. If restrictive clauses are found, licensees should promptly inform the employee or former employee that the restriction should be disregarded, that he or she may freely come to NRC at any time without fear of any form of retribution, and that such a restriction will not be enforced.

Please notify us no later than July 31, 1989 if any such restrictive clauses have been identified. Your response should be provided to your licensing contact in headquarters.

Although the Settlement Agreement to which H. Samuel Nunn, Duke Power Company, and others became parties in April of 1988 did not have the effect of preventing Mr. Nunn from raising safety concerns with the NRC, Duke has preliminarily concluded that it ought to respond to the NRC letter by identifying this Agreement. This conclusion is reinforced by an awareness of the sensitivities and perceptions associated with the issue addressed in the NRC letter, all of which are matters with which we know GAP and Steven and Michael Kohn, Mr. Nunn's counsel, to be familiar.

There never has been any intention to prevent Mr. Nunn from raising matters with the NRC. Indeed, since he had already raised his concerns with the NRC at the time the Agreement was concluded, it never was an issue. Rather, the provisions in the Agreement dealing with limitations on raising issues in future litigation were directed to ending the litigation of Mr. Nunn's allegations and their repetition in other cases/forums.

Should there be any confusion on the matter, however, Duke expressly states that under the Settlement Agreement Mr. Nunn is in no way barred from bringing any safety concerns to the NRC's

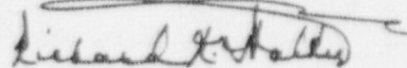
Joseph B. Kennedy, Esquire
July 13, 1989
Page 3

attention. Please convey Duke's position to Mr. Nunn. We have enclosed an extra copy of this letter for Mr. Nunn for your convenience.

Please let us know by July 24, 1989 whether you have any objection to Duke's identifying the Settlement Agreement in response to the NRC's April 27 letter. If we have not heard from you by that date, we will assume that you do not object. Should you no longer represent Mr. Nunn in this matter, please let us know so we can contact Mr. Nunn directly.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Richard K. Walker", with a horizontal line drawn above it.

Richard K. Walker

Enclosure

(cc: W/Enc.) Stephen M. Kohn, Esquire
M. Travis Payne, Esquire