RAS 1809



**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

Before the Commission

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| In the Matter of | ) | |
| | ) | |
| CAROLINA POWER & LIGHT COMPANY | ) | Docket No. 50-400-LA |
| | ) | |
| (Shearon Harris Nuclear Power Plant) | ) | ASLBP No. 99-762-02-LA |

## APPLICANT'S ANSWER OPPOSING COMMISSION REVIEW OF LBP-00-12

Pursuant to 10 C.F.R. § 2.786(b)(3), Applicant Carolina Power & Light Company ("CP&L" or "Applicant") files this answer opposing "Orange County's Petition for Review of LBP-00-12" ("BCOC Pet. Rev."), filed May 22, 2000.[1] Applicant submits that the Commission should deny the petition filed by the Board of Commissioners of Orange County ("BCOC" or "Petitioner") because BCOC has failed to make a showing of the existence of a substantial question measured by any of the five considerations set forth in 10 C.F.R. § 2.786(b)(4). If the Commission were to grant BCOC's petition, the Commission should affirm the Atomic Safety and Licensing Board's ("Board") decision disposing of the two technical contentions in this proceeding.

## I. BACKGROUND

This proceeding relates to CP&L's December 23, 1998 application for a license amendment to place two spent fuel pools (pools C and D) into service at its Harris Nuclear Plant ("Harris"). This license amendment request assures adequate spent fuel storage for CP&L's nuclear power plants, capacity required because of the Department of

[1] This answer is being filed within 15 days after service of the Petition for Review, including 10 days, as permitted under 10 C.F.R. § 2.786(b)(3), plus 5 days, as permitted under 10 C.F.R. § 2.710, for filings served by U.S. mail. See Certificate of Service for BCOC Pet. Rev. at 1 (served only by first class mail).

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Energy's ("DOE") failure to begin accepting spent fuel in 1998, as required by the contract between DOE and CP&L, and by federal law. CP&L requested that the license amendment be issued within one year, no later than December 31, 1999, in order to accommodate its spent fuel storage needs.

Intervenor BCOC filed eight contentions regarding Applicant's license amendment on April 5, 1999.[2] On July 12, 1999, the Board admitted two of the intervenor's contentions.[3] The first admitted contention ("TC-2," concerning criticality control) charges that burnup credit in spent fuel storage is "unlawful." Id. at 35-36. The second admitted contention ("TC-3," concerning the quality of welds in embedded piping) charges that Applicant's Alternative Plan[4] to activate piping for use with pools C and D is deficient. Id. at 36-37. CP&L invoked the 10 C.F.R. Part 2, Subpart K, hybrid hearing procedures adopted by the Commission at Congress' direction for the purpose of expediting licensing actions to expand at-reactor spent fuel storage capacity -- specifically including the use of high-density spent fuel storage racks. See 50 Fed. Reg. 41,662 (1985). See also 42 U.S.C. § 10154(a)(b); H.R. Rep. No. 97-785, pt. 1, at 39 (1982).

After a discovery period, the parties filed hundreds of pages of facts, data, and arguments with the Board, including numerous affidavits and exhibits, to support their respective positions on the two technical contentions.[5] On January 21, 2000, the Board

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[2] See "Orange County's Supplemental Petition to Intervene" at 4-41 (Apr. 5, 1999).

[3] Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 40 (1999) (Board's Ruling on Standing and Contentions).

[4] The Alternative Plan provides assurance under 10 C.F.R. § 50.55a that the field welds in embedded piping are satisfactory for use in the spent fuel pool cooling and cleanup system for Harris pools C and D.

[5] See "Summary of Facts, Data, and Arguments on which Applicant Proposes to Rely at the Subpart K Oral Argument" (Jan. 4, 2000); "NRC Staff Brief and Summary of Relevant Facts, Data and Arguments Upon which the Staff Proposes to Rely at Oral Argument on Technical Contentions 2 and 3" (Jan. 4, 2000) ("NRC Staff's Subpart K Filing"); Detailed Summary of Facts, Data and Arguments and Sworn Submission on which Orange County Intends to Rely at Oral Argument to Demonstrate the Existence of a Genuine and Substantial Dispute of Fact with the Licensee Regarding the Proposed Expansion of Spent Fuel Storage

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conducted a day-long oral argument on the two contentions. Almost five months later, the Board issued its decision (89 pages in length) disposing of the two contentions. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-00-12, slip op. at 88-89 (May 5, 2000). The Board decided two things: (1) it determined that an evidentiary hearing was not required to dispose of the intervenor's two contentions;[6] and (2) it disposed of both of the two contentions in the Applicant's favor. Id. The Board indicated in its Order that this proceeding is ongoing, because the Petitioner's four late-filed environmental contentions have yet to be resolved.[7] Id. at 88 n.14.

On May 22, 2000, BCOC filed with the Commission a petition for review of LBP-00-12. BCOC Pet. Rev. at 1.

## II. STANDARD FOR OBTAINING COMMISSION REVIEW

Commission review is discretionary. In determining whether to grant, as a matter of discretion, a petition for review of a licensing board order, the Commission gives due weight to a petitioner's showing of the existence of a substantial question measured against the five considerations set forth in 10 C.F.R. § 2.786(b)(4). Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 184 (1993). The five factors are: "(i) a clearly erroneous finding of material fact; (ii) a necessary legal conclusion that is without governing precedent or departs from prior law;

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Capacity at the Harris Nuclear Power Plant with Respect to Criticality Prevention Issues (Contention TC-2) and Quality Assurance Issues (Contention TC-3)" (Jan. 4, 2000).

[6] Petitioner does not challenge the Board's determination that "there is no genuine and substantial dispute of fact or law that can only be resolved with sufficient accuracy by the introduction of evidence in an evidentiary hearing" (i.e., the Board found there was no need for an adjudicatory hearing). See id. at 88. Rather, BCOC's petition challenges only the Board's decision resolving the two contentions on the merits in the Applicant's favor.

[7] See "Orange County's Request for Admission of Late-Filed Environmental Contentions" at 1 (Jan. 31, 2000).

(iii) a substantial and important question of law, policy, or discretion; (iv) a prejudicial procedural error; and (v) any other consideration deemed to be in the public interest." Id. Since a licensing board is the basis fact-finder under Commission procedures, the appellate reviewer (i.e., the Commission) will not ordinarily conduct a *de novo* review of the record and make its own findings of fact. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972).

## III. BCOC'S PETITION DOES NOT MEET THE STANDARD FOR GRANTING COMMISSION REVIEW

Commission review of the Board's decision is neither required nor appropriate because the Board's decision is thorough, well-reasoned, and fully-supported by both the facts and the law. Moreover, the Petitioner has not demonstrated that there is any substantial question under any of the five factors of 10 C.F.R. § 2.786(b)(4). Absent such a showing, the Commission should determine that its discretionary review should not be granted.[8]

### A. Petitioner Does Not Show a Substantial Question on Contention TC-2 (Criticality Control)

BCOC's arguments to justify review of Contention TC-2 do not identify any substantial question with respect to the five considerations in 10 C.F.R. § 2.786(b)(4).

Contention TC-2 included two bases: Basis 1, a question of law – is burnup credit lawful?[9] -- and Basis 2, a question of fact – would criticality occur in the spent fuel pool

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[8] Petitioner does not expressly address any of the factors of 10 C.F.R. § 2.786(b)(4). However, the Applicant will respond to the petition as though the arguments were structured to address the regulatory requirements.

[9] LBP-99-25, 50 NRC at 35-36. Central to Basis 1 is the meaning of General Design Criterion 62 in 10 C.F.R. Part 50, Appendix A ("GDC 62"). "Burnup" of nuclear fuel is a physical process whereby the reactivity of fuel is reduced with irradiation in a nuclear reactor. Affidavit of L. Kopp (NRC Staff), attached to NRC Staff's Subpart K Filing ¶¶ 11, 13 ("Kopp Affidavit"). Burnup is caused by the reduction in fissile material content in the fuel. Id. ¶ 11. "Burnup credit" permits licensees to account for the reduced fissile material content of spent fuel in criticality analysis for spent fuel storage. Id. ¶ 13.

under specific conditions?[10] The Petitioner only requests review of the Board's decision on Basis 1 of Contention TC-2.[11]

First, BCOC asserts that the Board has "committed clear legal error" in its statutory construction of General Design Criterion ("GDC") 62.[12] Id. at 4-5. BCOC apparently asserts that the Board's method of statutory construction "is a departure from or contrary to established law." 10 C.F.R. § 2.786(b)(4)(ii). The only legal support cited by BCOC in its argument is a general principle of statutory construction from a law treatise.[13] Otherwise, BCOC identifies no established law from which the Board's statutory construction is a purported departure, and instead just summarizes the arguments from its filing before the Board. BCOC's real concern appears to be that the Board did not adopt its position on statutory construction.[14] However, the Board's failure to adopt the Peti-

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[10] LBP-99-25, supra, 50 NRC at 36.

[11] Nothing in BCOC's petition addresses Basis 2, the question of fact. See BCOC Pet. Rev. at 4-9.

[12] BCOC alleges that the Board reached its conclusion on the statutory construction of GDC 62 "only by ignoring the plain language of GDC 62, sidestepping relevant regulatory history, misinterpreting subsequent regulations, and failing to address the inconsistency of its decision with the history of criticality prevention in the United States." Id. at 4. All of these allegations attack the Board's method of statutory construction.

[13] See Singer, Statutes and Statutory Construction, Vol. 2A, § 47:23 (2000 Revision)("Singer on Statutory Construction")(cited in BCOC Pet. Rev. at 5). While the principle incorrectly cited by BCOC, "'*inclusio* [sic] *unis* [sic] *est exclusio alterius*' (the inclusion of one is the exclusion of another)," BCOC Pet. Rev. at 5, (actually "*expressio unius est exclusio alterius*" (the expression of one is the exclusion of others), Singer on Statutory Construction at § 47:23) is generally recognized, BCOC's application of this principle in this case is flawed. BCOC asserts that this principle means that GDC 62 "must be read to exclude non-physical systems and process, *i.e.*, administrative measures...," BCOC Pet. Rev. at 5, but then on the next page BCOC states "it is certainly true that every physical measure has some administrative feature...," id. at 6, which directly contradicts its attempted use of the "*expressio unius*" principle.

[14] For example, BCOC complains that the Board's "reading of...regulatory history" is different from BCOC's. Id. at 5. The use of legislative history is a time-honored tool of statutory construction. See, e.g., Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 10 (1976). BCOC identifies no contrary law. BCOC also disagrees with the Board's use of the analogous regulation, 10 C.F.R. § 50.68, because the Board did not adopt BCOC's view of the regulation. Looking to analogous statutes or regulations is another well-established tool of statutory construction. See, e.g., National Fed'n of Fed. Employees, Local 1309 v. Department of the Interior, 526 U.S. 86, 105 (1999) (quoting Singer, Sutherland on Statutory Construction, Vol. 2B, § 53.03, p.233 (5th Rev, 1992)). Again, BCOC provides no contrary law. Next, BCOC opposes the Board's evaluation of long-standing agency interpretation and practice, another well-established tool of statutory construction. See, e.g., Aero Mayflower Transit Co. v. Interstate Commerce Comm'n, 711 F.2d 224, 228 (D.C. Cir. 1983). BCOC states that "nothing in a regulatory guide established

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tioner's arguments below does not raise a substantial question under any of the factors in 10 C.F.R. § 2.786(b)(4). The Board uses only well-established tenets of statutory construction in its decision.[15] BCOC fails to identify any substantial question or error in the Board's statutory construction.[16]

As its second basis for requesting review of Contention TC-2, Basis 1, BCOC admits that GDC 62 has been interpreted in prior NRC case law, but states that GDC 62 has not been interpreted in a prior decision by the Commission. Id. at 4, 8-9. BCOC states that "contrary to the Licensing Board's conclusion, prior adjudications provide no support..." because "only one of them actually applied GDC 62." Id. at 8 (emphasis added)(citation omitted). BCOC does not explain its position that "only one" governing legal precedent is insufficient.[17] Moreover, BCOC freely admits that the prior adjudicatory decision interpreting GDC 62 was an Appeal Board case, which is governing legal

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pattern of NRC practice can be relied on to override a duly promulgated regulation." BCOC Pet. Rev. at 7. Not only are these indicators of agency practice traditionally considered in statutory construction, but BCOC entirely ignores the fact that these agency practice indicators are consistent with the Board's construction of GDC 62. Finally, BCOC asserts that in "the history of the evolution of criticality prevention measures," "[o]ver time,...the NRC Staff began to relax its requirements for criticality prevention measures." Id. at 8. BCOC provides no support whatsoever for its supposition. Not surprisingly, BCOC's supposition was strongly refuted by the NRC Staff upon questioning by the Board during oral argument. Subpart K Oral Argument Hearing Transcript at 290-92 (Jan. 21, 2000)(statement of Mr. Weisman, NRC Staff counsel). BCOC gives no other explanation of the alleged "clear legal error." See id. at 5-9.

[15] In performing the statutory construction, the Board: (1) first addresses the plain language of GDC 62; (2) then considers the regulatory history; (3) then considers analogous agency regulations; and (4) then considers the agency's established practice. LBP-00-12, slip op. at 28-32. The Board's methodology of statutory construction is well established and consistent with established Supreme Court and federal appellate court law on statutory construction.

[16] Nor is there any help in the Petitioner's assertion that the "Board also erred in rejecting as irrelevant Orange County's examples of incidents of fuel assembly misplacement...." BCOC Pet. Rev. at 8 n.6. The Board's decision shows this to be a pure finding of fact; the Board considered BCOC's examples and the parties' positions, and concluded, as a matter of fact, that "the fuel mispositioning cases are not relevant to the Harris configuration." LBP-00-12, slip op. at 31-32. BCOC provides nothing to support an assertion that this finding of fact is "clearly erroneous" under 10 C.F.R. § 2.786(b)(4)(i). See BCOC Pet. Rev. at 8.

[17] BCOC states in its petition that "[a]lthough the Licensing [and Appeal] Board[s] ha[ve] approved administrative measures for criticality prevention, in only one case has the meaning of GDC 62 been addressed, and it is not clear whether the issue was fully ventilated in that case." Id. at 9.

precedent for the Licensing Board.[18] See id. at 8 n.6 (citing Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 571 (1983)). BCOC's arguments again fail to show a substantial question with respect to one of the factors for consideration under 10 C.F.R. § 2.786(b)(4).

BCOC's third argument to justify Commission review of Contention TC-2, Basis 1, is that this issue "raises important and novel legal and policy questions."[19] Id. at 9. The only new question raised in this argument[20] is BCOC's general assertion that the NRC Staff practice of permitting licensees to use burnup credit for criticality control in spent fuel pools "is widely applied" and "[n]o attempt has been made to evaluate the...safety [of this practice]." Id. The mere fact that a regulatory practice is "widely applied" hardly makes it a "substantial and important question of law [or] policy..." worthy of Commission review.[21] BCOC's other argument, that "[n]o attempt has been made to evaluate the...safety" of burnup credit is directly contrary to the record in this proceeding, in which the NRC Staff burnup credit has been in use for spent fuel pool storage for almost 20 years, at virtually every nuclear power plant in the country. The safety questions are evaluated in each instance, and there has never been an adverse

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[18] The Petitioner attempts to explain that the published opinion "suggests" that the Appeal Board in Big Rock Point "was presented with little information to illuminate the limits of GDC 62[,]" but in contrast, "this proceeding contains a very complete record of the meaning and history of GDC 62." Id. at 8 n.7. BCOC gives no indication that it investigated the record in the Big Rock Point case to ascertain what information on "the meaning and history of GDC 62" was actually before the Licensing Board and Appeal Board in that case. Moreover, the fact that the record here may (or may not) be more complete does not raise a substantial question with respect to one of the factors to obtain review under 10 C.F.R. § 2.786(b)(4).

[19] This appears to address the factor of "[a] substantial and important question of law, policy or discretion" in 10 C.F.R. § 2.786(b)(4)(iii). BCOC's generalized argument fails to identify a substantial question.

[20] Most of this single-paragraph argument is taken up by the argument addressed immediately above in this answer "only one case" has addressed "the meaning of GDC 62." See BCOC Pet. Rev. at 9.

[21] If this were the case, every generic industry issue would be guaranteed Commission review, whether or not each issue satisfied the requirements of 10 C.F.R. § 2.786(b)(4). Such a reading would render the Commission's regulation a nullity.

health and safety impact associated with burnup credit.[22] There is no substantial and important question regarding this proven method to facilitate expanded at-reactor spent fuel pool storage. BCOC's third argument for Commission review thus also fails to show a substantial question under 10 C.F.R. § 2.786(b)(4). Accordingly, the Commission should deny review of the Board's decision on Contention TC-2.

### B. Petitioner Does Not Show a Substantial Question on Contention TC-3 (Spent Fuel Pool Cooling and Cleanup System Embedded Piping)

Similarly, BCOC's perfunctory and unsupported arguments to justify review of Contention TC-3 do not identify any substantial question under the five factors in 10 C.F.R. § 2.786(b)(4).

First, BCOC asserts that the Commission should grant review of this contention because the Board "ignore[d] a significant portion of [BCOC's] evidentiary case."[23] BCOC Pet. Rev. at 9. In fact, the Board's decision shows that the Board thoroughly considered each of these issues in BCOC's case, but elected not to adopt BCOC's unpersuasive positions in making its findings of fact on Contention TC-3.[24] The Board's decision not to adopt BCOC's position on these highly technical fact issues is reasonable in light

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[22] The NRC Staff stated in its Subpart K filing that over the past 20 years more than 50 nuclear power plants have received NRC approval for the use of burnup credit for spent fuel pool storage. Kopp Affidavit ¶ 19. Every one of these 50 or more approvals included a plant-specific Safety Evaluation Report. See "Applicant's Answer to Petitioner Board of Commissioners of Orange County's Contentions" at 32 (May 5, 1999)(citing numerous Safety Evaluation Reports evaluating the safety of burnup credit). There has never been a reported incident of inadvertent criticality in any spent fuel pool. Kopp Affidavit ¶ 18. BCOC, on the other hand, provides no support for its assertion and no factual basis for its purported safety question. See BCOC Pet. Rev. at 9.

[23] Specifically, the Petitioner alleges that the Board ignored its position on "video-camera inspections," failure to "examine embedded piping," "fail[ure] to follow...weld inspection procedures," and "a single recent water test is insufficient to demonstrate that the pipes were free of corrosive agents...." Id. Mr. David Lochbaum, BCOC's only witness for Contention TC-3, stated that his concerns in this contention were limited to welds in piping embedded in concrete. See LBP-00-12, slip op. at 57.

[24] All four of these issues (video-camera inspections, examination of embedded piping, following inspection procedures, water testing) are addressed by the Board in its decision. See LBP-00-12, slip op. at 64-65, 71-78.

of the significant record supporting Applicant's and the NRC Staff's position on the facts. Furthermore, the Board correctly found that the sole witness proffered by BCOC on this contention, Mr. David Lochbaum, by his own admission, had little substantive knowledge of the underlying technical subjects involved in this contention. See id. at 59. The fact that the Board did not adopt the Petitioner's position on findings of fact fails to establish "a clearly erroneous finding of material fact."

Likewise, BCOC's assertion that the Board's determination that "potential leakage from spent fuel [pool] cooling pipes [is] insignificant" is an "unlawful...relaxing of NRC quality assurance standards," BCOC Pet. Rev. at 10, also fails to establish "a clearly erroneous finding of material fact." The Board considered all parties' positions on this issue, see LBP-00-12, slip op. at 79-81, and made the finding of fact that "[b]ased on the record now before us...it is clear that the result of any weld of piping failure could have only a limited number of effects on the integrity of the plant and the health and safety of the public." Id. at 82; see also id. at 83. No clear error is evident in this finding of fact and the overwhelming weight of the evidence on this point presented by both Applicant and the NRC Staff.

Finally, BCOC asserts that the Board erred in "refusing to consider [its] argument that CP&L must seek a construction permit amendment..." "as a late-filed contention." BCOC Pet. Rev. at 10. Here the Board made a finding of fact that BCOC's concern about the need for a construction permit, first raised right before the oral argument, was a different issue from the admitted Contention TC-3, and applied well-established NRC case law that a new issue outside the scope of the contention cannot be litigated without following the Commission's regulations for late-filed contentions. LBP-00-12, slip op. at 86. The Board's actions raise neither a clearly erroneous finding of material fact nor a departure from established law.

The Petitioner fails to identify any action in the Board's decision on Contention TC-3 that approaches a substantial question applying any of the five considerations in 10 C.F.R. § 2.786(b)(4). Therefore, the Commission should deny review of the Board's decision on Contention TC-3.

### C. The Board's Decision Resolving the Two Technical Contentions Makes Granting Commission Review Unnecessary

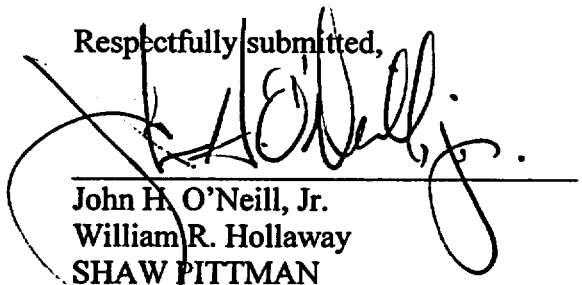
The Commission should deny BCOC's petition to review LBP-00-12. The Petitioner has made no showing that a substantial question exists with respect to any of the five considerations in 10 C.F.R. § 2.786(b)(4). Commission review is discretionary, and such review is not warranted here in light of the Board's thorough, well-reasoned, and fully-supported decision on the technical contentions in this proceeding.

If the Commission does grant Commission review of the Board's decision, the Commission should affirm the Board's decision disposing of two technical contentions in this proceeding.

## IV. CONCLUSION

For the foregoing reasons, Applicant requests that the Commission deny BCOC's petition for review of LBP-00-12.

Respectfully submitted,



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Dated: June 6, 2000

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicant's Answer Opposing Commission Review of LBP-00-12" were served on the persons listed below (unless otherwise noted) by U.S. mail, first class, postage prepaid, and by electronic mail transmission, this 6th day of June, 2000.

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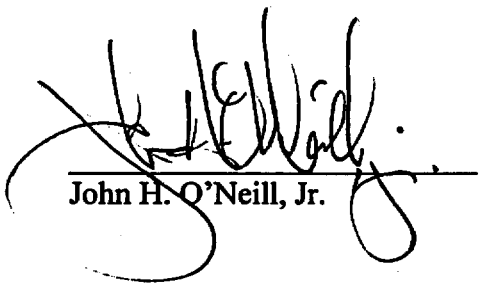

John H. O'Neill, Jr.