UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 6/20/00

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

CLI-00-11

MEMORANDUM AND ORDER

This proceeding involves a December 1998 license amendment application filed by Carolina Power and Light Company ("CP&L") to increase the spent fuel storage capacity at its Shearon Harris Nuclear Power Plant ("Shearon Harris"). The Board of Commissioners of Orange County [NC] ("Orange County") sought and was granted intervenor status to challenge the application. In granting Orange County intervenor status, the Licensing Board admitted two contentions involving the adequacy of CP&L's proposed criticality prevention measures and quality assurance program. See Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25 (1999).

Following a hearing (held pursuant to 10 C.F.R. Part 2, Subpart K) which included both the submittal of written presentations and oral argument, the Atomic Safety and Licensing Board issued LBP-00-12, 51 NRC ___ (May 5, 2000). That order concluded that, at least as to these two issues, Orange County had presented no genuine and substantial dispute of fact or law requiring further exploration at an evidentiary hearing. The Licensing Board then resolved the merits of these two issues in favor of CP&L. However, the Board also explained that "the admissibility of four [Orange County] late-filed environmental contentions is yet to be resolved" and that therefore "this proceeding is not subject to dismissal in accordance with 10 C.F.R. § 2.1115(a)(2)." See slip op. at 73 n.14.

Orange County has filed with us a petition for interlocutory review of LBP-00-12. In its petition, Orange County challenges the Board's substantive rulings on the merits of Orange County's two contentions, but does not challenge the Board's procedural ruling regarding the need for an evidentiary hearing. Both the NRC staff and CP&L oppose Orange County's petition. We dismiss the petition without prejudice to Orange County reraising the same issues at the end of the Licensing Board's proceeding.

Earlier this year, the Commission reiterated its longstanding general policy disfavoring interlocutory appeals. See Private Fuel Storage, L.L.C. (ISFSI), CLI-00-02, 51 NRC 77, 79 (2000). Section 2.1115(e) of our Subpart K regulations clearly applies this general policy to cases, such as this one, involving expansion of spent fuel storage capacity at nuclear power plants. That section declares that "[u]nless the presiding officer disposes of all issues and dismisses the proceeding, appeals from the presiding officer's orders disposing of issues and designating one or more issues for resolution in an adjudicatory hearing are interlocutory and must await the end of the proceeding." 10 C.F.R. § 2.1115(e).[(1)] As the Board expressly stated, it has not dismissed this proceeding. Consequently, under section 2.1115(e), Orange County's petition for review is interlocutory in nature and therefore premature.[(2)]

Orange County argues that the Board decision addresses important and novel issues. See Petition at 9. However, neither our regulations nor our case law authorize interlocutory appeals solely on such grounds. See, e.g., Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 63 (1994) ("the mere issuance of a ruling that is important or novel does not, without more, change the basic structure of a proceeding") (citing Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-817, 22 NRC 470, 474 & nn. 16-17 (1985)). Licensing Boards, of course, may refer interlocutory rulings to the Commission when "necessary to prevent detriment to the public interest or unusual delay or expense." See 10 C.F.R. § 2.730(f). And the Commission itself may exercise its discretion to review a Licensing Board's interlocutory order if the Commission wants to address a novel or important issue. See generally Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, passim (1998). However, the Commission's decision to do so in any particular proceeding stems from its inherent supervisory authority over adjudications and in no way implies that parties have a right to seek interlocutory review on that same ground. Here, there has been neither a Licensing Board referral nor a Commission determination that immediate review is necessary or desirable.

Orange County also argues that the Board ignored certain portions of the record, improperly refused to consider one of Orange County's arguments, and misinterpreted a relevant General Design Criterion. See Petition at 5-10. These arguments are essentially no more than assertions that the Board made substantive and procedural legal error -- an interlocutory review ground which our regulations and case law do not recognize. See, e.g., Hydro Resources, Inc. (2929 Coors Road, Suite 101, Albuquerque, NM), CLI-98-8, 47 NRC 314, 320 and n.4 (1998); Dr. James E. Bauer, CLI-95-3, 41 NRC 245, 246-47 (1995).

For these reasons, we dismiss without prejudice Orange County's petition for review on the ground that it was prematurely filed. After the Board ultimately rules on Orange County's environmental contentions and issues a final decision, Orange County may then resubmit to us its arguments that the Board erred in rejecting the merits of the two contentions concerning criticality prevention and quality assurance.

IT IS SO ORDERED

For the Commission

[Original signed by Annette L. Vietti-Cook]

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of June, 2000.

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1. In contrast, where the Board has denied all contentions and thereby precluded a would-be intervenor from participating, or where the applicant argues that all intervenor's contentions should have been denied, thereby barring the intervenor from the litigation, the adversely affected party may appeal as of right. See 10 C.F.R. § 2.1115(e). See generally Private Fuel Storage, 51 NRC at 80 n.1 (citing 10 C.F.R. § 2.714a (b) and (c)).

2. We have never ruled on the question whether the two regulatory exceptions to the prohibition against interlocutory appeals in Subpart G proceedings also apply in Subpart K proceedings. See 10 C.F.R. § 2.786(g)(1) and (2) (permitting such appeals only where a Licensing Board decision either threatens "immediate and serious irreparable harm" or "[a]ffects the basic structure of the proceeding in a pervasive and unusual manner"). Nor have we ruled on the analogous applicability of the case law which preceded (and provided the basis for) the 1991 promulgation of those exceptions in section 2.786(g). See, e.g., Public Serv. Co. of Ind. (Marble Hill Nuclear Generating Station), ALAB-405, 5 NRC 1190, 1192 (1977). Even were we to conclude that these two exceptions do apply to a Subpart K proceeding (an issue we need not decide here), Orange County still has not demonstrated -- or even alleged -- that the Board order created circumstances which would trigger either of these regulatory exceptions, and our review of the record likewise reveals no such circumstances.