

RELATED CORRESPONDENCE

April 18, 1983

DOCKETED  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )

CAROLINA POWER & LIGHT COMPANY )  
AND NORTH CAROLINA EASTERN )  
MUNICIPAL POWER AGENCY )

Docket Nos. 50-400 OL  
50-401 OL

(Shearon Harris Nuclear Power )  
Plant, Units 1 and 2) )

APPLICANTS' MOTION TO COMPEL DISCOVERY ON  
APPLICANTS' INTERROGATORIES AND REQUEST FOR PRODUCTION  
OF DOCUMENTS TO INTERVENOR WELLS EDDLEMAN (FIRST SET)

Pursuant to 10 C.F.R. § 2.740(f), Carolina Power and Light Company and North Carolina Eastern Municipal Power Agency ("Applicants") hereby move the Atomic Safety and Licensing Board ("Board") to compel Intervenor Wells Eddleman to respond in full to General Interrogatory No. 2 propounded to Intervenor in "Applicant's Interrogatories and Request for Production of Documents To Intervenor Wells Eddleman (First Set)" dated January 31, 1983.

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## I. Introduction

On January 31, 1983, Applicants served Intervenor Wells Eddleman with the first set of interrogatories and request for production of documents on Eddleman Contentions 9, 11, 22, 41, 45, 65, 75, 80, 83, 84 and 132. On March 21, 1983, Mr. Eddleman filed his response to Applicants' discovery request. Mr. Eddleman objected to Applicants' General Interrogatory No. 2, and objected in part to General Interrogatory Nos. 4(a), 7(a) and 7(b).

On Friday, April 8, Applicants' counsel met with Mr. Eddleman to negotiate his objections to discovery. At that time Applicants and Mr. Eddleman reached agreement regarding Mr. Eddleman's objections except with respect to General Interrogatory No. 2. Mr. Eddleman has categorically refused to respond to that interrogatory. See Certification of Counsel (attached hereto).

For the reasons discussed below, Applicants contend that Mr. Eddleman's stated reasons for failing to respond are without merit and that the Board should compel Mr. Eddleman to respond fully to General Interrogatory No. 2 as propounded.

## II. Discussion

General Interrogatory No. 2 which is the subject of this motion reads as follows:

2(a). State the name, present or last known address, and present or last employer of each person, other than affiant, who provided information upon which you relied in answering each interrogatory herein.

(b). Identify all such information which was provided by each such person and the specific interrogatory response in which such information is contained.

Mr. Eddleman's objection to this interrogatory is based on a misapplication of Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure which provides that:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Mr. Eddleman claims that pursuant to Rule 26(b)(4)(B) he is not required to identify the persons on whom he relied in formulating his contentions because those persons are either expert witnesses who have been retained in anticipation of litigation, but are not expected to be called at trial and are non-discoverable absent a showing of particular need, or are experts who have been informally consulted and are not discoverable under any circumstances.

Although Mr. Eddleman's approach to discovery would be seriously deficient even under the Federal Rules, the simple fact is that Rule 26(b)(4)(B) has no applicability in nuclear

licensing proceedings. The Board in General Electric Co. (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 N.R.C. 462 (1978) (hereinafter cited as "General Electric Co.") ruled on this precise issue and found that Rule 26(b)(4)(B) was not incorporated into the Commission's discovery rules. That Board explicitly rejected a suggestion that the Commission's rules should be interpreted to include Rule 26(b)(4)(B). As the Board stated, the fact that the Federal Rules may be used to interpret and apply similar Commission discovery rules does not provide a basis for incorporating a Federal Rule that has been expressly excluded from the Commission's discovery scheme. In fact, as the Board aptly noted, it can more readily be inferred that, having expressly selected some provisions of the Federal Rules, the Commission intentionally omitted other provisions from its discovery rules.<sup>1/</sup>

In the absence of provision for discovery of expert witnesses, such discovery is controlled by the general

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<sup>1/</sup> Mr. Eddleman attempts to undercut this compelling precedent by asserting that the case on which the General Electric Co. Board relied has been held "improperly decided." Wells Eddleman's Response to Applicants' First Set of Interrogatories and Request For Production of Documents at page 4. Even a cursory reading of the General Electric Co. decision reveals that Mr. Eddleman's assertion is without merit. The General Electric Co. result is in no way dependent on Baki v. B.F. Diamond Construction Co., 71 F.R.D. 179 (D. Md. 1976), the case Mr. Eddleman urges us to disregard. The Baki case interprets Rule 26(b)(4)(B); the Board in General Electric Co. held that Rule 26(b)(4)(B) is inapplicable to nuclear licensing discovery proceedings.

discovery provision of 10 C.F.R. 2.740 which reads in pertinent part as follows:

In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter (emphasis supplied).

General Electric Co., supra, 8 N.R.C. at 466. Applicants' General Interrogatory No. 2 with regard to the identity of the persons on whom Mr. Eddleman relied clearly is within the scope of permissible discovery contemplated by 10 C.F.R. 2.740. A substantially identical general interrogatory was approved over intervenors' objections in Pennsylvania Power and Light Co. and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 N.R.C. 317, 33 n. 23 (1980) (hereinafter cited as "Susquehanna").<sup>2/</sup>

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<sup>2/</sup> The interrogatory approved by the Appeal Board in Susquehanna reads as follows:

Is your answer based upon conversations, consultations, correspondence or any other type of communications with one or more individuals? If so:

- a. Identify by name and address each such individual.
- b. State the educational and professional background of each such individual, including occupation and institutional affiliations.

(Footnote Continued Next Page)



Furthermore, as the General Electric Co. Board stated, even if Rule 26(b)(4)(B) had some relevance to interpretation of the Commission rules, neither the Commission's rules nor the Federal Rules prohibit discovery of the identities and locations of expert witnesses. In accord with the general policy of liberal pretrial discovery, Rule 26(b)(4)(B) was not intended to prevent routine discovery of the facts upon which allegations in a complaint are based. Instead it provides protection only for a limited class of information -- "facts or opinions" "acquired by an expert in anticipation of trial."<sup>3/</sup> The information Applicants request does not fall within these categories and would not be protected by Rule 26(b)(4)(B) even if that rule were applicable to discovery under the Commission's rules.

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(Footnote Continued)

c. Describe the nature of each communication with each such individual, when it occurred, and identify all other individuals involved.

d. Describe the information received from each such individual and explain how it provides a basis for your answer.

e. Identify each letter, memorandum, tape, note or other record related to each conversation, correspondence, or other communication with such individual.

<sup>3/</sup> Mr. Eddleman has, of course, made no showing that the persons with whom he consulted were "experts" covered by Rule 26(b)(4)(B). Mr. Eddleman has not provided Applicants with the names of any "non-experts" if any, who assisted in preparation of interrogatory responses.

The protection afforded "facts and opinions" does not extend to the identities and locations of expert witnesses. Baki v. B.F. Diamond Construction Co., supra, 71 F.R.D. at 182. While Mr. Eddleman claims that Baki was wrongly decided, several other courts have followed the rationale of the Baki court. Arco Pipeline Co. v. S/S Trade Star, 81 F.R.D. 416 (E.D. Pa. 1978); Weiner v. Bache Halsey Stuart, Inc., 76 F.R.D. 624 (S.D. Fla. 1977); see also Sea Colony, Inc. v. Continental Insurance Co., 63 F.R.D. 113 (D. Del. 1974). At most, it could be said that a split exists among the circuits, with some courts requiring a showing of exceptional circumstances before names of retained or specially employed consultants may be discovered. Ager v. Jane C. Stormont Hospital & Training School for Nurses, 622 F.2d 496, 502 (10th Cir. 1980).

However, in light of General Electric Co. and Susquehanna it cannot be contended that a licensing board should follow those decisions requiring a showing of necessity before allowing discovery of expert identities. The Board in General Electric Co. explicitly held that expert identities were discoverable; two years later the Board in Susquehanna expressly approved an interrogatory requesting this information. Those cases illustrate quite clearly that expert identities are discoverable in nuclear licensing proceedings.

This interpretation of Rule 26(b)(4)(B) is consistent with the general scheme of discovery contained in the Federal Rules and the Commission's rules. Both the Commission's rules and

the Federal Rules permit liberal pretrial discovery to enable the parties in complex litigation to ascertain the facts, refine the issues, and prepare adequately for a more expeditious hearing or trial. South Carolina Electric and Gas Co., et. al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 N.R.C. 881, 888 (1981). The factual contentions of parties are not shielded from discovery. 4 J. Moore, Moore's Federal Practice, ¶ 26.66[2] (3d ed. 1983). A party is not permitted to make skeletal contentions and keep the bases for them secret. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 N.R.C. 1400, 1417 (1982). This first set of interrogatories seeks to elicit information regarding Mr. Eddleman's contentions and their bases to enable Applicants to understand the issues regarding which they have the ultimate burden of proof. If Mr. Eddleman has relied on certain experts in making allegations regarding the Harris Plant, the identity of such experts may well be critical to Applicants' understanding of the allegations.

Finally, Mr. Eddleman's categorical objection to General Interrogatory No. 2, which applies to each interrogatory response by Mr. Eddleman, is impermissibly broad. The party objecting to discovery bears the burden of demonstrating that the specific information sought is non-discoverable. Roesberg v. Johns-Manville Corp., 85 F.R.D. 292, 296 (E.D. Pa. 1980). Objections must be specific and supported by a detailed explanation of why the interrogatory is objectionable. In re



Folding Carton Antitrust Litigation, 83 F.R.D. 256, 264 (D. Ill. 1979). A broad, general objection such as Mr. Eddleman asserts which does not even concede that other persons were consulted and does not identify persons consulted (if they do exist) falls far short of the specificity required by the Federal Rules.<sup>4/</sup> Under the Federal Rules, Mr. Eddleman would, at the very least, be required to provide responsive answers regarding each specific interrogatory response, stating whether a formally retained expert was relied upon or stating whether the response was based on informal consultations with experts,

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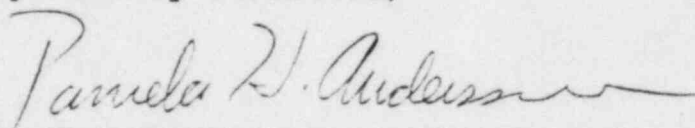
<sup>4/</sup> Mr. Eddleman's several general statements about the possible harrassment of his witnesses and the chilling effect that will ensue if he is required to identify these persons are made without any substantiation and do not merit the consideration of the Board. Intervenor's may not defeat valid attempts at discovery by making vague and unfounded allegations about the unscrupulous activity that they fear Applicants will engage in. General Electric Co., supra, 8 N.R.C. at 463. These arguments, available to any intervenor, will be given little credit absent some particularized showing of a real potential for harm. Id.

and to object specifically to providing the names of each such individual.<sup>5/</sup>

### III. Conclusion

For all of these reasons, Applicants respectfully request that the Board compel Mr. Eddleman to respond in full to General Interrogatory No. 2.

Respectfully submitted,



John H. O'Neill, Jr.  
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Dated: April 18, 1983

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<sup>5/</sup> In attempting to negotiate with Mr. Eddleman, Applicants requested that he provide a list of those interrogatory responses on which he obtained assistance. This information would have allowed Applicants to ascertain whether the names of such individuals would be helpful in understanding the nature of the contention which is the subject of the interrogatory and the basis which Mr. Eddleman asserts underlies that contention. Mr. Eddleman refused to provide such a list; indeed, he refused even to admit or deny that any such person(s) exists. He insisted on defending his absolute right to protect the anonymity of anyone who provides assistance to him.

April 18, 1983

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CAROLINA POWER & LIGHT COMPANY AND	)	Docket Nos. 50-400 OL
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POWER AGENCY	)	
	)	
(Shearon Harris Nuclear Power	)	
Plant, Units 1 and 2)	)	

CERTIFICATION BY COUNSEL

I, John H. O'Neill, Jr., Counsel for Applicants in the above referenced proceeding, certify that I have made the following efforts to resolve objections raised by Intervenor Wells Eddleman to certain of Applicants' interrogatories set forth in "Applicants' First Set of Interrogatories and Request for Production of Documents" dated January 31, 1983:

1. On March 31, 1983, I spoke by telephone to Mr. Eddleman regarding his objections to certain of Applicants' interrogatories as set forth in "Wells Eddleman's Response To Applicants' First Set of Interrogatories and Request for Production of Documents" dated March 21, 1983. We agreed to meet in person at a mutually convenient date, preferably during the week of April 4, 1982.

2. H. Hill Carrow, attorney for Carolina Power & Light Company, and I met with Mr. Eddleman on April 8, 1983, in CP&L's offices in Raleigh, North Carolina. We informally resolved all

of Mr. Eddleman's objections to our first set of interrogatories with the exception to his categorical objection to providing the names of individuals who assisted him in preparing responses to interrogatories as requested in General Interrogatory No. 2.

3. With respect to General Interrogatory No. 2, Mr. Eddleman expressed his views that he had the right to protect the names of individuals who assisted him in responding to interrogatories. Mr. Eddleman indicated that his concern was with respect to harassment of such individuals if their identities were disclosed. When Mr. Eddleman was asked for a list of the specific interrogatory responses regarding which he had obtained assistance, he refused to provide such a list or to admit that even one answer included information provided by a third party. Mr. Eddleman expressed his concern that such a response could somehow be construed as a waiver to his objection. Mr. Eddleman and Applicants agreed that a fundamental difference existed with respect to the legal interpretation of Mr. Eddleman's responsibility to provide the names of individuals who assisted him in the preparation of responses to Applicants' first interrogatories and who might assist him in responding to future interrogatories. Both parties agreed that further discussions on this matter would not be fruitful.

DISTRICT OF COLUMBIA:

Dated: April 18, 1983

Subscribed and sworn to before me  
this 18th day of April, 1983.

Glenn P. McDonnell  
Notary Public

My Commission expires: June 30, 1987

John H. O'Neill, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion To Compel Discovery On Applicants' Interrogatories And Request For Production Of Documents To Intervenor Wells Eddleman (First Set)" and "Certification of Counsel" were served this 18th day of April, 1983, by deposit in the U.S. mail, first class, postage prepaid, to the parties on the attached Service List.

*Pamela H. Anderson*

Pamela H. Anderson



UNITED STATES OF AMERICA  
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