UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

April 25, 1983

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
Glenn O. Bright
Dr. James H. Carpenter
James L. Kelley, Chairman

In the Matter of CAROLINA POWER AND LIGHT CO. et al. (Shearon Harris Nuclear Power Plant, Units 1 and 2)	Dockets 50-400 OL 50-401 OL ASLBP No. 82-468-01 OL

Wells Eddleman's Answer to Applicants' Motion to Compel(re first set of interrogatories)

Applicants completely misstate my position: First, the information and persons upon whom I relied in formulating my contentions are being revealed. Second, as stated in my objection, I object to releasing the names of persons who have provided information which I used in answering interrogatories. Information provided is being put into the answers where I rely on such information. This has been my consistent position.

Nor do I object to laying out a list (e.g. Al Aloe contributed information to response to interrogatory X-13) of pseudonyms for folks consulted IF this doesn't compromise my objection to actually revealing the persons' names. This the Applicants have about correct.

I amend line 7 of my objection to replace the words "essentially only if" with "unless": Unless Applicants can show "it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means," the facts are not discoverable.

But as stated above, I am willing (and have acted) to reveal the facts on which I rely in my answers. It is to revealing the names of persons informally consulted (unconditionally protected under Ager v. Jane C. Stormont Hospital, 622 F2d 496 (1980)), and any experts

D503

specially retained for this case but not as witnesses (non-witness experts) that I object.

Applicants rely on Vallecitos (8 NRC 462), but in a virtually identical case decided in Seabrook 24 March 1983, that Board rejected this argument. The Appeal Board has followed the federal rules of evidence and practices where an analogous NRC rule did not exist (Marble Hill, ALAB-374, 5 NRC 417 at 421, views of Mr. Farrar joined in by the entire Board). Neither Rule 26(b)(4)(B) nor 10 CFR 2.740 requires explicitly that the identity of non-witness experts be disclosed. Both rules, however, contain a prohibition against discovery of the content of the advice of non-witness expert consultants absent a special showing of exceptional circumstances under which the discovering party is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." 10 CFR 2.740(b)(2) and similarly in Federal Rule 26(b)(4). This requirement for a showing of exceptional need for the content of non-witness advice is held in Ager, supra to also Apply to the identity of non-witness consultants; the same case holds informal consultation with a non-witness expert absolutely privileged, as noted above. (In this case, since I am acting as my own counsel, oral communication with me may be privileged anyway.)

As stated in my original objection (p.4) this showing is not possible when the facts of a party's position are known, other experts are available (as they are to Applicants -- see my Certificate of Negotiations 4-22-83, which I incorporate here by reference for the statements of Applicants' counsel that they can hire any experts they need, for any or all of my contentions), and the supplier of the information is not expected to testify. Hoover v. US Dept of Interior, 611 F 2D 1132 at 1142, 5th Circuit, 1980.

The Seabrook board agreed with this same line of reasoning:

> We have examined the history of Rule 26(b)(4) and find that the situation it seeks to protect is analogous to this situation. Rule 26(b)(4) differentiates between experts whom the party expects to call as witnesses and those who have been retained or specially employed by the party in preparation for trial. The Notes of Advisory Committee on Rules explain that discovery of expert witnesses is necessary, particularly in a complex case, to narrow the issues and eliminate surprise, but that purpose is not furthered by discovery of nonwitness experts. (slip op at pp 9-10).

That Board found that "Discovery of NECNP's non-witness experts will not narrow the issues nor eliminate surprise at trial. Therefore, discovery of the content of the advice of NECNP's non-witness experts is denied." Now, the "content of the advice" of experts includes a lot of things which are not the facts-which-I-rely-on that I am voluntarily revealing: strategy suggestions, ideas I don't rely on, facts I don't rely on, even (as Staff has raised in its motion to compel re CCNC, on first set of interrogatories in this case) who disagrees with your position, and information against that position.

I hold that since Applicants have plenty of lawyers and strategists, and no lack of experts, they have no need for this information and it is not discoverable, under the federal rules and the Seabrook decision quoted from above.

The same decision (p.9) quotes the Appeal Board that "there must first be inquiry into whether the situations are truly similar" Midland, ALAB-379, 5 NRC 565, 588 at note 13 (1977). This situation is virtually identical to that in Seabrook, in which NECNP stated (Answer to Applicants Motion to Compel, p.7) that NECNP has already disclosed its contentions, their underlying rationale, and all facts upon which its position is based. I have done likewise.

The Seabrook board also ruled the identity of nonwitness experts was protected (slip op at 10), based on the same reasoning which I advanced in my objection. That basis is that the federal rules and the policy concerns behind those rules and the Ager decision do apply in NRC proceedings, and that the analysis set forth in Ager applies th that (Seabrook) case (which is virtually identical to this case).

The Ager court rejected arguments that disclosure of a consultant's identity would give the discovering party no material advantage at the expense of the opposing party's opposition. I set out that reasoning in my objection, pages 4 and 5 and 6. I add here that intervenors such as myself have access to a very limited pool of experts, who are reluctant to expose themselves to the time-consuming and expensive processes of being deposed or called as witnesses. (More than one has said so to me.) Other potential consultants or information sources are warded off by the possibility that they will be identified in connection with intervenors. (Again, I've seen several, and one who was not warded off by this question and was identified, Hawkeye's security expert I'd retained, was forced to withdraw from this case by industry pressure.) To require me to identify each person whom I have consulted with in answering interrogatories (or otherwise in preparing for this case) will have a chilling effect on my ability to obtain information and advice from experts, and thus prevent me from being able to assist in developing a sound record in this case.

Applicants rely also on Susquehanna, but in that case, no objection like mine (or NECNP's in Seabrook) had been raised. That case simply does not apply. note: I do not recall Applicants asking me for a "list" or listing of interrogatory responses on which I obtained any assistance; however, as noted above, I am willing to provide such a list if it doesn't compromise my objection.

Because the ability to obtain advice from experts is very important to intervenors, I would respectfully request that if the Board believes it should uphold the Applicants' position here, it should stay its order and bring the matter to the Appeal Board. This is an important issue and may well come up in many future cases; the Seabrook board found for the intervenor in a virtually identical matter, and consistency can be established by the Appeal Board. Finally, it will do irreparable harm to my ability to get expert advice and assistance if an unstayed order to me to reveal the names of persons who have provided information I have used in answering interrogatories issues, and the Appeal Board should eventually uphold my position and that of the intervenors in Seabrook, supra. In the interim, the chilling effect will have occurred and can't be undone. For these reasons I respectfully request the Board to either uphold my position here, or certify or otherwise appropriately bring this matter before the Appeal Board. I note the similar request of Applicants, 4-20-83, re cost-benefit analysis at the O.L. stage.

Wells Eddleman

This 25th day of April, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATOFY COMMISSION

In the matter of CAROLINA POWER & LIGHT CO. Et al.) Dockets 50-400
Shearon Harris Nuclear Power Plant, Units 1 and 2) and 504401 O.L.

CERTIFICATEOF SERVICE

I hereby certify that copies of Wells Eddleman's Answer to Applicants' Motion to Compel (re First Set of Interrogatories)

HAVE been served this 25 day of April 1983, by deposit in the US Mail, first-class postage prepaid, upon all parties whose names are listed below, except those whose names are marked with an asterisk, for whom service was accomplished by _____

Judges James Kelley, Glenn Bright and James Carpenter (1 copy each)
Atomic Safety and Licensing Board
US Nuclear Regulatory Commission
Washington DC 20555

George F. Trowbridge (attorney for Applicants)
Shaw, Pittman, Potts & Trowbridge
1800 M St. NW
Washington, DC 20036

Ruthanne G. Miller
ASLB Panel
USNRC Washington DC 2055 5

Office of the Executive Legal Director
Attn Dockets 50-400/401 O.L.
USNRC
Washington DC 20555

Phyllis Lotchin, Ph.D.
108 Bridle Run
Chapel Hill NC 27514

Dan Read
CHANGE/ELP
Box 524
Chapel Hill NC 27514

Docketing and Service Section
Attn Dockets 50-400/401 O.L.
Office of the Secretary
USNRC
Washington DC 20555

Pat & Slater Newman
CANP
2309 Weymouth Court
Raleigh NC 27612

John Runkle
CCNC
307 Granville Rd
Chapel Hill Nc 27514

Karen E. Long
Public Staff Atty
Box 991
Raleigh, NC 27602

Bradley W. Jones
USNRC Region II
101 Marietta St.
Atlanta GA 30303

Travis Payne
Edelstein & Payne
Box 12643
Raleigh NC 27605

Richard Wilson, M.D.
729 Hunter St.
Apex NC 27502

Certified by W Wells Eddleman