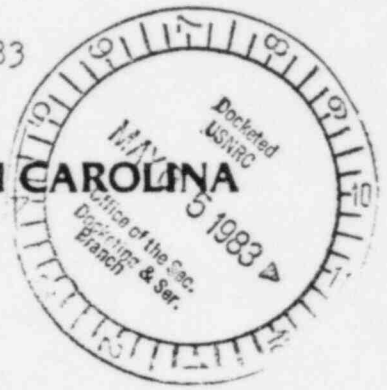
RELATED CORRESPONDENCE

5/2/83



THE CONSERVATION COUNCIL OF NORTH CAROLINA

307 Granville Road, Chapel Hill, N.C. 27514

(919) 942-7935 or 942-1080 (24 hours)

In the Matter of	)	
	)	
CAROLINA POWER & LIGHT COMPANY AND NC EASTERN MUNICIPAL POWER AGENCY	)	Docket No. 50-400-OL 401-OL
	)	
	)	
(Shearon Harris Nuclear Power Plant, Units 1 & 2)	)	

CCNC ANSWER TO
NRC MOTION TO COMPEL RESPONSE TO DISCOVERY

The Conservation Council feels it must respond to the NRC Staff's Motion to Compel CCNC to Respond to Discovery, dated April 20, 1983. It was our understanding at the February 24, 1983, prehearing conference, later confirmed by the Memorandum and Order, dated March 10, 1983, that the Board specifically did not require briefs to be filed in motions to compel discovery. However, as the Staff has seen fit to do so in this instance, we exercise our right to answer so that our position becomes clear to the Staff and the Board before an Order is entered into.

Permission to answer the Staff's motion was requested of Judge Kelley by telephone on April 26, 1983. Judge Kelley therein directed that an answer be submitted by May 2, 1983 and respond briefly to the Staff's motion. We will also take the opportunity to change some of our positions in response to the Board's mandate and therefore preclude the Board from the

DS03

necessity of ruling on all aspects of the Staff's motion.

Background and Negotiation

On February 4, 1983, the Staff served interrogatories on CCNC relating to CCNC Contentions 4, 12, and 14, along with a request for admission relating to the Applicants' ability to safely shut down the plant. A prehearing conference held on February 24 directed responses to all discovery to be made by March 10, which CCNC complied with. Charles Barth, Staff counsel, then called Mr. Runkle of CCNC on March 22 to discuss those responses which Mr. Barth determined inadequate. Mr. Barth was kind enough to put his views in writing in a letter dated March 23, reiterating his position and giving CCNC the opportunity to reconsider our responses to discovery.

Negotiation continued on April 11 when Mr. Barth again called Mr. Runkle. Excluding initial pleasantries, that phone call consisted of the following exchange: Barth: What have you done about the letter I sent? Runkle: I am waiting for responses to my interrogatories to the Applicants. Barth: These things cannot wait forever. (based on notes taken immediately after).

The Staff then filed a Motion to Compel CCNC to Respond to Discovery, dated April 20, 1983. We note further that the Staff has withdrawn several of his objections to our responses which he had stated in his March 23 letter. We will take the opportunity to reciprocate, particulary in our objection to Interrogatory 13 as we now know what the Staff is after.

Discussion

I. Interrogatory 13 (Contentions 4, 12, 14)

CCNC objected to Staff's general interrogatory 13 which stated:

> Provide the name, telephone number and address of each and every person who answered these interrogatories. Where more than one person contributed to an answer, identify all persons who contributed to the answer and indicate her or his contribution.

We based our objection that the information sought was the material prepared by our agents, therefore work-product and privileged.

Interrogatory is redundent when one looks at interrogatories 9 through 12 which ask fundamentally the same question. Our objection of work-product was based on the mistaken impression that the staff wanted the contributions, the internal memos and reports, which our agents prepared for us in anticipation of litigation. "Litigation" in the context of Federal Rule of Civil Procedure 24(b)(3) also includes the discovery process. The facts in the documents prepared for trial are the foundation for the other responses to the Staff's interrogatories as we stated in our respones to Staff's interrogatories 1 through 3 for each contention. We will continue to maintain that this material itself is not discoverable without the showing of "good cause" by either the Applicants or Staff because it includes mental impressions, conslusions, opinions, and the like.

However, from reading the Motion to Compel on pages 6 and 7, especially at the top of page 7, which states:

> We want it clearly established that the Staff general interrogatories 1-13 seek the identity of "persons" supporting the intervenors--whether they can qualify as experts is not now either known or at issue.

As long as interrogatory 13 is read to include only those persons who "support" our positions, we will attempt to answer it. We however have not faced a situation such as Mr. Eddleman describes in his Answer to Applicants' Motion to Compel, dated April 25, 1983, where persons provided information with the understanding that their names would not be revealed.

A broad reading of interrogatory 13 runs afoul of Rule 26(b)(4)(B) which protects the contributions of experts or other similar witnesses which a party does not expect to call as a witness at trial. This is done in order to protect a party because such an expert is likely to be adverse. This problem is adressed more fully in a recent memorandum and order, Public Service Company of New Hampshire (Seabrook), ASLBP 82-471-02-OL, issued on March 24, 1983, and referred to by Mr. Eddleman in his April 25, 1983, Answer to Applicants' Motion to Compel. We mention this ruling at this point because the Staff's Motion to Compel in this instance addresses the Ager case, Ager v. Hospital, 662 F. 2d 496 (10 Cir., 1980), without giving its holding that "once the identities of retained or specially employed experts are disclosed, the protective provisions of the rule concerning facts known or opinions held by such experts are subverted." Id. at 503. The Seabrook decision endorses this position.

Further, the Staff relies on the Susquehanna decision which allowed interrogatories fairly similar to those asked by the Staff.

Susquehanna can not be read to say that general interrogatories must be answered even if there are legitimate objections to them. If the Staff limits the scope of their question to those "persons" which we relied on to answer the interrogatories, then we will do so, even if it repeats our responses to the proceeding four interrogatories, as follows:

Interrogatory 13 (Contention 4)--No person supplied any of the information in the answers to these interrogatories. We will notify the Staff if and when we have enough information from the Applicants through discovery; at that point, we will have an expert to review the information and provide the analysis to answer the above questions fully.

Interrogatory 13 (Contention 12)--Dan Besse prepared a written report on the subject of the Jordan Dam Break which was used to answer interrogatories under Contention 12. His address and phone are given in response to Interrogatory 10 under this contention.

Interrogatory 13 (Contention 14)--Cecil Frost prepared a written report on the subject of Hydrilla which was used to answer interrogatories under Contention 14. His address and phone are given in response to Interrogatory 10 under this contention.

II. Interrogatories 23, 24, 26, 28, 29 30, 33, 36, 37 (Contention 12)

Contention 12 states that the Applicant has not considered the effects of the Jordan Dam break, and that such a break potentially could have a severe adverse impact on the SHNPP. Our purpose for Contention 12 is to gather information from the Applicants through discovery in order to determine what those effects are. The Staff finds our delay until we have that information unacceptable.

The Staff finds our assertion that dams do not fail to be meaningless. We would like to draw an analogy of the "hypothetical" dambreak to the equally "hypothetical" earthquake. Seismic analysis begins with the possibility that an earthquake may happen, especially if the plant is on a fault. Analogous is a large earthen dam sitting on a river upstream from the intake channel and cooling reservoir of the nuclear power plant. Analysis is not made when and how the earthquake will occur but whether the plan can safely withstand the pressures an earthquake would create. It makes no difference how the dam will break (and hopefull it never will). Our assertion is that the Applicant had better determine if their plant can withstand the flood.

It was extremely difficult for us to analyze the effects of the dambreak until the crucial information was received from the Applicants through discovery. We cannot take pressure readings over two years in each of the dam structures that the Applicants control. The Staff's insistence that their interrogatories must be answered before we have necessary information to

make a detailed analysis is intolerable. Often intervenors must do the Applicants' job for them. Several of the interrogatories the Staff submitted to CCNC could have generated much fuller data if those same interrogatories had been submitted to the Applicants.

At this point we must allow our responses to stand as we cannot provide responses to the Staff without reponses from the Applicants.

III. Interrogatories 40-43 (Contention 14)

Again, we must again rely on our responses, many of which incorporate our responses to the Applicants by reference. It was our understanding from our March 22 phone call with Mr. Barth that incorporation of our responses to Applicants was acceptable to them. We therefore find their demand for "an answer, not a reference to someting else" on page 8, paragraph 1, of their motion to compel to be uncalled for. Regardless, if the Staff has as their main concern the identity of the intake valves in question, we will answer that as follows:

> Interrogatory 40--All of the valves which either allow water from the reservoir into the plant itself or which touch that water are subject to clogging by hydrilla.

The remainder of the interrogatories under this contention are again in most part contingent upon responses given us by the Applicants. The Applicants should know the location, size, and water speed of these valves and the same interrogatories

sent to us, if sent to the Applicants, would reap a bigger harvest. Further, the specifications of the valves are no doubt in the FSAR.

IV. Oath

The oath was included on page 15 of our response to the Staff, dated March 10, 1983. If the Staff did not receive that page I apologize and will send them a copy of that page immediately. If possible I would like that oath to cover the responses to interrogatories which are included in this filing.

V. Request for Admission

We find the Staff's position in regards to their request for admission to be over-extended. Their request for admission is on one of the issues we will litigate in this matter. We do not find the Staff's assertion that "(t)he Harris Westinghouse PWR units are so designed as to be able to be brought to cold shutdown without using the main condensers," (page 8, third paragraph) to be reassuring.

We could have denied the admission for various reasons--the Jordan Dam break, hydrilla infestation, or the Applicants' general incompetence, for example--which could prevent cold shutdown. We did not do so until we have received responses from the Applicants to prevent the possibility of denying the statement and then reversing our position if our later analysis proved our initial position to be false.

Nowhere in the regulations does it state that from the moment a contention is initially submitted the intervenor's whole case

must be in final form, ready for the hearing. The Staff's insistence that we are derelict in our obligation if we do not have our full case prepared now, at least eight months before the first hearing, is regrettable.

Conclusion

We are willing to negotiate and certainly will share the responsibility for the failure of this round of negotiations to be resolved. We will not be able to answer all of the Staff's interrogatories and requests for admission until we manage to get information we need from the Applicants.

Respectfully submitted,

John Runkle

John Runkle
Attorney-at-Law
Conservation Council of NC

May 2, 1983

Attachment--Service List

CERTIFICATE OF SERVICE

I hereby certify that copies of this filing were served this 2nd day of May, 1983, by deposit in the U.S. mail, first class, postage prepaid, or by hand-delivery, to the following:

James L. Kelley
Atomic Safety and Licensing Board
US Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Glenn O. Bright
same address

Dr. James H. Carpenter
same address

Charles A. Barth
Office of Executive Legal Director
US Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
US Nuclear Regulatory Commission
Washington, D.C. 20555

Daniel F. Read
Chapel Hill Anti-Nuclear Group
PO Box 524
Chapel Hill, NC 27514

M. Travis Payne
Edelstein and Payne
PO Box 12643
Raleigh, NC 27605

Dr. Richard D. Wilson
729 Hunter Street
Apex, NC 27502

Wells Eddleman
718-A Iredell Street
Durham, NC 27705

Patricia and Slater Newman
Citizens Against Nuclear Power
2309 Weymouth Court
Raleigh, NC 27612

Deborah Greenblatt
1634 Crest Road
Raleigh, NC 27606

Ruthanne G. Miller
Atomic Safety and Licensing Board Panel
US Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Phyllis Lotchin
108 Bridle Run
Chapel Hill, NC 27514

Karen E. Long, Esq.
Public Staff, Utility Commission
PO Box 991
Raleigh, NC 27602

Bradley W. Jones, Esq.
US-NRC, Region II
101 Marrietta Street
Atlanta, GA 30303

Richard E. Jones
Vice President and Senior Counsel
Carolina Power & Light Company
PO Box 1551
Raleigh, NC 27602

George F. Trowbridge
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

John Runkle

John Runkle, J.D.
Conservation Council of North Carolina

CCNC Answer to Staff Motion to Compel Response to Discovery