February 14, 1984



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
| | ) | |
| CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY | ) | Docket Nos. 50-400 OL<br>50-401 OL |
| | ) | |
| | ) | |
| (Shearon Harris Nuclear Power Plant, Units 1 and 2) | ) | |
| | ) | |

APPLICANTS' ANSWER TO WELLS EDDLEMAN'S MOTION FOR EXTENSION OF TIME TO RESPOND TO SUMMARY DISPOSITION ON EDDLEMAN 65 UNTIL SECOND ROUND OF DISCOVERY IS COMPLETED

On January 30, 1984, intervenor Wells Eddleman filed "Motion for Extension of Time to Respond to Summary Disposition on Eddleman 65 until Second Round of Discovery is Completed" (hereafter "Eddleman Motion"). The motion seeks an order from the Board to defer Mr. Eddleman's response to "Applicants' Motion for Summary Disposition of Eddleman Contention 65," January 18, 1984, until 15 days after Mr. Eddleman receives answers to additional discovery requests filed on January 30, 1984 (including rulings on any motions to compel and answers which may be required thereunder) or until 15 days after Applicants file any amended summary disposition motion. Applicants oppose the Eddleman motion for extension of time.

Eddleman 65 was admitted by the Board in its September 22, 1982 Memorandum and Order (Reflecting Decisions Made Following

Prehearing Conference), LBP-82-119A, 16 N.R.C. 2069, 2101 (1982). On January 18, 1984, Applicants filed a motion for summary disposition of Eddleman 65, to which any response by Mr. Eddleman was due on February 13, 1984. Instead, Mr. Eddleman filed the instant motion for extension of time on January 30, 1984, accompanied by a 26-page set of discovery requests on Eddleman 65.

In their summary disposition motion, Applicants explicitly addressed the timeliness of their motion. Mr. Eddleman neither challenges nor addresses those arguments. To repeat, a motion for summary disposition may be filed at any time in the course of a proceeding. Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 N.R.C. 1245, 1263 (1982); see also 10 C.F.R. § 2.749(a). Mr. Eddleman simply asserts: "I think it basic fairness that I get to complete discovery before such a motion is ruled on." Eddleman Motion at 1. While Applicants concede that some opportunity for discovery may be appropriate prior to entertainment of a motion for summary disposition of an admitted contention, that opportunity is not unlimited and the Commission's regulations do not prohibit summary disposition until discovery is exhausted.

Discovery on Eddleman 65 has been open since September 22, 1982, by order of the Board.[1/] LBP-82-119A, supra, 16 N.R.C.

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1/ Apparently because the parties agreed to defer discovery on several safety contentions, Mr. Eddleman now harbors the mistaken impression that his agreement was necessary to begin discovery on Eddleman 65. See Eddleman Motion at 2.

at 2113. Until he filed the instant motion on January 30, 1984, Mr. Eddleman's only discovery requests to Applicants on Eddleman 65 were filed on March 21, 1983 -- nearly six months after discovery was opened. Until January 30, 1984, more than eight months later, no follow-up requests had been posed to the answers Applicants filed on May 13, 1983. With respect to the few additional discovery responses filed by Applicants on November 11, 1983 -- in accordance with the Board's October 6, 1983 ruling on an Eddleman motion to compel of August 3, 1983 -- again no action was taken by Mr. Eddleman until after the summary disposition motion was filed.[2/]

There is no requirement that a party conduct thorough discovery, or that a party conduct its discovery with dispatch. However, a party must accept the consequences of its failure to do so. There is a public interest in the expeditious resolution of the issues Mr. Eddleman has raised in this proceeding. Given the number of contentions Mr. Eddleman has raised, and the number of contentions he continues to propose be added to the proceeding, it is incumbent upon him not to attempt to forestall Licensing Board decisions on the merits of his allegations.

The first evidentiary hearing session in this case is scheduled tentatively for June, 1984 on environmental matters -- only one year prior to the projected fuel load date for

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2/ Mr. Eddleman's first discovery requests of the Staff on Contention 65 were not filed until May 6, 1983, and the Staff responded on June 24, 1983. Mr. Eddleman's second-round requests to the Staff were filed on January 30, 1984.

the Harris plant.[3/] Hearings on physical security plans, the numerous management and other safety issues will follow shortly, while the proceeding on emergency planning issues has barely begun. Given the involvement Mr. Eddleman is attempting on many issues, the potential conflicts yet to come for his participation in the proceeding may be significant -- albeit self-created. In an effort to avoid such situations, Applicants have sought to resolve some of the original contentions during this period of the proceeding when there is not the press of ongoing evidentiary hearings.

Beyond questions of the sound administration of the proceeding, however, it is clear that sixteen months represent an adequate and fair time period for Mr. Eddleman to have conducted discovery on Eddleman 65. He must now live with the situation created by his failure to do more than he chose to do. (Although the discovery conducted was broad -- a reflection of the fact that Eddleman 65 has no stated basis specific to the Harris concrete containment structure.)

The merit in Mr. Eddleman's motion is particularly absent in this instance where Applicants put him on notice in January, 1983, that summary disposition of Eddleman 65 might be sought prior to the close of discovery, so that discovery by the intervenor should be pursued expeditiously.

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3/ In its Memorandum and Order (Reflecting Decisions Made Following Second Prehearing Conference) at 2 (March 10, 1983), the Board recognized, in setting schedules, the Commission's policy of attempting to complete licensing proceedings prior to the time the plant is ready to operate, if that can be done consistent with a fair hearing. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452 (1981).

See Attachment A (counsel's letter to the Board of January 14, 1983, enclosing minutes of a meeting held by the parties on January 6, 1983). It was clear, as well, from the discussion at the second prehearing conference (held on February 13, 1983), that the basis for the parties' agreement to defer discovery on some safety contentions but not others was the likelihood of pursuit of summary disposition by Applicants. Tr. 476; see also Memorandum and Order (Reflecting Decisions Made Following Second Prehearing Conference) at 4 (March 10, 1983); Memorandum and Order (Ruling on Discovery Dispute Between Applicants and Joint Intervenors) at 2 (Nov. 29, 1983). Motions for summary disposition of safety contentions have been filed by Applicants on September 1, 1983 (Eddleman 64(f)), December 7, 1983 (CHANGE 44 and Eddleman 132), and January 9, 1984 (Joint IV). Consequently, it is nothing short of incredible for Mr. Eddleman to state to this board that "[u]ntil Applicants started doing it, I had not been aware that they intended to enter motions for summary disposition prior to the completion of discovery." See Eddleman Motion at 1.

In addition, Mr. Eddleman has made absolutely no attempt, in support of this motion, to explain why additional discovery is necessary. In fact, he in no way addresses the merits of Applicants' summary disposition motion. Rather, he appears to believe that he has an inalienable right to discovery at his

own pace and without regard to the summary disposition process. To the contrary, to justify the deferral of a ruling pending further utilization of discovery procedures, the party opposing summary disposition must be able to demonstrate with some particularity that discovery is indeed likely to develop the basis for avoiding summary disposition on the contention. Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 A.E.C. 520, 524 (1973).[4/] Mr. Eddleman has not even attempted such a showing. Moreover, even if it is viewed that discovery is not completed, the Board may grant summary disposition if it determines that there are no genuine issues of material fact and if the opposing party cannot identify what specific information it seeks to obtain through further discovery. Point Beach, supra, ALAB-696, 16 N.R.C. 1245, 1263 (1982); see also 10 C.F.R. § 2.749(c).

Mr. Eddleman's motion for extension of time does not discuss why he needs additional discovery.[5/] While Mr. Eddleman contemporaneously filed a 26-page set of discovery requests, Applicants review of those requests discloses no recognition, explicit or implicit, of Applicants' Motion for Summary

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4/ See also Cleveland Electric Illuminating Company, et al. (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-46, 18 N.R.C. 218, 226 (1983).

5/ Mr. Eddleman does state that so far he has not been able to see any of the Harris concrete reports themselves. Eddleman Motion at 1. The facts are that Mr. Eddleman never requested those reports in his first round of discovery. Rather, he asked for information which Applicants compiled and provided from the reports. If Mr. Eddleman wanted to see the reports, he need not have first put Applicants to the task of reviewing them to answer his interrogatories.

Disposition of Eddleman Contention 65, or the affidavit and statement of material facts in support thereof. Rather, the questions represent, as did the first round of discovery, a virtually unrestrained, unfocused attempt to cover every conceivable bit of information which pops into Mr. Eddleman's mind -- much of which appears to reflect mere curiosity. To illustrate the wandering breadth of these discovery requests filed some sixteen months after the contention was admitted, Applicants attempted to count the number of questions posed, excluding the general interrogatories.[6/] Interrogatories 65-9 through 65-27, and their voluminous and often compounding cross-referenced subparts, represent a minimum of roughly 275 questions, and a potential maximum (depending upon the answers) of over 900. Without regard to whether the discovery is otherwise objectionable, these numbers, and the nature of the questions asked, reveal Mr. Eddleman's failure to focus in on any promising basis for the contention or on the summary disposition motion.

The Board stated, upon admitting Eddleman 65, that "[i]f it develops that Mr. Eddleman has little or no evidence to back up this contention, it may be amenable to summary disposition." LBP-82-119A, supra, 16 N.R.C. at 2101 (1982). Applicants' motion for summary disposition was timely filed. Mr. Eddleman has had sixteen months in which to conduct discovery on Eddleman 65 -- more than an ample opportunity to

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6/ Also excluded was Interrogatory 65-8 which, among other things, poses the twenty questions in General Interrogatories G-10 and G-11 for each previous interrogatory response.

uncover any basis for the contention. Mr. Eddleman has not shown with particularity that additional discovery is likely to develop the basis for avoiding summary disposition of Eddleman 65, or identified why specific information is necessary in order for him to prepare an answer to the summary disposition motion. Further, delay in the Board's ruling on the summary disposition motion may contribute to delay in the conduct of the proceeding.

For all of the foregoing reasons, the Eddleman motion for extension of time should be denied, and Mr. Eddleman should be directed to file any answer to Applicants' summary disposition motion on or before February 28, 1984. This would provide Mr. Eddleman the opportunity at the same time to respond to any new facts and arguments presented in the "NRC Staff Response in Support of Applicants' Motion for Summary Disposition of Wells Eddleman's Contention 65," served on February 13, 1984. See 10 C.F.R. § 2.749(a).

Respectfully submitted,

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Dated: February 14, 1984

Attachment A


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January 14, 1983

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In the Matter of
Carolina Power & Light Company and North
Carolina Eastern Municipal Power Agency
(Shearon Harris Nuclear Power Plant, Units 1 and 2)
Docket Nos. 50-400 and 50-401 OL

Administrative Judges Kelley, Bright and Carpenter:

In its Memorandum and Order (Addressing Motions for Reconsideration and Clarification of the Board's Prehearing Conference Order), January 11, 1983, the Atomic Safety and Licensing Board announced its belief that it would be useful at this juncture to convene a second prehearing conference, primarily for the purpose of discussing discovery and scheduling questions. The Board also scheduled a telephone conference for January 21, 1983.

In order to facilitate the discussion on January 21, I will report to the Board now on the status of discussions held by the parties on the scheduling of discovery on environmental contentions. A meeting of Applicants and four intervenors took

place in Raleigh on January 6, 1983. Enclosed are my minutes of that meeting and my letter to the attendees, dated January 10, 1983.

We had intended to report to the Board on these discussions as soon as they were completed.

Respectfully submitted,

Thomas A. Baxter

Thomas A. Baxter
Counsel for Applicants

TAB:jah

Enclosures

cc: Service List attached

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| Plant, Units 1 and 2) | ) | |

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In the Matter of
Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency
(Shearon Harris Nuclear Power Plant, Units 1 and 2)
Docket Nos. 50-400 OL and 50-401 OL

Dear Messrs. Payne, Runkle, Read and Eddleman:

Enclosed are my minutes of our meeting of last week. Please review my statement of our agreements and telephone Samantha Flynn (836-7707) with any comments. Concurrently, John O'Neill will discuss the agreements with NRC Staff counsel Charles Barth and ascertain whether the Staff will join in the stipulation. We will then prepare and file an informal memorandum of understanding (approved by you) with the Licensing Board. I propose we avoid the time and expense of passing around a single document for everyone to sign.

I would like to add to the memorandum of understanding a stipulation that the following contentions are "environmental" and subject to the schedule agreement:

- Joint Contention II
- CCNC 4, 12 and 14
- CHANGE 9 and 79(c)
- Eddleman 15, 22A&B, 29 & 30, 37B, 75, 80, 83 & 84
- Wilson 1a-d, 1e-f3, and 1g

Sincerely,

Thomas A. Baxter

Thomas A. Baxter
Counsel for Applicants

TAB:jah

Enclosure

cc: Dr. Richard D. Wilson
Charles A. Barth, Esquire
Samantha Francis Flynn, Esquire

MEETING MINUTES

January 6, 1983, 9:30 a.m.
Legal Department Conference Room, Carolina Power & Light Co.
Parties represented: Applicants
Kudzu Alliance
Conservation Council of North Carolina
CHANGE/ELP
Wells Eddleman (participated by telephone)
(Dr. Wilson was invited, but was unable to attend.)

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The purpose of the meeting was to discuss voluntary arrangements the parties might undertake to manage and facilitate the discovery process in the NRC operating license proceeding on the Shearon Harris Nuclear Power Plant.

The discussion focused, for the most part, on environmental matters, in recognition of the NRC Staff's review schedule set forth in the December 28, 1982 letter from NRC to CP&L, which calls for the issuance of a draft environmental statement on February 21, 1983.

The parties agreed that prior to addressing motions for extensions of time to the Licensing Board, the parties would first seek from each other any needed extension of the discovery response times specified in the NRC's regulations (14 days for interrogatories, 30 days for document production requests).

The parties agreed that the intervenors sponsoring the Joint Contentions would pose consolidated discovery requests on those contentions, and that they would attempt to prepare consolidated responses to discovery requests on those contentions.

The parties agreed to a limit of two rounds of discovery on any given contention, absent good cause, and without waiving the opportunity to pursue motions to compel discovery if they are warranted.

Applicants, Kudzu, CCNC and CHANGE/ELP agreed upon the following discovery schedule for <u>environmental</u> contentions:

June 30, 1983 -- last day for filing discovery requests on contentions currently admitted by ASLB.

July 29, 1983 -- last day for filing responses to discovery on contentions currently admitted by ASLB.

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|---|---|
| 90 days after relevant ALSB order admitting contentions -- | last day for filing discovery requests on new/deferred contentions based on NRC Staff's draft environmental statement. |
| 120 days after relevant ASLB order admitting contentions -- | last day for filing responses to discovery on new/deferred contentions based on NRC Staff's draft environmental statement. |

It was agreed that the schedule stipulation does not waive the opportunity to pursue motions to compel discovery if they are warranted. Mr. Eddleman indicated that he would like to give further consideration to the matter of joining in the schedule stipulation. It was also agreed that the schedule does not apply to requests for admission.

Applicants advised the intervenors present that Applicants may pursue summary disposition early (i.e., prior to the close of discovery) on the following contentions:

- Joint II, IV, V, VI, and VII (3 & 4)
- CCNC 12 and 14
- CHANGE 44 and 79(c)
- Eddleman 9, 11, 15, 22A&B. 37B, 41, 45, 65, 75, 80, 83 and 84
- Wilson 1a-d, 1e-f3, and 1g

The purpose of the notification by Applicants was to alert the intervenors that should Applicants actually seek summary disposition of any of the listed contentions prior to the close of discovery Applicants would assert to the ASLB that any failure by intervenors to pursue discovery on those contentions is not an adequate defense to a motion for summary disposition.

Applicants agreed to provide an identification of the currently admitted contentions Applicants consider to be "environmental" and which would therefore be covered by the schedule stipulation.