February 24, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' MOTION FOR RECONSIDERATION
OR CLARIFICATION OF BOARD MEMORANDUM
AND ORDER ON HEALTH EFFECTS CONTENTIONS

In its January 27, 1984 Memorandum and Order (Memorandum & Order), the Licensing Board ruled on pending motions for summary disposition on the radiological health effects contentions, Joint Contention II and Eddleman Contentions 37B, 8F(1) and 8F(2).1/ Applicants recognize the Board's considerable effort to reach a pragmatic solution to the question of whether to deny or grant in whole or in part the motions for summary

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1/ Pending before the Board is proposed Eddleman Contention 8F(3), also a health effects contention.

disposition on health effect issues. However, upon careful analysis of the Memorandum & Order, Applicants believe that the Board has misapplied the legal standard applicable to a motion for summary disposition. Moreover, in shifting away from this standard, the Board has run afoul of several Commission rules and decisions which legitimately constrain the Board's authority in circumstances such as the one before it. Applicants therefore urge the Board to reconsider its ruling on Applicants' motion for summary disposition on Joint Contention II(a) and (c).2/ In the event the Board continues to abide by its ruling admitting Joint Contention II(a) and (c), Applicants seek further clarification of that ruling.

2/ Applicants understand the Board to have granted summary disposition of Eddleman 8F(2) and 37B, Joint Contention II(b), II(f) and II(e) except for the subpart concerning fly ash. Applicants are not asking the Board to reconsider its admission of the subpart of Joint Contention II(e) concerning fly ash or Eddleman Contention 8F(1). Mr. Eddleman has sought clarification of the ruling in his favor on 8F(1). See "Wells Eddleman's Requests for Clarification of, and Objections to, Board Order of 1-27-84," dated Feb. 6, 1984. The Board's comment on how the issue might be resolved at hearing, which Mr. Eddleman addresses here, was guidance but does not limit the cases the parties might choose to present, and Mr. Eddleman can brief the merits after hearing. In short, the clarification requested is not necessary.

MOTION FOR RECONSIDERATION

Governing Legal Standard

The NRC's summary disposition procedure has been described as "an efficacious means of avoiding unnecessary and possibly time-consuming hearings on demonstrably insubstantial issues." Houston Lighting & Power Co., (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 N.R.C. 542, 550 (1980). Like its counterpart motion for summary judgment under the Federal Rules of Civil Procedure,3/ a motion for summary disposition is the procedure used by a party to dispose of an allegation before trial because it presents no genuine issue of material fact. 10 C.F.R. §2.749; Fed. R. Civ. P. 56.

"[T]he purpose of summary judgment, or summary disposition, is to pierce the allegations in the pleadings and permit consideration of the dispute's merits at an early stage of the

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3/ "While the Federal Rules of Civil Procedure do not apply in practice before this agency, they offer guidance because our rules are generally patterned after them. This is certainly true in the case of Section 2.749, for 'the summary disposition procedure provided by Section 2.749 finds a judicial counterpart in Rule 56 of the Federal Rules of Civil Procedure . . . .'" Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 N.R.C. 741, 756 n.46 (1977), citing Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 A.E.C. 210, 217 (1974); accord, Pennsylvania Power & Light Co. et al. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 N.R.C. 550, 554 (1981); see generally Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 N.R.C. 346, 365 n.32 (1983).

proceedings." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d (1983) (Wright et al.) §2719; see Fed. R. Civ. P. 56, notes on 1963 amendment. As a practical matter, this is "almost always" accomplished by the filing of affidavits. Wright et al., §2719. Other forms of evidence, such as answers to written interrogatories, also may be used to support or challenge a summary deposition motion. Id., §2722; see 10 C.F.R. §2.749(d); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-544, 10 N.R.C. 15, 19 (1979). In addition, documents may be offered as exhibits supporting an affidavit. Wright et al., §2722. However, such documents must be admissible in evidence. Perry, supra, ALAB-443, 6 N.R.C. at 756; 10 C.F.R. §2.749(b). This means that the affiant must be a person through whom the exhibits could be admitted into evidence, e.g., a qualified expert. See Wright et al., §2722; Perry, supra, ALAB-443, 6 N.R.C. at 755-56.4/

4/ In an NRC proceeding, the use of documents to support an affidavit on a motion for summary disposition is particularly appropriate because hearsay is admissible in NRC proceedings. To be admissible, evidence must be relevant, material and reliable. 10 C.F.R. §2.743(c). A document therefore need not be offered into evidence through its author. A qualified expert, who will be subject to cross-examination, may sponsor the document. Wisconsin Electric Power Co. et al. (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 A.E.C. 319, 332-33 (1972); see also Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 N.R.C. 453, 475-77 (1982) (witness qualified as an expert because of specialized knowledge that will assist trier of fact to understand the evidence or to determine a fact in issue; such an expert can sponsor a document if he can be

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If a party is unable to obtain evidentiary support for its opposition to a motion for summary disposition, it is obligated to explain to the Board in an affidavit the reason why. 10 C.F.R. §2.749(c); Fed. R. Civ. P. 56(f). For example, the defending party may not yet have had the opportunity to conduct discovery. See generally Wright et al., §§2740-41.

In order to prevail, the proponent of a motion for summary disposition must establish the absence of a "genuine issue" with respect to the "material facts" raised by the allegation.

> Although there is no established standard governing the question of what constitutes a material fact, a few general observations can be made. The notion of materiality includes only those questions that are within the range of allowable controversy in a lawsuit.

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examined on the reliability of the factual assertions and soundness of the scientific opinions found in the documents). The same principle extends to documents relied on in affidavits on a motion for summary disposition. Perry, supra.

Thus, Applicants agree with the Board that Joint Intervenors' citations to published works that "have apparently reached conclusions at variance with the movants' affiants" is insufficient to rebut a well supported motion for summary dispositions. Memorandum & Order at 4. This is because these references are not supported by an affidavit from a qualified expert. However, Applicants believe the Board is in error when it suggests that the only way to overcome this deficiency, either during a hearing or in response to a summary disposition motion, would be for the Joint Intervenors to produce the researchers of these works as supporting witnesses (or affiants). Id. at 5. In response to Applicants' motions for summary disposition, for example, had the Joint Intervenors obtained an affidavit from a qualified expert, that expert could have relied in his affidavit on documents he did not author. During a hearing a qualified expert witness could do the same thing.

> Under this standard, a fact is material if it tends to resolve any of the issues that have been raised by the parties.... On the other hand, a factual issue that is not necessary to the decision is not material within the meaning of Rule 56(c) and a motion for summary judgment may be granted without regard to whether it is in dispute.

Id. §2725.

Under the NRC's summary disposition rule, as with the federal court rule, where the evidentiary material in support of the motion does not establish the absence of a genuine issue, summary disposition must be denied even if no opposing evidentiary matter is presented. Perry, supra, ALAB-443, 6 N.R.C. at 753-54, citing Adickes v. Kress & Co., 398 U.S. 144, 159-61 (1970); Susquehanna, supra, ALAB-641, 13 N.R.C. at 554; Fed. R. Civ. P. 56, notes on 1963 amendment. Thus, if an intervenor fails to respond to an affidavit proferred in support of a motion for summary disposition, the Board nevertheless must "proceed on the basis of the affidavit" filed by the movant and determine whether the burden has been met. Metropolitan Edison Co. et al. (TMI Station Unit No. 2), ALAB-562, 10 N.R.C. 437, 444 (1979). The absence of an opposing affidavit does not mean that the relief sought is granted automatically. Susquehanna, supra, ALAB-641, 13 N.R.C. at 554. However, if the movant has satisfied his burden of proof, and in the absence of a legitimate basis for the defending party's failure to properly challenge that proof, the motion should be granted. In sum, the

Board must rule on the summary disposition motion on the basis of the pleadings and other documents before it.

In the case of generic low-level radiation health effect issues, whether facts are material depends on whether the information constitutes new substantial evidence that casts serious doubt on the radiological health effect estimates relied on in the Commission's Black Fox decision. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 N.R.C. 264, 277 (1980); see Memorandum & Order at 6-8; Board Order of Nov. 23, 1983 at 1-2.

Application of the Standard

Applicants will not repeat here the procedural history that led to the Board's Memorandum & Order. See Applicants' Response to Intervenors' Response to Board Questions Re Health Effects Contentions, Dec. 9, 1983 (Applicants' Dec. 9 Response) at 1-6. Reduced to essentials, Applicants' motion for summary disposition on Joint Contention II is supported by "substantial expert opinion." Memorandum & Order at 3. Joint Intervenors have proferred no evidentiary support to rebut Applicants' motion. Id. The most Joint Intervenors have offered, after having been given several opportunities to overcome the evidence presented by Applicants and supported by the Staff, is that Ernest Sternglass and Carl Johnson will testify on Joint Intervenors' behalf on Joint Contention II. Not only is the

value of such testimony extremely dubious, see Board Memorandum & Order at 8-11, but, as Applicants' previously have asserted, this promise of confrontation at an evidentiary hearing does not cure Joint Intervenors' otherwise deficient answer to Applicants' motion.5/ See Applicants' Dec. 9 Response at 6.

In the absence of any evidentiary substantiation of Joint Contention II, or a sworn statement explaining why these facts cannot yet be presented, the Board's task is to assess whether Applicants have met the burden of establishing the absence of a genuine issue of material fact. If Applicants have met this burden, their motion should be granted.

Applicants believe the Board's Memorandum & Order is internally inconsistent as to the existence of a genuine issue of material fact. On the one hand, the Board considers the "one dispositive consideration" to be "[u]nless Dr. Gofman is to appear on the cancer risk estimate question, there will be no hearing on health effects on this case. We will grant the summary disposition motion under the Commission's guidance in Black Fox because the oppositions to those motions are

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5/ The summary disposition process would be rendered virtually meaningless -- as a means of avoiding a hearing on insubstantial issues -- if properly supported motions can be defeated by the mere assertion, by the opposing party's representative, that witnesses have been retained for the hearing. Applicants are aware of no precedent which recognizes such an assertion to be a cure for an otherwise deficient response to a motion for summary disposition (or summary judgment).

insubstantial and there is no prospect that a hearing would serve any useful purpose." Memorandum & Order at 16. On the other hand, in the Board's view, "it would be a constructive exercise" for Dr. Gofman to appear as a witness because his "recent estimates of radiation-induced cancers conflict sharply with those of the Staff, and that conflict produces a material issue of fact." Id. at 15; see also id. at 35 (genuine issues of fact regarding genetic defects).

If the Board believes that Applicants have not met their burden of proof on Joint Contention II(a) and (c), it would not be appropriate to grant Applicants' motion, regardless of the availability of Dr. Gofman to appear as a witness. Conversely, if there is no issue of material fact in dispute, there is no basis for conditionally denying the motion, notwithstanding the Board's interest in attaining "a full understanding of how [Dr. Gofman] arrived at his estimates." Memorandum & Order at 39. Applicants believe that their motion for summary disposition establishes that Joint Intervenors' use of Dr. Gofman's assertions and the assertions themselves do not constitute a substantial basis for challenging the BEIR cancer and genetic risk estimates. This is reflected in the Board's determination that it will grant Applicants' motion if Dr. Gofman is unable to testify. Consequently, while there may be an issue of fact in dispute here, and while Dr. Gofman's lengthy book may be an interesting scientific subject, there is no material issue in controversy. Applicants' motion therefore should be granted.

Without restating the arguments already raised in our summary disposition motion as to the merit and significance of Dr. Gofman's assertions, Applicants note the focus of the Board on the higher somatic risk estimates of Dr. Gofman. Memorandum & Order at 18. With respect to the somatic health effects of normal releases of radiation from the Harris facility to the public, which is the primary subject of Joint Contention II, the higher Gofman estimate is not significant. That is, even if one assumes that the Staff's assessment of annual risk to the maximally exposed individual contained in the Final Environmental Assessment (FES) is 53.9 times too low,6/ one arrives at a cancer mortality risk estimate of less than 1 chance in 10,000 (.000036383) rather than the FES estimate of less than 1 chance in a million (.000000675). See FES at 5-35. Neither of these numbers represents a significant risk, particularly in comparison with the 1 chance in 5 (.2) natural cancer mortality risk incidence, nor is there a material difference between these two estimates. See id. Using Gofman's risk estimator, the statistic remains immaterial for life-of-the-plant (i.e., 30-40 year) risk estimates.

6/ In fact, because the Staff uses the linear hypothesis, not the quadratic-linear equation which is used to derive the "lowest BEIR value" referred to by Gofman, this figure (53.9) is too high. Applicants also note the Board's reference to Dr. Gofman's cancer risk estimates as five to ten times higher than the BEIR I estimates on which the DES estimates are based. Memorandum & Order at 17.

Applicants therefore urge the Board to reconsider and grant Applicants' motion for summary disposition of Joint Contention II(a) and (c).

Use of Board Witnesses

If the Board believes that Applicants have failed to meet their burden of proof, the parties then have the responsibility to present their best case on the issue in controversy. It is an inappropriate exercise of its authority for the Board to now call Dr. Gofman as its own witness (or, to suggest in the alternative that the Staff call Dr. Gofman). See South Carolina Electric and Gas Co. et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 N.R.C. 1140 (1981); see also South Carolina Electric and Gas Co. et al. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 N.R.C. 25 (1983).

In Summer, the Licensing Board unilaterally decided that it wanted to retain its own expert on certain seismic safety issues of concern to it. This decision was prompted by the Board's dissatisfaction with the staff's review of these issues in the facility's Safety Evaluation Report and with the corresponding staff testimony. 14 N.R.C. at 1144-45. As a result of these asserted deficiencies, the Licensing Board decided that it wanted as its own witness "someone other than [one who] is already in the proceedings." Id. at 1144.

The Appeal Board found "no valid justification for the Board's extraordinary action of sponsoring its own witnesses." Id. at 1157. In reaching this conclusion, the Appeal Board articulated the following governing considerations in embarking on the "highly unusual, if not entirely unprecedented" course of calling a Board witness, id. at 1162 (appended Memorandum of Aug. 27, 1981):

> The usual expectation is that, in construction permit and operating license proceedings alike, the issues in litigation will be decided by the Board in the context of the evidence adduced by the parties on those issues. This does not mean, of course, that the Board is required to accept uncritically all testimony placed before it unless it has been specifically controverted by other evidence of record. To the contrary, in all circumstances the Board has the right, indeed the duty, to satisfy itself that the conclusions expressed by expert witnesses on significant safety or environmental questions have a solid foundation. To this end, Board members are free to examine the witnesses themselves respecting the basis for opinions which they express -- including the methodology or assumptions underlying the analyses which led to those opinions.

Id., at 1163 (appended Memorandum of Aug. 27, 1981).

Not only should a licensing board first ensure itself that the witnesses proferred by the parties cannot answer the board's concerns but, "if persuaded following such interrogation that, for one reason or another, certain of the evidence is unreliable, the Board has several options readily available to it short of calling its own witnesses to address the

perceived deficiencies." Id. Those options include rejecting the evidence considered deficient and deciding the issue without regard to it, i.e., on the basis of other evidence of record, and requiring the sponsoring party to produce supplemental testimony which is not subject to the same infirmities. Id. Notwithstanding the foregoing considerations,

> [A] licensing board may well have the latitude to call upon independent consultants itself for the purpose of supplementing what it deems to be an unsatisfactory record. Such an undertaking, however, should be reserved for the most extraordinary situation in which it is demonstrated beyond question that a board simply cannot otherwise reach an informed decision on the issue involved.

Id. (emphasis added) at 1163 (appended Memorandum of Aug. 27, 1981), 1146.7/ However, because of the extraordinary nature of the undertaking, the Board is obligated to first give the Staff an opportunity to resolve the Board's concerns. Id. Moreover, if the Staff is to be given a fair opportunity to address these concerns, they must be precisely focused by the Board. See id.8/

7/ In considering whether the Licensing Board had properly exercised its authority, the Appeal Board reviewed all applicable NRC precedent, as well as cases decided under Rule 706 of the Federal Rules of Evidence concerning court appointed witnesses. The Appeal Board concluded, "Our attention has not been directed to a single previous occasion upon which an adjudicatory tribunal has called upon experts of its own to pass independent judgment upon the uncontroverted testimony of witnesses for the parties who are acknowledged to be both 'highly competent and credible.'" 14 N.R.C. at 1155.

8/ In Summer, the Appeal Board also directed the Licensing Board to "provide detailed reasons" why it could not resolve

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In Summer, not only had the Board failed to follow the procedure outlined to it by the Appeal Board, but its reasons for calling Board witnesses had no "colorable merit." Id. at 1149. The Appeal Board found no basis for concluding that "it is beyond question" that an informed decision on the seismic issue could not be reached on the basis of the testimony of the parties. Id. at 1152. In fact, the Appeal Board was even skeptical that the Licensing Board persisted in its initial claim to this effect after the Staff had offered to provide supplemental testimony. "For one thing, there was no repetition of the Board's earlier insistence that the staff's seismic review was deficient." Id. at 1149. Thus, the alleged gap in the record may have been cured by the Staff. "For another, the Board characterized the 'staff reviewers' (i.e., the sponsors of the staff testimony) as 'highly competent and credible experts' in the various scientific disciplines relevant to the seismic inquiry." Id. Thus, there was no reason to believe different witnesses were necessary. Furthermore, the Board itself had conceded that "it had not 'demonstrated beyond question' that it could not 'otherwise reach an informed decision,' as required by [the Appeal Board's earlier directive to the Licensing Board.]" Id. at 1155.

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the matter so that the Appeal Board could decide the Staff's directed certification motion pending before it. Id. at 1146, 1149.

Licensee does not believe the Board need concern itself with the Summer decision and the question of Board witnesses because Applicants' summary disposition motion should be decided on the basis of the parties' arguments and supporting affidavits, regardless of the availability of witnesses. However, because the Board asserts the need for a Board witness, Applicants address here the additional problems this action presents.

In its Memorandum & Order at 15, the Licensing Board notes "the limitations on its authority to call its own witnesses," but distinguishes the Summer case from the case at bar. "In our case, we are at the summary disposition phase," whereas in Summer, the issue arose after testimony had been presented by the parties. Id. at 16. Thus, in our case, unlike Summer, "[t]he Staff has filed no testimony and we do not know what the Staff would say at a hearing, or who their witnesses would be." Id. Applicants agree that these distinctions exist; however, in our view, they weigh heavily against the Board calling its own witness at this juncture. Certainly, the Board is not in the position to find that "it is beyond question" that it cannot reach an informed decision on the basis of the testimony presented -- no testimony has been presented. Obviously, then, the options available to the Board "short of calling its own witnesses to testify" have not been exercised, i.e., granting or denying summary disposition. Summer, supra, 14 N.R.C. at 1163 (appended Memorandum of Aug. 27, 1981).

Moreover, if one were to analogize the present summary disposition context to the Summer evidentiary hearing context, the "evidence" presented by the parties in this case are the affidavits filed by Licensee and by the Staff in support of dismissal of Joint Contention II(a) and (c). The Board has recognized that this testimony is "substantial," and that the witnesses are "seemingly well qualified experts." Memorandum & Order at 3, 7.9/ See also id. at 34 ("We recognize the substantial qualifications and experience of Dr. Fabrikant, the Applicants' principal affiant."). No contrary "evidence" has been presented. See n.7, supra. The Board also has said it would rule in favor of this "evidence" if Dr. Gofman cannot testify. Thus, the Board believes that it can make an informed decision on the basis of the affidavits presented; it would simply prefer having additional testimony. In Applicants' view, such a preference is not an adequate basis for calling a

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9/ Admittedly, the Board is critical of the level of detail at which this testimony addresses Gofman's data or methodology. Memorandum & Order at 16-17. However, in Licensee's view, this criticism is unreasonable, given the breadth of subjects which Joint Contention II covers, and the effort by Licensee and the Staff to address this "wide-ranging" contention. Id. at 3. Although the Board has given them every opportunity to do so, Joint Intervenors have "not significantly narrow[ed] the focus of matters the Intervenors wish to put in issue." Id. at 3. Had the contention focused exclusively on Gofman's analyses or, more appropriately, on specific Gofman positions, most assuredly, Applicants would have addressed those views. Still today, Applicants are not on notice of the particular issues in dispute here. See discussion in Motion for Clarification, infra.

Board witness.10/ In fact, as Applicants already have indicated, this preference does not constitute a sufficient basis for denying Applicants' motion.

In summary, the Board's explanation of its interest in having Dr. Gofman testify confirms Applicants' view that its summary disposition motion on Joint Contention II(a) and (c) can and should be granted. However, if the Board believes the "evidence" or affidavits presented to date insufficiently address these allegations, it should deny summary disposition as to those allegations and allow the parties to address these issues, as they see fit, at the evidentiary hearing. If, after the Board has had the opportunity to cross-examine the witnesses presented, it determines that it cannot resolve the contentions without further testimony, it should specify that need to the parties. Only if that need is then not met by the parties would it be reasonable for the Board to resort to the extraordinary measure of calling its own witness.

10/ Applicants recognize that the Board has given the Staff the opportunity to "explain its apparent position that Dr. Gofman's cancer risk estimates are not valid and why, if that is the Staff's view, the Board should not call Dr. Gofman as a witness." Memorandum & Order at 17. While this opportunity can be analogized to the opportunity which Summer requires the Board to give to the Staff, in the summary disposition context, it is not a sufficient opportunity. Not only does the Staff (and Applicants) not know the precise concerns of the Board but, in this context, those concerns cannot be cured by Board (or parties') cross-examination of Staff (or Applicants') witnesses. Furthermore, the Board believes that the only way to cure the perceived evidentiary deficiency is the calling of Dr. Gofman. Id. Thus, the Board is giving the Staff what may be at best a hollow opportunity, short of calling Dr. Gofman.

Exercise of Sua Sponte Authority

Finally, Applicants believe another stricture on the Board's authority is applicable to the Board's initial ruling on Joint Contention II(a) and (c). Under 10 C.F.R. §2.760a, a Board presiding in an operating license proceeding is permitted to examine and decide an issue not put into controversy by the parties only if it determines that "a serious safety, environmental, or common defense and security matter exists." The Board has introduced new matters into this proceeding without regard to this limitation on its sua sponte authority. See Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 N.R.C. 1111, 1114 (1981); Texas Utilities Generating Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 N.R.C. 614 (1981).

Joint Contention II(a) is limited to three particular criticisms of the National Academy of Sciences' 1980 report entitled, "The Effects on Populations of Exposure to Low Levels of Ionizing Radiation: 1980" (BEIR III): (1) its use of latency periods; (2) its consideration of expressed dominant genetic effects; and (3) its failure to use a supralinear response. These three complex but particular issues, as addressed in BEIR III, are challenged by Joint Intervenors on the basis of the work of five individuals, including Dr. Gofman.

See Memorandum & Order at 19-20. Joint Contention II(c) is also a narrow challenge to BEIR III. On the basis of Dr. Gofman's work, as well as one other individual, Joint Intervenors contend that health effects are examined over "an arbitrarily short period of time compared to the length of time the radionuclides actually will be causing health and genetic damage." Id. at 20; see, e.g., Joint Intervenors' and Wells Eddleman's Response to Board Questions re Health Effects Contentions, Dec. 5, 1983 at 55-56 (reference to need to assess decay chains of thousands and hundreds of thousands of years).

Neither Joint Contention II(a) nor Joint Contention II(c) constitutes a challenge to BEIR III on the basis of the entire Gofman book, Radiation & Human Health (1981), which is over 800 pages long and covers an extremely broad number of complex subtopics within the equally broad rubric of somatic and genetic health effects of low-level radiation. Yet the Board appears now, after the parties have completed discovery of each other on the admitted contentions, to be requiring the parties to address Gofman's book in its entirety. See, e.g., Memorandum & Order at 19 ("Some expert should present the Gofman work in a reasonably objective manner"); id. at 35 ("The Board's view is that there are genuine issues of fact in this genetic defects part of the contentions as to Dr. Gofman's recent work"); see also id. at 38 ("It is not clear to us that the exact points cited in these parts of Contention II are the

exclusive reasons that Gofman's estimates diverge from the BEIR estimates"). In addition, in connection with Joint Contention II(c), the Board has introduced new concerns of its own that are completely unrelated to the issues raised by the Joint Intervenors here. See Memorandum & Order at 40.

Not only does the Board's action require Applicants to mount an enormous technical and legal effort not mandated by the contention on which it is allegedly based, but this expansion of Joint Contention II(a) to the entirety of Dr. Gofman's book, and the retention of Joint Contention II(c) on bases not raised by Joint Intervenors, is "tantamount to the raising of . . . new issue[s] sua sponte -- action that is now subject to immediate Commission oversight and that can be invoked only by observing special procedures." Cleveland Electric Illuminating Co. et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 N.R.C. 1105, 1115 (1982); see Secretary Chilk's Memorandum of June 30, 1981 to Rosenthal [Appeal Board Chairman], Cotter [Licensing Board Chairman] and Bickwit [General Counsel], concerning "Raising of Issues Sua Sponte in Adjudicatory Proceedings." Such a requirement cannot be imposed on the parties without an "affirmative finding" by the Licensing Board that a serious safety, environmental or common defense and security matter exists which compels the Board to exercise its sua sponte authority. Comanche Peak, supra, CLI-81-36, 14 N.R.C. at 1114.

The Licensing Board's Memorandum & Order does not make this affirmative finding. Furthermore, it does not appear that the Board believes safety or environmental concerns compel this exercise of its sua sponte authority.11/ In addition, there is nothing in the Board's discussion of the specific issues raised by Joint Contention II(a) and (c) that suggests the Board has a serious safety or environmental concern as to matters not covered by the contention. The Board has dismissed most of these concerns as insubstantial. Specifically, as to II(a)(1), concerning latency periods, in the Board's view, "To state as the intervenors do that the BEIR III committee did not understand cancer latent periods seems highly unlikely to this Board." Memorandum & Order at 34.12/ Similarly, on subcontention II(a)(3), concerning supralinearity, the Board recognizes that "[n]ot a single member of the twenty-three experts on the BEIR III Committee [a]dvocated supralinearity. . . . Further, no evaluations in the peer reviewed literature of any recent

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11/ Rather, the Memorandum & Order suggests the exact opposite -- the Board will grant summary disposition if Dr. Gofman does not appear. If Dr. Gofman's views did represent a serious safety or environmental concern, the Board would not have been willing to grant Applicants' motion regardless of Dr. Gofman's ability to testify.

12/ The Board therefore dismisses this subpart of the contention. Memorandum & Order at 35; but see id. at 39 (Joint Contention II(a)(1) litigable to the extent that addressing this issue is necessary or helpful to Dr. Gofman in explaining how he derived his estimates); see generally Motion for Clarification, infra.

reports on epidemiological studies suggest in any manner that the linear hypothesis is not conservative." Id. at 37.13/ Again, on subcontention II(c), while the Board identified its own concerns, it states "we do not believe that the Intervenors' eleven million years proposal has any merit." Id. at 41. In fact, the only allegation not apparently rejected outright by the Board is subcontention II(a)(2), concerning BEIR III's treatment of expressed dominant genetic effects. Here, the Board fails to directly address the merits of the subcontention. Memorandum & Order at 35.14/ Such an approach does not substantiate the need to litigate the subcontention, muchless Gofman's entire analysis of genetic effects of low-level radiation.

In summary, Applicants urge the Board to reconsider and grant Applicants' motion for summary disposition of Joint Contention II(a) and (c). Applicants continue to believe that there are no material issues of fact in dispute as to the

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13/ Nevertheless, rather than rejecting subcontention II(a)(3) on this basis, and without offering any basis for doing so, the Board holds open the issue insofar as Dr. Gofman may want to discuss it. Memorandum & Order at 37.

14/ The Board instead is interested in the parties generally pursuing genetics as addressed in Gofman's book. Incorrectly, in Licensee's view, the Board termed Dr. Fabrikant's reference to a not yet published report, "standing alone," to be a nonsubstantive basis for challenging Joint Contention II(a)(2). This characterizaton ignores Dr. Fabrikant's expert endorsement of the views expressed in that report. See Memorandum & Order at 35.

allegations raised in these contentions. Applicants also believe that the Board's contrary resolution is based solely on its interest in hearing from Dr. Gofman; however, this interest cannot be appropriately exercised at this juncture by calling Dr. Gofman as a Board witness. Furthermore, in deciding to call Dr. Gofman, the Board has greatly expanded the scope of the issues raised by Joint Contention II(a) and (c), without regard to the limited circumstances under which its sua sponte authority may be exercised.

MOTION FOR CLARIFICATION

In the event the Board declines any or all of the relief sought by Applicants in their Motion for Reconsideration, Applicants also seek clarification of the Board's Memorandum & Order.

Applicants understand the Board to be limiting litigation of Joint Contention II(a) and (c) to those issues as raised by Dr. Gofman in Radiation & Human Health. Thus, if Dr. Sternglass or Dr. Johnson were to successfully withstand voir dire, their testimony would be limited to Dr. Gofman's treatment of the issues identified in Contentions II(a) and (c). Compare Joint Intervenors' Response to Board order severd Jan. 30 (Ruling on Summary Disposition on Joint Contention II etc), Feb. 6, 1984, at 1. Applicants request confirmation of the scope of the issues held over for hearing.

In the event Dr. Gofman is called as a Board witness, Applicants urge the Board to precisely delineate the subissues he will be addressing. "[A]ssimilat[ing] all of Dr. Gofman's long book" and developing "a full understanding of how he arrived at his estimates" simply is not the definitive statement of the issues to which the parties, particularly Applicants, are entitled. See, e.g., 10 C.F.R. § 2.714(b) (requirement for "reasonable specificity"). In an analogous context, the Appeal Board has stated:

> The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the position of the intervenors, discharging that burden may be impossible. To permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any concerivable thrust at hearing would be patently unfair, and inconsistent with a sound record.

Pennsylvania Power & Light Company Allegheny Electric Cooperative Inc. (Susquehanna Steam Electric Station, Units 1 and 2), 12 N.R.C. 317, 338 (1980), citing Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 N.R.C. 1298, 1300-01 (1977); accord, Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 N.R.C. 1400, 1417 (1982). It simply is unreasonable to impose on Applicants the extraordinary burden of preparing a case on "the Gofman book."

As Joint Intervenors have observed,15/ clarification of the status of the health effect issues remaining in litigation is needed in that the Board's Memorandum & Order does not expressly rule on Joint Contention II(d), which challenges BEIR III on the basis of a Sternglass report on cancer mortality around nuclear facilities in Connecticut. Contrary to the understanding of Joint Intervenors, see Joint Intervenors' Response to Board order served Jan. 30 (Ruling on Summary Disposition on Joint Contention II etc), Applicants understand the Board to have granted Applicants' motion on this issue. In dismissing a subpart of Joint Contention II(b) concerning membrane damage, the Board specifically relies on BEIR III's critical review Dr. Sternglass' allegations about infant mortality rates. Memorandum & Order at 27-28. The Board also found that "there was no reason to think [Dr. Sternglass'] testimony could make any constructive contribution to this case." Id. at 9. Joint Contention II(d) is limited to a particular Sternglass study, which has been universally discredited in the scientific community. See Affidavit of Fabrikant, attached to Applicants' Motion for Summary Disposition, Oct. 3, 1983, at 65-71. In view of the Board's implicit finding of no material issue in controversy with respect to Joint Contention II(d), the Board should expressly reject this subcontention.

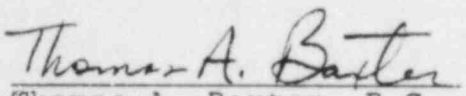
15/ "Joint Intervenors' Response to Board order served Jan. 30 (Ruling on Summary Disposition on Joint Contention II etc.)," February 6, 1984.

Finally, Applicants understand the Board to be uncertain whether in fact Dr. Gofman will testify in this proceeding. If the Board continues to advocate this approach, Applicants need to know as soon as possible whether Dr. Gofman will appear. In this regard, Applicants presume and request confirmation of their understanding that Dr. Gofman would offer prefiled written testimony on the issues the Board requests him to address. In view of the absence of any discovery of Dr. Gofman, Applicants request early receipt of such prefiled testimony so that we have the opportunity to properly prepare both our affirmative ease and our cross-examination of Dr. Gofman.

In conclusion, Applicants urge the Board to reconsider and grant Applicants' Motion for Summary Disposition on Joint Contention II(a) and (c). To the extent Applicants' Motions for

Reconsideration are denied, Applicants seek additional clarification of the scope of the health effects hearing, as specified above.

Respectfully submitted,



Thomas A. Baxter, P.C.
Deborah B. Bauser
SHAW, PITTMAN, POTTS &
TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000

Richard F. Jones
Samantha Francis Flynn
CAROLINA POWER & LIGHT COMPANY
P.O. Box 1551
Raleigh, North Carolina
(919) 836-7707

Counsel for Applicants

Dated: February 24, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion for Reconsideration or Clarification of Board Memorandum and Order on Health Effects Contentions" were served this 24th day of February, 1984, by Express Mail to the parties identified by one asterisk and by deposit in the U.S. mail, first class, postage prepaid, to the other parties on the attached Service List.

Thomas A. Baxter

Thomas A. Baxter, P.C.

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SERVICE LIST

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

Mr. Glenn O. Bright
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. James H. Carpenter
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Charles A. Barth, Esquire
Janice E. Moore, Esquire
Office of Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

* Mr. Daniel F. Read, President
CHANGE/ELP
5707 Waycross Street
Raleigh, North Carolina 27606

* John D. Runkle, Esquire
Conservation Council of North Carolina
307 Granville Road
Chapel Hill, North Carolina 27514

* M. Travis Payne, Esquire
Edelstein and Payne
P.O. Box 12607
Raleigh, North Carolina 27605

Dr. Richard D. Wilson
729 Hunter Street
Apex, North Carolina 27502

* Mr. Wells Eddleman
718-A Iredell Street
Durham, North Carolina 27705

Richard E. Jones, Esquire
Vice President and Senior Counsel
Carolina Power & Light Company
P.O. Box 1551
Raleigh, North Carolina 27602

Dr. Phyllis Lotchin
108 Bridle Run
Chapel Hill, North Carolina 27514

Dr. Linda W. Little
Governor's Waste Management Board
513 Albemarle Building
325 North Salisbury Street
Raleigh, North Carolina 27611

Bradley W. Jones, Esquire
U.S. Nuclear Regulatory Commission
Region II
101 Marrietta Street
Atlanta, Georgia 30303

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

Mr. Robert P. Gruber
Executive Director
Public Staff - NCUC
P.O. Box 991
Raleigh, North Carolina 27602