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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 |) | Docket Nos. 50-400 OL |
| COMPANY and NORTH CAROLINA |) | 50-401 OL |
| EASTERN MUNICIPAL POWER |) | |
| AGENCY |) | |
| |) | |
| (Shearon Harris Nuclear |) | |
| Power Plant, Units 1 and 2) |) | |

APPLICANTS' RESPONSE TO INTERVENORS' RESPONSE
TO BOARD QUESTIONS RE HEALTH EFFECTS CONTENTIONS

On October 3, 1983, Applicants Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency filed a Motion for Summary Disposition of Joint Intervenors' Contention II and Wells Eddleman's Contention 37B (Health Effects). Both Joint Contention II and Eddleman Contention 37B challenge the conclusions drawn by the Staff as to the health effects of normal releases of radiation from the Shearon Harris facility. In accordance with 10 C.F.R. §2.749, Applicants' motion was supported by affidavits from Dr. Jacob Fabrikant, Dr. Hoyt Whipple, and Dr. John Mauro, each of whose expertise in the

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subject matter to which they were attesting was fully described in their respective affidavits.

On October 28, 1983, Mr. Eddleman filed Wells Eddleman's Response to Applicants' Motion for Summary Disposition on Contention 37B and Joint Intervenors' Response to Applicants' Motion for Summary Disposition on Contention II. Neither of these pleadings was supported by any affidavits. Joint Intervenors also submitted a legal analysis in opposition to Applicants' Motion on Joint Intervenors' Contention II and Eddleman Contention 37B. See Joint Intervenors' Response to Applicants' Motion for Summary Disposition of Contention II (Health Effects), Oct. 31, 1983.

On October 31, 1983, the NRC Staff filed a response to Applicants' Motion in which the Staff endorsed the view that Mr. Eddleman and Joint Intervenors had failed to demonstrate that, with respect to Joint Intervenors' Contention II and Eddleman Contention 37B, there existed any genuine issue of material fact. See NRC Staff Response to Applicants' Motion for Summary Disposition of Joint Contention II and Eddleman Contention 37B, October 31, 1983. Accordingly, in the Staff's view, Applicants are entitled to a favorable decision as a matter of law. Id. at 1. The Staff's Response was supported by affidavits from Dr. Edward F. Branagan, Jr. and Mr. Irwin Speckler, each of whose professional qualifications to attest to the matters contained in their affidavits were set forth with particularity.

On November 22, 1983, Mr. Eddleman and Joint Intervenors (collectively "Intervenors") took the opportunity to challenge Applicants' Motion, this time in response to the Staff's pleading. See Wells Eddleman's Response to NRC Staff on Summary Disposition of Contention 37B, Nov. 22, 1983 and Joint Intervenors' Response to NRC Staff on Summary Disposition of Joint Contention II, Nov. 22, 1983. Again, neither intervenor provided any affidavits to support the allegations contained in their answers.

On November 2, 1983, Applicants filed a Motion for Summary Disposition of Wells Eddleman's Contention 8F(2), a contention challenging the Staff's assessment of the radiological health effects of the uranium fuel cycle. As was the case with respect to Applicants' Motion on Joint Intervenors' Contention II and Eddleman Contention 37B, Applicants' motion was supported by affidavit from a qualified expert, the Staff agreed with Applicants' position and supported their position by expert affidavit, and Mr. Eddleman filed only a cursory answer to both pleadings without any affidavits appended thereto. See NRC Staff Response to Applicants' Motion for Summary Disposition of Eddleman Contention 8F(2) and accompanying Affidavit by Dr. Branagan, Nov. 18, 1983; Wells Eddleman's Response to Applicants' Motion for Summary Disposition of Contention 8F(2), Nov. 30, 1983.

On November 23, 1983, the Board issued an Order applicable to the health effects contentions in this proceeding. In that Order, the intervenors were advised that their responsive pleadings to date to Applicants' Motion for Summary Disposition on Joint Contention II and Eddleman Contention 37B had failed to meet the test articulated by the Commission in the Black Fox decision for relitigating radiological health effect issues in individual licensing proceedings. Board Order of Nov. 23, 1983, citing Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 N.R.C. 264, 277 (1980). In particular, the Board focused on (1) the need for Intervenor to present "substantial evidence or at least 'present thinking' that raises serious questions about" Applicants' position on the panoply of health effect issues raised by Intervenor; in contrast, Intervenor had presented no expert evidence supporting their position; and (2) the need for identification of litigable subjects within the radiological health effects rubric; in contrast, Intervenor's response to date had been wide-ranging and unfocused. The Board considered it inconceivable that a hearing on generic health effect issues could be constructive unless these two problems were remedied. In an effort to provide Mr. Eddleman and Joint Intervenor with an extra opportunity, not specified in the NRC's Rules of Practice, to cure the ineffectual pleadings they had already submitted, the Board asked the Intervenor to identify any

expert witnesses they proposed to call at an evidentiary hearing on health effects, the issues those witnesses would address, and those disputes among the seven "most critical disputes," identified by Joint Intervenors in one of their pleadings, which would be the subject of expert testimony.

On December 5, 1983, Joint Intervenors and Wells Eddleman filed their Response to the Board's November 23 Order. See Joint Intervenors' and Wells Eddleman's Response to Board Questions re Health Effect Contentions, Dec. 5, 1983 ("Intervenors' Response"). As discussed in greater detail below, nothing in this new pleading provides any basis, much less "substantial evidence," to defeat Applicants' detailed motions for summary disposition and supporting affidavits on Joint Contention II and Eddleman Contentions 37B and 8F(2). Furthermore, not only have the Intervenors failed to establish that expert evidence will be presented to support their myriad health effect concerns, but these concerns now have been broadened even further. Thus, notwithstanding the numerous opportunities to do so, Mr. Eddleman and Joint Intervenors still have not established that anything constructive can be accomplished by litigating generic radiological health effect issues in the Shearon Harris operating licensing proceeding. In contrast, Applicants have offered substantial expert evidence to support their position that no genuine issue of material fact exists with respect to Joint Contention II and

Eddleman Contentions 37B and 8F(2). Accordingly, Applicants' motions for summary disposition of these contentions should be granted.

Intervenors' latest health effect pleading represents an effort by Mr. Eddleman, on his own behalf and on behalf of the Joint Intervenors, to respond to the Board's November 23 Order. Arguably, Intervenors did literally respond to the questions posed by the Board. The problem, however, is that Intervenors' Response does not begin to satisfy the concerns raised by the Board in its Order. Moreover, the ill-defined promise of confrontation at an evidentiary hearing does not by itself cure an otherwise deficient answer to a summary disposition motion.

The Intervenors have identified four witnesses they propose to call at an evidentiary hearing on radiological health effects who will support Joint Contention II and Eddleman Contentions 37B and 8F(2). The testimony of none of these witnesses, however, would constitute substantial evidence by an expert qualified to address radiological health effect issues.

Applicants already have addressed in great detail the repeated rejection by the scientific community of the views of Dr. Ernest Sternglass on the health effects of radiation. See Applicants' Motion for Summary Disposition of Joint Intervenors' Contention II and Wells Eddleman's Contention 37B (Health Effects), Oct. 3, 1983, at 8, 34-36, and Fabrikant Affidavit at citations contained therein. Intervenors' Response proffers no

evidence to rebut the substantial evidence presented by Applicants that Dr. Sternglass is not a competent expert on low-level radiation. In fact, Intervenor's offer no basis whatsoever for concluding that Dr. Sternglass is qualified to testify on the numerous and extraordinary range of subjects to which Intervenor's propose he attest, e.g., supralinearity, hazards of internal emitters, concentration model errors, radionuclide dispersion patterns, risk of diseases other than cancer from low-level radiation, pain and suffering, NRC Translation 520, Bross, Bertell, Mancuso-Stewart-Kneale and Gofman. See Intervenor's' Response at 1-4.

The Intervenor's next proffer Dr. Carl Johnson as an expert witness. No qualifications of Dr. Johnson are provided, notwithstanding the fact that Dr. Johnson's work has been considered and rejected by the BEIR III Committee, ICRP Committee 1 and the Office of Radiation Programs of the EPA. See Applicants' Motion for Summary Disposition of Joint Intervenor's' Contention II and Wells Eddleman's Contention 37B (Health Effects), Oct. 3, 1983, at 37. Furthermore, the Appeal Board recently concluded that Dr. Johnson's testimony, which "was generally critical of the health risk estimates that have been made in connection with projected routine radiation releases from Waterford," was "of essentially no value." Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 N.R.C. 1076, 1089-90 (1983). In the Waterford

proceeding, Dr. Johnson testified particularly about the Staff and applicant's dose estimates; however, on cross-examination it became clear that Dr. Johnson was "unconversant with the Commission's regulations on the control of radiation emissions and the methodology for determining dose estimates." Id. at 1090. Applicants refer in their motion for summary disposition on Joint Contention II and Eddleman Contention 37B to the various rejections of Dr. Johnson's work by these well-recognized scientific and legal reviewers. Without offering any basis, much less a substantial basis, for their position, the Intervenor now baldly assert that Dr. Johnson is qualified to testify to a broad range of subjects, including NRC's standards for radiation exposure and NRC's radionuclide concentration models -- the subjects about which his expertise was substantially undermined in the Waterford proceeding.^{1/}

Finally, Intervenor propose to have a psychiatrist, Dr. Morris Lipton, and a general practitioner, Dr. Barbara Wynn, testify about "the physical and psychic aspects of pain and

^{1/} Dr. Johnson also testified before a licensing board on the alleged under-estimation of radiological releases from the Clinch River Breeder Reactor ("CRBR") fuel cycle facilities. See United States Department of Energy Project Management Corp. et al. (Clinch River Breeder Reactor Plant), LBP-83-8, 17 N.R.C. 158 (1983), stay request denied, ALAB-721, 17 N.R.C. 539 (1983). In that proceeding, Dr. Johnson was found to have facilities and the Rocky Flats plutonium (weapons) production facility. Id. at 222. The Board also concluded that Dr. Johnson "had no specific training or experience that enabled him to make such comparisons." Id. at 222, 265.

suffering." Intervenor's Response at 7. Without questioning the "expertise" of Drs. Lipton or Wynn to testify on this subject--a subject on which most adults unfortunately have some "expertise"--Applicants reassert their previously stated position that pain and suffering are outside the scope of Contention 37B. See Applicants' Motion for Summary Disposition of Joint Intervenor's Contention II and Wells Eddleman's Contention 37B (Health Effects), Oct. 3, 1983, at 38 n.2. Applicants also question whether, as a matter of law, the pain and suffering directly attributable to health effects already included in a NEPA analysis should be separately treated in an environmental impact statement. Cf. Metropolitan Edison Co. v. People Against Nuclear Energy, 103 S.Ct. 1556 (1983). Furthermore, the Board is well aware of the fact that death might cause pain and suffering to the individual and his family. Applicants believe this fact is so obvious as to be reflected inherently in the Staff's cost-benefit analysis. Thus, nothing constructive can be gained through the testimony of Drs. Lipton and Wynn, even if one were to assume that their testimony would "add anything to the sum of human knowledge on [radiological] health effects." Board Order of Nov. 23, 1983 at 2.

In summary, notwithstanding the Board's gratuitous provision of an additional opportunity for Mr. Eddleman and the Joint Intervenor to satisfy the Commission's standard for

disposing of motions for summary disposition, see 10 C.F.R. § 2.749,^{2/} Intervenor still have not established that a genuine issue of material fact exists with respect to Joint Contention II and Eddleman Contentions 37B and 8F(2). Certainly, Intervenor have not met the even more rigorous standard articulated by the Commission in Black Fox that an intervenor seeking to withstand a well-supported motion for summary disposition must establish by substantial evidence presented by a qualified expert that a serious contest exists as to the health effects of low levels of radiation. Black Fox, supra, 12 N.R.C. at 277.

Not only have Intervenor failed to establish any basis for litigating their health effect contentions, but Intervenor now attempt to further broaden, rather than narrow, the scope of these contentions. Intervenor introduce, as a part of Joint Contention II and Eddleman Contentions 37B and 8F(2), subjects previously disposed of in other motions for summary disposition. They also now raise issues which are altogether new to this proceeding. Whether deliberately or because of an inability to do otherwise, Intervenor consequently have ignored the Board's advice that the health effect issues cannot effectively be addressed in an adjudicatory hearing unless they

^{2/} At best in answering the motions, Intervenor should have stated why they could not obtain affidavits to support their views and, on that basis, have been given an additional opportunity to do so. See 10 C.F.R. § 2.749(c).

are narrowed. Certainly, to the extent brand new or resolved issues are now raised by Intervenor, they are beyond the scope of their health effect contentions.

Applicants' motions for summary disposition on Joint Contention II and Eddleman Contentions 37B and 8F(2) addressed in detail all of the many subtopics with which the Intervenor were concerned in these contentions. The Intervenor's answers to these motions consisted of brief unsupported summary restatements of various aspects of Joint Contention II and Eddleman Contentions 37B and 8F(2). See Wells Eddleman's Response to Applicants' Motion for Summary Disposition on Contention 37B, Oct. 28, 1983; Joint Intervenor's Response to Applicants' Motion for Summary Disposition on Contention II, Oct. 28, 1983; Wells Eddleman's Response to NRC Staff on Summary Disposition of Contention 37B, Nov. 22, 1983; Joint Intervenor's Response to NRC Staff on Summary Disposition of Contention 8F(2), Nov. 30, 1983. As the Board noted in reviewing some of these pleadings, Intervenor's health effect concerns were unfocused and covered a broad range of subjects. Board Order of Nov. 23, 1983, at 2-3. Litigation of these contentions as articulated to date by Intervenor therefore seemed of dubious value. Id.

Intervenor has utterly failed to cure this problem in their latest filing. In the course of seven pages, Intervenor continues simply to restate every subtopic of their health effect contentions, possibly with the exception of the genetic

health effects of low-level radiation and latency periods of cancer. See Joint Contention II(a)(1) and (2), and (c). Intervenor also reassert arguments which already have been resolved in Applicants' favor. Specifically, the Board's Memorandum and Order (Ruling on Motions for Summary Dispositions of Eddleman Contentions 29/30, 64(f), 75, 80 and 83/84), Nov. 30, 1983 at 13-18, addressed and approved of Applicants' dispersion model insofar as it considered mixing and rainout (hotspots). These issues are resurrected by Intervenor. See Joint Intervenor's Response at 2. Intervenor also continue to refer to the so-called "Heidelberg Report" or NPC Translation 520, a document which the Board had noted does not substantively contribute to understanding of dose calculations. See Board Memorandum and Order of Nov. 30, 1983 at 5; Intervenor's Response at 3.

Further compounding the unsupported broad-brush approach of Intervenor are the references at this juncture to new topics clearly outside the scope of their health effect contentions. For example, Intervenor propose to have their witnesses testify about atmospheric dispersion patterns around the Shearon Harris facility, the Windscale fuel reprocessing and plutonium production facility, the San Onofre nuclear power plant, fetal deaths around Three Mile Island, industrial exhaust plume dispersion patterns, the efficiency of filters, exposure by Marshall Islanders to radiiodines and, as

previously discussed, the pain and suffering associated with disease and death. At any time, muchless at this extraordinarily late juncture of the environmental proceeding, it is totally inappropriate for Intervenorors to further broaden the scope of and in essence reformulate their contentions.^{3/} Moreover, this approach is the reverse of that which the Board suggested to Intervenorors was necessary in order for Intervenorors to overcome Applicants' thorough and well-supported motion for summary disposition on Joint Contention II and Eddleman Contentions 37B and 8F(2).

In conclusion, the NRC's Rules of Practice clearly specify what the parties must do in order to prevail on or defeat a motion for summary disposition. See 10 C.F.R. § 2.749. Notwithstanding the breadth of Joint Contention II and Eddleman Contentions 37B and 8F(2), Applicants submitted motions for summary disposition on all aspects of these contentions. These motions were based on affidavits from highly qualified experts. The Staff supported Applicants' motions, relying on their own experts' affidavits. Neither Mr. Eddleman nor Joint Intervenorors has offered any affidavits to support their allegations.

^{3/} Intervenorors effectively admit they are taking this approach in their December 5, 1983 Amendments to Discovery Responses re 8F(2) and 37B (by Wells Eddleman), and re Joint Contention II (by the Joint Intervenorors), re witnesses on said contentions (Intervenorors "adopt the outline of testimony ... as an updated statement of what we believe and are concerned with in that contention, to the extent it may differ from our previous responses.")

Furthermore, despite numerous opportunities to do so, neither of these parties has indicated that it has substantial evidence to rebut the health effect findings of the BEIR Committee. Instead, Intervenors simply continue to redefine their health effect contentions to include the myriad of subjects about which they are interested at any given point in time. These recitations do not constitute the showing necessary to overcome Applicants' motions for summary disposition on Joint Contention II and Eddleman Contentions 37B and 8F(2). Accordingly, Applicants' motions should be granted.

Respectfully submitted,

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Dated: December 9, 1983

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Docket Nos. 50-400 OL
50-401 OL

I hereby certify that copies of "Applicants' Response to Intervenor's Response to Board Questions Re Health Effects Contentions" were served this 9th day of December, 1983, by deposit in the U.S. mail, first class, postage prepaid, to the parties on the attached Service List.

Deborah B. Bauser

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| MUNICIPAL POWER AGENCY |) | |
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| (Shearon Harris Nuclear Power |) | |
| Plant, Units 1 and 2) |) | |

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