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RELATED CORRESPONDENCE April 20, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'84 APR 23 A11 :02

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' ANSWER TO EDDLEMAN
MOTION TO TAPE RECORD DEPOSITIONS

By Motion dated April 9, 1984, intervenor Wells Eddleman asks the Licensing Board to give Mr. Eddleman a blanket authorization to take tape-recorded depositions of unidentified individuals in this proceeding.[1/] Applicants oppose the Eddleman Motion.

NRC's Rules of Practice do not provide for the use of tape-recorded depositions during discovery. See 10 C.F.R. § 2.740a. In contrast, the Federal Rules of Civil Procedure include a specific provision, added in 1970, approving of this method of discovery. See Fed. R. Civ. P. 30(b)(4).[2/]

1/ Applicants note Mr. Eddleman's apparent first (and premature) invocation of the use of a tape recorder to record a number of depositions. See Eddleman Notice of Deposition, dated April 10, 1984. Applicants have responded to this Notice in a letter to Mr. Eddleman. See letter from Applicants' counsel to Mr. Wells Eddleman dated April 18, 1984.

2/ Fed. R. Civ. P. 30(b)(4) states:

Rule 30. Depositions Upon Oral Examination

(b) Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording;

(Footnote continued)

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This disparity between the NRC and Federal Rules is unusual, as the NRC's Rules of Practice generally are modeled after and, hence, usually replicate the Federal Rules. See Illinois Power Co. (Clinton Power Station, Unit Nos. 1 & 2), ALAB-340, 4 N.R.C. 27, 33 (1976); Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 A.E.C. 457, 460-61 (1974). Moreover, when Section 2.740a was published in 1972, it was specifically described by the Commission as following "the Federal Rules of Civil Procedure, as revised in 1970, by providing for production of documents, serving of interrogatories and taking of depositions without the necessity of motions and orders by the presiding officer or the Commission." 37 Fed. Reg. 15111, 15112 (1972).

(Footnote cont'd.)
Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under subdivision (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.

It is unclear whether the Commission deliberately excluded from its discovery rules the possibility of tape recording a deposition. The provision of the Rules of Practice permitting the taking of depositions was promulgated in 1962, prior to the amendment of the Federal Rules of Civil Procedure to allow for tape-recorded depositions. See 27 Fed. Reg. 377 et seq. (1962). However, this section of Part 2, originally designated as Section 2.740, subsequently was redesignated Section 2.740a and amended in 1972, see 37 Fed. Reg. 15133 (1972), and further amended six years later. See 43 Fed. Reg. 17802 (1978). Both of these rule modifications occurred after the 1970 amendment of the Federal Rules to permit the tape recording of depositions. Yet in neither instance was the NRC deposition rule changed to comport with the amended Federal Rule.

Thus, while the regulatory history of Section 2.740a is silent as to the permissibility of using a tape recorder to record a deposition, it seems more likely than not that the conspicuous omission of this procedure from the NRC's Rules of Practice is intended to preclude the use of a tape recorder to depose individuals. This conclusion follows from the fact that, notwithstanding the opportunity to do so, Section 2.740a was not amended to allow for this procedure. "[H]aving expressly selected some, but not all, of the discovery provisions set out in the Federal Rules, the Commission did not intend for the unselected Federal Rules, to control its proceedings." General Electric Co. (Vallecitos Nuclear Center-General Electric

Test Reactor), LBP-78-33, 8 N.R.C. 461, 465 (1978); Detroit Edison Co. et al. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 8 N.R.C. 575, 581 (1978); but cf. Carolina Power & Light Co. et al. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 N.R.C. 971, 978 (1983). In addition, utilizing a tape recorder rather than a transcription would require the Board to ignore a portion of Section 2.740a which requires the transcribing of the deposition. See 10 C.F.R. 2.740a(e). In sum, there is at least serious question as to the entitlement of Mr. Eddleman, under any circumstances, to tape record depositions during the discovery phase of this proceeding.

Even if Federal Rule 30(b)(4) is considered applicable in an NRC proceeding, the Eddleman Motion to Tape Record Depositions should be denied. At a minimum, Rule 30(b)(4) requires a party seeking to use a tape recorder in a deposition to establish that appropriate safeguards can and will be taken to ensure the accuracy and trustworthiness of the deposition. Fed. R. Civ. P. 30(b)(4). The Eddleman Motion fails to make this demonstration. Specifically, Mr. Eddleman must establish that he would utilize an effective manner of recording, preserving, and filing the particular deposition. These procedures would then be reflected in the court's order authorizing the tape-recorded deposition or in a written stipulation by the parties. Id. In addition, the need for an accurate deposition generally has required a party to make

available an independent person qualified to administer oaths who would administer the oath, witness the deposition, and operate the tape recorder. See generally 4A J. Moore et al. Federal Practice, ¶ 30.57 [14.-4] (3d ed. 1983 & Supp. 1983-84); see, e.g., Jones v. Evans, 544 F. Supp. 769, 778 (N.D. Ga. 1982) (requirement that independent third party must be present to run recording equipment, take custody of tape and file it with the court). The Commission's rules also clearly contemplate the presence of a third party, an officer authorized to administer oaths, during a deposition, who files the deposition with the Commission. See 10 C.F.R. § 2.740a(c) and (e). Mr. Eddleman apparently does not intend to utilize an independent witness qualified to administer oaths and operate the recorder. Certainly, his motion fails to address this requirement.

Mr. Eddleman has made no effort to ensure these safeguard measures. Instead, his motion effectively imposes the responsibility to ensure the deposition's accuracy and trustworthiness on Applicants. This is an unfair and burdensome tactic, and one that clearly is not contemplated under the Federal Rules. See Hicks v. Roberts, 89 F.R.D. 25 (E.D. Tenn. 1980) (motion for videotape deposition denied because of movant's failure to designate the person before whom the deposition would be taken).

Putting aside both the legitimate question as to the availability of tape recording as a deposition method under NRC's Rules of Practice and the substantive deficiencies,

outlined above, in Mr. Eddleman's Motion, this blanket request to conduct depositions presents another fundamental concern to Applicants. On the one hand, Applicants recognize that Mr. Eddleman is entitled to avail himself of available methods of discovery. On the other hand, the unrestricted availability of this particular discovery method clearly can be used to harass Applicants.

This potential is immediately evident from Mr. Eddleman's first, presumably of many, notice of deposition. The Notice seeks to interrogate 16 construction site employees of Applicants or one of Applicants' contractors, as a means of following up, after two complete rounds of discovery, on three out of hundreds of documents provided to Mr. Eddleman in connection with Eddleman Contention 65. No showing has been offered by Mr. Eddleman as to why this time-consuming process, which diverts individual employees from their normal duties, is necessary. If this unsupported request is permissible, any request to depose witnesses by tape recorder would be permissible.

Under the Federal Rules, while depositions may be taken of any person, there are safeguards to protect individuals and parties from harassment. For example, the Federal Rules allow a corporation whose deposition is sought to designate a corporate official knowledgeable about the matters on which the examination is requested. Fed. R. Civ. P. 30(b)(6). This procedure avoids unnecessary depositions of unknowledgeable

employees. See id. at Notes to Adv. Comm. on Rules, 1970 Amendment. Rule 30 also contains a provision allowing for motions to terminate unreasonably oppressive depositions. Fed. R. Civ. P. 30(d).

The potential for harassment that Rule 30(b)(4) discovery poses was raised in UAW v. Nat'l Caucus of Labor Committees, 525 F.2d 323 (2d Cir. 1975). In the UAW case, the Court dismissed an appeal from a lower court's denial of a Rule 30(b)(4) motion. The magistrate appointed by the district court not only concluded that the movants had not made a convincing showing of financial inability to take depositions before a reporter, but also found that in the circumstances of that case, there existed "a danger that deposition discovery would be extended to unreasonably and possibly harassing limits, a danger which would hardly be abated by allowing alternate means of recordation." Id. at 324;[3/] 4A J. Moore et al. Federal Practice, ¶ 30.57 [14. 2 n.3] (3d ed. 1983) ("In the UAW case, . . . there was some intimidation that the deposition procedure might have been overused in the case, to the harassment of the opposing party, and the magistrate was reluctant to facilitate the process by relaxing the normal requirements.")[4/]

3/ The magistrate also commented on the inadvisability of using persons interested in the outcome of the suit to do the recording and transcribing. 525 F.2d at 324.

4/ Applicants note the apparent conflict in the Federal Circuits over the extent of discretion vested in a court ruling on a Rule 30(b)(4) motion. Compare UAW v. Nat'l Caucus of Labor Committees, supra, with Colonial Times, Inc. v. Gasch, 509 F.2d 517 (D.C. Cir. 1975).

Applicants therefore urge the Board to deny Mr. Eddleman's blanket request to conduct discovery using a tape recorder rather than a reporter. This denial comports with the Board's authority to take action to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." 10 C.F.R. § 2.740(c). At a minimum, Mr. Eddleman should be required by the Board to make a showing as to why each identified deponent needs to be deposed, e.g., why other available, less intrusive and burdensome discovery methods are inadequate. Cf. Perry v. Mohawk Rubber Co., 63 F.R.D. 603 (D.S.C. 1974) (use of videotape, pursuant to Rule 30(b)(4) required, inter alia, a showing of need).

In summary, the Commission's rules clearly do not contemplate, and Applicants question the permissibility of, tape recording as a method of discovery in NRC proceedings. Clearly, however, if this method is permissible, it ought to be allowed only if the movant can assure the Board and the parties that he will be able to safeguard the process, as required by Federal Rule 30(b)(4). Mr. Eddleman has failed to make the necessary showing of accuracy and trustworthiness mandated by Rule 30(b)(4). More importantly, a grant of Mr. Eddleman's blanket Motion would authorize the unlimited harassment of Applicants, Applicants' contractors, and their respective employees.

For the reasons stated above, the Eddleman Motion to Tape Record Depositions should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to Eddleman Motion to Tape Record Depositions" were served this 20th day of April, 1984, by deposit in the U.S. mail, first class, postage prepaid, to the parties on the attached Service List.

Deborah B. Bauser

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