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RELATED CORRESPONDENCE

May 8, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'84 MAY -9 A10:27

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' ANSWER TO WELLS EDDLEMAN'S
MOTION FOR LEAVE TO TAKE DEPOSITIONS

On April 24, 1984, intervenor Eddleman filed his "... Response to Baxter Letter of 4-18 and Motion for Leave to take Depositions." Applicants oppose the motion.

Status of Contention 65

The Eddleman motion addresses his Contention 65. In order to weigh fairly the arguments for and against the relief sought by the motion, the Board should appreciate the status of that contention, both as to discovery among the parties and as to its readiness for resolution on the merits.

1. Eddleman 65 was admitted by the Board, over the objections of Applicants and the Staff, in its September 22, 1982

Memorandum and Order (Reflecting Decisions Made Following Prehearing Conference), LBP-82-119A, 16 N.R.C. 2069, 2101 (1982). The contention challenges the Harris base mat and containment on the basis of allegedly defective concrete placements by the constructor at other facilities. The Board stated 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." Id. Discovery opened on Eddleman 65, by order of the Board, with the issuance of the ruling admitting the contention. Id. at 2113.

2. On January 6, 1983, Applicants put Mr. Eddleman on notice that summary disposition of Eddleman 65 might be sought prior to the close of discovery, so that discovery by him should be pursued expeditiously. See letter from Applicants' counsel to the Board, January 14, 1983, enclosing minutes of a January 6, 1983 meeting of the parties; see also Tr. 476, Memorandum and Order (Reflecting Decisions Made Following Second Prehearing Conference) at 4 (March 10, 1983), and Memorandum and Order (Ruling on Discovery Dispute Between Applicants and Joint Intervenors) at 2 (Nov. 29, 1983).

3. On January 31, 1983 Applicants filed their first discovery requests of Mr. Eddleman on his Contention 65.

4. In its Memorandum and Order of March 10, 1983 (at 7), the Board set March 15, 1984 as the last day for filing discovery requests on Contention 65.

5. Mr. Eddleman responded to Applicants' discovery on March 21, 1983. Mr. Eddleman had been asked to identify any known deficiencies or nonconformances associated with the containment concrete placements at Harris. Mr. Eddleman responded that he knew of no such problems, but would pursue identification through discovery. See Eddleman Response to Interrogatories 65-1 and 65-2 (March 21, 1983).

6. On March 21, 1983, Mr. Eddleman filed discovery requests of Applicants on his Contention 65. Applicants responded on May 12 and November 11, 1983.^{1/}

7. Applicants filed follow-up discovery requests on September 2, 1983. Mr. Eddleman's responses of October 21, 1983, still did not reveal any factual basis for questioning the integrity of the Harris containment.

8. On January 18, 1984, Applicants filed a motion for summary disposition of Eddleman 65, supported by the affidavit of the Harris Project General Manager for Construction. The Staff responded in support of the motion, with an affidavit by Mr. Bemis of Region II, on February 13, 1984. Mr. Eddleman has not answered the summary disposition motion.

^{1/} On August 4, 1983, Mr. Eddleman filed a Motion to Compel Discovery with respect to certain of his interrogatories. The Board denied in part and granted in part the Eddleman motion during telephone conferences of September 22 and 23, 1983, and in its October 6, 1983 Memorandum and Order (Ruling on Discovery Disputes). Applicants' responses of November 11, 1983 were in compliance with these Board rulings.

9. On January 30, 1984, Mr. Eddleman filed a "... Motion for Extension of Time to Respond to Summary Disposition on Eddleman 65 until Second Round of Discovery is Completed." The motion was accompanied by a 26-page set of discovery requests on Contention 65. Applicants filed an answer in opposition to the motion on February 14, 1984.

10. On March 8, 1984, the Board granted Mr. Eddleman's motion and directed Applicants to respond to the new discovery requests. Tr. 792. In explanation of its ruling, the Board observed that this is the only instance to date in which discovery has been sought after a summary disposition motion was filed. Further, the Board noted that the discovery requests were before Applicants and the schedule would accommodate finishing this round. See Tr. 793.

11. On March 23, 1984, Applicants responded to the new discovery requests.^{2/} See, however, Mr. Eddleman's motion to compel discovery of April 16, 1984, and Applicants' answer dated May 1, 1984.

12. On April 10, 1984, Mr. Eddleman filed a document labeled "Notice of Depositions," which does not include the caption or docket number of the proceeding. In this document, Mr. Eddleman announced that he would depose a number of individuals on April 25, 26 and 30 on Applicants' property. The notice did

^{2/} Due to a typographical error, the responses are dated "March 23, 1983."

not identify "the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken." See 10 C.F.R. § 2.740a.

13. In a letter of April 18, 1984, copies of which were sent to the Board and parties, Applicants informed Mr. Eddleman of their objection to the depositions. Subsequently, the instant motion was filed.

The Motion Should Be Denied

Three months after he asked the Board to defer his summary disposition response in order to pose, and receive responses to, 26 pages of written discovery requests, Mr. Eddleman now seeks the Board's leave to depose 16 persons -- i.e., to conduct a third round of discovery. Mr. Eddleman did not alert the Board to this potential further discovery in his motion of January 30, 1984, and the Board's ruling of March 8, 1984, contemplated that the written discovery requests were the final round.

The reasons cited by the Board for granting Mr. Eddleman's first motion do not apply here. First, through his own actions Mr. Eddleman has eliminated the previously existing situation which the Board found to be unique (i.e., that further discovery is sought after a summary disposition motion is filed). There is no reason to believe that Mr. Eddleman will not continue to seek discovery on this contention.^{3/} See Wells

^{3/} In the instant motion, Mr. Eddleman states that the depositions he seeks might have to be delayed until he receives documents sought by his outstanding motion to compel.

Eddleman's Motion for Extension of Time to ask Questions based on information from Welders Identified in March 1984, dated April 3, 1984. Second, as discussed below, the schedule no longer accommodates additional discovery.

In its prehearing conference order of March 10, 1983, the Board set March 15, 1984 as the last day for filing discovery requests on Eddleman 65 (and other safety contentions). Thus, the Eddleman Notice of Depositions is untimely without regard to Applicants' pending motion for summary disposition. This schedule, set by the Board a full year in advance, is not arbitrary. It provided one and one-half years for discovery, and an opportunity for motions for summary disposition to be considered prior to testimony being filed on August 9, 1984 for hearings in September and October, 1984. Applicants are now preparing for these events as well as for the hearing on environmental matters and the beginning of the emergency preparedness phase of the proceeding. Further, if Mr. Eddleman's answer to the summary disposition motion on Contention 65 is not filed until after the environmental hearing, the Board's ruling on the motion may not come soon enough to avoid the potentially needless preparation of written testimony -- the very prospect Applicants attempted to avoid by filing their motion a few months early. Finally, Applicants submit that the Board should enforce deadlines such as this one which was known well in advance and upon which diligent parties have relied.

Mr. Eddleman argues, in the instant motion, that the basis for noticing the depositions is information uncovered in the March 23, 1984 response of Applicants to the January 30 interrogatories/document production requests. Mr. Eddleman, remarkably, attributes this situation to Applicants' delaying tactics. As the record makes clear, however, Applicants have been struggling to advance consideration of this contention. It is Mr. Eddleman who seeks delay after delay.^{4/} In addition, the fact that he is only now in a position to notice depositions is his own fault.^{5/} Mr. Eddleman let six months go by before he filed his first discovery requests; and then he did not seek the documents from which the individuals' names were derived, even though he could have done so. The second-round written requests to follow up on Applicants' first-round responses also could have been filed much earlier. In short, Mr. Eddleman did not plan and organize his discovery in a way which led to the inspiration to take depositions in the allotted time -- even though ample time was provided. Applicants, and the orderly progress of the proceeding, should not now be made to suffer because of Mr. Eddleman's self-created situation.

^{4/} Mr. Eddleman's failure at the outset to seek either Applicants' voluntary cooperation or the Board's leave to conduct these depositions -- which are clearly unauthorized and untimely -- itself has further delayed by as much as one month the Board's consideration of Applicants' motion for summary disposition.

^{5/} Applicants should not be penalized for exercising their right to advance reasonable objections to selected discovery requests. With respect to the January 30 discovery requests and Applicants' opposition, the Board all but acknowledged that a basis existed for Applicants' position. See Tr. 792-793.

Mr. Eddleman's motion advances no sound argument which overcomes these substantive timeliness objections. Most importantly, he fails to demonstrate with some particularity that these depositions are likely to develop the basis for avoiding summary disposition on Eddleman 65. See Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 A.E.C. 520, 524 (1973).

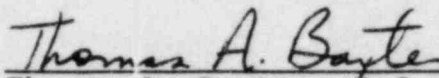
For example, Mr. Eddleman dislikes Applicants' interrogatory answer that the concrete placements about which he questioned were not viewed as difficult to place. See Applicants' Response to Wells Eddleman's Motion to Compel Discovery on Eddleman Contention 65, at 8-9 (May 1, 1984). Apparently, Mr. Eddleman hopes to find that someone among the 16 to be deposed will disagree with this answer. If someone did, however, what evidence presented in support of Applicants' summary disposition motion is affected? (The answer is: none.) Mr. Eddleman makes no attempt to link this dispute to the resolution of the contention. The same is true with respect to the additional documents Mr. Eddleman seeks. See id. at 5-8.

Mr. Eddleman's last two points -- on the potential for internal honeycombing and the results of compressive strength tests -- are addressed in Applicants' summary disposition motion and may be raised by Mr. Eddleman in opposition if he has some basis for his opinions. No one is suggesting that these issues be "dismissed lightly." Eddleman Motion at 2.

The Board Should Set a Schedule and
Direct Mr. Eddleman to Answer Applicants'
Motion for Summary Disposition of Contention 65

Mr. Eddleman appears unable or unwilling to conclude what has been a protracted and unfocused discovery campaign on Contention 65. The Board must therefore intervene and direct that he answer Applicants' motion for summary disposition at some point prior to commencement of the environmental hearing.

Respectfully submitted,



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Dated: May 8, 1984

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OFFICE OF SECRETARY
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(Shearon Harris Nuclear Power)
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to Wells Eddleman's Motion for Leave to Take Depositions" were served this 8th day of May, 1984, by deposit in the U.S. mail, first class, postage prepaid, to the parties on the attached Service List.

Thomas A. Baxter
Thomas A. Baxter, P.C.

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