

ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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 No. 50-400-OL

TELEPHONE CONFERENCE CALL

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Location: Bethesda, Maryland
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TELEPHONE CONFERENCE CALL

4350 East-West Highway
Fourth Floor
Bethesda, Maryland

Thursday, June 6, 1985

The telephone conference call in the above-entitled
matter was convened at 10:00 a.m., pursuant to notice.

APPEARANCES:

Board Members:

JAMES L. KELLEY, Esq., Chairman
GLENN O. BRIGHT
JAMES H. CARPENTER

1 APPEARANCES:

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6 Washington, D.C.

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P R O C E E D I N G S

JUDGE KELLEY: Good morning. This is Judge Kelley here. Judges Carpenter and Bright are also with me.

We have a court reporter, so we are on the record.

You will recall that in the last telephone conference call when we were talking about scheduling and related matters for 41G, the question arose whether Mr. Van Vo would be available as a witness for Mr. Eddleman, and at that point it wasn't entirely clear whether he would or wouldn't be.

The Board thought that a significant question, so we asked Mr. Guild to look into that and get back to us first of the week. Mr. Guild did that and called me originally on Monday. Then on Tuesday we talked, and Mr. Guild reported that he could not commit that Mr. Van Vo would be available as a witness on the 24th.

My response to that was that the Board would have to assume that he would not be there as a witness and that that meant we should address the concern that we raised last week but didn't discuss in any detail. That basically was whether, in light of the narrow nature of this 41G contention, it made sense to proceed to try it without Mr. Van Vo as a witness, whether it made sense to go ahead without him as a witness or whether alternatively we shouldn't

1 dismiss the contention for lack of a necessary witness and
2 for a resulting unfavorable five-factor balance in terms of
3 the legal theory underlying our concern, which we are going
4 to ask the parties to address.

5 You will all recall that this is a late contention
6 in the sense in which we use the term "late" here, and it
7 was subject to a five-factor balancing which we performed
8 when we admitted it last January. At that time the Board
9 was simply assuming that Mr. Van Vo, who, after all, was
10 the person who made these charges in the first place, would
11 be available to testify and we would then have his personal
12 view on the facts.

13 That was not stated in so many words, but that
14 was certainly our assumption. It never occurred to us we
15 would try this contention without Mr. Van Vo as a witness.
16 So now that we cannot count on his being there, it seems to
17 us appropriate to take another look at that five-factor
18 balance and see whether the absence of Mr. Van Vo, which
19 obviously tilts against Factor 3, that contribution to the
20 preceding factor, whether the absence of Mr. Van Vo means
21 that on balance the five factors weigh against the continued
22 prosecution of this contention.

23 That states the Board's concern, and we would
24 like the parties to address the question. I suggest we hear
25 from Mr. O'Neill and Ms. Moore and from Mr. Guild, if that is

1 satisfactory.

2 Mr. O'Neill, would you like to speak first?

3 MR. O'NEILL: Yes, sir. I would just pose the
4 question: Is Mr. Guild representing Mr. Eddleman for this
5 purpose and for this proceeding now? The last time he
6 spoke --

7 MR. GUILD: The answer is yes, John.

8 MR. O'NEILL: I just wanted to make sure I
9 understood who was with Mr. Eddleman for the purpose of this
10 call.

11 MR. GUILD: Judge Kelley, this is Guild. If I
12 could ask a preliminary question before John O'Neill launches
13 into his response to your question, is this a sua sponte
14 matter being raised by the Board, or do I understand this is
15 a request for relief that Applicants or the Staff seek? We
16 certainly don't bring the matter to the Board and, as we
17 stated last time, are prepared to go forward with or without
18 Mr. Van Vo based on our view that we have sufficient evidence
19 aside from Mr. Van Vo's testimony to prevail on this claim.

20 JUDGE KELLEY: The Board is raising the concern
21 sua sponte. The Board never even considered trying 41G with-
22 out Mr. Van Vo, and now that we know at this point that he
23 is not going to come to the hearing, we are saying in effect
24 this looks like a waste of time, or it may be, and therefore
25 we are going to reweigh the five factors. But we are the one

1 raising the point.

2 Mr. O'Neill.

3 MR. O'NEILL: Thank you, sir.

4 During the last conference call, I did articulate
5 as an initial reaction a concern that the Board might just
6 dismiss the contention if Mr. Van Vo were not available
7 as a witness. That was an initial reaction, in part because
8 Applicants believe the facts here are clear and the most
9 conservative approach might well be for counsel to advise
10 the Applicants to simply go forward, litigate the issue
11 because in their view the conclusion is foregone.

12 However, we have looked very hard at the question
13 of whether or not it would be appropriate for the Board under
14 the circumstances here to sua sponte reconsider the
15 admission of the contention. Our view is that it would be and
16 that the Board would be justified, first, in reconsidering
17 a submission of the contention as it did back early in the
18 year, and secondly, we believe that the Board could well
19 conclude in its discretion that Mr. Eddleman no longer meets
20 the five lateness factors that justify the admission of this
21 contention and that it could then, in reconsidering its
22 decision to admit the contention, dismiss Eddleman 41G as
23 previously admitted.

24 We note first that the Appeal Board has
25 consistently held that the Licensing Boards have considerable

1 discretion in addressing these five lateness factors.

2 I note in particular the Long Island Lighting
3 Company Shoreham decision, ALAB 743 at 18 NRC 387, 413 to 414,
4 where the Appeal Board found that it was not disposed to
5 substitute its judgment for that of the Licensing Board
6 insofar as the outcome of the balancing of Section 2.714(a)
7 lateness factors is concerned.

8 We went back and reviewed the arguments of Mr.
9 Eddleman with respect to how he proposed to address and meet
10 the five lateness factors, and we found it extraordinary the
11 extent to which he did rely on Mr. Van Vo's availability.

12 In the transcript of the oral argument where Mr.
13 Eddleman made his arguments on the five factors, at Tr. 5738,
14 Mr. Eddleman stated: "Mr. Van Vo is available. He is
15 available reasonably promptly, although with the schedule
16 change we have heard about from the fuel load being delayed
17 nine months." Going on: "I understand Mr. Van Vo would be
18 available the week of Tuesday, November 13th, and I would be
19 prepared to put him on as a witness on these things on that
20 schedule if it were necessary."

21 On the next page, Judge Kelley asked, with respect
22 to the scope of the contention and Mr. Van Vo's availability,
23 "But are you saying that what you want to do under these
24 contentions is bring in Mr. Van Vo and hear his story, or do
25 you want to go into a contention that is broader than that

1 that goes to material traceability and panels of Applicant
2 witnesses and who knows what?"

3 Mr. Eddleman responded, "Yes, I understand, and
4 I think that depends on Mr. Van Vo and the schedule a good
5 bit. In other words, if the schedule would generally
6 accommodate just hearing Mr. Van Vo on these issues, then
7 I think he is worth hearing on them because he has direct
8 experience."

9 A little bit later on, Mr. Eddleman again states,
10 "I think what Mr. Van Vo is talking about here is a very key
11 thing." And then later, one more statement in discussing
12 Factor 3, the third factor, which the Appeal Boards have held
13 is the very important pivotal factor in deciding whether or
14 not to admit a late-filed contention, Mr. Eddleman argued:
15 "The availability of the witness, I think, is clear, but let
16 me just mention that Mr. Van Vo, according to his counsel, is
17 willing to appear. He is willing to meet with me and his
18 counsel to prepare whatever he would need to prepare. I
19 don't know if we could prefile anything beyond his affidavit,
20 but if we could, I think we would. I would certainly make
21 efforts in that direction. He is available and has direct
22 knowledge of these matters as stated in his affidavit. So I
23 think as to having a witness, we are okay."

24 And finally, at Tr. 5743, Mr. Eddleman states:
25 "Since he would be my witness, it doesn't depend much on my

1 ability to cross. It just depends on my ability to put him
2 on."

3 Consequently, it was certainly reasonable for the
4 Board to assume that Mr. Van Vo would be available as a
5 witness and to rely on those representations.

6 MR. Eddleman presumably emphasized his availability
7 as a witness because he was aware of the Appeal Board
8 decision and in Washington Public Power System, WPPS Nuclear
9 Project No. 3, ALAB 747, 18 NRC 1167 at 1177, 1983, which
10 emphasizes the importance of the third factor. In that
11 decision, the Appeal cited with approval ALAB 704 in Grand
12 Gulf and stated: "When a petitioner addresses this criterion,
13 it should set out with as much particularity as possible the
14 precise issues it plans to cover, identify its prospective
15 witnesses, and summarize their proposed testimony."

16 And indeed, Mr. Eddleman set out to do that in
17 indicating the availability of Mr. Van Vo. The decision, of
18 course, has been cited with approval in the Shoreham decision,
19 ALAB 743, mentioned previously.

20 Now, what about the concern that I raised during
21 the last conference call, the concern that perhaps the
22 Intervenors do have a right to make their case solely on
23 cross-examination. It turns out that in the Appeal Board
24 decision in WPPS that I just discussed with respect to the
25 third factor, Judge Edels in his concurring opinion addressed

1 that very question. He noted, at 1182 and 1183 of that
2 decision, that while in certain circumstances on late-filed
3 contentions, intervenors may be able to make a showing that
4 they can make their case solely on cross-examination, Judge
5 Edels concurred with the majority in the particular circum-
6 stances of the WPPS case that the intervenors might not be
7 able to make such a showing and agreed with the remand back
8 to the Licensing Board.

9 Judge Kelley, I believe here we have an
10 extremely unique situation where the whole issue before the
11 Board in the admitted contention is Mr. Van Vo's allegation,
12 his allegation with respect to why he was terminated, why he
13 was put on probation prior to termination, and why he viewed
14 he was being harassed.

15 We now have Intervenors telling us that the one
16 person who is in a position to put that issue before you and
17 for the Board to be able to judge his credibility is not going
18 to be available. In those circumstances, we believe that the
19 Board is justified in reconsidering this contention and the
20 Board would be justified in reanalyzing the five factors that
21 it analyzed back in February and in finding that the
22 Intervenors clearly do not meet the five-factors test for
23 late-filed contentions, and that this issue should be
24 dismissed.

25 Quite frankly, I believe that Intervenors are

1 derelict in not having brought this to our attention
2 earlier. We were concerned at the deposition whether we
3 would ever see Mr. Chan Van Vo again, and it was no surprise
4 to us when we found out he would not be available.

5 JUDGE KELLEY: Is that it, Mr. O'Neill?

6 MR. O'NEILL: Yes, sir.

7 JUDGE KELLEY: Thank you.

8 Ms. Moore.

9 MS. MOORE: Staff also agrees that the five
10 factors considered by the Licensing Board in the first
11 instance in order to determine the admissibility of this
12 contention now weigh against its admissibility, principally
13 for the same reasons that the Applicant has just articulated,
14 and that is that the argument was made with regard to the
15 third factor, the ability to contribute to a sound record,
16 that Mr. Van Vo would be present to both assist Mr. Eddleman
17 and participate as a witness in the hearing.

18 It is our understanding now that he will no longer
19 be present, and therefore, Intervenors have not demonstrated
20 an ability to contribute to a sound record. This factor
21 weighed in balance with the other factors should weigh against
22 the admissibility of the contention. I don't believe there
23 is any reason to restate the arguments Mr. O'Neill has
24 already made, and we concur with those arguments.

25 JUDGE KELLEY: Thank you, Ms. Moore.

1 Mr. Guild.

2 MR. GUILD: First, Mr. Chairman, we think it is
3 inappropriate for the Board to consider this point in the
4 fashion that it has. We think that clearly in substance
5 this is a matter that is being raised by the Applicants and
6 the Staff. They are the beneficiaries, if you will, the
7 adversary parties. The appropriate vehicle for them to do
8 this is by pleading, by motion, which gives us as a party
9 the opportunity to respond to it.

10 Frankly, we knew only what was on the table was
11 what to do in light of my inability to certify that Chan
12 Van Vo would be present on a date certain, June 24th, despite
13 my reiteration that we intend to call him as a witness and
14 desire to have him as a witness but cannot certify that he
15 will, in fact, be there. That is the extent of our problem
16 at this point.

17 JUDGE KELLEY: Let's stop there, Mr. Guild. Let's
18 be real clear. You told me on the phone, and correct me if
19 I'm wrong, that you could not make a commitment that Mr. Van Vo
20 would come to the hearing. Correct?

21 MR. GUILD: Exactly.

22 JUDGE KELLEY: Now, we can get into a big inquiry
23 about doesn't he want to come, haven't you got enough money,
24 and all of that. That doesn't seem terribly useful. Our
25 issue is we are interested in having Mr. Van Vo there, and

1 if you can't make a commitment, we have to assume he isn't
2 going to be there. Your calling him and his not coming
3 just muddies the water, it seems to me.

4 MR. GUILD: That was indeed your response, Judge;
5 and it should be clear that Mr. Chan Van Vo is a volunteer.
6 Mr. Chan Van Vo has been to Raleigh at least two times at
7 the behest of the NRC and the Applicants to participate in
8 this proceeding, to cooperate, to provide evidence. He has
9 been cooperative up until now. I think it is incredibly
10 disingenuous for Mr. O'Neill and the Applicants, after
11 browbeating him for over ten hours, to then seize upon
12 the fact that they have succeeded in reducing his stamina
13 somewhat as a basis for chortling now that he indeed has not
14 committed to returning once more to be subjected to their
15 harassment.

16 The fact of the matter is the state of the record
17 as it stands right now is that upon the direction of the
18 Board, I conferred with Mr. Chan Van Vo and asked if he could
19 commit to be present on the date certain that the Board
20 provided for his testimony. He could not, and I cannot
21 certify that he will be present. The status of the record,
22 sir.

23 JUDGE KELLEY: Okay. Let's move on from there.

24 MR. GUILD: Now, my fundamental point is that the
25 relief, in essence, that Applicants and Staff support and --

1 I submit -- seek is either by way of summary disposition
2 of this contention or by way of a motion to dismiss on the
3 pleadings. They have not brought that to this Board. The
4 Board has raised --

5 JUDGE KELLEY: Let me repeat, Mr. Guild, what
6 I thought was clear when I said it to Mrs. Moore a few
7 minutes ago about the posture of the thing, who is raising
8 this. The Board is raising this.

9 MR. GUILD: I understand, Judge.

10 JUDGE KELLEY: The Board on its own motion is
11 reconsidering the five-factor balance. That is the posture
12 of the matter.

13 MR. GUILD: And I submit, sir, that the proper way
14 for this matter to be before the Board is on motion by the
15 parties who seek this relief, and I understand Applicants
16 to seek this relief; that in order for this party, Mr.
17 Eddleman, to be given a fair opportunity to be heard on the
18 matter, that he should be provided, as the rules require,
19 an opportunity to review the matter by pleading and to
20 respond in due course.

21 JUDGE KELLEY: Isn't it the case, Mr. Guild, that
22 this very issue was raised very clearly by the Board, by me
23 a week ago on this phone with you and Mr. Eddleman on the
24 phone?

25 MR. GUILD: I submit, sir, that --

1 JUDGE KELLEY: When I said that I am concerned
2 Mr. Van Vo may not be here, and as far as I am concerned, if
3 he isn't going to be here, there may not be any hearing.
4 So I hardly think you aren't on notice that the Board is
5 thinking about reweighing this thing and dropping the
6 contention. We said that quite explicitly.

7 MR. GUILD: Sir, I submit we had no prior notice
8 whatsoever that the Board intended to recast the balance of
9 the five factors test. The only issue that was raised for
10 our consideration today was what do we do in light of my
11 inability to certify his presence.

12 Now, my view, and I have stated this as clearly as
13 I possibly can, is that this matter should be brought before
14 the Board by the Applicants or the Staff since they seek this
15 relief, by motion, and we should be given an opportunity to
16 respond by pleading. We should be able to go do some
17 research on the question, we should be able to go and
18 address the cases that Mr. O'Neill has cited orally on the
19 record. That is the orderly way to approach this.

20 In substance, my response is this. I believe it
21 is inappropriate for the Board to rebalance the five factors
22 at this stage. The contention has been admitted. The
23 contention having been admitted -- over our objection to the
24 narrowing of the contention, in the face of a motion to
25 reconsider -- it still was admitted as 41G recast by the

1 Board, and as such, the burden of proof on that contention
2 is with the Applicants under Section 2.733 of the Commission's
3 Rules of Practice and related authority. They have the
4 burden of going forward and demonstrating that they prevail
5 on that contention.

6 They can meet that burden of proof either by
7 going to hearing on that contention and offering evidence
8 that this Board finds persuasive, or they have available
9 to them, should they feel they can prevail short of hearing,
10 by seeking summary disposition of this claim or portions of
11 this claim on the pleading, and that procedure is available
12 to them by way of summary disposition under Section 2.749,
13 a settled method for them to be able to establish that they
14 can prevail on this claim as a whole, the contention as a
15 whole or various subclaims, and it would then give us, under
16 the Rules, an opportunity to respond to each of the material
17 facts that they claim are not genuinely in dispute, by way
18 of affidavit or other admissible evidence.

19 We submit that if they were compelled to follow
20 that process, that it would be absolutely clear that there
21 is abundant evidence absent the live testimony of Chan Van Vo,
22 assuming he will not be available for hearing, that would
23 amply support and require going to hearing on this contention
24 because there are significant material facts that would
25 remain in dispute.

1 Let me just pursue that line a bit. After the
2 contention was admitted, properly, although narrowed beyond
3 the scope that we believe is appropriate, the parties
4 conducted discovery. Extensive discovery was sought and
5 obtained by Mr. Eddleman from Applicants. That discovery
6 represents several thousand pages of documents, including
7 myriad documents from Mr. Van Vo's personnel file, documents
8 reflecting the Company's reviews of his expression of safety
9 and quality concerns, documents reflecting how they responded
10 to those safety and quality concerns.

11 Mr. Chan Van Vo came to Raleigh at the behest of
12 the Office of Investigation and submitted to a lengthy
13 investigative interview, the transcript of which is now
14 appended as an exhibit to the OI report and has been identified
15 as an intended hearing exhibit by the NRC Staff. That reflects
16 his sworn testimony.

17 MR. EDDLEMAN: This is Eddleman. It's not sworn.
18 The OI interview was not sworn.

19 MR. GUILD: I stand corrected if that is the
20 case. In any event, it's Mr. Chan Van Vo's statements to an
21 investigative representative of the Office of Investigation
22 and to a technical representative of the NRC Staff.

23 Further, Mr. Chan Van Vo responded to a subpoena
24 duces tecum, traveled from Texas, where he is presently
25 residing and employed, to stand a deposition on the 26th of

1 February at the noticed of Carolina Power and Light. He
2 was cross-examined extensively and identified extensive
3 documentary exhibits that were identified by the Company.

4 So Mr. Chan Van Vo has, in fact, responded
5 abundantly to the demand that he cooperate in this proceeding
6 in substantiating his concerns. In addition, he has
7 submitted two affidavits which have been considered, at least
8 in the record, as support for pleadings on this contention,
9 sworn affidavits of Chan Van Vo related to his concerns.

10 Now, the juncture we are at right now is simply
11 the question of whether or not we can certify that he will
12 be present for hearing. We submit that the issue to be
13 decided, even as framed by the Licensing Board, does not on
14 its face depend upon Chan Van Vo's testimony, let alone his
15 live testimony, in the face of the abundant prior statements
16 by Chan Van Vo that are reliable and probative.

17 JUDGE KELLEY: For example, Mr. Guild, the
18 interview with OI. Are you proposing to put that in to
19 this Board?

20 MR. GUILD: That is a prerogative we would have.
21 We could do that, yes.

22 JUDGE KELLEY: You told me last week you were
23 going to object to the OI report on a hearsay basis.

24 MR. GUILD: Judge, I told you last week that I
25 would object to the OI report on a hearsay basis. That doesn't

1 mean the portions of an exhibit that happened to be
2 appended to that report, which in this case include an
3 investigative interview with Mr. Chan Van Vo, aren't
4 of probative value, aren't relevant and shouldn't be admitted
5 in the proceeding.

6 That is not a position that I should be required
7 to take at this point in time in any event. I simply submit
8 to you that if you are interested in what he has to say, if
9 that is material, that there are abundant sources that are
10 reliable that reflect what he has to say on these contentions.

11 I submit to you that in order to carry the day
12 on this contention, it is not even necessary to consider any
13 of those, but if the Board's concern is you want to hear his
14 story, you have got his story. You have got his story from
15 any number of sources. You have got his story where the
16 Applicants had full opportunity to cross-examine him at
17 great length, and they did.

18 JUDGE KELLEY: The Board is very interested. If
19 we were to try this contention, I can tell you that this
20 Board is very interested in Mr. Van Vo's story. We want to
21 hear it face to face. I can tell you that I would be asking
22 Mr. Van Vo a number of questions. Now, as it is, I have no
23 assurance that the man will come, and so how am I to judge
24 his credibility? That is what it comes down to. How do we
25 get the credibility?

1 MR. GUILD: Let me submit this to you. I think
2 that -- given this contention is focused on why action was
3 taken against Chan Van Vo, that the way the Board Chairman
4 framed the contention, it now appears as was Chan Van Vo
5 put on probation and terminated because he sought to raise
6 safety concerns or because, as the Company says, he was
7 guilty of poor work performance -- that, it seems to me,
8 turns on a question of what was the motivation by those who
9 took those actions against him? Was it retaliatory or was it
10 in response to legitimate concerns about his work performance?

11 I want to cite to the Board the case of Alice
12 Bishel State Cancer Hospital v. Marshall, an Eighth Circuit
13 decision, 1980. It was decided in amplification of the
14 Energy Reorganization Act Employee Protection Provisions.
15 It reported at 629 Fed 2nd 563. I direct the Board's atten-
16 tion to page 566, where it made clear that a demonstration of
17 retaliatory motive is not dependent upon the personal knowledge
18 or direct knowledge of retaliatory motive on the part of the
19 Complainant.

20 That makes all the sense in the world, Judge, that
21 the fact that Chan Van Vo puts two and two together, given a
22 series of facts that have occurred, and draws the inference
23 that retaliatory motive is the likely explanation for the
24 actions they took against him, is the same inference we would
25 have you draw, the same inference we would have any other

1 observer draw because the focus is on the motive of those
2 who take the action, let's say particularly, in this case,
3 Alex Fuller.

4 It's clear that the authority that has passed on
5 this question of how this Board is to weigh the action
6 against Chan Van Vo excludes the necessity for direct
7 knowledge or testimony from the victim as the source of
8 establishing what that motive is. In fact, it makes sense
9 that the victim would be the last person to have such direct
10 knowledge. Absent a confession to him by the perpetrator of
11 the harassment, there would be no other basis for direct
12 knowledge on the part of the complainant.

13 We submit to you that the clear authority is on the
14 face of it that the central issue in the case does not hang
15 on the personal knowledge or testimony of Chan Van Vo. We
16 would submit that the way to resolve this issue is by putting
17 Applicants on their burden of moving, by way of motion for
18 summary disposition, where each claim as to which they submit
19 we cannot prevail in the absence of Chan Van Vo's testimony
20 can be the basis of material facts not in dispute. We then
21 would have an opportunity to respond, to turn to the deposition
22 recordings, which we have the opportunity to transcribe, to
23 say we can meet that material fact that you claim is esta-
24 blished, we can meet that fact through the testimony of one
25 of the six witnesses we deposed, plus to turn to the thousands

1 of pages of documentary exhibits that were -- documents
2 that were produced in discovery and to be able to say the
3 fact that Mr. Chan Van Vo met with Mr. McDuffy on such and
4 such a date and transmitted this document on such and such
5 a date, and the fact that Mr. McDufffy communicated with the
6 site management about Mr. Van Vo's visit, and that Mr. Fuller
7 learned of that visit, is established by this document or
8 that piece of testimony, all matters which we believe are
9 extrinsic to the testimony of Chan Van Vo.

10 That, we believe, is the orderly and appropriate
11 way of proceeding on this point. We think it is inappropriate
12 and unfair and unsupported by any authority that we are
13 aware of to permit this Board to at this stage, when hearing
14 has been scheduled, when Applicants have foregone the
15 opportunity for summary disposition, to reach back and say,
16 for a party who doesn't bear the burden of proof, that since
17 you can't certify that a witness who is not in your control
18 and your employ will be absolutely present for trial, that
19 we are going to go back to the pleading stage and recast
20 the question of the admission of this contention. We think
21 that is inappropriate.

22 Addressing that balance, though, it is clear --

23 JUDGE KELLEY: Let me note, Mr. Guild, in terms
24 of time, you have had more than anybody else. Can you wrap
25 this up pretty soon?

1 MR. GUILD: It is clear that the Board expressed
2 no reliance on the testimony of Chan Van Vo in weighing the
3 five factors when it was admitted. The Board focused on, in
4 its balancing of the five factors, solely on the contribution
5 it expected from Mr. Eddleman as the proponent of the
6 contention.

7 I direct the Board's attention to its January 14th
8 Order at page 2 and 3. It concluded, when it admitted the
9 contention, that the factor of contribution weighed against
10 Mr. Eddleman, so it never credited him with prevailing on
11 that factor, with or without Chan Van Vo's testimony. In
12 fact, the only observation that it made that was favorable
13 on that point was that the trial of a quality assurance
14 contention as a general matter did not appear to require any
15 particular expertise, and I assume that meant as contradis-
16 tinct from a physics contention or welding contention or
17 something of that sort.

18 So we submit to you that in no prior consideration
19 of the balance was Chan Van Vo's appearance and testimony
20 weighed in that balance, and that it is even more inappropri-
21 ate at this point to recast that balance again including that
22 factor against Intervenor when it wasn't considered explicitly
23 at all in the prior balance.

24 I will conclude by saying that we think that if
25 Applicants were put to the test of demonstrating through an

1 orderly process, and that is summary disposition, that
2 we could not prevail or are not entitled to a hearing absent
3 Chan Van Vo's testimony, that a record would exist that would
4 make it abundantly clear that that is simply not the result;
5 that we, in fact, could prevail, would prevail and should
6 go forward to hearing with or without this particular piece
7 of evidence. We think it is highly irregular and untoward
8 that a party who doesn't bear the burden of proof runs the
9 risk of losing a contention and having it dismissed without
10 a hearing, without any opportunity to offer evidence simply
11 because a volunteer witness that they would seek and want to
12 have available, his presence cannot be guaranteed at this
13 date.

14 So we oppose any recasting of the balance at this
15 point. We would ask that if Applicants want dismissal, that
16 they do so by pleading and seek summary disposition.

17 JUDGE KELLEY: I would suggest that we take a
18 short break at this point, and the Board will consider the
19 argument that we have just heard.

20 Mr. Guild, you indicated an interest in seeking
21 some means of taking the broader harassment issue to the
22 Appeal Board, and I won't characterize it any more than that,
23 but I indicated your interest to the parties and indicated
24 further we might have some discussion of that also.

25 MR. GUILD: I guess as a preliminary matter, and

1 it may not be of significance procedurally, but before you
2 make a decision on this issue, now that the issue is on the
3 table, I gather that one option would be to certify the
4 question and not make the decision. 2.718(i) seems to give
5 you that authority, and Appeal Board authority suggests, I
6 guess, that you could not decide the question and simply
7 refer it to the Appeal Board or Commission to decide.

8 That seems to be a procedure that is taken
9 extremely rarely, and I read the authority to suggest the
10 Appeal Board would desire your views on the matter in any
11 event.

12 So I put that before you before you make a
13 decision on the matter and would ask an opportunity, assuming
14 you decide adversely to us, to raise the question of
15 referral.

16 JUDGE KELLEY: Well, we can wrap that in. You
17 are interested, are you not, in the broader question. That
18 is what I was first referring to.

19 MR. GUILD: The point I tried to raise was that I
20 would like to have the question of the Board's consideration
21 of this contention essentially reflected in the request for
22 reconsideration filed by Mr. Eddleman, the issues that are
23 set out there -- and that is the February 4th Motion for
24 Reconsideration -- but also including the procedural decision
25 the Board has made since then to refuse to expand the scope

1 of that contention on the basis of the additional harassment
2 evidence, and then I guess whatever consideration the Board
3 intends to make today on the basis of --

4 JUDGE KELLEY: You want to talk about certification
5 of our denial of Mr. Eddleman's petition for reconsideration
6 of our decision to cut back on 41G.

7 MR. GUILD: You already made that decision.

8 JUDGE KELLEY: I understand that; but you want to
9 talk about getting that certified? Is that right?

10 MR. GUILD: Well, I don't know. The distinction
11 may not make any difference, but I read certification to mean
12 sending it up before you decide it. So you have decided it
13 already, and I read referral to mean sending it up after you
14 have decided it.

15 JUDGE KELLEY: That is correct; and all we ever do
16 is refer. We always decide things.

17 MR. GUILD: Exactly. That is why I --

18 JUDGE KELLEY: That is what they want us to do,
19 and that's what we do.

20 MR. GUILD: Exactly.

21 JUDGE KELLEY: And we have already made a decision.
22 Now, you want to talk about referral of the
23 earlier denial of reconsideration?

24 MR. GUILD: Yes, sir. Maybe the best thing --

25 JUDGE KELLEY: And you want to do that without a

1 pleading; right?

2 MR. GUILD: Let's take this question after you --
3 you wanted to reach a decision on a pending matter and
4 address this whole matter after that, and that would be fine
5 by me.

6 JUDGE KELLEY: But you want to do that without
7 a pleading, without any motion of any kind, just you want to
8 talk about it on the phone; correct?

9 MR. GUILD: I would like to talk about it on the
10 phone if the Board can give us -- if the Board is not
11 disposed to consider the matter, a simple "no" would help,
12 and then we would file some pleadings with the Appeal Board,
13 Judge. We understand that time is of the essence and that
14 is why we are having to take up this matter on the phone
15 instead of by way of pleading.

16 JUDGE KELLEY: I am just noting your complaint
17 earlier about a lack of pleadings here on this earlier
18 question that we talked about at some length, and noting that
19 you don't seem to have the same problem with this approach
20 that we are going to get to after the break. That is my
21 only point.

22 MR. GUILD: Well, Judge, you know, I kind of
23 figure when it is used to disserve us, that we should have
24 the opportunity to avail ourselves of the same vehicle that
25 is being used to the benefit of the Applicants and the Staff.

1 I would prefer that we put all these matters in pleadings and
2 that we not decide any of these issues on conference calls
3 where the public can't observe and participate.

4 JUDGE KELLEY: Mr. Guild, I think that is the
5 most hypocritical statement I have ever heard you make in
6 this case. You are the chief asker of informal procedures,
7 telephone calls, anything that will avoid formal pleading,
8 and now this morning you want it all on paper. I resent
9 that.

10 We are going to take a five-minute break. We
11 will be back on at 10:45.

12 MR. GUILD: I will be happy to have it by way of
13 pleading, Judge, is the final point. If you want to do it
14 by pleadings, I would be happy to do that. Just give us
15 enough time to do it, and we will be happy to do it.

16 JUDGE KELLEY: We are going to take our break
17 now.

18 [Recess]

19 JUDGE KELLEY: Ladies and gentlemen, this is Judge
20 Kelley back on. Can you hear me?

21 MS. MOORE: Yes.

22 MR. GUILD: Yes.

23 MR. O'NEILL: Yes.

24 JUDGE KELLEY: We have considered your arguments
25 this morning, our own knowledge of the papers and facts, and

1 we have decided that we are going to reweigh the five
2 factors, and our conclusion is that the balance has changed
3 and that we are going to and we do now dismiss 41G on the
4 basis of an unfavorable five-factors balance flowing from the
5 fact that we do not have any commitment and no guarantee
6 that Mr. Van Vo will appear for hearing and therefore we have
7 to assume that he won't. In that posture, we reject 41G, or
8 dismiss it.

9 We are going to write a short Memorandum and Order
10 on that, probably next week, so right now this morning we are
11 just going to give you the bottom line. That will be followed
12 up, then, by a more full statement of our reason.

13 We had some discussion earlier just before we went
14 off the phone about certification. Mr. Guild, I think what
15 we need is perhaps a restatement, but a statement by you of
16 your proposition, what you would like to see done, and then
17 we can talk about it.

18 Could you give us your proposition first?

19 MR. GUILD: Yes, sir. Based on the Board's
20 displeasure just before the break, perhaps the best thing for
21 me to do would be to simply put it in writing and get to the
22 Board that way. I would do that.

23 JUDGE KELLEY: All right.

24 MR. GUILD: It would be helpful to have your order
25 before I do that. I just would flag the parties and the

1 Board that we would intend to seek review of the handling of
2 this harassment contention by the Appeal Board, and that
3 should include all the significant procedural decisions
4 the Board has made narrowing the scope of the contention and
5 limiting discovery, as well as dismissing it on the reweigh-
6 ing of five factors.

7 I will put that into a pleading and have it
8 circulated.

9 JUDGE KELLEY: I would just suggest -- and frankly,
10 I am thinking out loud a little bit. We have written an
11 opinion back in -- the original one was January when we cut
12 back 41G, and then we had another opinion in March denying
13 reconsideration. Now we have decided to submit 41G as
14 modified. So there are Board opinions on those issues.

15 I will put it this way, Mr. Guild. This Board
16 wouldn't be offended if you just went ahead and sought
17 direct certification. The opinions are there. You can come
18 back and file a pleading asking us -- not certification.
19 Referral is the right term. You could come back to us and
20 ask for referral. We can think about that. We may or may
21 not do it. Or you could go straight to the Appeal Board, I
22 would think.

23 The Appeal Board has said in the past they want
24 to know what the Licensing Board thinks, but they usually
25 say that on certification where there is no opinion. They
want to know what our view is on the merits of the issue.

1 But I just suggest that as a tactical matter, you certainly
2 would not have any -- the Board would take no umbrage if you
3 took the certification straight to the Appeal Board, and you
4 can decide that for yourself.

5 That, then, raises a question of scheduling. We
6 did have Mr. Van Vo and that part of 41G on Monday the 24th.
7 In fact, we were going to have all of 41G starting Monday the
8 24th.

9 Is Mr. Baxter with us at this point?

10 MR. BAXTER: Yes, sir.

11 JUDGE KELLEY: Well, what about the proposition
12 of reinstating those two emergency planning contentions for
13 Monday morning the 24th. Is that doable and desirable?

14 MR. BAXTER: Yes, it is, Judge. Our witnesses
15 will be available, and we would propose to start that Monday
16 morning first with our case on Mr. Eddleman's contention on
17 the protection factors and complete that contention and go
18 into the joint contention on bus drivers.

19 JUDGE KELLEY: Okay. Staff, do you agree with
20 that?

21 MS. MOORE: That is fine with the Staff, Your
22 Honor.

23 JUDGE KELLEY: Mr. Eddleman?

24 MR. EDDLEMAN: Judge, I don't have a problem with
25 that. I think we probably ought to check with whoever is lead

1 counsel for Joint Intervenors on bus drivers. I don't know
2 if it would be more convenient for them to go Monday or me
3 to go Monday. It doesn't make a lot of difference to me.

4 JUDGE KELLEY: Incidentally, I think we tried to
5 reach Mr. Runkle. The main thing here this morning was what
6 we have already talked about.

7 Now, lead for Joint Intervenors on the bus
8 drivers. Is that Mr. Reed or Mr. Runkle?

9 MR. BAXTER: It's Mr. Reed.

10 JUDGE KELLEY: Mr. Baxter, could you undertake to
11 reach him as soon as possible and maybe report back to us on
12 whether that is okay with him?

13 MR. BAXTER: Yes, I will.

14 JUDGE KELLEY: Now, we decided various states and
15 procedures last week, and they are in the transcript of that
16 discussion. I did say I would do a confirmatory order, and
17 then when we got into this issue over Mr. Van Vo's appearance,
18 we waited on that. In other words, we haven't sent one yet.
19 We can send one, I suppose, first thing Monday. I am just
20 going to be out tomorrow, and it may be up in the air with
21 Mr. Reed for a little bit.

22 Can we simply restate the basic points here with
23 the understanding that the Board will put out a confirmatory
24 order next Monday?

25 We had certain dates for filing of witnesses and

1 subpoena requests and also a date for that. We have a date
2 for testimony and exhibits. They were, as I recall, the
3 11th and the 17th.

4 Mr. Baxter, is that your recollection?

5 MR. BAXTER: That is correct.

6 JUDGE KELLEY: Okay.

7 Now, just for refreshing our memory on all this,
8 we said 10 a.m. in Apex at the Ramada Inn, and that is set
9 up already.

10 Is there anything else that we should restate
11 this morning so people know what steps are under way?

12 MR. BAXTER: Judge Kelley, I think I might have
13 spoken too quickly. I don't have the entire transcript here.
14 I think the 17th -- the 11th and the 17th were dates that
15 had been set for 41G.

16 JUDGE KELLEY: Only 41G?

17 MS. MOORE: I believe that is correct. In the
18 conference call the 21st, we agreed on the 10th for emergency
19 planning testimony.

20 JUDGE KELLEY: The 10th for testimony and
21 exhibits?

22 MS. MOORE: Yes.

23 MR. BAXTER: Correct.

24 JUDGE KELLEY: I frankly don't remember.

25 Have we got a written -- we do have an order out

1 on that, do we not?

2 MR. BAXTER: Yes, sir. I believe that is a
3 confirmation of about three conference calls ago.

4 JUDGE KELLEY: That's what my problem is.

5 Mr. Eddleman, does that sound right to you?

6 MR. EDDLEMAN: Yes, Judge.

7 JUDGE KELLEY: So the testimony and exhibits are
8 on the 10th, and the hearing now is reinstated for the 24th.

9 Is there anything else really that we need?

10 MS. MOORE: Judge, I would like to note for the
11 record that the Staff was required by the Board last week
12 to provide a memorandum to them on the admissibility of the
13 OI report.

14 JUDGE KELLEY: I was going to mention that. I
15 can add -- let's stick with emergency planning for a moment.
16 In terms of emergency planning dates, deadlines, filings and
17 the like, is everything set? Mr. Baxter, is there anything
18 else you can think of?

19 MR. BAXTER: I have nothing else, sir, no, not on
20 emergency planning.

21 JUDGE KELLEY: Ms. Moore, anything else on
22 emergency planning?

23 MS. MOORE: No, sir.

24 JUDGE KELLEY: Mr. Eddleman?

25 MR. EDDLEMAN: I just want to make sure. As I

1 understood the 10th, Judge, that was just to file it. That
2 wasn't a Quick Mail requirement or anything; it was just
3 filing. Is that right?

4 JUDGE KELLEY: I think so, Mr. Baxter. Ms. Moore,
5 is that just a service date?

6 MR. BAXTER: That is my understanding.

7 MS. MOORE: That is my understanding as well.

8 MR. EDDLEMAN: That's what I wanted to clarify.
9 Thank you.

10 JUDGE KELLEY: So that's what it is. Okay.

11 So if that puts us on track for that purpose, let
12 me note again that we did say in that confirmatory order
13 that we would do a limited appearance session that evening
14 in Apex, if the parties would do whatever they can in
15 disseminating that word. We did issue a press release. I
16 don't know the extent to which it has been picked up. It
17 would be useful to let people know about that.

18 If there is nothing else on emergency planning,
19 there was one other thing. We raised the question last week
20 on the admissibility of the OI report without a sponsoring
21 witness, and we asked Ms. Moore for a pleading, originally
22 by yesterday. When I spoke to her Tuesday about today's call,
23 I stated that she could put that in suspense until we had
24 this discussion today.

25 I might just add that yesterday I received or the

1 Board, all three of us, received a short letter from Mr.
2 Hayes which -- I can read it to you. It's short.

3 "Dear Administrative Judges. We have been
4 advised by the Office of the Executive Legal Director that
5 parties to this proceeding have requested that a member of
6 the Office of Investigations Staff be made available for
7 hearing scheduled later this month. We have also been
8 advised that this OI Staff member will be testifying both
9 to the conduct and the contents of the OI report of investi-
10 gation recently provided to you.

11 "In that this request is a matter of first
12 impression, OI respectfully requests a three-week extension
13 in time so that we can consult with our counsel, OGC, and
14 other members of the Commission to arrive at a conclusion
15 regarding our testifying at a contested licensing hearing.

16 "Sincerely, Ben Hayes, Director of OI."

17 A couple of comments. When I got this yesterday,
18 knowing that we were going to have this discussion today,
19 it occurred to me that the need for resolving this issue
20 might not obtain if we decided to dismiss 41G, as we have now
21 done. So it seems to me that now this issue that Mr. Hayes
22 wants to get resolved will probably get resolved in some
23 other case of some other contention and not here. I will
24 let him know what we did here today.

25 Beyond that, though, his statement -- and this may

1 not be too important -- but for the record, his first
2 sentence says "parties to this proceeding have requested
3 that a member of the Office of Investigations Staff be made
4 available for a hearing" and so on to testify at the hearing.
5 That is not, strictly speaking, what happened, as I recall,
6 and I would be happy to be corrected. But Ms. Moore simply
7 stated her intention to use the OI report as the Staff's
8 direct case, and the Board then anticipated that some party
9 might well object to that for lack of a sponsoring witness,
10 and I believe Mr. Guild indicated that he probably would.
11 And I indicated that I had a doubt about whether one could get
12 in such a report for its substantive effect without a sponsor-
13 ing witness. That was the issue that we were raising.

14 Now, as a practical matter, assuming the Staff
15 wants to have a direct case in a matter like this, they may
16 very well have to put in the report and bring the OI investi-
17 gator in. I'm not saying that wouldn't happen; probably it
18 would. But at least in the posture we were in, it had not come
19 to that. Nobody had asked for any particular witness, and
20 conceivably one could get into an issue of this kind where an
21 OI report was in existence and you simply called the witnesses
22 who were interviewed or some or most of them and you never
23 do put the report in but it still serves the purpose as a
24 source of information for parties.

25 So I simply want to note that the posture of it

1 was, as I understand it, as I have just stated and not that
2 we had any specific request of some named investigator to
3 show up for the hearing.

4 In any case, we will tell Mr. Hayes that we
5 have dismissed 41G and that, Ms. Moore, your obligation to
6 file a pleading on the question should be dismissed along
7 with it, so that we won't have any pleadings on that point.

8 Does that cover it, in your mind, Ms. Moore?

9 MS. MOORE: Yes, Your Honor.

10 I would just like to note for the record, too,
11 that I agree with you -- the Staff agrees that it was not
12 communicated to OI, as far as I know, that it was a party's
13 request. I believe Mr. Hayes has just made somewhat of an
14 erroneous statement. I have not seen the letter, and we
15 were not consulted before the letter was sent.

16 JUDGE KELLEY: I might just add that at the
17 bottom of the letter, it says, cc S. Chilk, Secretary, H.
18 Plaine, OGC, and E. Cunningham, OLD. So it may not have been
19 distributed beyond that.

20 MS. MOORE: That's correct, and we did not see it
21 before the letter was sent. He did not consult with us before
22 it was sent.

23 MR. GUILD: Judge, this is Guild. I wonder if you
24 could circulate a copy to the parties, at least who are
25 interested in 41G, for the record.

1 JUDGE KELLEY: I don't see any reason why not.
2 He didn't serve it. I just read it into the record anyway,
3 so I might as well send you a copy. It doesn't say confiden-
4 tial or anything. What it is is a request for an extension
5 of time. That is really all it comes down to. So sure, I
6 will send you a copy.

7 The Reporter is asking me, for NRC, Ms. Moore, in
8 addition to you is Mr. Barth there?

9 MS. MOORE: Yes, Your Honor.

10 JUDGE KELLEY: Jones isn't, though?

11 MS. MOORE: No, sir.

12 JUDGE KELLEY: It is just you and Mr. Barth, is
13 that right?

14 MS. MOORE: Correct.

15 JUDGE KELLEY: Anything else from the Applicants?

16 MR. BAXTER: No, sir.

17 JUDGE KELLEY: The Staff?

18 MS. MOORE: No, sir.

19 JUDGE KELLEY: The Intervenors, Mr. Guild or Mr.
20 Eddleman?

21 MR. GUILD: Judge, one other matter. We do want
22 to preserve the record on 41G for whatever further proceedings
23 by way of appeal or efforts to seek review on an interlocutory
24 basis, and in that regard, the Board Chairman, we understand,
25 has possession of a couple of disputed documents that were

1 sought in discovery on 41G, and we had been asked to -- or
2 we had been given the opportunity to respond to authorities
3 cited by Applicants in a letter to the Board.

4 JUDGE KELLEY: Right.

5 MR. GUILD: We would still like the opportunity to
6 respond to that and intend to respond to that, and would ask
7 that the Board Chairman simply secure those documents until
8 you have a chance to rule on the question.

9 JUDGE KELLEY: Yes, we have the documents, and
10 I suggested you think about just where you send a referral or
11 certification pleading, but whatever you do in that regard,
12 could you include at the same time your response on that
13 point?

14 MR. GUILD: That would be fine.

15 JUDGE KELLEY: Do that. We have the documents
16 here, and we will abide the receipt of all pleadings and
17 then we will decide that, too.

18 Anything else?

19 [No response]

20 We will then see at least most of you on the 24th
21 of June in Apex. Thank you very much.

22 [Whereupon, at 11:05 a.m. the conference call
23 was concluded.]
24
25

1 CERTIFICATE OF OFFICIAL REPORTER

2
3
4
5 This is to certify that the attached proceedings
6 before the United States Nuclear Regulatory Commission in the
7 matter of: CAROLINA POWER & LIGHT COMPANY AND NORTH CAROLINA
8 EASTERN MUNICIPAL POWER AGENCY (Shearon Harris
Nuclear Power Plant, Units 1 and 2)

9 Name of Proceeding: Telephone Conference Call

10
11 Docket No.:

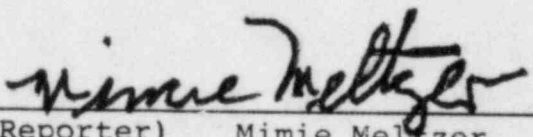
12 Place: Bethesda, Maryland

13 Date: Thursday, June 6, 1985

14
15 were held as herein appears and that this is the original
16 transcript thereof for the file of the United States Nuclear
17 Regulatory Commission.

18
19 (Signature)

(Typed Name of Reporter)


Mimie Meltzer

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23 Ann Riley & Associates, Ltd.
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