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July 26, 1985

OFFICE OF SECRETARY  
DOCKETING & SERVICE

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

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

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

In the Matter of  
Carolina Power & Light Company, et al.  
(Shearon Harris Nuclear Power Plant)  
Docket No. 50-400 04

Dear Judges:

By letter of June 19, 1985, Intervenor Wells Eddleman requested that certain documents believed to be relevant to the issues before the Board and to the safety of the Shearon Harris Nuclear Power Plant which had been submitted to the Board by CP&L be made a part of the record in this proceeding and be disclosed to us pursuant to the Commission Rules of Practice and the Freedom of Information Act. CP&L responded in opposition and we were granted an opportunity by the Board Chairman to reply. Order of July 15, 1985.

Only now, after our FOIA request for disclosure, does CP&L belatedly petition the Board on the authority of 10 CFR 2.790 (b)(1) to "withhold disclosure of the Review Panel Report and Quality Check Report as containing confidential and privileged commercial information." July 9, 1985, Response, P.21. On submission of these documents CP&L asserted no privilege but only an objection to their relevance to the admitted contention and a desire to prevent their disclosure to Intervenor. May 20, 1985, letter, pp. 2-5. CP&L's present application for withholding is untimely by the explicit terms of Section 2.790 (b)(1) which requires that "(T)he application and affidavit shall be submitted at the time of filing the information sought to be withheld."

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Judges Kelley, Bright and Carpenter  
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The Court of Appeals for the Seventh Circuit, further, recognized that to permit a withdrawal of a document sought under the FOIA, as CP&L argues here, "would certainly violate the spirit, and maybe even the letter of the Freedom of Information Act (citations omitted)." The NRC itself apparently agrees. General Electric Company v. NRC, 750 F.2d 1394, 1399 (1984). It would be equally anomalous to permit the NRC to "return" a document sought under the FOIA under authority of Section 2.790 (b)(5), as argued in the alternative by CP&L. July 9, 1985, Response, p.2. Even so, it is the relevance of these documents to this Board's decision or at least the correctness of its actions which remains in issue.

These documents are agency records which were "submitted to the agency for use in carrying out its duties." General Electric, supra, 750 F.2d at 1400. CP&L simply cannot be credited any legitimacy to its claim of competitive harm which is critical to the application of the so-called "trade secret" FOIA exemption 4:

...competitive harm in the FOIA context...(is) limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws.

Public Citizen Health Research Group v. FDA, 704 F.2d 1280,1291 in 30. (D.C. Cir. 1983).

Intervenor Wells Eddleman submits that these documents which are believed to contain important information concerning the effectiveness of the Quality Assurance program at the Harris plant should be made a part of the record in this proceeding and disclosed as requested.

Sincerely,

  
Robert Guild

cc: Service Unit  
Director, Office of Administration