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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RUBEN GONZALEZ  
ADJUDICATIONS STAFF

In the Matter of )  
)  
CAROLINA POWER & LIGHT )  
(Shearon Harris Nuclear )  
Power Plant) )

Docket No. 50-400-LA  
ASLBP No. 99-762-02-LA

ORANGE COUNTY'S MOTION FOR EXTENSION OF  
SCHEDULE FOR DISCOVERY, BRIEFING  
AND ORAL ARGUMENT  
AND REQUEST FOR EXPEDITED CONSIDERATION

Pursuant to 10 C.F.R. §§ 2.1117 and 2.718(e), Orange County hereby requests a two-week extension of the deadlines for discovery, briefing, and oral argument in this proceeding. The extension is necessary because extraordinary and unforeseen delays in the production of discovery documents have prevented Orange County from completing discovery in a timely way, and have seriously hampered Orange County's ability to prepare its Subpart K presentation under the schedule established by the Board. Given the very tight schedule involved in the proceeding, the County requests expedited consideration of this motion.

The County has consulted with the Applicant and the Nuclear Regulatory Commission ("NRC" or "Commission") regarding this request, but neither party agreed to the requested extension.

**Procedural Background**

On August 7, 2000, in LBP-00-19, the Licensing Board admitted to this proceeding Orange County's Contention EC-6, which contends that the NRC should be required to prepare an Environmental Impact Statement for the proposed expansion of spent fuel storage at the

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Harris plant, due to the increased risk of a severe accident involving radioactive releases from the spent fuel pools. The Board ruled that the expedited procedures of 10 C.F.R. Part 2, Subpart K would apply, and set a schedule as follows: discovery to commence on August 21, 2000; discovery to close on October 20, 2000; and written evidentiary and legal summaries to be filed by November 20, 2000. *Id.*, slip op. at 19. In a subsequent order, the Board set a date for the oral argument of December 7, 2000. Memorandum and Order (Corrections to LBP-00-19 and Oral Argument Schedule) (August 29, 2000).

### ARGUMENT

The hybrid hearing procedures under Subpart K are designed to expedite spent fuel pool expansion litigation. One of Subpart K's tools for expediting proceedings is to limit discovery to 90 days. *See* 10 C.F.R. § 2.1111. The Licensing Board has allowed only 60 days for discovery in this environmental phase of the Harris license amendment case. As discussed below, Orange County seeks a two-week extension of the discovery schedule for the purpose of conducting written discovery. This is well within the 90 days permitted by the regulations.<sup>1</sup> Orange County submits that in these circumstances, an extension of time for discovery,

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<sup>1</sup> To the extent that the Board has added the 60 days of discovery in this phase of the proceeding to the 90 days of discovery granted in the first phase of the proceeding, Orange County submits that it would be unreasonable to view the discovery periods in the first and second phase of the case cumulatively, because the subject matter of the contentions in the two phases is completely different. Little or none of the discovery done in the technical phase of the proceeding is useful in this environmental phase. In any event, the Board has the discretion to extend the discovery schedule. In promulgating the Subpart K procedures, the Commission specifically recognized that the Presiding Officer must have "[s]ome discretion . . . to adjust the schedule to the demands of a particular case," *i.e.*, for "good cause" or "exceptional circumstances." Final Rule, Hybrid Procedures for Expansion of Onsite Spent Fuel Storage Capacity at Civilian Nuclear Power Reactors, 50 Fed. Reg. 41,662, 41,665 (October 15, 1985). As discussed below, such extraordinary circumstances exist here.

briefing and oral argument are necessary to ensure that the County's opportunity to participate in this proceeding is meaningful. *See Union of Concerned Scientists v. NRC*, 735 F.2d 1437,1446 (D.C. Cir.1984), cert. denied, 469 U.S. 1132 (1985).

Orange County has done its best to complete discovery within the two-month framework established by LBP-00-19. The County sent out its principal sets of discovery requests to the Applicant and Staff on August 21, 2000, the first day of discovery; and arranged to inspect CP&L's documents within a week of their production on September 20. By arrangement with CP&L, Orange County inspected documents on September 27 and toured the Harris plant on September 28, the only day during that week when CP&L could accommodate a site tour. The County also entered an agreement with CP&L which stipulated, *inter alia*, that Orange County would not request additional depositions beyond the three permitted by the Board's July 29, 1999, Order; that the two parties would take all depositions during the week of October 16 in the Washington, D.C./Rockville area; and that they would produce certain documents on a schedule. *See* Letter from John H. O'Neill to Diane Curran (October 3, 2000), attached as Exhibit 1. The County and CP&L also agreed that they would not petition the Board to extend the discovery period "absent extraordinary, unforeseen circumstances." *Id.*

Orange County also attempted to work cooperatively with the NRC Staff on document discovery, by making efficient use of the NRC's Public Document Room ("PDR"), and asking the Staff to produce only those documents that could not be obtained from the PDR.<sup>2</sup>

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<sup>2</sup> The County has also worked diligently to produce documents requested by CP&L and the NRC Staff. In response to CP&L's document production request of August 30, 2000, the County produced the bulk of its documents on October 2, 2000; and delivered the

Document discovery is an important aspect of Orange County's case preparation. In order to make a meaningful presentation on the risks of a severe accident at Harris, the County's expert must survey the body of existing literature on severe accident risks, and familiarize himself with many aspects of the specific design of the Harris nuclear power plant. Unfortunately, the County has experienced extraordinary and unforeseen delays in obtaining documents from both the NRC and CP&L, thus precluding the timely completion of discovery and hampering the County in the preparation of its evidentiary presentation.

With respect to NRC documents, the County estimates that delays involved in searching for and copying documents have set it back by two or three weeks. Several factors are involved in the delay. First, the PDR moved from its downtown D.C. offices to the NRC's White Flint offices at the end of September. *See* public notice re Relocation of the Nuclear Regulatory Commission's Public Document Room, 65 Fed. Reg. 54,865 (September 11, 2000). For several days, the PDR and associated copying service were either completely incommunicado or so backed up with requests that it was impossible to obtain any documents.

Second, in the course of moving, the PDR has sent virtually all of its paper files to storage, and is now copying all documents from microfiche unless specifically requested to do otherwise. Several documents requested by the County in mid-September were copied from microfiche, and were largely unusable. The quality of the microfiche copies was so poor that tables, graphs and finely printed footnotes were illegible. The County was required to spend a

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requested box of documents to CP&L by close of business the following day. Two smaller sets of documents were delivered to counsel for CP&L on October 9 and 12. The County also made timely document production to the NRC Staff.

great deal of time re-ordering the material to be copied from hard copies (which must be retrieved from off-site storage at the cost of an additional day's time), finding hard copies that were not in the PDR, and negotiating credit for several hundred dollars of wasted copying fees. As a result, it took more than two additional weeks for the County to obtain the documents in readable form. Several other documents that were requested on October 3 were not received until October 11.

Third, many of the documents requested by the County are over ten years old, and the PDR either no longer has hard copies or cannot find them. The process of searching for hard copies in PDR and NRC Staff files has been time-consuming. While NRC Staff counsel has been helpful and cooperative in searching for documents, the process of locating and producing documents has been slow. Finally, the County has encountered delays in obtaining some non-NRC publications, despite having sought them in a timely manner. For instance, Orange County ordered two IAEA reports related to severe accidents on September 19, but recently learned that the IAEA did not ship them from Europe until October 10.<sup>3</sup> They have not yet arrived.

The County has also been seriously hampered by delays in CP&L's production of documents. After visiting CP&L's document production room on September 27, the County tagged and requested about three boxes of documents to be copied and mailed. On September 28, the County also identified and requested several additional documents. The County also arranged with CP&L to obtain negatives and prints of photographs that were taken during the

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<sup>3</sup> The reports are Recovery Operations in the Event of a Nuclear Accident or Radiological Emergency: Proceeding Series (1990); and On-Site Habitability in the Event of an Accident at a Nuclear Facility: Safety Series (1989).

Harris site tour on September 28. Given that most of the documents were requested on a Thursday and the photos were taken on a Friday, and based on CP&L's counsel's representation on Monday October 2 that copying was underway and would be mailed out soon, the County reasonably expected to have the photographs and most of the documents, if not all of them, by the middle of the following week, or October 4.<sup>4</sup> On Friday, October 6, however, the County had not received a single box of documents or the photographs.

On October 6, 2000, counsel for Orange County wrote to counsel for CP&L, expressing frustration at the unreasonable discovery delays, and notifying them that the County intended to seek additional time for discovery. E-mail message from Diane Curran to John O'Neill and Steven Carr re: Discovery Delays (October 6, 2000). In response, counsel for CP&L acknowledged that there had been problems with reproduction which had since been resolved, and committed to expedite the process.<sup>5</sup> E-mail message from Steven Carr to Diane Curran re: Discovery Delays (October 6, 2000).<sup>6</sup>

The County did not receive the first box of CP&L documents until Saturday, October

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<sup>4</sup> It was also based on CP&L's counsel's representations that counsel for the County entered into the October 3 agreement with CP&L not to seek an extension of the discovery period.

<sup>5</sup> In a later telephone conversation, counsel for CP&L informed counsel for Orange County that the delays were due to her request for double-sided copying of many of the documents. Double-sided copying is a routine operation that should not have caused such a delay. If CP&L had in-house copier problems, there are many commercial copying facilities in the area to which it could have taken the documents. In any event, the request was for double-sided copying "if possible." CP&L could have elected to do single-sided copying, or at least call counsel for Orange County to alert her to the problem.

<sup>6</sup> Both Ms. Curran's October 6 message and Mr. Carr's October 6 reply are attached as Exhibit 2.

7<sup>th</sup>. The first workday on which any box arrived was Tuesday October 10. The last box did not arrive until Wednesday October 11. As a result, the County did not receive any of the CP&L documents until after October 6, the last day for filing timely interrogatories and requests for admissions.<sup>7</sup>

The difficulty of timely obtaining documents has delayed Orange County's case preparation in two major respects. First, the County has not been able to take adequate advantage of the written discovery process, because it did not receive many of the discovery documents in time to meet the October 6 deadline for the last set of timely interrogatories and requests for admissions. For instance, Orange County wishes to propound a number of discovery questions to CP&L in order to clarify certain issues raised by CP&L's documents about the design of the Harris nuclear power plant and the status of CP&L's studies of severe accident risks at Harris. The three depositions of CP&L affiants scheduled for next week are unlikely to be sufficient for this purpose, because the subject matter on which each has been offered is relatively narrow.<sup>8</sup> The County expects that it may also have written discovery

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<sup>7</sup> To be timely, the discovery must have been answerable by October 20. Allowing 14 days for a response, that would require the last written discovery requests to be filed by October 6.

<sup>8</sup> In this regard, the County notes under the Board's July 20, 1999, Order, it has had to choose three out of eight potential CP&L affiants to depose, and three out of four Staff affiants to depose. (In contrast, Orange County has identified only one affiant in the Subpart K proceeding.) Each of the affiants has a different area of expertise and/or knowledge. See Applicant's First Supplemental Response to the Board of Commissioners of Orange County's First Set of Discovery Requests Regarding Contention EC-6 at 2-3 (September 20, 2000; NRC Staff's Second Supplemental Response to Orange County's First Set of Environmental Discovery Requests Directed to the NRC Staff at 2 (September 20, 2000). Obviously, the depositions will not be sufficient to cover all areas on which CP&L and the Staff are knowledgeable and/or will submit affidavits.

questions for the NRC Staff, based on recently received NRC documents that it is now reviewing.

Even in the absence of the discovery delays described above, the schedule imposed by the Licensing Board for this Subpart K proceeding would have been extremely difficult to meet. The preparation of a Subpart K presentation on Contention EC-6 requires a thorough and extensive study of the literature on severe accident risks and probabilistic risk analysis, detailed study of the Harris design, and analysis of many technical issues. These are time-consuming tasks for which the current timetable provided by the Board would have been barely adequate, under the best of circumstances. The time lost through delays in obtaining discovery documents has set Orange County back so far that it is impossible to meet the Board's schedule at this point.

Accordingly, Orange County requests the following relief:

1. That the discovery schedule be extended until November 10, 2000, for the sole purpose of propounding additional interrogatories and requests for admissions.<sup>9</sup> This will give Orange County through the week of October 23rd to develop discovery questions based on the documents that were not produced until after the first week of October.<sup>10</sup>

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<sup>9</sup> Orange County wishes to clarify that by this motion, it does not seek to exceed the limit of 15 interrogatories per party established in the Board's July 29, 1999 Order. If and when Orange County determines that it is necessary to exceed the limit, it will make a separate request at that time.

<sup>10</sup> In making this request, the County notes that the week of October 16 is effectively unavailable for any purpose other than conducting the seven depositions that have been scheduled for that week, as well as a day-long ACRS subcommittee meeting regarding spent fuel pool accident risks, at which the NRC Staff, Dr. Thompson, and the Nuclear Energy Institute will be making presentations.

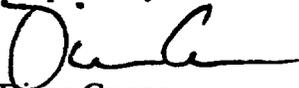
2. That the deadline for written presentations be extended until December 4, 2000, to make up for over two weeks of case preparation time that Orange County has lost due to discovery delays.

3. That the date of the oral argument be correspondingly changed to December 19, 2000. As of this writing, the McKimmon Center at North Carolina State University remains available on that date.

### Conclusion

As a result of discovery delays caused by the NRC and CP&L and which are outside the control of Orange County, the County has been significantly prejudiced in its efforts to complete discovery and prepare its evidentiary presentation in this Subpart K proceeding. Accordingly, a two-week extension of the deadlines for written discovery, written evidentiary presentations, and oral argument is warranted.

Respectfully submitted,



Diane Curran

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October 13, 2000

# ShawPittman

*A Law Partnership Including Professional Corporations*

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202.663.8148  
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October 3, 2000

Diane Curran, Esq.  
Harmon, Curran, Spielberg &  
Eisenberg, L.L.P.  
1726 M Street, N.W., Suite 600  
Washington, D.C. 20036

Re: CAROLINA POWER & LIGHT COMPANY (Shearon Harris  
Nuclear Power Plant) Docket No. 50-400-LA, ASLBP No. 99-  
762-02-LA

Dear Diane:

This letter confirms certain agreements that counsel for the Board of Commissioners of Orange County ("BCOC") and counsel for applicant Carolina Power & Light Company ("CP&L") have reached regarding discovery in the above referenced Subpart K proceeding described in the Board's August 7, 2000 Memorandum and Order.

1. All depositions will be scheduled to be taken in Washington, DC or at the NRC's offices in Rockville, Maryland during the week of October 16, 2000. CP&L and BCOC agree that informal notice (by letter or e-mail) will be sufficient in lieu of formal deposition notices.
2. CP&L will make Robert Kunita and Ed Wills available for deposition during the week of October 16<sup>th</sup> at a mutually convenient date and time. CP&L will make Dr. Edward Burns available for deposition on October 20, 2000. BCOC will not seek leave of the Board to take more than these three depositions.
3. BCOC will make Dr. Gordon Thompson available for deposition on October 16, 2000 at 9:00 AM at Shaw Pittman's offices at 2300 N Street, N.W., Washington, D.C. Counsel for CP&L has agreed to limit Dr. Thompson's deposition to one day.
4. BCOC will respond to CP&L's August 30, 2000 Request for Production of Documents on Monday, October 2, 2000, and will make most responsive documents available for review at the offices of BCOC's counsel in Washington, DC at a mutually convenient time on October 2<sup>nd</sup>. To the extent that Orange County has identified any other responsive documents, they will be made available for review as early as possible during the week of October

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Diane Curran, Esq.  
October 3, 2000  
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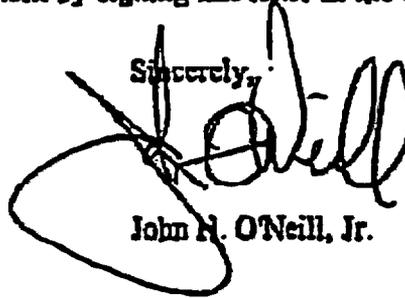
- 2<sup>nd</sup>. Orange County has not completed its analysis of Contention EC-6, and may identify additional responsive documents as their analyses progress. The County recognizes that it is under an obligation to timely supplement its discovery responses with any additional responsive documents that are identified.
5. As of this writing, CP&L has identified and produced all documents that are responsive to Orange County's first set of document requests. CP&L has agreed to make certain additional documents available in response to BCOC's Second Request for Production of Documents dated September 21, 2000. Many of the documents were provided for BCOC's review on September 27, 2000 in CP&L's offices in Raleigh, NC, including the latest revision of the Emergency Plan, which was provided for your review after negotiations on the Second Request. In addition, CP&L will produce a copy of the "Plant Emergency Procedures," a document which is referenced in the Emergency Plan. CP&L has also agreed to provide a printout from its database which shows the fuel location, fuel type, date of discharge from the reactor, and burnup of each fuel assembly stored in Harris spent fuel pools at the present time. CP&L will endeavor to provide the printout on or before October 13, 2000. CP&L has not completed its analysis of Contention EC-6, and may identify additional responsive documents as its analyses progress. CP&L recognizes that it is under an obligation to timely supplement its discovery responses with any additional responsive documents that are identified.
6. BCOC and CP&L agreed not to petition the Board to extend the discovery period absent extraordinary, unforeseen circumstances.
7. On the basis of their mutual commitment to good faith disclosure of all non-privileged documents, BCOC and CP&L agree to mutually waive the preparation of privilege logs.

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Diane Curran, Esq.  
October 3, 2000  
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Please indicate your agreement by signing this letter in the space provided below.

Sincerely,



John H. O'Neill, Jr.

Agreed to:



Diane Curran, Esq.  
Counsel for BCOC

cc: Steven Carr, Esq.  
Susan Ural, Esq.

**Subject: RE: Discovery delays**

**Date: Fri, 6 Oct 2000 14:57:13 -0400**

**From: "Carr, Steven" <steven.carr@cplc.com>**

**To: 'Diane Curran' <dcurran@harmoncurran.com>**

**CC: Douglas Rosinski <douglas.rosinski@shawpittman.com>, "Susan L. Uttal" <slu@nrc.gov>, Gordon Thompson <irss@igc.apc.org>, "Fanning, Ann" <ann.fanning@cplc.com>, "Hunt, Charlene F." <charlene.hunt@cplc.com>, "Lee, David S." <davids.lee@cplc.com>, "Caves, John" <john.caves@cplc.com>, "John\_O'Neill@shawpittman.com" <John\_O'Neill@shawpittman.com>**

Diane, a considerable number of the documents will be shipped this afternoon by FedEx for delivery tomorrow to Dr. Thompson, including tour photographs and negatives (approximately 3,300 pages).

The documents are double-sided copies, so this production will represent about two boxes you requested. Another box of documents (including FSAR excerpts requested) will be finished and sent out Monday. We are augmenting our document production team to put more hands into the effort, in order to expedite the process Monday. Our offices are open Monday. The Federal holiday should not preclude shipping Monday or delivery on Tuesday.

I regret that we have not been able to get these to you sooner. We have had difficulties with our reproduction services people, and I am told that that problem has been rectified and that the copying is moving more quickly now.

Diane, I did not reply to your email yesterday as I was aware that you had spoken with Ann Fanning on my staff, and Ann and I continued to press to get these documents copied and out the door after your call. I learned from Ann last evening after 6 pm that we had a problem that prevented shipment yesterday. You spoke with Charlene Hunt, my assistant, this morning, and I have just learned from Charlene that that reproduction services group will have some additional documents (in addition to the 3,300 pages) that we can include in the shipment we make today.

Please be assured that we are making every effort to expedite the production of documents you have requested. Dr. Thompson will have a considerable volume of documents to read this weekend, and more on Tuesday. I don't believe that there is any reason to delay the proceedings.

Thank you for your cooperation and your courtesy.

Best,

Steven Carr  
Associate General Counsel  
Legal Department  
CP&L Service Company LLC  
Voice (919) 546-4161 - Fax (919) 546-3805  
steven.carr@cplc.com

-----Original Message-----

From: Diane Curran [mailto:dcurran@harmoncurran.com  
<mailto:dcurran@harmoncurran.com>]

Sent: Friday, October 06, 2000 12:46 PM

To: John H. O'Neill, Jr.; Steven R. Carr

Cc: Douglas Rosinski; Susan L. Uttal; Gordon Thompson

Subject: Discovery delays

Dear John and Steve,

I am writing to express my extreme frustration at not having received a single discovery document from CP&L, or any prints or negatives of the photographs that were taken for us during the site tour last Friday. I consider this inexplicable delay to constitute extraordinary, unforeseen circumstances that have hampered my ability to complete discovery within the time allotted by the Board.

It has been over a week since Dr. Thompson and I identified the great bulk of the CP&L documents that we requested on September 28, and a week since the rest of the documents were identified and the photos were taken. When I spoke to Steve on Monday October 2, he said he thought a box was going out that day or the next day, and that copying was well underway. As of this date, however, we have not received a single document. I spoke this morning with Steve's secretary Charlene, who said that a box that was intended to go out yesterday did not go out because of a problem with reproduction. She said she would try to get a box of documents out today, but when she described the contents it did not appear to include all of the documents that we requested. Steve has not returned my phone call or answered my e-mail from yesterday.

I consider this delay inexcusable, and it has seriously hampered our efforts to conduct discovery in a timely way. We had planned to file some additional discovery questions today, based on the CP&L documents. Of course that has become impossible. It has also been impossible for Dr. Thompson to move ahead with his review of CP&L documents in preparation for his deposition testimony and evidentiary presentation.

In reaching our agreement of Tuesday October 3, I reasonably relied on Steve's representation on Monday that reproduction was progressing apace and that documents would be on the way shortly. Based on CP&L's apparent good faith efforts, I also made a concerted effort to get discovery documents to CP&L in a timely manner -- relying, I might note, on a much smaller office staff. Shaw Pittman received a box of documents from me the following business day after they were requested.

As you know, Monday is a federal holiday. As a result of CP&L's delay in producing documents, we stand to lose another three days of time for reviewing documents, in addition to the time that has already been lost. Unless Dr. Thompson receives all of the requested documents by tomorrow (Saturday, with CP&L absorbing the extra charge for Saturday delivery), I plan to ask for an extension of the discovery schedule, including the postponement of depositions. In any event, once we do receive the documents, I anticipate that I will need to ask for additional time to pose interrogatories and admissions that are based on those documents.

Sincerely,  
Diane Curran



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Diane Curran