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 AUTH.NAME: NEWELL,G.J. AUTHOR AFFILIATION: Spiegel & McDiarmid
 NEWELL,G.J. North Carolina Eastern Municipal Power Agency
 RECIP.NAME: MURLEY,T.E. RECIPIENT AFFILIATION: Office of Nuclear Reactor Regulation, Director (Post 870411)

SUBJECT: Presents plant request for commencement of informal complaint procedures under Section 5.3.2,NUREG-0970.W/encl.

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June 22, 1989

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Dr. Thomas E. Murley
Director, Office of Nuclear
Reactor Regulation
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: Shearon Harris Nuclear Power Plant, Request
for Commencement of Informal Complaint
Procedures Under Section 5.3.2, NUREG-0970

Dear Dr. Murley:

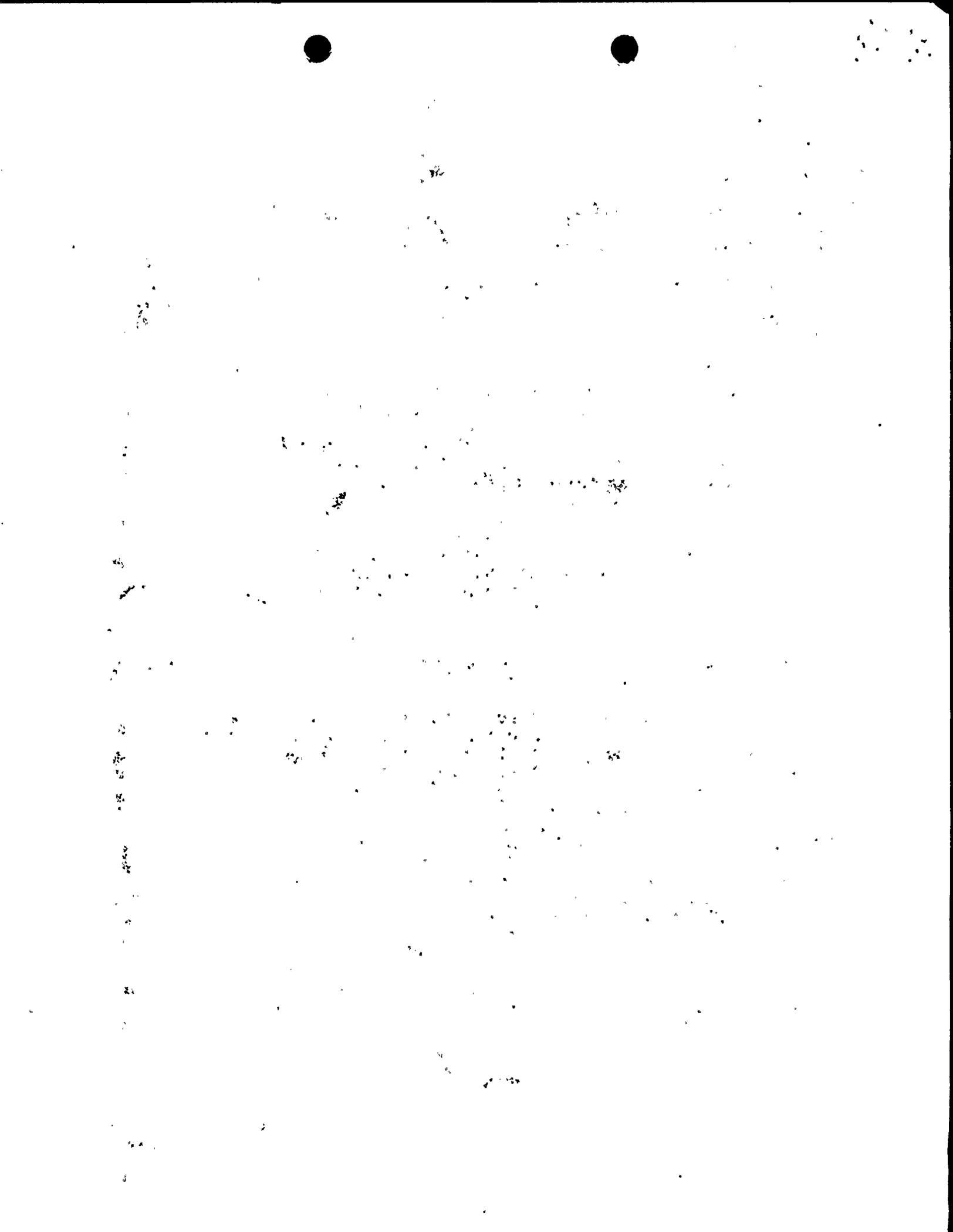
Yesterday we received a copy of a letter to you dated June 15, 1989 from Mr. George Avery, counsel for Carolina Power & Light Company ("CP&L"), setting forth CP&L's response to the Request for Initiation of Informal Complaint Procedures filed on behalf of North Carolina Eastern Municipal Power Agency ("Power Agency") on May 5, 1989.

There are a number of assertions contained in CP&L's response to which Power Agency hopes to respond at a meeting with the Commission Staff (as proposed in the May 24, 1989 letter from Mr. Cecil O. Thomas of the Office of Nuclear Reactor Regulation). There are, however, two assertions contained in CP&L's response that are of sufficient importance that Power Agency wishes to correct them immediately.

First, CP&L's response discusses the Federal Energy Regulatory Commission's acceptance for filing of the 1981 Power Coordination Agreement ("PCA") between CP&L and Power Agency. At pages 10-11, the response states the conclusion that FERC's acceptance of the PCA "confirms that the 1981 PCA conforms to the requirements of the Federal Power Act." In reliance on that acceptance, and on License Condition 6 to License No. NPF-53,

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Dr. Thomas E. Murley
June 22, 1989
Page 2.

CP&L reasons that actions by CP&L in conformity with the PCA cannot violate License Condition 4. Apart from the fact that CP&L's compliance with the PCA is a threshold matter in dispute between the parties, Power Agency wishes to advise you that FERC's acceptance of the 1981 PCA was expressly not a finding that the Agreement comports with statutory standards under the Federal Power Act. In accepting the 1981 PCA for filing, FERC stated as follows:

This acceptance for filing does not constitute approval of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service provided for in the filed documents; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Carolina Power & Light Company.

A complete copy of FERC's letter order accepting the 1981 PCA for filing is provided as Attachment 1.

Second, CP&L's response also recites that the subject matter of Power Agency's Request for Initiation of Informal Complaint Procedures was also the subject of a complaint filed with FERC, as to which FERC granted dismissal with directions to arbitrate the dispute. At page 11 of the response, CP&L notes that initial arbitration pleadings have been filed, and states that "[t]he arbitration thus is proceeding, consistent with FERC's orders." CP&L fails to advise you that, on June 14, 1989, CP&L filed with the arbitrator a motion to stay the arbitration proceeding pending a decision of the U.S. Court of Appeals for the District of Columbia Circuit on Power Agency's petition for review of FERC's dismissal orders. A copy of CP&L's Motion to Stay the Arbitration Proceeding (without exhibits) is provided as Attachment 2.

In concluding its response, CP&L asks the Commission to dismiss Power Agency's complaint. Power Agency believes that



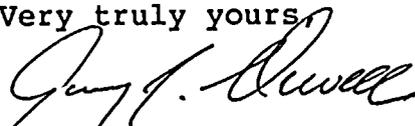
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Dr. Thomas E. Murley
June 22, 1989
Page 3

CP&L's request should be denied, and that the parties should have an opportunity to meet with the Commission's Staff to discuss in greater detail the subject matter of Power Agency's complaint.

Very truly yours



Gary J. Newell

Counsel for North Carolina
Eastern Municipal Power Agency

cc: Mr. Joseph Rutberg
Mr. William M. Lambe
Mr. Cecil O. Thomas
Mr. Bobby L. Montague
Mr. George A. Avery
Mr. William G. Wemhoff
Mr. Michael S. Colo

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON 20426

IN REPLY REFER TO:

Docket No. ER82-9-000

Carolina Power & Light Company
Attention: Mr. William W. Graham, Jr.
Executive Vice President
P. O. Box 1551
Raleigh, North Carolina 27602

OCT 30 1981

Dear Mr. Graham:

By letter dated October 7, 1981, you submitted for filing with the Commission a Power Coordination Agreement dated July 30, 1981, between Carolina Power & Light Company (CP&L) and North Carolina Municipal Power Agency Number 3 (Power Agency). A Purchase, Construction and Ownership Agreement and an Operating and Fuel Agreement relating to the Power Coordination Agreement was also submitted for informational purposes. Pursuant to Section 375.308(1) of the Commission's Regulations, your submittal is accepted for filing and designated as shown on the Enclosure.

Notice of your filing was issued on October 8, 1981, with comments, protests, or interventions due on or before October 22, 1981. On October 16, 1981, Power Agency filed a petition to intervene in support of the filing.

Good cause is shown for granting waiver of the notice requirements pursuant to Section 205(d) of the Federal Power Act and Section 35.11 of the Commission's Regulations thereunder; therefore, the rate schedule shall become effective upon initiation of service. Please inform the Commission of the date of initiation of service and provide a final list of the members of Power Agency receiving service under the Power Coordination Agreement.

Any change in a fixed component of the formulary rate methodology contained in the Power Coordination Agreement will constitute a change in rate and will require timely filing with the Commission pursuant to Section 35.13 of the Commission's Regulations accompanied by appropriate data and computations showing the basis for the proposed change in rate.

Carolina Power & Light Company

This acceptance for filing does not constitute approval of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service provided for in the filed documents; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation affecting or relating to such service or rate; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against Carolina Power & Light Company.

This action is final unless a petition appealing it to the Commission is filed within 30 days from the date of this letter, as provided in Section 1.7(d) of the Commission's Regulations, 18 C.F.R. 1.7(d) [as amended in Docket No. RM78-19 (August 14, 1978), Docket No. RM79-59 (July 23, 1979) and Docket No. RM81-20 (May 22, 1981)]. The filing of a petition appealing this action to the Commission or an application for rehearing as provided in Section 313(a) of the Act does not operate as a stay of any date specified in this letter except as specifically ordered by the Commission.

This acceptance for filing terminates Docket No. ER82-9-000.

Sincerely,



William W. Lindsay, Director
Office of Electric Power Regulation

Enclosure

cc: North Carolina Municipal Power Agency Number 3
Attention: Mr. Ralph W. Shaw
General Manager
P. O. Box 59162
Raleigh, North Carolina 27625

Spiegel & McDiarmid
Attention: Mr. James N. Horwood
2600 Virginia Avenue, N. W.
Washington, D. C. 20037

Enclosure

Carolina Power & Light Company
Rate Schedule Designations
Docket No. ER82-9-000

Filed : October 7, 1981
Effective: Commencement of Service

<u>Designation</u>	<u>Other Party</u>
(1) <u>Carolina Power & Light Company</u> Rate Schedule FERC No. 121 Power Coordination Agreement (Supersedes the Following Rate Schedules)	North Carolina Municipal Power Agency Number 3
FPC No. 68	Town of Louisburg
FPC No. 72	Town of Apex
FPC No. 73	Town of Benson
FPC No. 74	Town of Clayton
FPC No. 77	Town of Red Springs
FPC No. 79	City of Southport
FPC No. 81	Town of Fremont
FPC No. 83	Town of La Grange
FPC No. 85	Town of Pikeville
FPC No. 87	Town of Smithfield
FPC No. 88	Town of Wake Forest
FPC No. 90	City of Wilson
FPC No. 94	City of Rocky Mount
FPC No. 99	City of Kinston
(Supersedes Service Agreements under FPC Electric Tariff, First Revised Volume No. 1)	Town of Ayden Town of Farmville Town of Hookerton City of Laurinburg City of Lumberton Town of Selma
(2) Exhibit (A) to Rate Schedule FERC No. 121 (Operating and Fuel Agreement)	
(3) Exhibit (B) to Rate Schedule FERC No. 121 (Purchase, Construction and Ownership Agreement)	

PROCEEDING IN ARBITRATION

NORTH CAROLINA EASTERN MUNICIPAL
POWER AGENCY,

Initiating Party,

v.

CAROLINA POWER & LIGHT COMPANY,

Responding Party.

MOTION TO STAY THE
ARBITRATION PROCEEDING

TO: The Honorable Sidney O. Smith, Jr., Arbitrator

Carolina Power & Light Company ("CP&L") hereby moves for an order staying this arbitration proceeding pending resolution of a Petition for Review filed by North Carolina Eastern Municipal Power Agency ("Power Agency") in the United States Court of Appeals for the District of Columbia Circuit. The grounds for CP&L's motion are that, in the related litigation, Power Agency seeks rulings which could (i) render this arbitration unnecessary in its entirety; (ii) greatly limit the issues to be decided in this arbitration; and (iii) result in decisions or rulings that are inconsistent or contradictory with the Award rendered in this proceeding. In support of this motion, CP&L states the following:

Factual Background

This arbitration arises from a Power Coordination Agreement entered into by Power Agency and CP&L in 1981 ("the 1981 PCA"). Pursuant to the 1981 PCA, CP&L provides Power Agency with backstand, supplemental power and transmission services that enable Power Agency to provide All Requirements Bulk Power Service to its thirty-two municipal participants.

Under the 1981 PCA, CP&L is obligated to backstand power supplied by generation facilities Power Agency jointly owns with CP&L ("the Joint Units"), and to provide Power Agency with Supplemental Capacity and Energy in amounts required by Power Agency and its participants. In exchange, Power Agency agreed to purchase its backstand and Supplemental Capacity from CP&L on agreed upon terms.

The 1981 PCA also states terms and conditions by which Power Agency may serve its supplemental load with power generation resources other than those provided by CP&L. Under Sections 6.1(D) and 6.1(E) of the 1981 PCA, Power Agency may displace purchases of Supplemental Capacity from CP&L with another resource if the resource qualifies as a "New Resource" as defined in the 1981 PCA, and if appropriate eight-year notice is provided. If these terms are satisfied, CP&L and Power Agency are required by Section 6.1(D)(1) of the 1981 PCA to undertake negotiations for a power coordination agreement for that new resource.

Power Agency seeks to acquire a resource from South Carolina Public Service Authority ("Santee Cooper"), which it

intends to use to displace Supplemental Capacity and energy purchases from CP&L. In early 1988, CP&L and Power Agency had preliminary discussions regarding a draft power coordination agreement for the Santee Cooper resource. From the outset of these discussions, Power Agency threatened that if CP&L did not capitulate to its terms and conditions, Power Agency would file a complaint with the Federal Regulatory Energy Commission ("FERC"), asking the Commission to impose a power coordination agreement on CP&L.

The FERC Proceeding And Power Agency's
Pending Appeal In The D.C. Circuit

On June 7, 1988, after only three negotiating sessions, Power Agency filed a complaint against CP&L with FERC. Power Agency alleged that CP&L had failed to negotiate in good faith to reach agreement with Power Agency on arrangements for its use of the resource it sought to acquire from Santee Cooper. Along with the complaint, Power Agency submitted a proposed power coordination agreement (the "1988A PCA"), between Power Agency and CP&L which it asked FERC to impose on CP&L. A copy of the complaint is attached as Exhibit A.

CP&L answered the complaint and alleged that Power Agency had failed to negotiate in good faith regarding the terms of the proposed power coordination agreement and that good faith negotiation would have resulted in an agreement that would enable Power Agency to use the Santee Cooper power. CP&L also moved to dismiss the complaint on the ground that the dispute between it and

Power Agency arises from the 1981 PCA, and that pursuant to Section 22.2(A) of the 1981 PCA, the parties are required to submit all unresolved disputes that arise out of or relate to the 1981 PCA to arbitration. A copy of CP&L's answer and motion to dismiss is attached as Exhibit B.

On December 22, 1988, FERC issued an Order which found that the dispute between CP&L and Power Agency was subject to arbitration under the 1981 PCA, and accordingly, dismissed Power Agency's complaint without prejudice to Power Agency's refiling upon completion of arbitration. A copy of FERC's Order is attached as Exhibit C.

On January 23, 1989, Power Agency filed a motion for clarification and a conditional request for rehearing of FERC's December 22, 1988 Order. Power Agency argued that pursuant to Sections 6.1(C)(3) and 6.1(E) of the 1981 PCA, it is entitled to have FERC resolve in the first instance disputes which relate to the terms and conditions of interconnection, and that such disputes are not subject to the general arbitration clause set out in Section 22.2(A) of the 1981 PCA. A copy of Power Agency's motion is attached as Exhibit D.

By Order dated February 22, 1989, FERC denied Power Agency's motion for clarification and rehearing. FERC ruled that the arbitration clause of the 1981 PCA applies to all disputes arising out of or relating to the 1981 PCA (with only two exceptions not at issue here), including disputes as to whether or

not a particular issue is subject to arbitration in the first instance. A copy of FERC's order is attached as Exhibit E.

On March 23, 1989, Power Agency filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit seeking review of FERC's orders issued on December 22, 1988 and February 22, 1989 dismissing Power Agency's complaint based on a finding that the dispute was subject to the arbitration clause in the 1981 PCA and denying Power Agency's subsequent motion for clarification and conditional request for rehearing, North Carolina Eastern Municipal Power Agency v. FERC, D.C. Cir. No. 89-1205. A copy of Power Agency's Petition for Review is attached as Exhibit F. The parties have agreed to an expedited briefing schedule for the appeal. The motion setting forth that schedule is attached as Exhibit G.

Power Agency Raises The Same Issues In Its Appeal Of FERC's Order And In The Arbitration Proceeding

On May 4, 1989 Power Agency commenced this arbitration proceeding by filing a Notice of Intention to Arbitrate ("the Notice"). In the Notice, Power Agency has unconditionally submitted to arbitration three issues which it concedes arise from or relate to the 1981 PCA. Power Agency has also conditionally submitted to arbitration seven additional issues which it claims do not arise from or relate to the 1981 PCA, but instead are issues regarding the terms and conditions of an agreement for the Santee Cooper resource which Power Agency claims it is entitled to have resolved by FERC in the first instance pursuant to Sections

6.1(C)(3) and 6.1(E) of the 1981 PCA. Power Agency states in the Notice that if the Court of Appeals agrees with its position, it will withdraw these issues from arbitration.

CP&L believes that the issues conditionally submitted by Power Agency to arbitration are disputes as to the correct interpretation of the 1981 PCA and are therefore appropriately submitted to arbitration. For example, Power Agency had conditionally submitted to arbitration the issue of whether it is entitled to "After-the-Fact Classification of Energy" provided by the Santee Cooper resource, which in effect, would enable Power Agency to elect between taking backstand service from Santee Cooper or CP&L, depending on which service was lower priced on an incremental basis. It is CP&L's position that the 1981 PCA requires Power Agency to purchase its backstand services from CP&L and that Power Agency is not entitled to make such an election. CP&L believes this dispute arises out of or relates to the 1981 PCA, and should therefore be resolved by arbitration in the first instance, and not by FERC. Power Agency is unwilling to accept the legitimacy of this Arbitration as the forum for resolving this dispute and seeks a ruling in its favor on this issue from the Court of Appeals.

The Same Issues Should Not Be Considered In
Different Forums At The Same Time

CP&L is prepared and willing to go forward with this arbitration if it is agreed by both parties to be the proper device for resolution of the dispute between CP&L and Power Agency.

Alternatively, it is prepared and willing to litigate in the Court of Appeals as to the correctness of the Commission's order on that issue. However, CP&L is not willing to acquiesce in Power Agency's effort to pursue the same issue simultaneously both in arbitration and before the Court of Appeals.

CP&L submits that it is inefficient and wasteful to arbitrate issues relating to Power Agency's use of Santee Cooper resources in a piecemeal fashion before two different tribunals when, as here, the issues are obviously inter-related and inter-dependent with each other.¹ Accordingly, this arbitration should not proceed until Power Agency has either accepted this forum as the legitimate tribunal for this entire dispute or the Court of Appeals has rendered judgment on the validity of FERC's order referring the matter to arbitration. If Power Agency pursues its

¹ In fact, Power Agency is pursuing its claims in five proceedings in four forums. In addition to its D.C. Circuit appeal of FERC's order dismissing Power Agency's complaint against CP&L and this arbitration proceeding, Power Agency has raised the same issues in another proceeding before FERC and in a complaint before the Nuclear Regulatory Commission. In a separate FERC docket established to review a bulk power purchase arrangement between CP&L and Duke Power Company, Power Agency has once again complained to FERC of CP&L's failure to agree to Power Agency's proposed use of Santee Cooper resources. See Power Agency's December 28, 1988 Protest, Motion to Intervene and Request for Suspension and Hearings, In re Duke Power Co. (FERC Docket No. ER89-106-000). Power Agency has sought yet another forum in which to raise this dispute, having filed with the Nuclear Regulatory Commission on May 5, 1989 an informal antitrust complaint (attaching a copy of its Notice for this pending arbitration) requesting enforcement action against CP&L based on this same proposed use of Santee Cooper resources. Thus, Power Agency has raised this same dispute in five separate proceedings: in two separate dockets before FERC, one in the U.S. Court of Appeals, one before the NRC, and now in this arbitration proceeding.

appeal and the Court of Appeals agrees with Power Agency that Power Agency is entitled to submit the issues conditionally submitted here directly to FERC for resolution in the first instance, this proceeding may be completely unnecessary, or, at the very least, the proceeding will be much more limited in scope. If the Court of Appeals were to agree with the Commission that all issues, including both those submitted conditionally and unconditionally to this proceeding, are subject to arbitration, it would be appropriate at that time to proceed with arbitration of all issues.

Notably, the Court of Appeals case is proceeding on an expeditious track. CP&L and Power Agency have agreed to an expedited briefing schedule proposed by FERC staff. Under the proposal, final briefs to the Court of Appeals are due in the first week of January, 1990 and the case will then be ready for oral argument.

Further, if this proceeding continues at this time, there is a risk that this arbitration and simultaneous proceedings before the Court of Appeals or FERC will result in inconsistent and contradictory decisions. For example, using the example stated above, CP&L seeks an Award in these proceedings which would hold that Power Agency cannot use the Santee Cooper resource to displace backstand services provided by CP&L, while, if Power Agency were successful before the Court of Appeals and obtained a remand, Power Agency would seek a ruling from FERC that Power Agency is entitled to "After-the-Fact Classification of Energy" provided by the Santee Cooper resource. While CP&L believes that both tribunals should

rule favorably on its position on the issue and all others, the possibility of inconsistent rulings in the two forums must be recognized. The Arbitrator should exercise his authority to avoid that result.

Cases in which courts have stayed a proceeding pending the outcome of another proceeding support granting a stay here. It is well established that "the power to stay proceedings is incidental to the power in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants." Landis v. North American Co., 299 U.S. 248, 254 (1936); accord, Watters v. Parrish, 252 N.C. 787, 115 SE.2d 1, 4 (1960); see also Henry v. Stewart, 203 Kan. 289, 454 P.2d 7, 11 (1969) (rule of comity between courts of concurrent jurisdiction is most beneficial and is bottomed upon the principle of wisdom and justice to prevent vexation, oppression, and harassment, and to eliminate unnecessary litigation in a multiplicity of suits). As noted above, a stay here would prevent unnecessarily duplicative determinations of the issues pending before both this tribunal and the United States Court of Appeals for the District of Columbia Circuit.

Until the Court of Appeals' decision is rendered, or until Power Agency recognizes the legitimacy of this Arbitration by withdrawing that appeal, neither CP&L or Power Agency can properly plan discovery or otherwise prepare their cases in an efficient and economic manner. Moreover, the possibility exists that all of that expense and effort, including that of the Arbitrator, could be

rendered meaningless and unnecessary. Thus, in order to avoid unnecessary expense and waste of resources in preparation for arbitration of issues that may or may not be appropriately submitted in this proceeding, CP&L respectfully submits that all proceedings in this arbitration should be stayed until either the Court of Appeals has ruled on Power Agency's Petition for Review or that appeal is no longer pending for some other reason.

WHEREFORE, for the foregoing reasons, the arbitrator should order that this arbitration proceeding be held in abeyance pending resolution of Power Agency's appeal of FERC's orders dismissing Power Agency's complaint against CP&L or, alternatively, Power Agency's acceptance of this forum as the legitimate tribunal for the resolution of these disputes.

Respectfully submitted,



George K. Avery
Lynda S. Mounts
Gregory M. Petrick
CADWALADER, WICKERSHAM & TAFT
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 862-2200

Of Counsel:

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Carolina Power & Light Company
411 Fayetteville Street
Raleigh, North Carolina 27602

Counsel for Carolina Power &
Light Company

Dated: June 14, 1989

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion to Stay the Arbitration Proceeding, this 14th day of June, 1989, by hand before 6:00 p.m. on:

James N. Horwood, Esq.
Gary Newell, Esq.
Spiegel & McDiarmid
Suite 1100
1350 New York Avenue, N.W.
Washington, D.C. 20005-4798

and by Federal Express on:

Michael S. Colo, Esq.
Poyner & Spruill
133 South Franklin Street (27804)
Post Office Drawer 353
Rocky Mount, North Carolina 27802-0353



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