NRC PUBLIC DOCUMENT ROOM

15 February 1979

Dockets 50-400/403

Response of Kudzu Alliance and Wells Eddleman
to Applicant's 9 February Answer to
their Appeal Brief and Notice

TO THE ATOMIC SAFETY AND LICENSING APPEAL BOARD:

1. With respect to our petition for general intervention, we find there are facts contradicting George F. Trowbridge's argument that no one can be made a party to all hearings associated with a nuclear power plant license. Dennis Myers of the NC Attorney General's office told me he believed that office was a party to the upcoming safe management capability hearings "because we were a party in the original case." To our knowledge, the Conservation Council of North Carolina has not had to file separately to intervene in each hearing as it comes along.

Thus, while we don't know enough about NRC precedents to say whether an order making us a party to all hearings on the Harris case is allowed, we see other parties apparently continuing their participation without continual filing of petitions to intervene. This practice seems sensible as it avoids wasting the intervenors', ASLB's, and Applicant's attorneys' time re-arguing the same questions over and over. (That latter situation, Applicant's lawyers profess to abhor.)

Briefly, given the extensive interests of Kudzu Alliance members (lives, health, property, businesses near the plant; owning shares of CP & L stock; paying the costs of the plant through electric bills; paying the costs of nuclear research through taxes; possibly paying for waste disposal through taxes, etc etc as cited 7 and 29 November 1978, 4 January 79), we think that we are ~~xxxxxii~~ so deeply and extensively interested in the case that our participation now on the same basis as the CCNC and the NC Attorney General's office is justified. We note again that the ASLB did not consider our interests, as required by section 2.714 (d) with the command "shall, in ruling on a petition for leave to intervene, consider the following factors, among other things," listing right to be made a party under the (Atomic Energy) Act, financial, property or other interest, and the possible effect of any order in the case on

the petit'oners' interests. Since Trowbridge didn't object to our extensive assertion on pages 4 and 5 of our appeal brief that the ASLB erred in not weighing these factors together with those of section 2.714 (a) (1), and that all three of these factors weigh in our favor, we feel that an order admitting Kudzu Alliance and Wells Eddleman as parties would have been very much in order. Further, participation on the same basis as the CCNC and the NC Attorney General's office (i.e. not having to re-file petitions to intervene in every hearing) would save time and effort in the hearing process, which saving Applicant says it desires. As noted in the 4 Jan 79 amendment to our petition to intervene (which should be considered part of this response for purpose of giving the ASLAB the information it contains), Wells Eddleman has all the interests listed in paragraph 3 of page 1 of this response, and indeed as an energy conservation & management consultant is a direct competitor with the proposed Harris facility. Thus he is entitled to the same status as is the Kudzu Alliance.

None of the types of hearings and proceedings listed by Trowbridge on page 3 of his "Answer" are such that Kudzu Alliance and Wells Eddleman do not have an interest in them; nor does he argue that we are not possessed of an interest in each and all of them. In fact, we have shown in our petition, its amendments and our appeal brief that we have interests in every aspect of the plant from antitrust to zoology, i.e. extremely inclusive interests of both petitioners.

Therefore we urge at minimum that the ASLB be directed to reconsider the two petitions for general intervention, because of its error in not weighing the 2.714 (d) factors noted above, and because several of the other factors were erroneously ruled against us among the 5 in 2.714 (a) (1).

3 response to applicant's answer to Kudzu Alliance/Eddleman appeal [illegible]

2. With reference to the petitions to intervene in the uncoming hearings on safe management capability:

First, Trowbridge's argument that the original NRC remand order includes only the narrow topic of the OIA (Office of Inspector and Auditor?) internal NRC investigation of misleading testimony in the original hearing, ~~xx~~ should be rejected. The NRC staff has repeatedly taken the position that the subject of the hearing is CP & L's financial and management capability to construct and operate the Harris facility without undue risk to public health and safety.[1] The Staff has taken this position often and repeatedly (see footnote 1 below) in this petition, as well as the hearing case. Applicant and its attorneys have had ample opportunity to dispute these assertions in response to the NRC Staff filings. To our information, they have never done so until now.

Petitioners believe the issue is twofold: safe financial-construction and management capability AND the question of how information was withheld from the ASLB. Unless we can be sure that the ASLB is getting full factual information, we can have no real faith in its decisions on management capability or any other question. A hearing record in which both issues (accuracy of information in the hearing and safe management/financial capability) are not resolved is by definition unsound. This is another reason why we desire to participate in these hearings, and we have raised these questions before on 7 and 29 November and elsewhere.

Trowbridge gives no reason why limiting the hearings' subject

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[1] Barth to Eddleman 6 November 78 "We expect to hold hearings in Raleigh before the end of the year (1978) on CP & L's management capability to construct and operate the Harris facility." In Barth's 24 November 78 response to petition to intervene, page 2, "By an order dated September 5, 1978, the Commission remanded to this Licensing Board for a further hearing on the issue of the management capabilities of CP & L to construct and operate the proposed Shearon Harris facility without undue risk to the health and safety of the public." NRC Staff memorandum on legal issues for this hearing asserts the same issues and states the burden of proof of these issues is on the Applicant, as always. The ASLB's order of 24 Jan 79 setting hearing dates also states the issue is safe management capability. [illegible]

to the narrow questions he describes (QIA audit only, basically) will result in a sound record or a complete hearing. We note above that such limitations will frustrate those objectives. Moreover, Trowbridge makes no showing that the issues we raise are irrelevant to safe management capability. Thus their exclusion may make the record unsound, and necessitate still more hearings later, when more money invested in the Harris plant construction will make a decision based on the facts that much more difficult to render given the weight of CP & L's investment particularly if such decision were to require major changes in construction or its suspension. We have argued 29 November 78 and elsewhere that every issue we raise is relevant in some way (often directly) to safe management and or sound financial capability of CP & L. However, if even some of the issues are relevant, that is a further argument in favor of admitting us, in the interest of developing a sound record and protecting petitoners' interests as well as Applicant's right to prompt resolution of issues (which applicant's attorneys, by their delaying tactics, may jeopardize; but petitioners are not now concerned with legal tactics of the applicant being the best for their interests).

Trowbridge's argument is particularly weak when he asserts that the fitness of the Applicant's contractors is not a proper part of these hearings. We are now hearing of base-mat problems at ~~xx~~ two other Daniel nuclear plants (one, Callaway, MO; another at ~~Wolf~~ Wolf Creek, Kansas). ~~If xxkix~~ How can it be safe management to hire an unsafe builder? If this is not mismanagement it is certainly further suppression of relevant information to try to keep the issue out of these hearings. This sort of unwillingness to face the problems with nuclear power is precisely the reason more and more people are coming to distrust the power companies and the NRC. I urge that these issues be considered before it's too late, and the issue becomes whether to license a plant that is built with dangerous construction errors, or to stick CP & L and its shareholders

& 5 response to applicant's answer to kudzu alliance/eddleman appeal with a billion-dollar (or much more) loss. That would be the height of regulatory irresponsibility.

In sum, Trowbridge is wrong: the issue is safe management capability and financial responsibility, as well as suppression of information. Keeping the safe management issue and relevant aspects of it such as the qualifications of contractors out of the current hearings can only result in an unsound record and further hearings and delays as the NRC then tries to correct the errors Applicant's attorneys would have them make.

Finally, it is absurd to argue here(re the subject of the hearings) that the new or different issues raised by petitioners may not be heard, ("Answer" pages 5 and 6) and then argue later ("Answer" page 7 and 8) that petitioners have nothing new to contribute to the sound record of any hearings. Indeed, in footnote 4 on page 7, Trowbridge contradicts his earlier argument on the hearing issue, saying "Since under the Commission's order the remanded issue includes Applicant's management capability to operate as well as construct the Harris units ...". We will leave Trowbridge to resolve this argument with himself, but in no case should the Appeal Board take seriously his self-contradicted ideas about limiting the scope of the hearings.

Concerning the 5 issues of 2.714 (a) (1), we have already noted the ASLB's failure to consider the issues of 2.714 (d) which weigh in our favor strongly; there is no language in section 2.714 stating that any of the five factors listed should be given greater weight than any or all of the others. Rather, "a balancing of the following factors in addition to those set out in paragraph (d) of this section" is required. [redacted] The Board appears to have given greater weight to the "good cause" factor than any other. This may well be an error. However, it is the complete balance of all eight factors involved that petitioners believe should properly decide the question of our admission

as intervenors, with respect to all four petitions cited in our appeal brief. (17 Jan 79)

We believe that "good cause" for nontimely filing should not be given more weight than the other factors involved, particularly if it is to be narrowly interpreted as the ASLB seems ~~inclined~~ to have taken it.

We have explicitly addressed the question of other people moving into the power plant area and other organizations forming. With respect to us, their was certainly no intent to circumvent NRC regulations in the formation of Kudzu Alliance or Eddleman's moving to this area near the Harris nuclear site. No one has argued that there was any intent to circumvent the rules and regulations of the NRC.

Applicant maintains that a ruling in our favor on this point would subject CP & L to continual litigation on the plant. If applicant's attorneys will note some facts, nuclear power plants are subject to continual litigation in many cases: consider e.g. Trojan, Humboldt Bay, North Anna (reactors similar to Harris's according to CP & L's PSAR), Indian Point etc. Thus a ruling against us on this point will not relieve CP & L of continuing litigation unless they can subvert the Conservation Council of NC as they evidently did Wake Environment (as we have mentioned earlier) and persuade the NC Attorney General to withdraw from the case. In that ~~unlikely~~ event, no one would be representing citizens' rights in the case, and doubtless other individuals and groups would try to gain citizen representation, shareholder representation etc, leading to still more litigation. Thus, in no way does denying our petition to intervene (any of the 4) relieve CP & L of further litigation on the issues. Nuclear power's problems, not intervenors, assure furtner litigation.

What denying our participation does assure is that we are denied the rights of citizens to participate in decisions affecting us. In a society as mobile as America today, where organizations are free to form

without government approval (or CP & L's), ever-larger numbers of people and groups will be denied the right or ability to participate in nuclear decisions that do affect many of their vital interests. This is undemocratic and contrary to the Constitution's general welfare clause, the prohibition against taking "life liberty or property without due process of law", and other points of the Constitution and federal law.

In sum, denying our intervention will not relieve CP & L of further litigation; but it will deny our rights. Further, since only a balancing of the eight 2.714 factors is required to admit an intervenor, it is perfectly possible that all 4 petitions to intervene could be approved without asserting any general right of new residents and new groups to participate in licensing of nearby nuclear plants that affect them (much as we endorse that right). Thus CP & L's argument at best asks for relief from litigation which the NRC is powerless to grant and which experience shows will likely not be forthcoming in any case, at the price of denying the rights of hundreds of persons explicitly and millions implicitly.

We have also argued that the lack of information, and the misinformation circulated about intervention, contributes to our filing only when we did. Wells Eddleman decided to test the assertion that we could not intervene. Kudzu Alliance concurred in this test and here we are. The experiment is not over yet. We must point out that many individuals and groups still don't know the plant is being built, what it does, how much radioactive material it will contain, the hazards of nuclear waste, etc. It is absurd to argue that citizens must be experts with unique information (this seems the intent of Trowbridge's arguments pages 7 and 8) in order to participate in the hearings. Trowbridge himself, if he will excuse such an example, has not to our knowledge shown any special expertise in nuclear power plants or evaluation of their hazards, nor to our knowledge is any such expertise required of attorneys in this or any other nuclear case. To ask that we meet requirements applicant's

torneys have given us no indication that they meet, is unfair and absurd. plicant bears the burden of proof, which may well be onerous. If they not need special qualifications to bear that burden, it is strange ey should ask use to be general experts with all possible information order to bear the smaller burden of assisting in developing a sound cord. Indeed, the voluminous information on nuclear hazards available kes our task much easier than theirs, since they must prove their case. we introduce reasonable doubts, we can prevail. Yet, what expertise required to do that? Surely no more than we have already shown we ve. On one explicit point (footnote 6, p.8) Trowbridge appears question the value of investigative experience. Wells Eddleman ates that while he may not be the best investigator known, he has dealt the investigations listed with many people who skillfully attempted conceal relevant information, and often revealed the information. at is the point of these hearings, as Trowbridge would have it (we ink the point is broader, see above): Concealed information.

One does not have to have managed a nuclear power plant to raise od questions about management (Trowbridge omits to mention the managers ong Kudzu members, or Eddleman's graduate management courses). (p.8) Trowbridge really requires explicit explanation, systems engineering exactly the branch of engineering appropriate to independent evaluation nuclear power plants (complex systems, we're sure he'll agree) and their management in a safe manner (also a complex task). We explicitly ate that our knowledge will be useful in catching technical errors testimony, in understanding what can and cannot reasonably be expected people working in a plant in terms of accuracy, tiredness, errors, erwork etc. (all these issues are raised e.g. in Floyd Cantrell's testimony the uncoming hearings, which to my knowledged Eddleman alone of intervenors and petitioners has yet read).

NOTE 2 continued: We have stated that we can serve as a conduit for such information (the NRC allows for confidential informants on nuclear problems) while assuring that the persons who give the information will be protected. The NRC evidently is not doing well at providing such protection (Wm. Smart case again--involved Daniel, CP & L's constructor). While we would hope we were past the time in this country when some sorry corporation (or the US government) would fire someone for telling the truth, we know from the congressional report on whistle-blowers (who reveal govt waste, corruption etc) and from numerous nuclear cases, that this is not so. Thus people with information rightly fear for their job security. Indeed, we've heard Kudzu members say that they could lose their non-nuclear jobs if they were to vocally anti-nuclear. That is the sorry situation in this case.

For example, CP & L might find some non-nuclear deficiencies in the performance of our informants who say the true cost of the Harris plant is now figured from $6 to $8 billion. The employees' would lose their jobs and have no recourse. The facts, however, can be revealed. Let CP & L come forward with their current cost accounting, quickly lest they prepare a faked statement, and show what they now estimate the cost to be.

In sum, leaked information is vital to many investigations, and many who have such information rightly fear for their job security if they were revealed as information sources. This is the reason Kudzu Alliance has undertaken to protect the names of its sources. The information will speak for itself.

Contrary to Trowbridge's argument on page 9 of his "answer", the ASLB's intention to pursue the further development of the record is only part of the ASLB's duty, and to admit us as intervenors might be to admit that the ASLB could stand some help in that task. The record of the ASLB's interview with OIA indicates that that may well we the case (October 1978). To ~~xxxx~~ borrow Trowbridge's language, the ASLB does not indicate how it will pursue the case or what expertise will be brought to bear on it. Only one board member states explicitly that he would have pursued the issue further immediately on hearing Cantrell's concerns had they not been suppressed, though the full ASLB says it now will investigate. We submit that in no way does the ASLB's intention to participate now guarantee a sound record to the extent that we would not be able to provide further assistance in developing the record.

It is absurd to claim that the ASLB deserves special deference to its promises to investigate, such that our own willingness to investigate may not even be allowed. Beware an investigation that will not allow

esponse to applicant's answer to kudzu alliance/eddleman appeal 2.15.79
(S no requirement that we state all our contentions prior to 15 days
a special prehearing conference — which we've not heard of yet.
e must remind Trowbridge that only "assistance in developing
ound record" is required of us. We do not have to be experts or
lear managers; we can call them as witnesses or persuade the Board
call them (e.g. some of the managers Centrell mentions as resigning
n CP & L): we have explained how we can assist in cross-examination
hich certainly assists in developing a sound record; why else would
ar'ngs still be required when there are no intervenors, if not so the
al'can'ts assertions can be examined?). We have also shown, uncontra-
ted, that several intervenors can be of more assistance than one
developing a sound record, as there will be more time for study
more people available to concentrate on particular topics and to
atch errors or questions in testimony that others may miss.

Finally, as mentioned 4 January, Kudzu Alliance members are the
nly ones (based on discussion with Tom Erwin or CCNC and Dennis Myers,
Atty. Gen.'s office) to have read over the prefiled NRC testimony
n this case. Eddleman in particular has read everything in this filing
xcept for every LER on Brunswick 2 (yet) tho he has reviewed every LER
sted for Robinson 2 and Brunswick 1 reactors. This may not be special
xpertise, but it is necessary preparation to effectively participate
n a case (no offense to Myers or Erwin). We have done it (other Kudzu
embers have read parts of the testimony also: we are not in possession
f a copy of CP & L's response, but will get one and go over it if indeed
some Kudzu members haven't already done so).

We find it absurd that we who are working most on a case may be
kept out of it at this point. If Trowbridge will permit, we will gladly
show him how our knowledge and information may be brought to bear on this
case.[2]

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[2] Trowbridge mentions that many of our informants will not give their names. He characterizes them as unwilling to come forward and be confronted on the accuracy of their statements. He ignores our statement that they fear for their lives if they do so, see e.g. Callaway MO Wm Smart case.

checking on the investigator. At best this is a very weak argument, because our assistance is considered null in order for it to prevail. As we have pointed out, Kudzu may well be better qualified than any existing intervenor to assist in developing this record. We've certainly done more work on it than other intervenors have. To disallow our participation while allowing others who've done less on this matter to participate is absurd.

This brings us to the issue of representation of our interests by existing parties. As we have argued (29 November, xx page 6) the existing parties can take no more interest in us (at best) than a court-appointed, overburdened public defender could take in one of many poor clients. The question is "the Extent to which the petitioner's interest will be xrepresented by existing parties." (2.714 (a) (1) (iii)). Even if the other parties did represent the same interests, all of them, that we do,[3] the extent of that representation is not addressed by Trowbridge. We have argued in detail in our petition and appeal brief that the extent of representation afforded us by intervenors CCNC and NC Attorney General's office is inadequate, though we endorse their efforts. The inadequacy of such representation is shown by existing intervenors not reading the material for these hearings (certainly not in the detail we have), not planning to call witnesses, etc. None of these facts have been challenged. Thus we say that the extent of representation afforded our interests by other parties is inadequate even on the interests we have in common. Our other interests (e.g. as shareholders, as energy competitors of CP & L's) we have only ourselves to give any representation. Thus the extent to which our interests are now represented is quite inadequate.

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[3] They do not; e.g. Eddleman and other Kudzu members are CP & L shareholders. No one has shown another party representing this interest. We have pointed out financial risks to shareholders in this case repeatedly.

The simple remedy is to admit us as intervenors on the basis of the total balance of all the eight factors, which we have shown already is strongly in our favor.

Trowbridge's final argument, about delay, reminds me of Quintus F. Cunctator, "the delayer", who would never meet Hannibal in open battle. Applicant and the NRC staff are the source of delay in these hearings. We could have had nearly 4 months to deal with all the questions following our admission as intervenors had they not opposed us. Now, having delayed us so long, applicant complains that to admit us now would delay matters still more (while they exercise other rights, with which they may delay us further! -- but we have no objection to their exercising their rights fully).

Fortunately, petitioners have not been idle, and have done much of the preparation we intended anyway, though with less energy perhaps due to the difficulty of getting more people to work on something knowing that it may not be listened to at all when it counts. We submit that our actions have not delayed this case, we stated early on that we wanted the hearings speeded up, not slowed down, and that any delay in the case be properly ascribed to Applicant and the NRC staff who have caused the delay, and not to us, who have done nothing to cause it, nor has anyone ever said we have delayed this case in any way.[4]

In sum: If ever an intervenor was qualified to participate in all aspects of a nuclear case by virtue of extensive interests etc, we should qualify and those petitions for general intervention should have been granted.

The ASLB erred in omitting 3 mandated 2.714 d factors from its balancing of factors, and it erred in its decisions wholly on all except (i) late filing where it partially erred and (ii) the correct ruling that

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[4] We are not certain whether Trowbridge's page 1 statement deals with this question because he does not say when he received our appeal. We would like the appeal board to review the date the appeal was sent and determine if Trowbridge's response is late without good cause from the date our appeal got to him. As Trowbridge could have read, we asked the ASLB to forward copies of our filings to other parties because we lack the time and money to make and mail such copies in such numbers. No one has ruled against the ASLB's evident granting of that request, and to do so would impose financial requirements for intervention unreasonably

there are no other means whereby our interest may be represented, which factor should have been given greater weight, and that therefore the ASLB decision denying intervention in the upcoming hearings ought to be reversed, or at least remanded for further consideration.and accurate weighing of the evidence on all eight factors the NRC rules require to be considered.

We wish finally to note that we esteem George F. Trowbridge as a person and in his rights as a citizen etc, and wish no offense to be taken if we reject his arguments with some force.

On behalf of myself and the Kudzu Alliance

Wells Eddleman

Wells Eddleman
15 February 1979 mailed same date.

Note: copies of this are clearer than the original so I have sent a signed copy to the ASLAB.

Correction to Trowbridge's note #1, p.2 of answer:
Only Wells Eddleman has requested the NRC to reopen the Harris hearings. The suggestion the ASLB made was too good for me to pass up. Kudzu Alliance may join in this request, or make its own requests to the NRC at any future time. I look forward to the NRC's determination of how to treat this petition, but it is in no way part of this appeal, or relevant to it. As we have stated, we want intervention. Then we can decide whether as intervenors we should ask for more hearings on issues of importance.

Notary Public
My Commission Expires 11-13-79