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USNRC

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

February 4, 1983

'83 FEB -8 A11:07

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Glenn O. Bright
Dr. James H. Carpenter
James L. Kelley, Chairman

In the Matter of CAROLINA POWER AND LIGHT CO. et al. (Shearon Harris Nuclear Power Plant, Units 1 and 2)	Dockets 50-400 OL 50-401 OL

Wells Eddleman's Answer to Applicants' Motion for Extension of Time of Feb. 1

I received 4 February, 1983, after the time for Applicants to either respond to my interrogatories or object to same had run, (ending February 3, 1983), this motion. I incorporate herein by reference all facts stated in my January 31, 1983 letter to Applicants' attorney Baxter, and make this further answer to the motion:

First, Applicants fail to comply with Pilgrim (LBP - 75- 30 see p. 580 as attached to the Board's Memorandum and Order of 1-25-83) in that they have not shown plainly and specifically why any part of the information sought is either privileged, not relevant, unduly burdensome to produce, or "otherwise improper" to produce. Eddleman 15 is an admitted contention; discovery is open on it; the Board's 1-25 Order did not stay the time to respond to Staff proposed interrogatories, nor did it stay the time for any other parties to respond to any interrogatories, though my interrogatories filed on January 15 should have made it through the mails to the Board and parties before this Order was entered.

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And surely information about how CP&L estimates capacity factors is relevant and material to this contention. It is worth noting that Eddleman 15 is an environmental contention, i.e. it goes to the NEPA cost-benefit balance. Therefore, costs which vary with capacity factor (or matters which affect it, e.g. forced outage rates, repairs, steam generator leaks) such as fuel costs, operation and maintenance costs, and "avoided costs" of energy under PURPA (the subject of inquiry in Docket No. E-100 sub 41 of the NCUC, wherein CP&L estimated avoided energy costs using a PROMOD model, and their witness King noted the complexity of the inputs to that model), is all relevant.

Pilgrim, supra, provides that if information sought through discovery is relevant and material (CP&L has made no specific showing that any of it is not), a party is not excused from furnishing such information on the grounds that it would be burdensome and expensive. (p. 580) Moreover, CP&L has made no showing, only a claim, that production of the information would be burdensome or costly. I believe most of it is in their files and would only need to be copied or summarized. They can surely afford that.

It is my understanding that a proper objection to discovery or an interrogatory must be quite specific as to why the information should not be produced. Applicants do not even identify any of the 42 interrogatories as objectionable or unrelated to Contention 15, nor do they show how any of them are (or may be) unrelated to it. This sort of broad-brush approach appears to violate both the letter and the spirit of Pilgrim and NRC's discovery rules, 2.740 & following.

While the Board's January 11 Order (served Jan. 12 '83) does appear on close reading (p.3) to say the Board will rule on Eddleman 15 OR any timely revisions thereof, there is nothing to preclude one of the revisions being the original contention 15 or virtually

identical to it. I do not interpret the Board's Order of Jan. 11 to say that Eddleman 15 must be abandoned entirely in order to plead revised or additional contentions based on ER Amendment 5's "study" of capacity factors and the costs and benefits therefrom.

Applicants' analysis is wrong: It is unlikely that any revision of Eddleman 15 would not relate to the information sought, since Eddleman 15 is about capacity factor estimates and their effect on operating costs and benefits. To concur with Applicants' view, one must assume that both Eddleman 15 and any revisions thereof will be rejected by the Board. Again, the point is Eddleman 15 is now admitted and discovery is open on it. One cannot assume that the contention and any revisions of it would be completely rejected just in order that Applicants should not respond to interrogatories.

Applicants attempt to distinguish discovery relevant to the admitted contention and discovery related to possible amended contention(s) in this area. This is not possible, I submit, because the estimation of capacity factor and the other factors affecting any costs and benefits of operating a nuclear plant (versus other resources, or at all) which are required to convert a capacity factor estimate into a dollar figure are intimately interrelated. CP&L witness King said as much in NCUC Docket No. E-100 sub 41, just this past December (1982). Thus, any contention which may be a "revision" of Eddleman 15 would necessarily find relevance in the interrogatories propounded on Eddleman 15, or certainly could.

But that is no reason not to answer them. Intervenors are not permitted discovery on a given contention before formulating it. Eddleman 15 has been formulated and admitted, so discovery on it is OK. Other contentions which may not have been formulated yet (and which conceivably might not be formulated at all), and which certainly were not formulated on January 15 (when these interrogatories were filed)

cannot, by definition, have any discovery on them. They don't exist, they aren't before the Board or the parties, as of the time these interrogatories were served. So these interrogatories cannot be viewed as discovery ON new or revised contentions not made yet.

If Applicants' view that discovery on matters which may relate to a possible further or future or revised contention which may later be filed, shall not be permitted, even though the discovery relates to an admitted contention, were accepted, the hearing would become a morass of delay. For in virtually every area in which any party has raised contentions, new contentions may be filed based on documents NRC Staff, Applicants or others have not yet produced or made available. Moreover, one purpose of discovery upon admitted contentions is to enable them to be revised or specified more precisely. (See e.g. 10 CFR 2.752(a)(1), (a) after (a)(6) (last paragraph) and 2.752(c) which includes amendments to the pleadings (contentions).)

Under Applicants' reasoning in their Motion, any discovery which might relate to some future contention would be stayed until that future contention is pleaded, and ruled upon. This would be true of discovery related to admitted contentions. I just don't see how discovery could be conducted under such conditions, as Applicants could almost always have a motion pending to dismiss or reject any given contention, and could invariably argue that future contentions or revisions of the admitted contention might be made.

But, as 2.752 above clearly shows, any contention may be revised subject to the approval of the Board. Thus, all contentions are subject to the sort of objection (if such it be) that Applicants raise here, and discovery would become impossible. The Board has consistently ruled so far that discovery is open on all admitted contentions pursuant to its 9/22/82 Order. Applicants deserve no exception.

W. Linderman