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USNRC  
March 15, 1985

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CAROLINA POWER & LIGHT COMPANY	)	
and NORTH CAROLINA EASTERN	)	Docket No. 50-400 OL
MUNICIPAL POWER AGENCY	)	
	)	
(Shearon Harris Nuclear Power	)	
Plant)	)	

APPLICANTS' RESPONSE TO INTERVENOR EDDLEMAN'S  
MOTION FOR RECONSIDERATION OF EDDLEMAN 57-C-7

I. Introduction

On March 1, 1985, intervenor Wells Eddleman filed a "Motion to Reconsider re Contention 57-C-7," noting the recent issuance of the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in GUARD v. NRC, No. 84-1091 (D.C. Cir. Feb. 12, 1985).<sup>1/</sup> As Mr. Eddleman points out, the Court of Appeals there

<sup>1/</sup> The mandate in the case has not yet issued. Pursuant to Rule 14 of the Rules of the U.S. Court of Appeals for the D.C. Circuit, "the Court will ordinarily include as a part of its disposition an instruction that the Clerk withhold issuance of the mandate until the expiration of the time for filing a petition for rehearing or a suggestion of the appropriateness of rehearing en banc and, if such petition or suggestion is timely filed, until seven days after disposition thereof." The rule further provides that where (as here) "the United States, or an agency or officer thereof, is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment."

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\* \* \* reject[ed] as irrational the NRC's generic interpretation [in Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), CLI-83-10, 17 N.R.C. 528 (1983)] of section 50.47(b)(12) with respect to members of the public exposed to dangerous levels of radiation.

Slip op. at 13. Observing that the Board here relied on the Commission's San Onofre decision in ruling on the admissibility of Eddleman 57-C-7, Mr. Eddleman requests that the Board "reconsider and admit Contention 57-C-7 as originally drafted (or appropriately modified consistent with the Court of Appeals' decision)." Applicants respond herein to Mr. Eddleman's motion. As set forth below, the Board should defer ruling on Mr. Eddleman's motion pending Commission guidance on the matter, both for legal and policy reasons as well as practical considerations.

## II. Argument

In its San Onofre decision, the Commission interpreted a specific section of its regulations, to define the scope of emergency planning for medical services for members of the general public. As both the Commission and the Court of Appeals observed in their respective opinions, "the interpretation of the regulation [§50.47(b)(12)] involves a significant issue of policy that affects other plants and proceedings." 17 N.R.C. at 530, quoted in GUARD, slip op. at 7. Accordingly, the Court's opinion

\* \* \* vacate[s] the dispositions on review that state or apply the generic interpretation and remand[s] [the] matter to the agency for further consideration consistent with [the] opinion.

Slip op. at 13 (emphasis supplied). Where the Commission has interpreted its own regulations and made agency policy, it falls to the licensing boards to apply those interpretations and policy determinations in individual adjudicatory proceedings. As this Board has previously recognized, the Commission's interpretations of its regulations are binding on its subsidiary tribunals. See, e.g., LBP-84-29B, 20 N.R.C. 389, 402 (1984). Cf. Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 N.R.C. 453, 465 (1982). It is therefore appropriate for the Board here to defer action on Mr. Eddleman's motion pending further Commission policy guidance on the interpretation of 10 C.F.R. § 50.47(b)(12).<sup>2/</sup>

Moreover, there are compelling practical considerations which militate in favor of deferring action on Mr. Eddleman's motion. The post-GUARD interpretation of 10 C.F.R. § 50.47(b)(12) is by no means a foregone conclusion. The Court of Appeals emphasized that its ruling

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<sup>2/</sup> Counsel for Applicants are informed that the NRC Office of General Counsel is already preparing an "options paper" for the Commission in response to the GUARD decision.

\* \* \* impose[s] no tight restraint on the NRC's regulatory authority. The Commission, on remand, may concentrate on the SONGS record; it may revisit the question, not now before [the Court] for review, of the scope of the section 50.47(b)(12) phrase "contaminated injured individuals"; it may describe genuine "arrangements" for medical services for dangerously exposed members of the general public; or it may pursue any other rational course.

Slip op. at 3-4. Thus, while the GUARD opinion makes it quite clear what the Commission may not do in interpreting 10 C.F.R. § 50.47(b)(12), it is equally clear that the Court of Appeals has not defined what the Commission must do. Rather, the Court has allowed the Commission great latitude in interpreting the regulation in response to GUARD.

In light of the broad range of options open to the Commission under the GUARD opinion, any licensing board ruling interpreting § 50.47(b)(12) now would be premature, and could be based on little more than speculation as to the action which the Commission will elect to take. Any such licensing board rulings would run a very real risk of conflict with the Commission's policy guidance, when it issues. Accordingly, deferral of ruling on Mr. Eddleman's motion is also appropriate in the interests of efficiency and avoidance of needless expenditures of time and resources by the Board and the parties.

### III. Conclusion

For the reasons stated, the Board should defer ruling on Mr. Eddleman's motion, pending generic Commission policy guidance in response to the GUARD decision. For the present, the Board should establish a schedule calling for submittal of intervenors' views<sup>3/</sup> on the litigability of proposed contentions

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<sup>3/</sup> Applicants note that the Board discussed the Commission's San Onofre decision in ruling on the admissibility of Mr. Eddleman's contentions (Eddleman-56, Eddleman-63, Eddleman 57-C-7, and Eddleman 57-C-8), as well as CHANGE-33. The Commission's decision was also discussed in "Applicants' Motion For Summary Disposition of Eddleman 57-C-7" (January 2, 1985).

within 20 days of issuance of the Commission guidance, with the responses of Applicants and the NRC Staff/FEMA due 10 days after service of the intervenors' submittals.<sup>4/</sup>

Respectfully submitted,

*Thomas A. Baxter*

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Thomas A. Baxter, P.C.  
Delissa A. Ridgway  
SHAW, PITTMAN, POTTS & TROWBRIDGE  
1800 M Street, N.W.  
Washington, D.C. 20036  
(202) 822-1000

Richard E. Jones  
Dale E. Hollar  
CAROLINA POWER & LIGHT COMPANY  
P.O. Box 1551  
Raleigh, North Carolina 27602  
(919) 836-7707

Counsel for Applicants

Dated: March 15, 1985

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<sup>4/</sup> It is simply insufficient for Mr. Eddleman to ask the Board to "appropriately" modify Eddleman 57-C-7 "consistent with the Court of Appeals' decision." It is up to the intervenor -- not the licensing board -- to frame proposed contentions, and to supply the bases for them. This schedule will enable all parties to cast their arguments on the litigability of contentions (including the bases therefor) with specific reference to the Commission's interpretation of the regulation, and will permit Applicants and the Staff to address intervenors' specific proposals.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response to Intervenor Eddleman's Motion for Reconsideration of Eddleman 57-C-7" were served this 15th day of March, 1985, by deposit in the U.S. mail, first class, postage prepaid, upon the parties listed on the attached Service List.

  
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Thomas A. Baxter

Dated: March 15, 1985



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SERVICE LIST

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

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

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

Charles A. Barth, Esquire  
Janice E. Moore, Esquire  
Office of Executive Legal Director  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Docketing and Service Section  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mr. Daniel F. Read, President  
CHANGE  
P.O. Box 2151  
Raleigh, North Carolina 27602

John D. Runkle, Esquire  
Conservation Council of  
North Carolina  
307 Granville Road  
Chapel Hill, North Carolina 2751

M. Travis Payne, Esquire  
Edelstein and Payne  
P.O. Box 12607  
Raleigh, North Carolina 27605

Dr. Richard D. Wilson  
729 Hunter Street  
Apex, North Carolina 27502

Mr. Wells Eddleman  
718-A Iredell Street  
Durham, North Carolina 27705

Richard E. Jones, Esquire  
Vice President and Senior Counsel  
Carolina Power & Light Company  
P.O. Box 1551  
Raleigh, North Carolina 27602

Dr. Linda W. Little  
Governor's Waste Management Board  
513 Albemarle Building  
325 North Salisbury Street  
Raleigh, North Carolina 27611



Bradley W. Jones, Esquire  
U.S. Nuclear Regulatory Commission  
Region II  
101 Marrietta Street  
Atlanta, Georgia 30303

Steven F. Crockett, Esquire  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Mr. Robert P. Gruber  
Executive Director  
Public Staff - NCUC  
P.O. Box 991  
Raleigh, North Carolina 27602

Administrative Judge Harry Foreman  
Box 395 Mayo  
University of Minnesota  
Minneapolis, Minnesota 55455

Spence W. Perry, Esquire  
Associate General Counsel  
FEMA  
500 C Street, S.W., Suite 480  
Washington, D.C. 20740

Steven Rochlis, Esquire  
Regional Counsel  
FEMA  
1371 Peachtree Street, N.E.  
Atlanta, Georgia 30309