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UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

CAROLINA POWER & LIGHT COMPANY and
NORTH CAROLINA EASTERN MUNICIPAL
POWER AGENCY

(Shearon Harris Nuclear Power
Plant, Units 1 and 2)

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	:	
CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY	:	Docket No. 50-400-OL 50-401-OL
(Shearon Harris Nuclear Power Plant, Units 1 and 2)	:	TELEPHONE CONFERENCE

Ace-Federal Reporters, Inc.
Suite 402
444 North Capitol Street
Washington, D. C.

Thursday, March 21, 1985

The telephone conference in the above-entitled matter convened at 10:00 a.m.

BEFORE:

JAMES L. KELLEY, ESQ., Chairman
Atomic Safety and Licensing Board

GLENN O. BRIGHT, Member
Atomic Safety and Licensing Board

JAMES H. CARPENTER, Member
Atomic Safety and Licensing Board

-- continued --

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Also Present:

ROBERT GUILD, ESQ.

P R O C E E D I N G S

JUDGE KELLEY: Let's start and hopefully we will find Mr. Guild in a few minutes.

We issued our January 14 order which allowed in a modified rather narrow contention on Mr. Van Vo's charges. At that time the board was not aware of the fact that OI, the office of investigations, would be investigating Mr. Van Vo's harassment charges.

We went ahead under the January 14 order and some discovery was completed. I believe Mr. Van Vo's deposition was taken by the applicant. Right toward the end, along about the 27 or 28 of February, I think, there were some disagreements, procedural disagreements, as far as I know, between Mr. O'Neill and Mr. Guild about taking his deposition.

I attempted to get both of them on the phone with me and we are having some difficulty. Mr. Guild suggested at that time that in view of the fact we would be making a ruling on Mr. Eddleman's petition for reconsideration of the pattern aspects, the broader aspects of 41G, why didn't we just put off the procedural dispute until that was done. That seemed reasonable.

I was just reciting a little background that I think you you are familiar with, Mr. Guild. Mainly, that there were some procedural disputes late February and that you

and I, I think with Mr. O'Neill's subsequent concurrence, agreed to put over resolving those disputes until the board had ruled on Mr. Eddleman's petition for reconsideration.

Let me say, too, that we have certain letters and other papers that have come to us that bear on -- seem to bear on the matter one way or another. There is a letter of March 1, 1985 from Mr. O'Neill to Mr. Guild about the taking of depositions. Secondly, there is a short letter from Mr. Barth to Mr. Eddleman saying that certain of his interrogatories have been referred to OI, that a copy of Mr. Eddleman's notice of depositions of Messrs. Utley McDuffie, Banks, Johnson, Fuller and Lumsden, that notice is dated the 21 of February. I got a letter dated March 8 from Mr. Guild -- excuse me, from Mr. Barth to Mr. Guild about various discovery issues.

I recite these letters really just to give you an idea of our knowledge about the existence of certain disputes. We don't take them as formal pleadings. I don't think they were intended as such. But they simply surface the fact that there were disagreements about certain things. What we thought we would like to do today is surface and discuss whatever disagreements among the parties are still viable and haven't been overtaken by events and hear you on them. If it seems straightforward enough, perhaps we

could make a decision. If it seems that we ought to ponder what you have to say, we will do that and issue some written decision shortly hereafter. The parties can correct me if I am wrong, but I understand there was a dispute between Mr. Guild and Mr. Eddleman on one hand and Mr. O'Neill on the other as to the matter of taking depositions. The proposition, I gather, is to take these depositions. Mr. Eddleman was to take them by stenographic means. Is that as good as anything? Can we do that first?

MR. O'NEILL: That is fine, Judge Kelley. I might just note that I think my letter of March 1, at least sets forth my understanding of the dispute. I had not agreed that we would defer this issue and allow discovery just to linger on. I had tried to resolve this before the end of the discovery period. I indicated to Mr. Eddleman first and then Mr. Guild that the notice of deposition was defective, that what they asked for was not contemplated by the rules. We tried to settle it informally. I tried to put it before the board the last time on March 1.

Mr. Guild elected not to have the issue heard within the discovery period. My position is that the ball is in his court. He did not move to compel. The discovery period is over. I did not agree that we were just going

to hold this over and allow discovery sort of to linger on. That was never my position.

JUDGE KELLEY: Well, maybe it wasn't done in the best possible way, Mr. O'Neill. My understanding -- and that was arrived at without your participation at the moment -- was that the taking of those particular depositions, the deadline for taking them would be told, pending the board's resolution of the dispute that you had. That might have been less than clear. I regret it. That was my understanding. I think what we are interested in is if you have objections about the nature of the notice and whether it was timely, even more so, objections about the manner of proceeding, that is the main thing we would want to hear.

Mr. Guild, do you want to be the proponent of the notion that you take these depositions by other than stenographic means?

MR. GUILD: Yes, sir. Let me just note that Mr. Eddleman is on the line as well and has asked me to speak for him on this subject. In addition, I have been asked to represent the confidential witness who he responded to the board's notice with a communication to be filed by the first of March. At some point later in the conference call, I would like to address a related point that bears on the interest of that witness.

At this point, on Mr. Eddleman's behalf, I would raise a motion to compel discovery directed to Applicants and pursuant to 10 CFR 2.740(f), we would ask that the board compel the deposition and oral examination of the persons who were noticed in the pleading served the 21 of February that the chairman alluded to. That called for depositions to be conducted the 27th of February and following of those named persons on Eddleman contention 41G. Those depositions to be recorded by nonstenographic means.

Without belaboring the ebb and flow of the dispute that occurred between Mr. Eddleman and Applicants involving those depositions, suffice it to say that those witnesses were not presented for deposition, that counsel for Applicants communicated their objection to the method of conducting depositions and that my understanding from Applicants' counsel was that they, by agreement, agreed to defer the consideration of the propriety of conducting those depositions, as the chairman stated, until a decision on the motion for reconsideration, which has not occurred.

We would move at this time that those depositions be compelled, and first I would like to address the question of the method of conducting those depositions. That goes to the issue of the recording by nonstenographic means. Later, as I discussed in some detail with Mr. O'Neill

yesterday, we have an interest in trying to focus the subject matter that would be addressed in those depositions. I would like to try to do that by -- in the form of a motion to compel responses to specific subject matter areas that we believe are properly within the scope of discovery on contention 41G. But if the chairman would like me to address the nonstenographic recording issue first?

JUDGE KELLEY: Why don't you do that.

MR. GUILD: All right, sir. We believe that provisions of the Commission's rules that speak to discovery by deposition simply don't treat the issue of recording by other than stenographic means. We don't think that they are exclusive in their specification of the more traditional means. They don't speak to the issue. We would point to Commission Rule 2.756, a provision which encourages the use of informal procedures where consistent with the interest of fairness and rights of the parties and 2.718, generally specifying the powers of the presiding officer among which are included the power to under sub D order depositions.

Generally the Commission's policy statement on the conduct of adjudicatory proceedings we also think supports the authority of the presiding officer to specify that depositions be conducted by nonstenographic means,

particularly pointing to appendix 8 of part 2 Roman IV, discovery, which refers to the conduct of discovery being in line with the Federal Rules of Civil Procedure.

In the Federal Rules of Civil Procedure, rule 30(b)(4) specifies that by stipulation of the parties or upon order of the Court, the Court may provide for -- the parties may conducts depositions which are to be recorded by nonstenographic means. The principal case interpreting that provision of the Federal Rules is a case of Colonial Times, Incorporated versus Gasch, G-a-s-c-h. Reported at 509 F.2d 517. D.C. Circuit case of 1975.

That case compelled by mandamus in district court to reconsider its denial of a request for the conducted of depositions by nonstenographic means. There, the Court of Appeals states that its view of the rule is that the Court's discretion in permitting the conduct of such depositions is limited to specifying the means to safeguard the appropriate transcription or recording of the deposition and not a discretion that extends to barring the use of such nonstenographic means themselves.

The opinion emphasizes that the purpose behind the rule, as reflected in the advisory committee notes, is to minimize expense to parties, particularly appropriate in the case such as ours where resources among the parties effectively preclude resorting to traditional discovery

tools such as stenographic recorded depositions. And it would work a great injustice on Mr. Eddleman and limit his ability to proceed and require evidence through discovery in support of contention 41G.

We think it is especially appropriate that the devise of the nonstenographic deposition be employed here. I would point out that the Gasch decision emphasizes that in the exercise of discretion by the Court there, the focus should be on the objection -- objecting party's specification of particular objections to the proposed method to be employed. In other words, since the discretion is to be exercised in assuring appropriate safeguards, the focus should be on the objecting party's specific problems with the method that has been suggested.

Second, that particular methods to assure accuracy can be so onerous and expensive in themselves as to defeat the very purpose of the rule, which is designed to minimize expense. Particularly, the Court said there, the device of requiring an independent operator or a tape recorder being the most significant expense likely to be incurred in having such a nonstenographic deposition would defeat the very purpose of the rule and it suggested alternative means for assuring accuracy.

That is where we believe the law leads us. We think that the focus, then should not be on the question of

whether such depositions recorded by nonstenographic means are proper or appropriate or lawful. We think they are.

We think the question really comes down to a matter of how we protect the interest of the various parties and of the Commission in assuring the accuracy of the deposition recording.

I might say in that regard that the proposal reflected in the notice Mr. Eddleman served called for essentially that the depositions would be taken before an officer authorized to administer oaths, a notary public. The request is that Applicants make available one of their employees who I just happen to be aware -- of course they have notaries who sign pleadings, can authenticate documents, but Mr. Eddleman certainly could supply a notary for purposes of swearing witnesses.

Then he would intend to record the deposition questions and answers, as the rule requires, the Commission rules requires, by use of a tape recorder. Applicants or other parties would be free to provide for other means of preserving the testimony that would serve their purposes, including the use of a stenographer at their own expense. The deposition record then would be in the form -- at least a record in Mr. Eddleman's possession, would be in the form of a tape recording of the testimony.

That was objected to by Applicants, and perhaps I

should let them speak to what their particular difficulties were with that proposal. Our motion at this point then would be that we would be permitted to conduct such a deposition by nonstenographic means to be recorded by nonstenographic means and the means that we propose are reflected in that notice.

We think the appropriate point here then is to inquire into what the nature of applicants' objections are as to that means of preserving the testimony. We think -- we are certainly amenable to reasonable alternative approaches to preserve the testimony, subject to the overriding consideration that the purpose is to save money and to permit Mr. Eddleman to conduct these depositions in the first instance. That is all I have to say on that. We would move that we are permitted to conduct the depositions as noticed.

JUDGE KELLEY: How good a tape recorder would Mr. Eddleman have for that purpose?

MR. GUILD: I think that is a valid question. I haven't checked out his equipment but I think the rule would contemplate that it be a recorder of some quality that would assure an accurate record.

JUDGE KELLEY: We may ask some other questions. Why don't we shift to Mr. O'Neill at this point.

MR. O'NEILL: Judge Kelley, I begin by pointing

out that I believe this is a tardy notice of deposition. Applicants noticed the deposition of Mr. Chan Van Vo on February 2. Mr. Eddleman, February 21, Thursday before Mr. Van Vo's deposition was noticed for the 26th, filed a notice that Mr. Guild has described. The Commission's rules provide for timely notice for depositions. It doesn't define what that means, but a number of cases have -- Federal Rules have indicated that a minimum of 10 days would be required.

In any event, we attempted to work with Mr. Eddleman to see if we could come up with a reasonable schedule, given the fact that we were preparing for Mr. Van Vo's deposition on the 26th which might have gone over to the 27th which is the day we wanted to begin taking depositions of employees of CP&L, and given the fact that we would have to prepare them for a deposition.

We start with the proposition that the notice wasn't timely. Secondly, that it wasn't timely to the extent that he is raising a question which he knew or should have known, and certainly with Mr. Guild's assistance to this, would be controversial. The Commission's rules do not provide, do not contemplate nonstenographically recorded depositions. The Commission's rules specifically require that transcriptions of depositions be provided to the Commission. The Commission's rules specifically provide

that the party taking deposition would provide an officer before whom the deposition can be taken.

JUDGE KELLEY: Your voice is fading. Our receiver here is not state of the art.

MR. O'NEILL: I have no problem speaking for loudly.

In summary, the Commission's rules specifically do not contemplate nonstenographically recorded depositions. They specifically require, at subparagraph E, that a transcription of the deposition be provided to the Commission and they specifically require that the party taking the deposition provide an officer before whom the deposition would be taken. We are, of course, mindful of the board's dicta in a discovery dispute order some time ago where the board indicated that it might favor informal agreement among the parties for tape-recorded depositions. And we attempted to work out something that would be satisfactory. But we believe that if Mr. Eddleman were to decide to take this on, that he should have filed a notice of deposition well in advance of the nine days before the end of the discovery period.

We go to the merits of the nonstenographically recorded depositions and indicate that we are not aware of any board having ordered that there be tape-recorded depositions in any case. We are aware that the board has

encouraged in Catawba, under different circumstances and different time pressures, that there be informal depositions. We are also aware that Applicants were not particularly pleased with the way that that worked out and do not believe that it served their interest.

JUDGE KELLEY: Why was that?

MR. O'NEILL: They ended up having to pay for a stenographer to record the depositions which we understand in the final analysis became available to the Intervenors and ended up being an employee for the Applicants to have to go to the expense of stenographically recording the depositions and providing it to the Intervenors.

JUDGE KELLEY: That was due to the vagaries of the Freedom of Information Act, right?

MR. O'NEILL: That is what I understand.

JUDGE KELLEY: Go ahead.

MR. O'NEILL: In any event the pinpoint is that it is not contemplated nor has ever been ordered to our knowledge in the Commission proceedings.

The Federal Rules certainly do, as Mr. Guild points out, provide for nonstenographically recorded depositions. This amendment to the Federal Rules was adopted in 1970. 10 CFR section 2.740 A, which provides for depositions under the Commission's rules, was published in 1972, two years after the 1970 amendment to the Federal Rules which

permitted tape-recorded depositions. It was further amended six years later and did not allow for nonstenographically recorded depositions.

We admit that it is unclear whether the Commission deliberately excluded from its discovery rules the possibility of tape-recorded depositions, but we believe the inference from the conspicuous admission is that they did.

We cite a licensing board decision in the Vallecitos Nuclear Center LPB-78-33 where the board there said, having expressly selected some but not all of the discovery provisions set out in the Federal Rules, the Commission did not intend for the unselected Federal Rules to control its proceeding. It isn't clear to us how the board would deal with the provision at section 2.740 A, subparagraph E, which requires a transcribing of the deposition and that that transcription be provided to the Commission.

JUDGE KELLEY: Do you think that the word "transcribe" in that subsection carries with it the clear meaning that a court reporter will take it down in shorthand and go home and type it up? Is that how you read it?

MR. O'NEILL: It does not have to be taken down in shorthand. There are various ways by which the

stenographer can transcribe it. But I believe that if we are talking about a transcription as opposed to reporting, that is the way that that work would be interpreted.

JUDGE KELLEY: There are lots of court reporters around now where they take it down with a tape recorder.

MR. O'NEILL: That is correct.

JUDGE KELLEY: Then they go home and type it up. What would the difference be then if Mr. Eddleman brings his tape recorder and takes it back home and finds somebody to type it up and gives you a copy?

MR. O'NEILL: Because the next sentence requires that the officer certify the deposition or that if the deposition is not signed by the deponent -- it would be very difficult for the deponent to sign a tape recording and certify the reasons for failure to sign and forward the deposition by registered mail to the Commission.

This Commission certainly has a parallel to the provision in the rules that deals in the stenographically recorded deposition section on how one files a transcription with the Court. It is either first provided to the deponent who is given an opportunity to make any corrections, swears under oath to those corrections, it is provided back to the stenographer who then files it with the Court. This provision appears to parallel that provision of the Federal Rules with respect to

stenographically recorded depositions.

JUDGE KELLEY: Isn't it also true that certain provisions of these rules, including the deposition rule, are rather widely ignored in the name of convenience? Isn't it true that depositions very often are not forwarded to the licensing board?

MR. O'NEILL: Those types of arrangements certainly can be agreed to by stipulation of the parties.

JUDGE KELLEY: I think our main -- apart from the legal question, it is a fair enough question -- but apart from that, the practical question of what is really objectionable about proceeding this way from the standpoint of your having a reliable record of what somebody said, are there not ways that -- I assume you would at least come with your own tape recorder if this were done. What is it that you are afraid of in proceeding this way?

MR. O'NEILL: I would not characterize we are afraid of --

JUDGE KELLEY: What concerns you about proceeding this way?

MR. O'NEILL: We have a number of concerns. One, the usefulness of this type of a recorded deposition. We query whether the Intervenor would want to use the tape in response to a motion for summary disposition. How would

he use that tape in that respect? The other use of the recording might be to impeach a witness during a hearing. We clearly -- if we would sit there while the Intervenor would go through his tape recording to try to find that particular point that he desires to play for the board, it may well be that some two seconds later there was a disclaimer that then the other side would wanted to come up with and play for the board. We don't believe as a practical matter that this really works. If you have some purpose of the deposition, other than just simply to find out information.

JUDGE KELLEY: At least it gives the Intervenor an investigative tool if nothing else as to the concerns you have just raised. If the parties know in advance they want to use certain portions of a recording, why couldn't they just type that up and serve the other parties and say, I am going to use this or try. Then you have got something typed up for hearing.

MR. O'NEILL: It is clear that one could come up with an order, and certainly if you were a judge operating under the Federal Rules you probably would come up with an order because it would be required if there is no stipulation that would first require an independent third party to administer the oath and operate the equipment. That is required by a number of decisions, both reported

in the Federal Rules and also by Federal Rules of Civil Procedure, 28 C.

JUDGE KELLEY: When you say "independent third party" -- Mr. Guild used the term too -- what exactly does that mean in terms of an example?

MR. O'NEILL: The Court, as an example, has to facilitate this, has designated a person who is not related in any way to the party or to the counsel and has no relationship whatsoever to the person taking the deposition or the party for whom the counsel is taking the deposition.

JUDGE KELLEY: You could go to the local electronics store and get a good tape recorder and hire somebody that works there that knows how to run it? And then bring them down there?

MR. O'NEILL: As long as the board would designate that person as an officer for purposes of administering the oath and to sit during the deposition.

JUDGE KELLEY: Right.

MR. O'NEILL: Again, under the Federal Rules, it is my understanding that the courts have specifically designated in an order a third person who operates the electronic equipment to be the officer for purposes of administering the oath and sitting through the deposition. I don't remember the particular decision, but it is one

where the Judge indicated that there was no need to have both an oath taker and an operator for this type of deposition, but there had to be an independent party who was designated by the Court as an officer.

JUDGE KELLEY: Is it possible, as a technical matter, do you know for the proponent of the deposition, Mr. Guild and Mr. Eddleman, can one make a tape and then furnish an exact copy of that tape to the other party?

MR. O'NEILL: I have seen a number of court orders, Judge Kelley, which require that the independent party make at least two tapes off of the same original, one which is provided to the deponent and the original filed with the Court, and certainly one can be retained by the party taking the deposition.

JUDGE KELLEY: Okay. Thank you.

MR. O'NEILL: I would just like to indicate other protections, safeguards for the reliability of -- and trustworthiness and accuracy of the recording include, for example, that the parties would be bound not to use the tapes for any other purpose, at least to the public. They would not be heard on the morning news the next day, some segment of them, for any reason.

Other safeguards, if there were to be any later use in a proceeding, that the party taking the deposition would have to have certain portions of them transcribed at their

expense and present it to the deponent in advance of any proceeding or any use in a pleading so that the deponent would have an opportunity to insure the accuracy of the transcription.

These are way that the courts, under the Federal Rules, have dealt with the question that we are really talking about here. That is, accuracy and trustworthiness and usefulness of such a deposition in a proceeding.

JUDGE KELLEY: Okay Mr. Barth or Ms. Moore, any view on this matter?

MR. BARTH: Your Honor, in general principal, we think that a stenographic -- we think that a nonstenographic by tape recorder deposition could be permissible in this case; and if this were done, we would strongly urge that the same strictures be applied by your Honor as applied by the Federal District Court, which are for very good and sound reasons.

For future reference I would like to refer you to 78FRD340 which is Barham versus IBM. I would also like to refer you, your Honor, to 62FRD336 which is Lucas, L-u-c-a-s, versus Kurran, K-u-r-r-a-n.

These cases hold, your Honor, that two tape recorders shall be simultaneously used at the deposition and in the control of the independent party who administers the oath.

One tape shall be placed in a sealed envelope at the close of the deposition, initialed by all parties and deposited with the Court. In this case with the licensing board or the Commission secretary. The other tape from which the transcription shall be typed shall be retained by the party taking the deposition, independent of Mr. Eddleman, independent of the power company and independent of the Staff.

A neutral party and only that neutral party may prepare any necessary transcription which shall be done by the proponent of the deposition. According to the court cases, he can have those portions he wants and any portion which the applicant may want and he shall provide those copies to Applicants' counsel.

The administrative inconvenience, I am strongly persuaded by Mr. O'Neill and by my own experience, would make this a very difficult and cumbersome procedure, your Honor. They are just not handy to have. It is difficult. But on the other hand, as a matter of law and on behalf of the ELD, I think that this could be done were the same guidance and protection put on by your Honor which are put on by the federal district courts which have experience in this.

I do note that we do not have any comparable rule 30(B)(4) section as the Federal Rules of Civil Procedure

which specifically provides for nonstenographic transcriptions. In view of the agency's past views as expressed in the Catawba proceeding, we, in principle, do not have an objection to doing a deposition by nonstenographic methods, assuming, of course, that these kinds of protections and guidance that the Court's put on are utilized here, your Honor.

I have just one short moment that I need to talk with Ms. Moore?

JUDGE KELLEY: Okay.

MR. BARTH: Ms. Moore did remind me of one thing, the Court cases have put into the requirements that each speaker on the tape identify himself or herself before speaking for the very purpose of identification, which the reporter here has well brought out the problem which is involved. I think this probably ends our views.

JUDGE KELLEY: Thank you.

MR. GUILD: I think the overriding point should be that the strictures that are applied be finely tuned to accomplish legitimate purposes and not simply to make the whole process so cumbersome and expensive as to defeat the purpose of the provision for recording by nonstenographic means. That is, to make the device of discovery deposition as viable to a party who otherwise could not afford to employ that device because of financial

limitations. That is a circumstance we face.

We think that the Colonial Times versus Gasch decision by the D.C. Circuit clearly speaks to those points in rejecting the notion of requiring an independent operator because it would be of considerable expense. I point out that a number of Federal Rules decisions that apparently are referred to by the Staff and alluded to by Applicants are cases in which the nonstenographic means are not employed for the purpose of a saving expense. They are essentially cases where people wanted to use videotape recording, a very complicated medical malpractice claim, a very sophisticated litigation where expense saving is not the interest and where sophisticated kinds of controls that the Court may apply are not objectionable on financial grounds but are trying to facilitate using what is in essence a state of the art technique for preserving testimony.

In this case our primary interest is in using this discovery tool as an investigative device. We do believe that beyond simply learning facts about this contention that witnesses should approach a deposition and their answers to questions at a deposition with some formality and should speak the truth. We trust that they would. But we should not be precluded from employing statements made by witnesses in this form, just as we wouldn't be

precluded from using statements made by those same persons if we interviewed them completely informally outside the Commission rules at a later time should they make an inconsistent statement under oath at a hearing.

The device of employing a tape recording, a portion of which is transcribed and distributed to the parties, distributed to the board for use as an impeachment vehicle seems perfectly appropriate and controls certainly effectively for -- gives the party whose testimony is sought to be impeached a perfect opportunity to be able to see in front of them the transcription and object to its accuracy, if there is an objection.

We think that the device should be available and we think the strictures should be such that they don't defeat the purpose of the rule. We are willing to work out details of those strictures but believe that they don't need to be exhaustive or burdensome or expensive.

MR. O'NEILL: I would like to respond to one thing. We have had an opportunity, during this conversation, to take a quick look at Colonial Times. We would suggest that you might want to look at this case, too, because this -- you can't digest it completely. One particular statement in the case seems to be directly contrary to Mr. Guild's reading of it where the Court says the ability of the party to pay for stenographic

deposition should, as a general matter, be irrelevant to a grant of an order to take depositions by other than stenographic means. The rule is designed to decrease everyone's stenographic costs whenever that can be accomplished with no loss of accuracy and integrity.

I don't believe that case stands for the proposition that the purpose of these nonstenographically recorded depositions to allow a party who feels they are disadvantaged to somehow save on their cost of litigating a party who may otherwise have greater financial means. I think that Mr. Guild seemed to suggest that that was the holding in that case.

Secondly --

JUDGE KELLEY: It is there for our enlightenment.

MR. O'NEILL: With respect to the informal investigatory approach, there is no reason to take a tape recording if the purpose of the deposition is to do no more than to have some information about the case in an informal manner. Indeed, we have indicated some willingness to accomplish that during the discovery period. But that does not require a tape recording. Our concern is about the misuse, abuse, and impracticality of dealing with tape-recorded depositions as opposed to -- giving the Intervenor an opportunity to obtain information which we do in providing documents and answers to interrogatories.

JUDGE KELLEY: Okay. I think we have worked this one over rather thoroughly.

MR. EDDLEMAN: I just want to mention one fact. I did, in fact, notify the Applicants' attorneys in informal conversations that I was going to ask for depositions, but I couldn't decide who it was going to be until we had had access to documents. That is the reason the formal notice didn't come in until the 21.

JUDGE KELLEY: Let me ask you if you were not authorized to proceed by tape recorded or some other recorded means, would you go forward with these depositions with the same number of people if you had to pay for a court reporter?

MR. EDDLEMAN: It is unlikely, judge, because the expense can be driven up tremendously just by the kinds of things that can come up in a deposition. There are objections and there are arguments and all that sort of thing, all that has to be on the record. I just wouldn't be able to sit down and say: Okay, we can have a court reporter for unlimited time. It would make it a lot more difficult to go forward.

JUDGE KELLEY: Okay. Gentlemen, I have got a mute button on this box here. We are going to turn to a couple of other things. Maybe we will take a short break. It is about 10 minutes of 11. We will come back at 5 of.

If there is anything else you have got in the way of issues we will discuss them. We will take a five-minute break.

(Recess.)

JUDGE KELLEY: I did not know of -- that he had any particular need to be in on the call. I guess we will just go ahead. Have we got Mr. Guild back?

MR. GUILD: Yes, sir.

JUDGE KELLEY: As to the argument that we just completed on whether there should be other than stenographic means, we may have something to say on that or at least something, if not everything, to say on that when we finish up here, but for right now, we would like to pass on to whatever else there is before us that we ought to address.

Mr. Guild indicated the possibility of some scope questions. There is the question of what we ought to do about a date for summary disposition. Those are two things. Are there other things that we have before us, Mr. Guild?

MR. GUILD: Yes, sir. I would ask that we discuss a bit the treatment of the volunteer witnesses who responded to the board notice, that general question. I think also you noted that you wanted to consider the question of the pending Office of Investigation inquiry.

JUDGE KELLEY: That, at least, has a bearing on the summary disposition question.

MR. GUILD: So those are two related subjects.

MR. O'NEILL: I think we probably have the same issues which we would characterize somewhat differently. With respect to schedule, decoupling the Van Vo deposition from the other letter writers and trying to establish the schedule so that we can accomplish what the board indicated when it originally admitted this contention should be accomplished. That is, a disposition of this contention in a relatively straightforward manner.

JUDGE KELLEY: I think that may be accomplished in what we have already indicated.

MR. O'NEILL: There also is the outstanding discovery issue between the Staff and Mr. Eddleman.

JUDGE KELLEY: That being that certain interrogatories, in effect, go to the people as to what they know about these matters and the Staff saying they will finish their investigation at some time in the future and then answer them.

MR. O'NEILL: I am not sure that has been completely resolved. If it has, that is fine.

JUDGE KELLEY: Mr. Eddleman, as to the results -- your questions apparently ought to be answered by the OI people who are conducting this investigation.

MR. EDDLEMAN: That is correct, judge. But those interrogatories were directed to the Staff as a whole, and I think that the written pleading that I filed takes care of this. It is simply that just because OI is investigating does not relieve Region 2, I&E, ELD or anybody else on the Staff who has that information responsive to those interrogatories from either responding or raising timely objections. I don't think they have done that. I want them compelled to do that. I don't want to interfere with the confidential investigations, but I think the nonconfidential part of it needs to be responded to. That is, anybody who is not in OI needs to respond to these interrogatories.

MR. BARTH: May I address that? We are filing today or have filed responses to Mr. Eddleman's interrogatories insofar as the Staff is separate and distinct from OI and has information.

JUDGE KELLEY: Well, Mr. Eddleman, how does that sound?

MR. EDDLEMAN: Let me look at it and it may be that this thing is all moot. If it satisfies me, there will be no problem. If it doesn't, I will be willing to commit to negotiate with the Staff. If we can't work it out, then I will get back to you.

JUDGE KELLEY: Let's leave it on that basis.

MR. GUILD: Let me just mention the same related subject, we also have a pending Freedom of Information Act request to the Staff which the Staff acknowledged receipt of yesterday that goes to the same general subject.

JUDGE KELLEY: I have had occasion to say in the past that the FOIA, I am aware of that, but it is not our action. It is the Staff's.

Mr. Barth?

MR. BARTH: Your Honor, we have been conducting this conversation with a number of people, all of whom are in the case, except that Mr. Guild is not in the case, has not filed a notice of appearance. It does create a bit of confusion and difficulty in handling this matter whether an attorney is in or not in and out or not out. The agency's regulations do provide that when people are in the case, they need to file appearances. I do have a bit of difficulty in these kinds of discussions with a person who is not on record as a counsel for anybody or in the case.

JUDGE KELLEY: Mr. Guild?

MR. GUILD: I believe I noticed an appearance this morning for Mr. Eddleman as well as Mr. Van Vo and in addition the confidential witness who responded to the board notification. Mr. Barth knows that as a matter of fact.

JUDGE KELLEY: It will be on the record of the transcript from today, will it not?

MR. GUILD: Yes, sir.

JUDGE KELLEY: Okay.

Mr. Guild, I am not sure how we can deal with scope questions, if that is what you have got in mind.

MR. GUILD: I was left, after the January 15 order, with some substantial questions about the scope of proof that was permissible under the board's admitted 41G, as well as the scope of discovery that legitimately would support that scope of proof. A number of those questions were raised in Mr. Eddleman's motion for reconsideration.

While that remained pending, I had some discussions with Mr. O'Neill on this same subject. He candidly stated his view of the scope of proof consistent with the board's order and his view of the contention. I stated mine. They were, not surprisingly, rather disparate.

I had hoped, I think both Applicants and Mr. Eddleman had hoped that the question, that the board's ruling on the motion for reconsideration would solve all, if not most, of those questions. I just have to say that reading the board's most recent order denying the motion for reconsideration, I remain somewhat in the dark about those same questions.

I put to Mr. O'Neill yesterday a couple of ideas of how

to resolve those scope issues. They really are for purposes of trying to anticipate what I am assured by Mr. O'Neill will be objections that will be forthcoming from him when and should the depositions go forward, when those subjects are raised. I guess I wanted to have those things resolved in advance, if possible, so that we could save ourselves some time and expense and not have to come to the board first thing once the depositions commence, if they are authorized. Let me turn to that, if I may. What I was proposing to do, judge, was this. That is, as part of this motion to compel, put before the board a request for an order compelling answers to subject matter questions. Those subject matter questions related to our view of what the scope of the admitted contention should be.

Let me just turn to them and see if we can proceed from that.

JUDGE KELLEY: Let me ask you one question. It is my understanding that under NRC practice, if you are taking a deposition and counsel for the witness objects, normal procedure is to note the objection without argument and go ahead and get the answer. Then when you get to hearing, if you want to use that, then full argument is heard and you get a board ruling.

MR. GUILD: That would be my expectation.

Unfortunately, I think Applicants' and Mr. Eddleman's position on the scope questions are at such polar points that I am assured by Mr. O'Neill that a question outside the scope of the deposition will be not only objected to but would be the subject of instructions by counsel not to answer the question. This would lead us to either forgo the question or seek --

JUDGE KELLEY: In which case you would come back to the board anyway.

MR. GUILD: Yes, sir.

JUDGE KELLEY: Give us an idea, I am not sure how much help we can give you here. We tried in our order to indicate the basic parameters. Those being that the broader version of 41G that we didn't let in was clearly on allegations of patterns of a harassment. The one we let in on whether or not Mr. Van Vo himself was retaliated against because of what he did. I would think that that is some help anyway. Go ahead.

MR. GUILD: Let me us go quickly through this. In our view, the approach to litigating this contention, by at least analogy, ought to look first to the Commission's rules prohibiting discriminatory action against those who engage in protective conduct. I cite to 10 CFR 50.7. This is the Commission implementing regulation for section 210 of the Energy Reorganization Act.

I say "by analogy" because the board's contention is couched in terms of harassment. We think harassment is tantamount to one of the types of discrimination that is talked about.

The cases implementing the provisions of section 210 of the Energy Reorganization Act, the employee protection provisions make clear that for purposes of allocation of the burden of proof and standard of proof, one should look to decisional authority under the National Labor Relations Act. I refer to the legislative history of the employee protection provisions of the ERA, reported at 78 U.S. Code and Administrative News, page 7303, which makes reference to the NLRA.

Two circuit court decisions applying the employee protection provisions under the NRC statute also say look to the NLRA. Those are Consolidated Edison against Donovan, 673 F.2d 61, second circuit decision, 1982 and Deford, D-e-f-o-r-d versus Secretary of Labor, 700 F.2d 281, the Sixth Circuit decision, 1983.

I would direct the board's attention to a U.S. Supreme Court case that I think is useful in stating our view of the standard of proof and burden of proof allocation.

JUDGE KELLEY: Aren't we talking about the scope after contention? The only issue here is what 41G as modified lets in; isn't that right?

MR. GUILD: I think that is right. But what is inescapable in order for us to have a fair shot at proving 41G, as the board admitted it, is to look to the analogous provisions of law that I have cited you to that tell you how you go about proving who has the burden of proving and how you go about establishing a claim of retaliatory discharge or discriminatory treatment which is the core of even 41G as admitted. Those authorities, in our view, are clear in supporting the scope of discovery that is beyond that which I am told by Applicants they will permit their witnesses to respond to. That is what brings me to the board to try to ask for some guidance by way of this motion to compel.

If I can -- I have got the subject matters I would like to put to the board. If I can just give the cite to the Supreme Court case. The Supreme Court decision is directive in this instance, NLRB versus Transportation Management Corporation. 103 Supreme Court 2469, 1983 decision. Essentially the point here is that the initial burden is on the proponent of this contention or analogously on the complainant or victim of discrimination to make out a prima facie case that: One, they were covered under the protections of the law.

Two, they were the victim of discrimination; and third, they engaged in protected activity, raising concerns about

nuclear safety matters. Fourth, that there there was a retaliatory motive, that the action taken against the complainant was due to the fact that they engaged in protected activity.

The elements all are available to us through fairly direct proof except the most critical question. That is, the question of retaliatory motive. In order for us to carry our day and our initial burden, we have to demonstrate retaliatory motive. The cases clearly state that we can do so through direct evidence, someone saying that they are motivated by design to retaliate. But most importantly here through circumstantial evidence or indirect evidence. That is where the initial point of difficulty comes.

Once we establish our prima facie case of retaliatory motive, it is then open for respondents to come back and establish that they have a legitimate nondiscriminatory basis for the action they have taken against the complainant.

Applicants have already stated that position formally in their pleadings. They acted against Van Vo for work performance.

Then the opportunity must be available to the proponent of the contention to demonstrate first either that that explanation, that legitimate nondiscriminatory reason was

a mere pretext, was not in fact the real reason that they discharged him, but is merely a sham or pretext to cover their illegal motive.

There is a line of cases that treat the question of pretext. That is a problem for discovery, to try to demonstrate, gather evidence to demonstrate that the asserted ground for putting Mr. Van Vo on probation and terminating was pretext, motivated by retaliation.

There is also a line of cases, both of which are referred to in the NLRB which talks about the dual motive circumstance. That is a case where the applicant finds himself in a situation where they carry their burden that, in part, they were motivated by a legitimate motive. That they had some factual basis for claiming poor work performance, but their decision was also colored by the illegal motive of retaliating against him for the protected activities he engaged in.

The question then becomes one of sorting out contributing sets of those two dual motives. The Supreme Court decision makes it clear that then the burden becomes on the Applicants here to demonstrate that they would have taken the action against the complainant even if he had not engaged in the protected activity.

All of that said, we are left with the necessity, in our view, of going simply, in order to carry our burden

and in order to, within the scope of discovery, discover facts regarding claims or defenses of any party, carry our burden on our claims and anticipate evidence on the company's defenses. We simply have to go beyond what has been available to us so far. That has been limited to simply the company's, what we would assert are pretextural reasons for justifications for taking personnel action against Mr. Van Vo.

We have his personnel file that are the company's case against him. What we don't have is the critical circumstantial evidence of retaliatory motive, except for the nexus of facts that are obvious in his file that go beyond what the company has deemed to put in his file. Those are key elements that this line of authority, under the Energy Reorganization Act and under related NLRA cases, clearly require us to have available to us.

JUDGE KELLEY: Mr. Guild, I can't read the cases today, but these things turn on their facts pretty much. The fact that the Supreme Court may have said in some case that such and such had to be proved, they weren't thinking about our contention.

What we need to do is get, if we can -- I don't know whether we are going to get anywhere on this. What we are trying to do is make rulings on interrogatory or rather on position questions before they are asked in the abstract.

I am really not at all sure that that is something that can be done. What I need to hear from you is: What kind of things do you want to ask these people if that they say they don't want to answer?

MR. GUILD: We want to establish a motive for retaliation. That is subject No. 1. We believe that Mr. Van Vo was working in a critical area of the facility where there were significant problems. In the area of pipe hangers, the board has heard abundance evidence of repeated major trauma in CP&L's efforts to accomplish the pipe hanger program. Mr. Van Vo was intimately involved in various aspects of those programs.

In his affidavit he makes clear that he raised very sharp criticism about the capubilities and effectiveness of his supervision. The persons who are also responsible for the retaliatory action against him, in their management of the piping and pipe hanger program at Shearon Harris -- I speak directly of Messrs. Willet and Fuller. We believe that we should be permitted to inquire in deposition to look at the significance of Mr. Van Vo's complaints to management regarding Messr. Willet and Fuller and to look at questions regarding their competence.

Were they removed from positions of responsibility because of their own job performance problems? Why they, in fact, were in a position where they would be motivated

to retaliate against Mr. Van Vo, as we believe they were, for raising concerns about the effectiveness of the program under their management. Once they learned that he went to Mr. McDuffie, protected activity, were they then motivated to take retaliatory action against him?

Secondly, we believe that the Transportation Management Corporation decision makes clear that, by analogy, when one says that one is -- in that case when one was fired for legitimate reasons -- when the company says they are fired for legitimate reasons and the complainant says "No, I was fired for illegal reasons," one looks to the usual practice of the company in dealing with persons who commit those same transgressions. The Supreme Court there found that the company failed to carry their burden of proof. That their usual practice would have been to take action against a person that made similar transgressions but for the fact that they engaged in this protective conduct.

In Mr. Van Vo's case we need to discover the usual practical of Carolina Power & Light in dealing with persons who have allegedly transgressed similar or the same performance standards.

Who else was put on probation or terminated for similar or the same failures of performance as allegedly were the basis for action against Mr. Van Vo?

That subject, the subject of who else was disciplined

and who else was terminated who did not engage in protected activity, is a clear basis for being able to demonstrate retaliatory motive, and it is something Applicants say they won't allow us to inquire into.

The third area seems most to -- seems to have been addressed in your two decisions, at least by inference. But I think it is also a critical point. That is, what kind of treatment has CP&L meted out to others who have engaged in similar protected activities as Mr. Van Vo? What pattern of discriminatory conduct has CP&L engaged in that would provide a basis for inferring that a discriminatory motive is established in the actions taken against Mr. Van Vo? In short, who else raised the kind of safety complaints, raised the kind of complaints about ineffective and independent adequate management of safety-related construction work as was raised by Mr. Van Vo.

What has the company's pattern of harassment been, having engaged in discrimination against others from which we can draw the inference that the most likely motive was likewise a discriminatory one.

They are the three subject matters which, by way of a motion to compel, we would ask that the witnesses who are the subject of our notice of deposition, be directed to respond to questions. We are trying to seek some guidance

from the board. This is the most logical administrative, efficient way that I can think to bring these matters to the board's attention. Anticipating that they would be the subject of dispute at the deposition.

JUDGE KELLEY: I can appreciate your concern and your desire for as much guidance as you can get. Let's hear from Mr. O'Neill. I must say that we are not real sure how much we can do for you at this point, as much as it might be more efficient to try to cross some of these bridges.

MR. EDDLEMAN: Your Honor, I wanted to ask Mr. Guild a question of clarification on the second point. I think when we were talking about this, we would have included the people who may have had job performance problems and actions comparable to that taken against Mr. Van Vo was not taken against them. I think that might also be included.

MR. GUILD: I meant to include the broad class of people who had had similar performance problems taken against them. Regardless of what action was or was not taken against them. What is the usual practice of the Applicants for persons who commit these transgressions, similar to those allegedly committed by Mr. Van Vo? The Transportation Management Corporation decision by the Supreme Court, that is the language from that decision

which states that in that case the dispositive evidence was that there were others who committed the same transgression, but the company's usual action was not to fire them. They took it against this guy because of the illegal motive.

MR. BARTH: I would like to make a short comment too, for the Staff. It seems from Mr. Guild's long speech, it is clear that he want the scope of discovery to be on the proper contention. They asked for reconsideration. He has been turned down twice. This is nothing more than a back door route to open the original contention of Mr. Eddleman to be the subject of the discovery. I think you have already reached that in your opinions twice, your Honor. The answer is no. The second observation is that I think you are being asked to give an advisory opinion on speculative questions. I think that that is not a good thing to do, and I think the normal practice is that the question is asked and the person is instructed not to answer it. The matter then goes before the Judge. Not some kind of speculation in advance like this. Thank you.

JUDGE KELLEY: Mr. O'Neill?

MR. O'NEILL: I will try to make it short. This is not the Department of Labor case that was settled. This is going to the scope of the contentions; we have already argued this before. I think the board has been

pretty clear in giving instructions as to what the scope of this contention is. In the original memorandum and order, the board said this contention should be understood as focusing on the reasons particular personnel actions were taken against that particular individual. The parties' attention should focus on particular incidents alleged in the Van Vo affidavit.

In its most recent order, the board stated, while it may be necessary to look somewhat beyond the Van Vo charges to place them in context, any hearing that would focus on those charges, not on an alleged pattern of harassment. Discovery would be similarly limited.

We think that is clear. I would not instruct a deponent not to answer a question that goes to some of the context. The policy of the company with respect to treating employees, for example, that certainly would be a contextural question.

Mr. Guild is right. If he asks questions about other personnel actions against other individuals and we started on a fishing expedition of how, what other people raised, what other claims and how they were treated, he is correct, I would instruct the witness not to answer those questions because I think it is very clearly outside the scope of this contention. I would suggest that the board need not do more than point to what it said in those two orders as

to what the scope of this contention is and reaffirm that that certainly would be the scope of discovery. We can get on with it. This is the third time Mr. Guild and Mr. Eddleman have tried to take a bite of litigating this Department of Labor harassment type case in the context of this NRC proceeding. I just don't think the board is going to count that.

JUDGE KELLEY: I think we will try to speak something on this before we hang up here today. I think we have heard the various competing factors.

Another question was, we had set assert date for filing summary disposition motions. That was before the OI investigation appeared on scene. We said we would hear from the parties today about whether we should set some new date, presumably in the fairly near future but after the depositions are closed, or whether we should just put the whole motion of summary disposition of 41G on hold until after we get a report on the OI investigation. I guess that is the question, Mr. Guild; what is your answer?

MR. GUILD: Our view is that clearly discovery can't be closed until the -- until access to evidence has been made available. That means the completion of the Office of Investigation inquiry into the subject of harassment, as raised now by three different people at the very least.

JUDGE KELLEY: I was raising a different question. I was talking about discovery. My assumption is that once you take these depositions that you have been wanting to take by tape recording, however those get taken, then when those are taken, discovery will thereupon close. We will then hear later from OI. We don't know now what exactly is going to be done with the OI report. Maybe it has got confidential sources in it. Those kinds of problems may arise. The question we are raising now is: What about summary disposition? Should we go ahead with that or should we just wait? I am assuming that when those depositions are taken, discovery will close.

MR. EDDLEMAN: Judge, we are on kind of a thin line where Mr. Guild and I divided this. I was going to take the summary disposition. If I understand your question, it is: Shouldn't we be able to go ahead with summary disposition after the depositions and not have to wait for OI?

JUDGE KELLEY: That is one way of putting it. Another option would be to wait on any summary disposition. I am not even sure there will ever be a motion for summary disposition.

MR. EDDLEMAN: Why don't we ask the applicant that first.

JUDGE KELLEY: Mr. O'Neill, do you want to

comment on this question?

MR. O'NEILL: I would be happy to, Judge Kelley.

Let me take this in a logical order. The letter from Mr. Hayes indicated that, as of the date of that letter, which was the 25th, that he thought that the report from OI would be on the order of 10 weeks. That would make it, by my calculation, May 6.

JUDGE KELLEY: Right.

MR. O'NEILL: We were somewhat dismayed that it was going to take that long and OI didn't start their investigation until almost the middle of February. And indeed, during the safety hearings and discussions with counsel for I&E, they were certainly aware that I&E was going forward with their investigation and OI would take the harassment part of it. But be that as it may, we are now into March and OI says it needs perhaps until May to complete this investigation. We know that -- as far as we understand, they have completed their interviews of personnel at the plant site.

We would like to get on with this contention and to resolve it. We believe that that is in the best interest of, certainly of Applicants and the parties, not to let contentions linger on, particularly with the other safety issues having been heard.

We would ask the board to reconsider attaching the

anonymous letter writer, some of which certainly don't go to harassment, decouple that from the OI investigation of Mr. Van Vo's charges and harassment claims. We don't see that they are coupled. They don't support that narrow contention. We see no reason to give OI and opportunity to take additional weeks to take a look at this issue.

JUDGE KELLEY: I think I can safely tell you this with the confidential aspect, that the harassment charges in the other letter are more specific than the Paquese letter. The Paquese letter refers to it in a PS at the end. But there is more of a link in the harassment sense in the other letter.

MR. O'NEILL: Assuming that, it still doesn't go to the contention that is before the board, which goes to whether or not Mr. Van Vo was harassed and terminated from employment for raising safety issues or because of poor performance. Unless you are suggesting that the anonymous writer has disclosed some information that goes to that issue, it isn't clear to me that there is any reason to delay deciding the admitted contention before the board while OI investigates an issue that has been put before it, in this case because you have referred a letter to them. It is not part of this contention. It is not part of this issue. I don't believe that the board has raised it.

JUDGE KELLEY: Are you saying that we should go

ahead with the Van Vo matter and you should be entitled to file summary disposition after discovery closes?

MR. O'NEILL: No. I am saying that we believe that if we wait on OI to complete the investigation of, not only the Van Vo issue, but also the other two issues, that it is going to defer resolution of the contention that is before the board and we believe that is undesirable.

With respect to summary disposition, I think our position can be summarized as follows: We would -- the board initially established early summary disposition with a hearing in May or April time frame, as necessary. We believe we could go forward without the OI report on this contention and there is case law that would support that.

On the other hand, in this case Applicants would be faced with the prospect of going forward during the pendency of this OI investigation into the very issue admitted for litigation and, as we understand it, without the Staff taking a position on the issue. Given the time available, we think that that is not prudent and we would believe that the most prudent thing to do is to wait until OI issues its report, whatever that report might be, and then immediately go into resolution of this issue. Quite frankly, we would urge the board and do urge the board to communicate to OI the board's desire to have this wrapped

up, which has been, quite frankly, lingering since October now.

We would, in effect, defer the option of summary disposition in the hopes that the OI would get the report out on May 6, that the parties would be able to file testimony soon thereafter, and that we could have a hearing in the late May, certainly early June time frame before the emergency planning hearings. We would be willing to waive summary disposition if that kind of schedule could be held.

We would simply like to retain the option, if the best laid schedules that we might establish here become delayed and summary disposition looks like an option that might be invoked, that we retain the opportunity to move for leave to file summary disposition if it makes sense in the future. We quite frankly believe after the deposition of Mr. Van Vo that this contention would be amenable to summary disposition, but we see no reason to delay it until late summer simply to take the crack at summary disposition and then possibly have to go to a hearing later.

I think that our view of summary disposition is to retain the option, if possible, but to look to a schedule to be established for a hearing, assuming that we get the report from OI in early May and with the request to the

board that they communicate the board's desire to OI to try to do that in the context of decoupling from the other two issues.

JUDGE KELLEY: Mr. O'Neill, if I understand your bottom line then, if we were writing an order we would not set a new date for summary disposition. We would just leave that open at the moment and then you would see where things are after the OI investigation comes in and you may come in wanting a motion for summary disposition. You want to propose a schedule for hearing. You may want to do various things. Right now we would, in effect, do nothing, isn't that right?

MR. O'NEILL: No. I would not say that. I think the import of my suggestion is I would like the Court to look at its schedule. I understand that you are now involved in the Shoreham proceeding, and to take a look at any potential conflicts and right now block out some time for a hearing on this issue. Then once that is established, to convey that schedule and the board's intent to OI and ask that they give their best shot at completing this investigation of Mr. Van Vo in the early May time frame to give the parties an opportunity to be apprised of its contents prior to a deadline for filing testimony.

Applicants are prepared to go forward with our case

without the OI investigation but we understand that the Staff needs to have OI's cooperation to put on their case and that the Intevenors may have a right to be apprised of it prior to having to go forward with their case.

JUDGE KELLEY: Okay. Thank you.

Mr. Eddleman?

MR. EDDLEMAN: I believe there Ms. Moore was trying to speak up earlier. Maybe she has a comment to put in here. Ms. Moore?

MS. MOORE: I don't remember having tried to say anything. However, the Staff would have no difficulty with separating out Mr. Van Vo's contention from the other issues. We think that would be a good course of action to follow.

JUDGE KELLEY: Why? I understand the Applicants' desire to do things expeditiously and not -- why are you in a hurry?

MS. MOORE: We are not in a hurry. We just thought that it would be easier to do that at this point. We know that OI has been working on their investigation and I have no reason to think that they will not attempt to meet their commitment with regard to the report on Mr. Van Vo. I have no idea what their schedule is at this point for completing their investigation or beginning it of the other two issues you referred to them.

JUDGE KELLEY: We asked them to fold it in with Van Vo.

MS. MOORE: I don't know that they have been able to determine whether they could do that in the time frame which they originally suggested to you for completing Mr. Van Vo's investigation.

JUDGE KELLEY: Why do you think that is desirable, to split off the letter writers from Mr. Van Vo?

MS. MOORE: As I understand it, the contention does not really reflected the issues that are raised by Mr. Paquese letter. It was a narrow contention. I would think that it would have to a wait completion of the OI report on the other two issues to determine whether, in fact, there was a contention to be litigated in the proceeding. Meanwhile we could resolve this particular contention in a fairly expeditious manner.

JUDGE KELLEY: It seems to me that you have got a couple of claims of harassment and you are concerned about the existence of a pattern and you have got an office looking into those two claims of harassment. It makes some sense to wait until they come back and tell you what they have found. We would go through an awful lot of time and effort and work to go all the way through Mr. Van Vo's claims and then we could crank up and do it again in August on the other complainants, if that looks appealing

to you. Given the fact -- we have not heard anything definite about fuel load other than March 1986. Why can't we give OI another reasonable time period to wrap all this up? That is hard for me to understand. That is the way I see it.

VOICE: The letter writers issues have to do with the Van Vo contention.

JUDGE KELLEY: For now, that is the leverage, is the confidential informant -- excuse me a moment.

(Discussion off the record.)

JUDGE KELLEY: I had hit the wrong button. I said something and realized after that that I was off the phone so I guess what we were just talking about is decoupling the two letters from Mr. Van Vo's claims. I just want to note one thing. In our January 14 order, at page 6, we are talking about this notice that we sent out which is what elicited those two letters. We said if the board receives any information pursuant to the notice, we will consider appropriate action on it, including broadening of 41G.

So I think there has been some, if you will, coupling of Van Vo with other complaints from the beginning, as far as the board is concerned.

Mr. Eddleman?

MR. EDDLEMAN: Yes, judge. Am I to understand

then that by taking this action, the board, in fact, has broadened 41G as admitted?

JUDGE KELLEY: No, you are not to understand that.

MR. EDDLEMAN: Okay.

JUDGE KELLEY: I said we would consider it. We didn't do it. We haven't done it yet. We may not do it. As of now, it is old 41G as modified.

MR. EDDLEMAN: As modified in the January 14 order. Just like it was?

JUDGE KELLEY: Right.

MR. EDDLEMAN: Okay.

So -- but that language in that order is the reason for the coupling of the investigation; am I right about that?

JUDGE KELLEY: Well, I wouldn't put it quite that way. I am simply pointing out that we, from the beginning of this, January 14, have seen that there may be potential information coming this way by way of the notice that we had posted that may have some relationship to 41G. That is all.

MR. EDDLEMAN: Okay.

MR. GUILD: I think there are two possible relationships. I think one is that, as your order of January 14 suggests, upon receipt of additional information, you consider broadening the contention. And

the other side of the coin, if no further evidence surfaces, then presume presumably that issued would be closed.

JUDGE KELLEY: Right.

MR. GUILD: That evidence did come forward. It seems to me by the terms of your orders that are outstanding, the posture we are in right now is to consider what to do with that.

JUDGE KELLEY: I don't see that at all. In the first place, if you were sending out the Paquese letter on harassment, there is nothing in that letter. The other one has some other things in it. We are not in a posturing of considering that now. We sent it over to OI and we said, look into this. They are going to come back and tell us what they found. Then we will consider it.

MR. GUILD: Your order very specifically said that upon receipt of additional information and consultation with the parties, you would consider what to do with that additional information.

JUDGE KELLEY: We are giving you further interpretation, if that is necessary. Right now, 41G is what you have to work with.

MR. GUILD: Our point right now is, we think it makes no sense whatsoever to further truncate the real question that is important to us which is: Is there

harassment that has the effect of suppressing the identification of safety deficiencies at the Shearon Harris Nuclear Power Plant? That is the bottom line question. You suggested one way, which is to truncate it to the point where you eliminate each little piece and we can come back and consider the pieces we now know of separately and distinctly. We don't think that makes sense from a question of proving harassment, a pattern of harassment in the first instance. We think it is plain inefficient. I think it is inconsistent with what the board said it would do when and if it received additional complaints of harassment.

JUDGE KELLEY: We need to note the fact that we have accomplished very little in almost two hours. The question now is: What should the board do by way of setting a new date for summary disposition or just leaving that matter open? Do you have a position, Mr. Guild?

MR. GUILD: Yes, sir. We may not be in much disagreement here. We think you should wait for the OI investigation to be concluded. We think that the OI investigation should take -- should not ignore the other harassment evidence that has been referred to it, but should consider it as a piece of a whole. And when that report comes out, any party should be free to take action that it likes by way of summary disposition. We think

that the board should not require summary disposition prematurely before the OI report is out, nor should it be coupled, some harassment from the harassment evidence that Mr. Van Vo has brought to us. We think we should allow OI to induce evidence and make that evidence available to the parties and this board before it resolves or can resolve the harassment contention.

JUDGE KELLEY: Okay. I think we understand the positions on that. Those were the things that we had namely in mind. I don't wanted to get into along discussion on treatment of these letter writer potential witnesses. Could you indicate what you have got in mind?

MR. GUILD: The narrowest points is this: on behalf of the second confidential witness, I wanted to ask the board to do this. That witness learned of the board's disposition of their communication, the referral to OI, from reading about it in the newspaper. That witness contacted me and expressed great alarm and distress and fear for the very retaliatory response from the company. That was the basis for seeking protection in the first instance.

Because they understood that treatment to remove that witness from the protection of this licensing board, as they understood they would be protected in the terms of the notice, they understood from the terms of the notice

that the board would essentially follow, the procedures that it set out in the notice and that I recollected from the Catawba proceeding. That was that any treatment of that witness' information would be subject to sanctions of the licensing board and a protective order designed to assure that: One, that the witness be protected from reprisal or retaliation.

Two, that the confidentialty of that witness be assured to the maximum extent possible under specific terms that would assure that anybody who learned of the identity of that witness or identify identifying facts would be the subscriber to an affidavit of confidentiality. The board and the parties would then know who had access to that information and presumably that would provide a powerful disincentive for any of those named persons for taking any kind of action.

They now find themselves in a position, the confidential witness, of being turned over to OI, who admittedly has a confidentialty policy, but from past experience we all know that their assurances of confidentialty are always subject to the practical limitations of the necessity for investigating a concern. The most particular appropriate problem is this: When OI begins to investigate that concern, if, in the course of that investigation, of necessity, identifying information

gets communicated to Applicants' employees -- I refer you to the Welder B example in the Catawba proceeding --

JUDGE KELLEY: Are you concerned -- frankly, I thought that you would not be concerned about information being given to OI. They do these things on a confidential basis. We all know that. Are you saying that OI should not investigate the issues --

MR. GUILD: They should investigate the issues, but since the witnesses were solicited under the board's order with their offer to protect their confidence, that the board should honor that offer and should provide for a protective order. That protective order should include limitations on the dissemination of identities and identifying information that would be binding on the NRC Staff, including OI, but most particularly would be binding on anybody else who learned of that information.

I have particular concern for these contacts that OI might make, not disparaging their efforts on protecting confidentialty, but necessary contacts with Applicants' personnel with information that is sufficient to identify that individual.

JUDGE KELLEY: I think I understand your point. My feeling was that when this board divulged information about the writer's identity, counsel for the parties, we would at the same time adopt a protective order along the

lines that you suggest. Since we haven't given it to anybody but OI, you know about it because you represent the person in question, I think.

MR. GUILD: Yes, sir.

JUDGE KELLEY: I don't quite see why we should be in a mode of issuing protective orders at this point. I think that OI is going to treat this as confidential. We asked them do. The transmittal memo of the letters over there says, "Please note, this is confidential." I assume they will do so.

Are you saying that in that mode under these circumstances that we need to issue a protective order?

MR. GUILD: Yes, sir, I believe you do. It is because OI is constrained to balance the need to protect the confidence of a witness with their duty to investigate these concerns. In accomplishing those conflicting ends, as a matter of course, identifying information is likely to be transmitted to other persons. I would submit to Applicants' people that is a particular concern to this witness and is a very clear basis for protective order.

I think that, frankly, the board has solicited this information. The witness came forward in response to that notice which specifically states that when information about that person is transmitted to others, it will be subject to the board's control. I think the board has to

maintain that control.

We would ask that a protective order be issued.

JUDGE KELLEY: I think I understand you.

MR. GUILD: I understand you have rejected our related point, which is that we think that this witness' evidence should be before the board and parties and should be transmitted to the parties and made subject to adjudication. As part of the harassment contention that is before the House. We think the connective proposition is that there should be a protective order that applies to all, and subject to that protective order, the witness expected that that information would be made available to counsel for Applicant and the Staff and the parties and would be subject to adjudication. But be that as it may, even if no further action is taken except to refer it to OI, we think a protective order is required.

JUDGE KELLEY: All right. We would like to confer for a few minutes. Why don't we say -- I have got 3 minutes until 12. Stay on the line but pick your phone back up at 5 minutes after.

MS. MOORE: It would seem to me that if Mr. Guild wants a particular type of protective order, since it is difficult from what he is saying to understand exactly what he wants included in it when he refers to people being interested viewed by OI, perhaps he should

propose one in writing for the board to consider and the parties.

MR. O'NEILL: Applicants concur with that because we haven't the slightest idea how we would carry out a protective order if it were to cover Applicants' employees when we haven't the slightest idea, when OI comes on the site, whether it has to do with this investigation or some other one.

JUDGE KELLEY: The board will consider the protective order request. We will go off until about 5 after. Thank you.

(Recess.)

JUDGE KELLEY: We have considered the matters that you have put to us this morning and we have the following rulings to make: First of all, on the taking of depositions by nonstenographic means; we think the untimeliness point was really overtaken by events, whatever the merits of that would have been back in February. The board itself put this matter over. We said we would address the method of taking, which we are now doing, so we don't think the untimeliness pertains here. We think the NRC rule on the point in question, namely whether a board may authorize the taking of a deposition by nonstenographic means, obviously it doesn't speak directly to the point. We think it is a debatable point

one way or the other. Our information is to conclude and we do conclude that we have got discretion to take that approach. What is really the question then is what kind of protective features ought to be included where there is no stipulation among the parties what kind of protective features ought to be included in order to insure accuracy and reasonable access by all parties to copies and the like.

To that end we are going to ask Mr. Guild if he wants to pursue this option of the nonstenographic means, that he prepare in the first instance a draft order for the board's approval, incorporating such provisions as he thinks appropriate and that he then first serve the other parties. We are perfectly happy, ladies and gentlemen, to speed this up a little bit and not have back and forth versions of things in any formal sense, further briefs we don't want to see. We would be perfectly happy if Mr. Guild sent his proposed order to the two parties. That they then put forward whatever they think ought to be included and that then send it back to Mr. Guild who will send the whole package back to us. Then we will review it and probably edit it somewhat, if possible. We have heard argument this system won't work, it has too many abuses on it. We feel on reflection when we read the order, we will improve it and you will have to proceed by the customary

court reporter means. But if we think the order is reasonable and is a compromise, we expect we will approve it. At that point, we would set some outside date to get this deposition taking done. So that is the ruling on point 1.

The second thing is, we had some discussion about the scope of the deposition. Mr. Guild pointed us to some areas where he wished to question and there have been objections by the applicant to the scope that he was espousing. While we understand the desire to get things more specific now, we feel on balance that we really can't make those rulings in advance. We have said what -- we thought we chose our words rather carefully in the January 14 and March 13 orders. We expect there may well be a dispute. In that event, Mr. O'Neill, if he is there, will simply have to instruct the witness not to answer. If Mr. Guild wants to pursue it, it will have to come back to the board. We think that is really the best thing for us to do.

On the question of summary disposition and whether there should be a specific date for the filing of a motion, we think not. We are not going to set a new date for filing summary disposition motions. Our general feeling is that it is preferable for the OI people to complete their investigation on Mr. Van Vo and the other matters we

sent to them before we revisit the question of summary disposition. So that is where we are going to leave that at the moment. I might just say that we understand the Applicants' concern about time and desire to set a hearing date. We will keep those concerns in mind, but we are not going to act on those matters at this point.

The last point on which we have a ruling is the request for, or motion for a protective order with regard to the one person who wrote the letter that we have not given copies to the parties. We don't think it is appropriate that we enter a protective order at this point. That comes into play, as we see it, primarily when we have disclosed the identity of this person to the parties. We want to make sure that it goes no further than counsel. But we haven't done that in this case. Counsel hasn't been told this information. Mr. Guild knows who the person is and is representing the person here, but the other parties have not been informed. The question of informing other parties, the question of protective order and probably other questions will come up when we get the OI report back in hand.

That is what we have. Let me see if I have omitted anything that we should also get to. I will ask the parties. Mr. Guild, anything else?

MR. GUILD: Specifically, judge, I take it the

board has rejected the notion of considering expansion of the narrow 41G as admitted to include the information presented by the two witnesses who have come forward in response to the board notice?

JUDGE KELLEY: That is correct. We are not going to consider that until we get the investigation back.

MR. GUILD: That is all I have.

JUDGE KELLEY: Mr. O'Neill?

MR. BAXTER: This is Mr. Baxter. The Applicants would like to request the board, and certainly take the time to consider, if you are not prepared to react today, to advise us if the confidential letter expresses safety concerns about the construction of the plant which, if not corrected immediately, could be compounding a more difficult problem to rectify at a later time when the OI report comes out, that we be notified of what those safety concerns are. I am not speaking of the harassment of the --

JUDGE KELLEY: I understand.

MR. BAXTER: But the safety concerns.

JUDGE KELLEY: That seems to be reasonable. That strikes the board as a reasonable request. We will do that.

Mr. Barth?

MR. GUILD: If the board would entertain transmitting any information, we think the fear is that

that would be identifying in some fashion. We would ask that the board consider the proper protective order at that point.

JUDGE KELLEY: I think that is a reasonable request also. We will do that.

Ms. Moore?

MS. MOORE: Staff has nothing to add, your Honor.

JUDGE KELLEY: Okay. Well, I guess that is it then. Thank you very much.

MR. EDDLEMAN: Can I ask a question?

JUDGE KELLEY: Yes.

MR. EDDLEMAN: Does the lack of a protective order mean that we are all free to try to find out who this alleger is?

JUDGE KELLEY: I hadn't thought about it. You can ask Mr. Guild. I don't know. I don't see any reason why not. Anybody disagree with that?

MR. EDDLEMAN: I mean beyond asking Guild, if I have records or something that I think may give me clues, can I start poring through them to try to figure it out?

JUDGE KELLEY: I don't see why not. Does anybody -- that is my tentative reaction. You are not under an order. Anybody disagree with the proposition that Mr. Eddleman is free to do as he proposes? I gather not.

MR. EDDLEMAN: I am just asking if I am free to do it. I presume that applies to all the other parties, too.

JUDGE KELLEY: Yes, I think that is fair. Okay. Well, thank you very much. Good day.

(Whereupon, at 12:15 p.m., the telephone conference was concluded.)

CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings before the UNITED STATES NUCLEAR REGULATORY COMMISSION in the matter of:

NAME OF PROCEEDING: CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY

(Shearon Harris Nuclear Power Plant, Units 1 and 2)

DOCKET NO.: 50-400-OL; 50-401-OL

PLACE: WASHINGTON, D. C.

DATE: THURSDAY, MARCH 21, 1985

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission.

(sigt) Rebecca E. Eyster/sg

(TYPED)
REBECCA E. EYSTER

Official Reporter
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