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May 20, 1985

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In the Matter of
Carolina Power & Light Company and North
Carolina Eastern Municipal Power Agency
(Shearon Harris Nuclear Power Plant)
Docket No. 50-400 OL

Administrative Judges Kelley, Bright and Carpenter:

During a conference call on May 7, 1985, counsel for Mr. Eddleman petitioned the Board to compel discovery of documents or issue a subpoena to compel the production of documents. Tr. 7556-67. The documents in question were described by counsel for Mr. Eddleman as (1) "documents related to [the] Inspector Review Panel, its final report, the audit or report of Mr. Parks Cobb with respect to that panel's work and the underlying documents behind that report," and (2) "the report and associated documents with respect to the individual charge of harassment by a quality assurance or construction inspector at the Harris site." Tr. 7559; 7563. Mr. Eddleman alleges that



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these documents are relevant to litigation of Eddleman Contention 41-G. The Board denied Mr. Eddleman's motion, subject to its review of the Inspector Review Panel Report and papers relating to the individual claim of harassment. Tr. 7580. As directed by the Board, enclosed are copies of the "Final Report SHNPP QA/QC-Construction Inspector Review Panel," dated August 30, 1984, and four documents, consisting of a total of eight pages, relating to an investigation of an allegation of "harassment" by a QA/QC inspector. See Tr. 7581.

These documents are transmitted to the Board members solely for the purpose of an in camera review to confirm the Board's preliminary determination that such documents need not be produced by Applicants. These documents are not to be considered evidentiary in any way. Since these documents will not be part of the record and will not be viewed by other parties, Applicants ask that they be returned after the Board has completed its review to avoid any concern regarding an ex parte communication.

There is no question, however, regarding the propriety of the procedure adopted by the Board. Pursuant to Rule 26 of the Federal Rules of Civil Procedure, a court may require that documents be submitted to it for a determination of any question as to privilege, relevancy or materiality before the moving party will be permitted to inspect them. As clearly stated by a District Court in Alabama in Diamond v. City of Mobile, 86 F.R.D. 324, 327 (S.D. Ala. 1978), "the overwhelming case authority on this subject allows a judicial in camera inspection of the materials to resolve any relevancy dispute." See, e.g., Holmes v. Gardler, 62 F.R.D. 70 (E.D.Pa. 1974); Frankenhauser v. Rizzo, 59 F.R.D. 339 (E.D.Pa. 1973); Wood v. Breier, 54 F.R.D. 7 (E.D.Wis. 1972); 4A J. Moore, J. Lucas and D. Epstein, Moore's Federal Practice § 34.19[2] (2d ed. 1984).

Applicants opposed Mr. Eddleman's motion to compel production of documents because the motion was untimely and the documents are not relevant to the contention being litigated. See Tr. 7567-77. We summarize below the arguments made during the conference call and provide citations to the record where appropriate.

Applicants responded to Mr. Eddleman's request for production of documents regarding Contention 41-G on February 19, 1985. "Applicants' Response to 'Wells Eddleman's Request for Production of Documents' (Contention 41-G)," dated February 19, 1985. All documents relating to the contention responsive to Mr. Eddleman's request had been made available for inspection by both Mr. Eddleman and his counsel Mr. Guild on February 18, 1985. A significant number of documents were copied for Mr.

Eddleman and made available to him or his counsel prior to the end of the discovery period on March 1, 1985.

A motion to compel must be filed within ten days after the date of the response or failure of a party to respond, concerning which the party objects. 10 C.F.R. § 2.740(f). There were no ongoing "negotiations" with respect to the adequacy of document production. Thus, Mr. Eddleman's motion to compel was untimely by almost two months.

The Inspector Review Panel Report was not requested by Mr. Eddleman in his request for documents, although its existence had been identified in an "Affidavit of A. Parks Cobb, Jr.," which was filed in support of "Applicants' Response to Late-Filed Contentions of Wells Eddleman and Conservation Council of North Carolina Based on the Affidavit of Mr. Chan Van Vo," dated November 13, 1984. Portions of the Inspector Review Panel Report that related to two of Mr. Chan Van Vo's concerns were produced in February 1985 and copies of such portions were made for Mr. Eddleman's counsel, along with other underlying documents relating to that concern. See Inspector Review Panel Report, Appendix B at C-23 and C-24.

The documents regarding the QA/QC inspector who claimed "harassment" by his supervisor (not related to raising safety concerns) are not relevant to Contention 41-G -- as discussed below -- and were not requested in Mr. Eddleman's Request for Production of Documents. If Mr. Eddleman believed that he might have convinced the Board to allow discovery regarding allegations of harassment by employees other than Mr. Chan Van Vo, he could have brought that issue before the Board by requesting such information through discovery and could have sought to compel discovery if Applicants objected. Instead, Mr. Eddleman sought reconsideration on the scope of the admitted contention and of discovery -- which motion was denied. The identification of a document by a deponent in depositions authorized after the close of discovery does not cure an untimely request for documents -- particularly where the information is disclosed in response to questions outside of the scope of the issue being litigated.

The documents sought by Mr. Eddleman utterly lack relevance to litigation of Contention 41-G. The Board has already rejected Mr. Eddleman's view of the scope of discovery regarding Contention 41-G on a number of occasions. In rejecting Mr. Eddleman's Motion for Reconsideration, the Board dismissed Mr. Eddleman's arguments for expanded discovery:

> Mr. Eddleman's analysis of the Van Vo complaints leads him to conclude that they "will require

> discovery comparable to that required for the original contention 41-G." That is not correct. While it may be necessary to look somewhat beyond the Van Vo charges to place them in context, any hearing would focus on those charges, not on an alleged pattern of harassment. Discovery would be similarly limited.

Memorandum and Order (Ruling on Contentions Concerning Diesel Generators, Drug Use and Harassment at the Harris Site) (March 13, 1985) at 10 (emphasis added). In its Memorandum and Order (Ruling on Certain Safety Contentions and Other Matters) (January 14, 1985) at 4, the Board stated clearly:

> This contention should be understood as focusing on the reasons particular personnel actions were taken against a particular individual. The parties' attention should focus on particular incidents alleged in the Van Vo affidavit.

In addressing the relevance of the Inspector Review Panel Report and any underlying documentation, counsel for Mr. Eddleman again argued that the scope of discovery should go to "retaliatory motive" and any evidence of a "pattern" of harassment -- notwithstanding the Board's ruling on these arguments previously. Tr. 7559-60. He first argued that the documents "reflect how CP&L responded specifically to Chan Van Vo's concerns * * * that were treated by the inspector review panel." Tr. 7559. But those specific sections of the report have already been provided to Mr. Eddleman. Next, he argued the documents are relevant because they demonstrate "on retaliatory motive, how CP&L responds to the safety concerns generally, what its practice is with respect to the safety concerns expressed by the inspectors whose concerns were considered by that review panel, demonstrating a pattern." Id. Since Mr. Chan Van Vo was not a QA/QC inspector, even if some sort of pattern were discerned from the Inspector Review Panel Report, the relevance is not apparent. However, its is clear from a perusal of the Report that the concerns expressed by QA/QC and CI inspectors cover a broad spectrum of issues and establish no pattern. The third point asserted by Mr. Guild is that the documents allegedly "reflect CP&L's knowledge and response to the existence of harassment, discrimination and retaliation concerns raised by site employees, again bearing on the existence of retaliator motive in Van Vo's case." As the Board can judge for itself, the allegation is simply not true.

In arguing the relevance of the investigation of an "harassment" complaint, Mr. Guild maintains "the existence of a complaint of harassment by an inspector bears on both the

existence of retaliatory motive in Mr. Van Vo's case, and by way of demonstrating the Company's approach to resolving concerns of harassment, the existence of other instances of harassment bearing on his case in Mr. Van Vo's case." The first problem with Mr. Guild's argument is his misuse of the word "harassment". The investigation of "harassment" as reflected in the documents which Mr. Eddleman desires to be produced was not an allegation of "harassment" in the sense of "adverse action against some employee who raised safety concerns in some fashion." Tr. 2725 (Kelley). As Mr. Guild is well aware from the deposition, the allegation of "harassment" in this instance related to a supervisor who insisted that the employee stay in his work place and do his job. There is clearly no relevance here to the Chan Van Vo allegations -- even if we accepted Mr. Eddleman's expanded scope of discovery.

The Board asked that Applicants state their position regarding why the documents should be kept confidential even if the Board finds that they are not discoverable. As a general matter, if Applicants' documents need not be disclosed to the public and in particular to adverse parties, Applicants have an interest in maintaining some degree of confidentiality. With respect to the documents regarding the allegation of "harassment" by an employee, Applicants have an interest in protecting the confidentiality of the employee -- who provided information to a Quality Check investigator on a confidential basis. Disclosure of the individual's name and the circumstances of his allegations could cause him embarrassment or adversely reflect on his future employment opportunities. The confidentiality of the Inspector Review Panel Report raises different, but also fundamental questions. The information obtained from the inspectors was obtained on a confidential basis. Although the report does not identify individuals by name, it has been closely held within management as a tool to allow management decisions to improve the QA/QC program and to ensure that some of the problems that have been identified at other utility projects have not surfaced at the Harris site. If the results of critical self-evaluations were to be made public, the quality of such reviews and the frankness of comments in reports of such reviews would suffer greatly. While the Inspector Review Panel Report has been available for inspection by Inspection and Enforcement staff members, it was not provided to the NRC. Applicants have an interest in maintaining the confidentiality of their self-appraisals. In certain cases that interest may be overtaken by the NRC's interest in ensuring relevant information is made available in the litigation of admitted contentions. But, where, as here, the information sought is not relevant, Applicants maintain their right to the confidentiality of their internal reports.

Where the documents provided herein for the Board's review are not relevant to a matter in controversy, Mr. Eddleman has no right to obtain them in discovery. See 10 C.F.R. § 2.740(b)(1). Applicants ask the Board to reaffirm the decision to deny Mr. Eddleman's motion to compel and/or subpoena for such documents and to return them to counsel for Applicants after review by the Board members.

Respectfully submitted,

John H. O'Neill, Jr., P.C.
Counsel for Applicants

JO'N/dy

cc: Attached Service List w/o enclosures

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



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



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