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February 24, 1986

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	)	Docket No. 50-400 OL
MUNICIPAL POWER AGENCY	)	
	)	
(Shearon Harris Nuclear Power	)	
Plant)	)	

APPLICANTS' ANSWER TO EDDLEMAN REQUESTS FOR SUBPOENAS ON EDDLEMAN 57-C-3

I. Introduction

On November 4 and 5, 1985, the Licensing Board in this proceeding convened evidentiary hearings on Eddleman 57-C-3, which concerns the effectiveness of siren systems for public notification at night. In its post-hearing deliberations, the Board "discovered gaps and ambiguities in the record" precluding, in its view, the definitive resolution of certain issues presented by the contention. By its January 16, 1986 "Memorandum and Order (Limited Reopening of the Record on Eddleman Contention 57-C-3)" ("January 16 Order"), the Board reopened the record "for a further evidentiary hearing in

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the limited areas described" in its order.1/ By agreement of the parties, the reopened evidentiary hearing was set for March 4, 1986 (Tr. 10,275-78), with all parties' witnesses identified by February 7 (Tr. 10,282; 10,286), and any subpoena requests due February 12 (Tr. 10,286). The parties further agreed that any pre-filed testimony on Applicants' proposed supplemental tone alert system would be due February 18, with all other pre-filed testimony due February 21, 1986 (Tr. 10,278; 10,287).

Intervenor Wells Eddleman identified no witnesses on February 7. However, on February 12, 1986, Mr. Eddleman filed his "Requests For Subpoenas on Contention 57-C-3 (Night-time Notification)" (the "Eddleman Requests"), seeking subpoenas for four individuals -- Mr. Jesse Riley, Dr. M. Reada Bassiouni, and Mr. Robert Black as Mr. Eddleman's witnesses, and Mr. Eugene J. McKinney as a Board witness. Applicants oppose the issuance of the four subpoenas.

1/ The six issues identified in the Board's order are: (1) determination of siren arousal probabilities in the 5 - 10 mile area of the EPZ, using both the Horonjeff data and the Krallman data; (2) exploration of arousal probabilities predicted in FEMA testimony vs. Krallman data; (3) review of Board calculations (using Dr. Kryter's approximation for dBA-to-SEL conversion) against Harris siren directivity data filed by Applicants; (4) clarification of "Affidavit of David N. Keast Correcting Oral Testimony on Eddleman 57-C-3" (January 2, 1986); (5) clarification of Dr. Kryter's testimony on cross-examination; and (6) cost and feasibility of supplemental alerting systems within the first 5 miles of the EPZ.

II. Mr. McKinney Should Not Be Called As A Board Witness

Identifying Mr. McKinney as a representative of "Southern Bell Marketing," Mr. Eddleman requests that Mr. McKinney be subpoenaed as a Board witness on telephone alerting systems. However, licensing boards may take the extraordinary action of calling their own witness(es) ". . . only after (i) giving the parties to the proceeding every fair opportunity to clarify or supplement their previous testimony, and (ii) showing why it cannot reach an informed decision without independent witnesses." South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-710, 17 N.R.C. 25, 27-28 (1983) (footnote omitted). As the Board here has noted, "[t]his is a stringent standard." "Memorandum (Concerning Denial of Subpoenas for Intervenor Witnesses)" (December 27, 1985), at 3.

Acknowledging the Summer test, Mr. Eddleman asserts merely that the Board's January 16 Order "found the record deficient * * * concerning mechanisms such as the telephone alerting system called for by the contention." That argument reflects a fundamental misapprehension of both the Summer holding and the procedural posture of this case. Under Summer, it is not enough that the Board has determined a need for additional evidence. Rather, the first prong of the Summer test requires a demonstration that the parties have had "every fair opportunity to clarify or supplement their previous testimony" (emphasis

supplied). Mr. Eddleman has not even attempted such a showing. Indeed, there can be no dispute that the reopened hearings present the parties' first opportunity to clarify or supplement the testimony presented at the November 4-5, 1985 hearings in order to address the issues raised in the January 16 Order. Accordingly, Mr. Eddleman's request is premature, and must be denied for that reason alone.

Moreover, Mr. Eddleman has completely failed to address the second prong of the two-part Summer test -- that is, to show why the Board "cannot reach an informed decision without independent witnesses." And Mr. Eddleman is simply wrong in asserting that there will be no testimony on telephone systems in the absence of a Board witness. The Board expressly directed Applicants to provide such testimony, and Applicants have complied with the Board's order. See January 16 Order, at 10; "Testimony of H. Ralph Goodwin, Alvin H. Joyner, David N. Keast, and Dewey B. Overman, II On Eddleman Contention 57-C-3 (Nighttime Notification)" (February 18, 1986), at 4-9, 13. For all these reasons, Applicants object to the issuance of a subpoena compelling Mr. McKinney's appearance as a Board witness at the reopened hearings.

III. Messrs. Bassiouni, Black and Riley Should Not Be Subpoenaed

The Commission's regulations, at 10 C.F.R. § 2.720, authorize the issuance of subpoenas requiring the attendance and testimony of witnesses. The regulations specifically contemplate that the issuing officer may (but need not) require a prior showing of "general relevance" of the testimony. Alternatively, the issuing officer may simply issue the subpoena without any prior showing, and await the filing of a motion to quash (if any) to determine the relevance of the testimony sought.2/ Moreover, the regulations note that the issuing officer is not to "attempt to determine the admissibility of the evidence." See 10 C.F.R. §§ 2.720(a), 2.720(f). However, the regulations on subpoenas cannot be read in a vacuum.

In support of previous subpoena requests, Mr. Eddleman has argued that the Board is obligated to issue subpoenas upon a showing of general relevance, and then can only deny the requests if they are unreasonable -- a concept which governs motions to quash. In connection with the appearance of witnesses

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2/ In considering previous requests for subpoenas, this Licensing Board has "cut through" the pleading stages contemplated by the subpoena process -- eliminating the motion to quash and answer filings in the interests of expedition -- and considering all arguments pro and con prior to ruling on the subpoena request. Applicants understand that the same procedure is being followed here. See generally "Memorandum (Concerning Denial of Subpoenas for Intervenor Witnesses" (December 27, 1985), at 2 n.1.

to present testimony at an evidentiary hearing session, the Board has rejected Mr. Eddleman's argument as based upon a too narrow reading of the Board's authority. Quoting from 10 C.F.R. § 2.757(a), the Board has observed that to prevent unnecessary delays or an unnecessarily large record, it may limit the number of witnesses whose testimony may be cumulative. In the Board's view, with which Applicants agree, this allows the Board to make judgments in advance on whether testimony will be cumulative. Tr. 3190. Similarly, under these circumstances, no party is prejudiced by Board consideration of the admissiblity of proffered testimony in advance of convening a hearing -- particularly considering the potential time, expense, and burden on all parties which may be avoided.

A. Dr. Bassiouni

The bulk of Mr. Eddleman's terse argument for the subpoena of Dr. Bassiouni is a series of wholly conclusory assertions, devoid of factual detail or reasoned analysis. Mr. Eddleman begins by asserting that Dr. Bassiouni -- whose consulting firm analyzed the siren systems for the various CP&L nuclear facilities (including Harris) to demonstrate conformance to the guidance of NUREG-0654 and FEMA-43[3] -- was one of "the principal

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3/ NUREG-0654/FEMA-REP-1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (Rev. 1, 1980); FEMA-43, "Standard Guide For The Evaluation of Alert and Notification Systems" (1983).

affiants in summary disposition on 57-C-53" and has "extensive knowledge relevant to this contention." While it is true that Dr. Bassiouni prepared an affidavit in support of Applicants' motion for summary disposition of Eddleman 57-C-3, that affidavit merely affirmed that the Harris siren system is designed to NUREG-0654 and FEMA-43 standards (which provide for system analysis under average summer daytime conditions). See "Affidavit of M. Reada Bassiouni on Eddleman 57-C-3" (November 2, 1984). Thus, Dr. Bassiouni's analyses of the Harris system, documented in his affidavit and elsewhere, were limited to consideration of summer daytime conditions. In contrast, Eddleman 57-C-3 postulates summer nighttime conditions. Mr. Eddleman has completely failed to explain how Dr. Bassiouni's personal knowledge of the Harris system -- limited, as it is, to summer daytime conditions -- relates to the subject of Eddleman 57-C-3 in general and, more particularly, to the six specific issues on which the Board has reopened the record.

Nor are Dr. Bassiouni's professional qualifications in general acoustics and his asserted "wide experience" with the notification systems of other nuclear utilities necessarily availing. For example, as framed by the Board, Issue 2 calls for the testimony of a witness with specialty expertise in psychoacoustics.4/ But, as the Board has observed,

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4/ While the Board has expressed its appreciation to Dr. Bassiouni for calling attention to the Krallman study,

(Continued next page)

Dr. Bassiouni is not so specialized. Tr. 9864. See also "Resume of Dr. M. Reada Bassiouni," attached to the "Affidavit of M. Reada Bassiouni on Eddleman 57-C-3" (November 2, 1984). Thus, Dr. Bassiouni's testimony on Issue 2 would be objectionable as unreliable, for lack of the requisite expertise.

Further, given the procedural context of this case, Dr. Bassiouni lacks the familiarity with the existing record which would be necessary to make his testimony meaningful. Accordingly, the Board should not accept at face value Mr. Eddleman's assertion that "Dr. Bassiouni is well qualified to answer the Board's questions 1, 3, 4, 5 and 6." The upcoming hearings are not starting on a clean slate. Specifically, the hearings have been reopened to take evidence on a

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(Continued)

the Board has also observed that Dr. Bassiouni did not participate in the study and has no specialized knowledge of it. "Memorandum (Concerning Denial of Subpoenas for Intervenor Witnesses)" (December 27, 1985), at 6. Nor did Dr. Bassiouni (at least initially) appear to appreciate the relative import of the Krallman study. Even after reviewing the FEMA testimony filed in the initial hearings, Dr. Bassiouni appeared to believe that the Krallman arousal data were more conservative than the Horonjeff data. Tr. 9877-78. In fact, the opposite is true. See generally, e.g., "Applicants' Proposed Findings of Fact and Conclusions of Law on Eddleman 57-C-3" (December 9, 1985), ¶¶ 33-34. Dr. Bassiouni's failure to appreciate the relative significance of the Krallman data may be in some measure attributable to the expedited nature of his review of the FEMA testimony. The potential for further such errors strongly underscores the unreliability and lack of probative value of any testimony which is not based on a solid, studied familiarity with the existing record in this proceeding.

very few, limited issues, which necessarily require some knowledge of the record which has been compiled to date. While a subpoena could be used to compel Dr. Bassiouni's appearance at the hearings, it could not compel him to review the Board's January 16 Order. Nor could he be compelled to acquire even a passing familiarity with the details of Applicants' proposed supplemental tone alert system and with the extensive testimony and numerous exhibits received in connection with the initial hearings on Eddleman 57-C-35/ -- on which the Board's six issues are based. Certainly the hearings cannot be delayed while Mr. Eddleman takes the time to acquaint Dr. Bassiouni with such information while Dr. Bassiouni is on the witness stand.

For example, Issue 1 plainly requires a command of both the Horonjeff and Krallman data, as well as knowledge of other matters of record such as nighttime siren contours and demographic characteristics of EPZ households. And, as a practical matter, the analyses which the Board calls for must be performed in advance of the hearing. Yet the subpoena which Mr. Eddleman seeks could compel nothing more than Dr. Bassiouni's appearance at the hearings. Similarly, probative, reliable testimony on Issue 3 requires advance review of

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5/ The existing record on this contention is comprised of some 160 pages of written direct testimony, more than 600 pages of oral testimony, and twelve multiple-page documentary exhibits.

the Board's calculations in the January 16 Order, and comparison to the specific directivity data submitted by Applicants. But Dr. Bassiouni simply cannot be compelled to undertake the necessary analyses.

Issues 4 and 5 call for clarification of the prior testimony of Mr. Keast and Dr. Kryter, respectively. Thus, by definition, these issues require knowledge of the record, which Dr. Bassiouni lacks. Moreover, the issues would appear to be peculiarly directed to the respective witnesses; that is, only Mr. Keast is truly in a position to clarify Mr. Keast's prior testimony, and only Dr. Kryter is in a position to clarify Dr. Kryter's prior testimony. Dr. Bassiouni's speculation as to what the two experts might have intended simply would not be either probative or reliable.

Further, although Mr. Eddleman broadly asserts that Dr. Bassiouni has knowledge of "tone alert radios, telephone and other systems" and is thus "well qualified" to address Issue 6, Mr. Eddleman does not represent that Dr. Bassiouni played any role in Applicants' selection of tone alert radios as a supplemental notification system; nor could he truthfully make such a representation. In essence, what Mr. Eddleman seeks to do is to put Dr. Bassiouni on the witness stand, describe Applicants' proposed supplemental notification system, and see what Dr. Bassiouni says. Thus, on Issue 6 -- as on all other issues -- Mr. Eddleman's subpoena request must be

recognized for what it is: a thinly-veiled attempt to use the witness stand as a forum for discovery. For all these reasons, Mr. Eddleman's request to subpoena Dr. Bassiouni should be denied.

B. Mr. Black

Like his argument on Dr. Bassiouni, Mr. Eddleman's argument for the subpoena of Mr. Black is comprised largely of conclusory assertions, based on pure speculation. According to Mr. Eddleman, Mr. Black (whom he characterizes as "CP&L's senior emergency planning person"),6/ was one of the "principal affiants in summary disposition on 57-C-3." This is simply untrue; Applicants did not file an affidavit of Mr. Black in support of their motion for summary disposition of Eddleman 57-C-3. See "Applicants' Motion For Summary Disposition of Eddleman 57-C-3" (November 2, 1984).

Similarly, Mr. Eddleman asserts broadly that Mr. Black has "extensive knowledge relevant to this contention" (emphasis supplied). However, he provides no underlying facts or analysis to support that claim. Certainly, Mr. Black's position necessarily requires a general familiarity with "the CP&L alerting system, [and] alternatives considered for expanding/augmenting it" (Eddleman Requests, at 2). But

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6/ Mr. Black is CP&L's Manager of Emergency Preparedness.

Applicants' pre-filed testimony makes it clear that one of Mr. Black's staff members -- Mr. H. Ralph Goodwin (who will be testifying at the re-opened hearings) -- was actually responsible for "the development of information concerning notification mechanisms to supplement * * * the existing siren system." See "Testimony of H. Ralph Goodwin, Alvin H. Joyner, David N. Keast, and Dewey B. Overman, II On Eddleman Contention 57-C-3 (Nighttime Notification)" (February 18, 1986), at 2. Thus, absent any indication that Mr. Black has knowledge of alternative public alert systems which is not shared by Mr. Goodwin,7/ the issuance of a subpoena for Mr. Black is objectionable on the ground that his testimony would simply be cumulative of Mr. Goodwin's testimony.

Mr. Eddleman's assertion that Mr. Black could "assist in calculation of numbers of households" is also unavailing. Mr. Eddleman does not claim that Mr. Black has any special knowledge or expertise in such calculations -- nor could he. Further, it would be a perversion of the Board's subpoena power to compel an individual to appear at hearings merely to do

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7/ In an attempt to bolster his argument, Mr. Eddleman has resurrected his conspiracy theory, asserting that Mr. Black "may have both opinions and information Applicants have withheld from testimony" (emphasis supplied). These patently speculative allegations provide no legal basis for the issuance of a subpoena, particularly where, as here, such grave charges have been leveled -- and rejected -- in the past. See generally "Memorandum (Concerning Denial of Subpoenas for Intervenor Witnesses)" (December 27, 1985), at 3.

arithmetic for a party. Indeed, to date, the witnesses proffered by the parties have adequately performed their own calculations. Thus, again, Mr. Black's testimony would be cumulative. Accordingly, Mr. Eddleman's request to subpoena Mr. Black should be denied.

C. Mr. Riley

The Commission's regulations mandate the advance filing of written direct testimony in its licensing proceedings. Section 2.743 of the Rules of Practice expressly provides:

> The parties shall submit direct testimony of witnesses in written form * * *

(Emphasis supplied). Similarly, 10 C.F.R. Part 2, Appendix A, § IV.(d)(2) provides:

> The parties are required to submit direct testimony in written form and serve copies of such prepared written testimony on all parties * * *

(Emphasis supplied). This practice of pre-filing direct testimony is integral to such hearings on complex, highly technical issues, to assure "that all the other parties -- as well as all potential witnesses -- know in advance the basic position to be taken by each witness." Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 N.R.C. 565, 569 (1977).

Mr. Eddleman's request to subpoena Mr. Riley is, in effect, an attempted end-run around the requirement for

pre-filed direct testimony. Mr. Eddleman has made no showing whatsoever that Mr. Riley's testimony could not have been filed in advance, like that of the other parties. Indeed, Mr. Eddleman also has not attempted such a showing with respect to Dr. Bassiouni or Mr. Black, though an unwillingness to cooperate in the preparation of testimony can perhaps be inferred from the circumstances in those cases. But Mr. Riley must be viewed in quite a different light.

As Mr. Eddleman acknowledges, Mr. Riley is affiliated with a group of Catawba intervenors. Eddleman Requests, at 2. See also Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-84-37, 20 N.R.C. 933, 935 (1984) (noting appearance of Mr. Riley for Carolina Environmental Study Group). Indeed, Mr. Eddleman relied upon Mr. Riley as a basis for his Contention 57-C-3 and, in the past, Mr. Riley has supplied Mr. Eddleman with information about automatic phone-dialing systems. See "Wells Eddleman's Responses to Applicants' 8-09-84 Emergency Planning Interrogatories" (September 7, 1984), at Response 57-C-3-9(b). Mr. Eddleman even states that Mr. Riley has indicated that he is "most readily available to testify at the reopened hearings." Eddleman Requests, at 3 (at the "P.S.").

Under these circumstances it would blink reality to assume that Mr. Riley would have refused to cooperate with Mr. Eddleman in the preparation of written direct testimony. Indeed, all indications are to the contrary. In any event,

Mr. Eddleman has defaulted on his affirmative obligation to show good cause for failure to pre-file Mr. Riley's testimony. This default alone compels rejection of the request for a subpoena for Mr. Riley.

Moreover, if Mr. Riley is not willing to cooperate with Mr. Eddleman in the preparation of a direct case, Mr. Riley's testimony would not be sufficiently reliable, given his lack of familiarity with the extensive record already compiled on this issue. As discussed with respect to Dr. Bassiouni in Section III.A above, a subpoena could be used to compel Mr. Riley's appearance at the reopened hearings; but it could not compel him to undertake even a cursory review of the existing record, on which the Board's issues are based. And the delay which would be incurred while Mr. Eddleman took the time to familiarize Mr. Riley with the record while Mr. Riley is on the witness stand cannot be countenanced. For example, assuming arguendo that Mr. Riley had the professional qualifications to conduct the "technical analyses" called for in Board Issue 1, he could not even begin to address that issue until he acquainted himself with the Horonjeff and Krallman data, house locations, nighttime siren contours, and demographic characteristics of EPZ households -- all on the witness stand.

Finally, Mr. Eddleman asserts that Mr. Riley "has extensive experience in calculation which may be useful in dealing with items 2 through 5" of the Board's January 16 Order. It is

difficult to imagine how most of those issues could involve a need for "calculations."8/ But, in any event, as noted in Section III.B above, the subpoena power is not properly exercised to compel an individual's appearance at hearings merely to do arithmetic for another. Mr. Eddleman's request to subpoena Mr. Riley should therefore be denied.

8/ See the discussion of Issues 2 through 5 in Section III.A above, incorporated herein by reference.

IV. Conclusion

For the reasons discussed above, the Board should deny Mr. Eddleman's requests that Mr. McKinney be called as a Board witness, and that subpoenas issue to compel the appearance of Messrs. Bassiouni, Black and Riley as Mr. Eddleman's witnesses at the March 4 hearing.

Respectfully submitted,

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Dated: February 24, 1986

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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	)	
(Shearon Harris Nuclear Power	)	
Plant)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer To Eddleman Requests For Subpoenas on Eddleman 57-C-3" were served this 24th day of February, 1986, by deposit in the U.S. Mail, first class, postage prepaid, upon the parties listed on the attached Service List, except that those whose names are marked by a single asterisk were served by hand delivery this 24th day of February, 1986, and those whose names are marked by a double asterisk were served by deposit with Federal Express this 24th day of February, 1986.

Delissa A. Ridgway

Delissa A. Ridgway

Dated: February 24, 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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