

ORIGINAL
UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DOCKET NO: 40-400 OL

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

(Shearon Harris Nuclear Power Plant)

ORAL ARGUMENT

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 BEFORE THE ATOMIC SAFETY AND LICENSING
4 APPEAL BOARD

5 -----x
6 In the Matter of: :
7 CAROLINA POWER & LIGHT COMPANY and : Docket Number
8 NORTH CAROLINA EASTERN MUNICIPAL : 40-400 OL
9 POWER AGENCY : ORAL ARGUMENT
10 (Shearon Harris Nuclear Power Plant) :
11 -----x

11 Nuclear Regulatory Commission
12 Fifth Floor Hearing Room
13 4350 East-West Highway
14 Bethesda, Maryland

15 * Wednesday, February 5, 1986

16 The oral argument in the above-entitled matter convened
17 at 10:00 a.m.

18 BEFORE:

19 THOMAS S. MOORE, Chairman
20 Atomic Safety and Licensing Appeal Board
21 U.S. Nuclear Regulatory Commission
22 Washington, D. C.

23 DR. REGINALD L. GOTCHY, Member
24 Atomic Safety and Licensing Appeal Board
25 U.S. Nuclear Regulatory Commission
Washington, D. C.

HOWARD A. WILBER, Member
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D. C.

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19 On behalf of the Nuclear Regulatory
20 Commission Staff:

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24 U.S. Nuclear Regulatory Commission
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Washington, D. C. 20555

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P R O C E E D I N G S

2 JUDGE MOORE: Good morning. We are hearing oral
3 argument this morning on the consolidated appeal of the
4 Conservation Council of North Carolina, Wells Eddleman and
5 the Joint Intervenors, from the Licensing Board's August 20,
6 1985 partial initial decision on the safety issues in the
7 operating license procedure for the Shearon Harris Nuclear
8 Power Plant.

9 The argument is governed by the terms of our
10 December 19, 1985 order and provided therein, each side is
11 allotted a total of 45 presentation of argument. The
12 Appellants may reserve a reasonable portion of their time
13 for rebuttal.

14 Before beginning this morning, I would appreciate
15 if each of you would identify yourselves for the record.

16 Staff, if you would start.

17 MR. BARTH: I am Charles A. Barth of the Office
18 of the Executive Legal Director.
19 With me is Mrs. Janice E. Moore, also of the Office
20 of the Executive Legal Director and Mr. Stuart A. Treby, the
21 Assistant Chief Hearing Counsel with primary responsibility
22 for supervising us in our office.

23 MR. BAXTER: On behalf of the Applicants, I'm
24 Thomas A. Baxter. To my left, also appearing today as
25 counsel for the Applicants, Mr. John H. O'Neill, Jr., and

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1 Dale E. Hollar. Mr. Hollar is Associate General Counsel,
2 Carolina Power & Light Company.

3 Mr. O'Neill and I are with Shaw Pittman Potts &
4 Trowbridge.

5 MR. EDDLEMAN: I'm Wells Eddleman, Intervenor,
6 appearing pro se.

7 MR. RUNKLE: John Runkle, General Counsel for
8 the Conservation Council of North Carolina.

9 JUDGE MOORE: Is the Appellant prepared to
10 proceed?

11 MR. RUNKLE: Yes, sir.

12 JUDGE MOORE: Please proceed.

13 ORAL ARGUMENT ON BEHALF OF CCNC BY JOHN RUNKLE.

14 MR. RUNKLE: Chairman Moore, Dr. Gotchy and
15 Mr. Wilber.

16 I will be taking the first part of the argument
17 here today. Mr. Eddleman will be taking the second part.
18 We will reserve about 15 minutes of our time for rebuttal,
19 if necessary.

20 As Joint Intervenors -- and the Conservation
21 Council is one of those Joint Intervenors, and Mr. Eddleman
22 is another one of the Joint Intervenors -- we have raised a
23 number of issues in this proceeding.

24 We will keep our arguments brief here today,
25 because

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1 we have briefed them out. You have before you our Proposed
2 Findings of Fact and Conclusions of Law.

3 And also, the whole record bears out what we're
4 going to say here today.

5 The first issue I'd like to address is what has
6 been labeled as Joint Contention 1. We referred to it as
7 the Management Capability.

8 Now this contention was stipulated back in 1982
9 between the Joint Intervenors and Applicants and Staff. I
10 won't read the contention for you, but in brief, this
11 contention states that the applicants, because of their
12 practices and management, various fines, various systematic
13 failure to make any positive change at their other nuclear
14 plants, specifically the Brunswick Nuclear Plants in North
15 Carolina, that they do not have the management capability to
16 operate and construct the Shearon Harris Nuclear Power
17 Plant.

18 We had two weeks of hearings on the matter.
19 There's a considerable amount of testimony that bears that
20 out.

21 I would just like to outline some of the
22 testimony. We've briefed these out, and they're also in our
23 Proposed Findings at length.

24 The Conservation Council was an Intervenor in
25 the Construction Permit proceedings, beginning in the early

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1 1970s. At that time, four units were proposed for Harris,
2 to come on line starting in 1976. At the last filing from
3 the Applicants, one unit at Shearon Harris is to have its
4 commercial power sometime early in 1987, January 1987.

5 As part of the Construction Permit proceedings,
6 the Conservation Council raised various matters of the
7 competence of the Applicants to construct the Harris plant.
8 In fact, on one of the appeals in the Construction Permit,
9 it resulted in what had been called the 1979 remand
10 hearings. The hearings were remanded to hear management
11 issues raised by NRC Staff Inspector, Mr. Cantrell. These
12 were not brought out in the initial hearings on Construction
13 Permit.

14 In the Construction Permit License, the Board
15 said that although the Applicants could construct Shearon
16 Harris safely, it was not then in a position to determine
17 the management capability to operate the facility.

18 As part of the appeals to the Commission, the
19 Commission addressed the issue by directing the Staff to
20 prepare a preliminary assessment of management capability at
21 the operating license stage. The Applicants, surely, at
22 that point in 1979 to 1980, were on notice that the NRC and
23 that the Intervenors were going to look closely at their
24 management capability. And at that time in testimony, the
25 Applicants' position, basically, was we promise to do

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1 better. This promise is repeated consistently from 1980 to
2 the present date. They have systematically failed to make
3 any positive changes in their management.

4 In 1980, the NRC Staff assessment, a fairly brief
5 document, as a part of this record, stated, among other
6 things, that the Applicants needed one corporate officer to
7 be in charge of their nuclear projects, to tie together
8 their management.

9 To date, there is no one corporate officer at
10 the Applicants. This kind of thing has been repeated again
11 and again an again.

12 You are probably familiar with the systematic
13 assessment of Licensee performance. These are reports on
14 each of the nuclear utilities. We've referred to them
15 extensively in the hearing, the proposed findings and the
16 brief as SALP reports. There's the first SALP report that
17 was time in 1979, 1980; the SALP 2 report, July '80 to
18 December '81, and that. The second SALP report raised
19 considerable issues about the poor management of the
20 Brunswick plant. The SALP 3 report found many of the same
21 areas, there had been no change, there had been no
22 betterment, and that the Applicants consistently had not
23 changed. The Applicants said, "We promise to do better."
24 The next SALP report, the next assessment -- it goes on and
25 on.

26 In our Proposed Findings, we list all the

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1 different findings by different agencies -- The Nuclear
2 Regulatory Commission Staff, the North Carolina Utility
3 Commission, who audited the Applicants. And every time a
4 report would come out and raise serious management
5 questions, questions about their ability to manage their
6 nuclear power plants, Applicants said, "Yes, we will
7 change."

8 As late as February 1983, the Applicants were
9 fined \$600,000 for not conducting inspections at their
10 Brunswick plant for a period of eight or nine years. This
11 was in the actual fine itself. It said this was an example
12 of the breakdown of management controls. We refer to this
13 several times in the record as a \$600,000 fine that was
14 levied in 1983.

15 Let me quote from that. That's Joint Exhibit
16 No. 18 in the transmittal letter for the civil penalty.

17 "Because of these violations, there appears
18 to be a breakdown in corporate and facility
19 management controls in areas of corporate
20 oversight, facility management operations
21 and problem identification and correction.

22 This is years after being on notice that NRC
23 Staff and the Intervenors were going to look at their
24 management capability.

25 The Licensing Board in this proceeding found

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1 that, yes, indeed, in 1981, the Brunswick Nuclear Power
2 Plant was poorly managed. Again, this is at least two years
3 after being on notice that there were problems.

4 There's a considerable amount of testimony and
5 exhibits in the record that bear this out.

6 On the other side, again, we have the Applicant's
7 assurance that they will do better, that they'll make the
8 changes needed to have a better management. And we have one
9 witness that the Licensing Board below relied on very
10 heavily. It was a staff witness, Mr. Bemis. Mr. Bemis is
11 in an interesting position for an NRC Staff person. He had
12 a special assignment in Region 4. His special assignment
13 was to assure that the Applicants' management improved.
14 That was his overall assignment. It was a special
15 assignment, and Mr. Bemis said when he started in mid-'82,
16 the Regional Office had concluded that no substantial
17 program improvements had been observed since the Cantrell
18 concerns were aired in the 1979 ASLB hearings.

19 So Mr. Bemis' job was to go ahead and determine
20 to help the Applicants try to better their management.

21 The Licensing Board, in their decision, quoted
22 Mr. Bemis extensively, his conclusions, his findings, and
23 also the fourth SALP report. Now the fourth SALP report,
24 which is in the time period beginning February 1, 1983, said
25 that there had been improvement of the Applicant's

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management.

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In cross-examination, Mr. Bemis said that, yes, he was the principal author, the principal editor of the fourth SALP report. And the point that we have today on appeal is, in our efforts to bring out Mr. Bemis' testimony and the conflicting, the really conflicting interests he had in this matter, one, to make sure that they did better and second, to report to Region 4 that they were doing better, we attempted to subpoena several members of Region 4.

JUDGE MOORE: Mr. Runkle, you state in your brief that you requested a subpoena from Mr. O'Riley, and that the Licensing Board denied your request.

MR. RUNKLE: Yes, sir.

JUDGE MOORE: You state in your brief to us that you wish to demonstrate his possible bias on your cross-examination.

MR. RUNKLE: Yes, sir.

JUDGE MOORE: Did you inform the Licensing Board of that basis for your request?

MR. RUNKLE: Sir, we did not use, when we brought those -- when we made our request to the Licensing Board, we did not use the term, we are going to seek to bring out his bias or attack his credibility. The Board has informed us that we had to be fairly specific about the evidentiary matters that we had to bring out, if we could cross-examine

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1 Mr. O'Riley. Those were the matters that we did bring to
2 their attention. The assignment that he had given
3 Mr. Bemis, what Mr. Bemis' involvement had been in the SALP
4 report, why he had assigned Mr. Bemis to look at the
5 management capability in the first place.

6 JUDGE MOORE: If you failed to raise the matter
7 you now have before us, before the Licensing Board -- that
8 is, you sought to impeach his credibility -- how can we
9 consider it on appeal?

10 MR. RUNKLE: Because from the evidence that we
11 had drawn from Mr. O'Riley and the other NRC witnesses, the
12 Board could have drawn the conclusion that the witness
13 was not credible in his conclusions.

14 JUDGE MOORE: But your failure to raise that
15 issue in that form before the Licensing Board precludes you,
16 does it not, from raising it here on appeal?

17 MR. RUNKLE: No, it certainly doesn't. Before
18 the Licensing Board, we were talking about evidentiary
19 matters. Matters of bias and credibility can be drawn from
20 the evidentiary matters. The reasons for raising these
21 issues with Mr. O'Riley, then the Board could have drawn the
22 same conclusions that we had already drawn and proposed in
23 our findings about the credibility of the witness.

24 JUDGE GOTCHY: Had you proposed in your Proposed
25 Findings, argued that Mr. Bemis had a conflict of interest?

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MR. RUNKLE: We certainly did, and we tried to be very careful about what those conclusions were drawn from. In the record, as it is, we are confident that any further cross-examination of Mr. O'Riley and the other NRC witnesses, you could have drawn even a stronger conclusion, and we felt that the Board would have had to, by looking at the total role of Mr. Bemis in the Staff's assessment of the management capability, would have had to draw those conclusions of bias and credibility.

JUDGE WILBER: You said Mr. Bemis was the primary Staff member on the SALP report. Isn't there input from several sources in the SALP report? Are you indicating that he would have edited the material submitted by other people?

MR. RUNKLE: Yes, sir. The term that was used was, he had the final editorial. So my interpretation of that was, the primary author. So in different areas, an inspector at the plant would say, "Okay, I looked at the QA program, "but drawing the overall conclusions and putting them together in final form and taking that to the SALP committee itself for final approval.

JUDGE WILBER: Was there -- was he the person that conducted the SALP meeting or was there a different level of management in Region 2 that delivered it?

MR. RUNKLE: There is a different level at Region 2 that conducts the SALP meeting, and that was a different person that we attempted to subpoena.

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JUDGE WILBER: I thought you only mentioned
2 Mr. O'Riley.

3 MR. RUNKLE: There is a Mr. Lewis -- we did not
4 raise that on appeal -- who was in the SALP. We had
5 originally requested a subpoena of Mr. Lewis, who is the
6 chairman, the conductor of the SALP.

7 JUDGE WILBER: You would think that he would have
8 no control over any bias that Mr. Bemis might have
9 introduced into the SALP?

10 MR. RUNKLE: Well, we are not sure. That was one
11 of the reasons why we requested him, but the key person in
12 this again is Mr. O'Riley, who has the overall say of what
13 comes out in the SALP report.

14 JUDGE WILBER: But then he endorsed the SALP
15 report; is that what you are saying?

16 MR. RUNKLE: That is our understanding, and that
17 is one of the reasons why we wanted to cross-examine him
18 about his role, his relationship to Mr. Bemis, and just how
19 this SALP-4 report was put together and made the conclusions
20 that the Licensing Board agreed on.

21 At the same time that we were looking, as this
22 proceeding was going on, we had put in a request for a
23 Freedom of Information Act. We tried to get information in
24 several different veins of how Region 4 was conducting the
25 SALP report, trying to get to the basis of the SALP report.

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2 So we have tried very many different things. We
3 feel that it was very important for the Licensing Board to
4 hear from Mr. O'Riley on his role and to clarify Mr. Bemis'
5 role, also.

6 The one other issue, we had also asked to reopen
7 the record on this matter and submitted an affidavit by an
8 engineer at the plant, Mr. Chan Vanh Vo. That motion was
9 denied.

10 We have briefed that out, and our arguments are
11 pretty clear. It is in direct contradiction to some of the
12 Applicants' testimony. Safety questions were raised, but --

13 JUDGE GOTCHY: Excuse me. What is your position
14 on the value of Mr. Chan's deposition in this case?

15 MR. RUNKLE: Mr. Chan Vanh Vo raised what we
16 considered to be safety issues. We have followed that in
17 raising contentions, and Mr. Eddleman raised what I know are
18 some safety-related contentions.

19 JUDGE GOTCHY: I am talking about the
20 deposition. He gave a deposition which, to my
21 understanding, is not in evidence.

22 MR. EDDLEMAN: Dr. Gotchy, maybe I can address
23 that later. Mr. Runkle has not even seen that deposition.
24 I have.

25 MR. RUNKLE: The second issue I would just like
to outline briefly for you is a fairly simple issue, and

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1 that is on what has been called Joint Intervenor Contention
2 No. 4. That deals with the accuracy of the
3 thermoluminescence dosimeters, the TLDs.

4 Now, after the hearing on this matter, granted
5 everything that the Applicants and the Staff said on this,
6 the Board erred in its final conclusion in looking at the
7 TLDs.

8 There are two very important concepts concerning
9 the TLDs.

10 One is the radiation dosage received by the
11 individual worker. So we refer to it as the delivered
12 dosage. That is the actual amount received by the
13 individual.

14 And in the regulations under 20.101, it talks
15 about the dosage received by the worker.

16 Now, the TLDs are not accurate. There are many
17 different ways that they can have inaccuracies, even if the
18 Applicants did everything perfectly and were able to control
19 every one of the accuracies and their reading and how they
20 were actually worn and monitored and everything. Those
21 TLDs, if they give a reading, the actual delivered dosage
22 can be 50 percent greater than that or 50 percent less than
23 that.

24 For example, if a TLD reads 5 rems, which is the
25 regulatory limit, the delivered dosage can be anywhere

1 DAVbur 1 between 2.5 rems and 7.5 rems. Similarly, if the reported
2 dosage from the TLD is 2 rems, that could be anything from 1
3 to 3 rems. There is 50 percent on either side.

4 JUDGE GOTCHY: Is that ANSI standard an NRC
5 requirement or regulation?

6 MR. RUNKLE: The ANSI standard deals with how
7 accurate the TLDs are.

8 JUDGE GOTCHY: You are talking about plus or
9 minus 50 percent.

10 Where did you find that other than in the ANSI
11 standard?

12 MR. RUNKLE: That is the ANSI standard, and also
13 that was what the Applicants put forward as their program.
14 That was the standard that their program had adopted.

15 JUDGE GOTCHY: A minimum standard?

16 MR. RUNKLE: Yes, sir.

17 JUDGE GOTCHY: What is the actual performance of
18 the Applicants' TLD monitoring program?

19 MR. RUNKLE: As testimony gave various different
20 ranges and various different radiations, it ranged from on
21 the order of 20 percent to about 45 or 50 percent.

22 JUDGE GOTCHY: On those current tests at
23 Michigan?

24 MR. RUNKLE: Yes, sir.

25 JUDGE GOTCHY: For one signal?

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MR. RUNKLE: I am sorry, sir. You are outside my area of expertise here.

For argument on appeal we have just -- we have accepted for the sake of argument that they can meet that standard.

JUDGE GOTCHY: Have you read Part 20.202 dealing with personnel monitoring?

MR. RUNKLE: Yes, sir, I have.

JUDGE GOTCHY: Do you recall what it says?

MR. RUNKLE: No, I do not.

Yes, sir. Again, it talks about the dosage received or is likely to receive.

JUDGE GOTCHY: Doesn't it also say that each licensee shall supply appropriate personnel monitoring equipment?

And there is nowhere in the regulation a definition of what "appropriate" is.

Do you agree with that?

MR. RUNKLE: Yes, sir.

JUDGE GOTCHY: Have you ever read 20.4?

MR. RUNKLE: Yes, sir, and that is in the reporting system.

JUDGE GOTCHY: No, 20.4, paragraph (d). That, by my reading, says the dose is measured by a properly calibrated appropriate instrument in air or near the body

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1 surface in the region of highest dosage rate.

2 Does that tell you anything about what kind of
3 accuracy regulations would require?

4 MR. RUNKLE: I think that the accuracy of the
5 TLDs is in some ways -- we have the actual standard. We
6 have a 5 rem standard of received dosage actually delivered
7 to the worker.

8 JUDGE WILBER: Excuse me, Mr. Runkle. In that
9 same paragraph, 20.4(d), it says that the doses discussed in
10 20.101 are measured doses, not delivered doses.

11 MR. RUNKLE: Sir, all I can say to that is that
12 we have briefed out the issue, and it is in the brief.

13 Our position is that under the 20.101, it is the
14 received dosage, and certainly that is an issue that can be
15 raised on that. I had not read 20.4(d) to be a measured
16 dose.

17 JUDGE WILBER: I think that is what it says,
18 though, doesn't it?

19 MR. RUNKLE: But then 20.101 says dose received.

20 JUDGE WILBER: But 20.4(d), if you read the
21 entire paragraph, doesn't it say for the purposes of 20.101
22 it shall be a measured dose, as Dr. Gotchy says, by a
23 suitably calibrated instrument?

24 MR. RUNKLE: Yes, sir. That is the reading of
25 that.

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2 If there are any more questions about TLDs,
3 obviously it is an area beyond my technical competence.

4 We raised the issue below. There was extensive
5 testimony on it, and we have proposed findings and briefed
6 the issue.

7 At this point I would like to turn the argument
8 over to Mr. Eddleman, who would like to continue on.

9 ORAL ARGUMENT ON BEHALF OF CCNC AND PRO SE BY
10 MR. EDDLEMAN

11 MR. EDDLEMAN: Thank you, and good morning,
12 gentlemen.

13 I believe the region Mr. Runkle was referring to
14 is NRC Region 2. EPA has a Region 4 in Atlanta that he
15 probably deals with more.

16 If I might make a couple of remarks about the
17 management issue and CP&L's management record. It is
18 basically a question of how close to the edge can you get
19 and still get your license. The NRC Staff seems to want to
20 let them get away with it.

21 As for subpoenas, to get a subpoena all you have
22 got to do is show the relevance of the person's testimony.

23 Let me now turn to page 23 of our brief, the
24 issues raised in Contentions 132(a), (b), et cetera, as
25 listed there.

JUDGE MOORE: ... Eddleman, even though you are

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1 replowing a field here, my regulations state that when a
2 Staff witness is to be subpoenaed exceptional circumstances
3 must be shown before a subpoena can issue, and there need be
4 no motion to quash. There has to be a showing up front.

5 MR. EDDLEMAN: You are right.

6 JUDGE MOORE: That is considerably different than
7 your relevance.

8 MR. EDDLEMAN: You are right.

9 It is quite obvious that you can't rely on
10 predictive findings or turn a safety issue over to the Staff
11 to investigate when a contention has been raised.

12 JUDGE WILBER: Mr. Eddleman, could you give me a
13 cite where the Licensing Board did that?

14 I have tried to find where they said, well, the
15 Staff will do this on -- what is it -- the four, at least,
16 contentions that you applied that statement to.

17 MR. EDDLEMAN: I don't have the page on it, but
18 what the Licensing Board said was that these issues were
19 things that the Staff had to resolve. That is what I am
20 relying on.

21 JUDGE WILBER: And you are saying that that was
22 the basis -- let's see, these are rejected contentions, is
23 that correct?

24 MR. EDDLEMAN: Yes.

25 JUDGE WILBER: And that was the basis for the

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rejection?

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MR. EDDLEMAN: I believe so.

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JUDGE GOTCHY: Before you get too far into the rejected contentions, though, you mentioned that you were going to enlighten me on Mr. Chan Vanh Vo's deposition.

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MR. EDDLEMAN: I have read it. It is not in evidence.

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So I would say that if Contention 41(g) had come to trial some of the things in there might have been confirmed and some not, but as far as its use here is concerned, our position would be that it shouldn't be.

12

Did you have anything else?

13

JUDGE WILBER: No. Are we back to 132?

14

MR. EDDLEMAN: Right. Okay.

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JUDGE WILBER: Then if I read it correctly, one of those that you have raised has been abandoned, 132(a). Is this correct? And I believe you withdrew 132(d).

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MR. EDDLEMAN: Anyway, the appropriate action on this I believe would be to either admit the contention or defer it to the point where the Staff review came in. It is just not appropriate to leave a contested issue to the Staff.

23

The issues in 64 on spent fuel are briefed out.

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115, the ATWS, that is a good contention, and it is straightforward on its face.

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2 The failure modes and effects analysis
3 contentions, there certainly was something valid in those.

4 Contentions 48 through 51, the Board ruled those
5 out based on the withdrawal of Contention 47, but I had
6 never withdrawn the factual basis in 47 that is referred to
7 in 48 through 51. So I claim that was error.

8 The issues of the reactor vessel in 92, 130 and
9 -31, it is integrity likewise.

10 JUDGE WILBER: Let's go back to Contention 51. I
11 believe that was also withdrawn by you at transcript 432.

12 MR. EDDLEMAN: That is right.

13 JUDGE WILBER: So why is it coming back up here
14 now?

15 MR. EDDLEMAN: Oversight on my part.

16 65(a) and (b). The Applicants held back the
17 information on this as long as they could. If I tried to
18 raise the issues earlier without the information at hand,
19 then the contentions would have been dismissed as
20 speculative.

21 JUDGE WILBER: Are you talking about the four
22 packages that were withheld or not requested? This is what
23 you are referring to, is that correct, the four packages?

24 MR. EDDLEMAN: Right.

25 JUDGE WILBER: But they were done back in the
middle or late '70s, weren't they?

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2 MR. EDDLEMAN: Some of them were. The relevant
3 ones to 65(a) and (b) were done in 1978, I believe. So they
4 did exist.

5 JUDGE WILBER: And you requested them and they
6 weren't delivered; is this what you mean by being withheld?

7 MR. EDDLEMAN: I requested, I think, the second
8 round of discovery on that contention

9 JUDGE WILBER: When was that?

10 MR. EDDLEMAN: That would have been '83 -- '84.
11 That is correct.

12 In any event, I don't think that as long as
13 discovery is open that you can say, well, you should have
14 requested this earlier, when discovery is still open.

15 Let me turn to 64(f). The lack of a binding
16 agreement means here that if Applicants now or later decide
17 to ship the spent fuel from Harris the public may not have a
18 right to a hearing if this summary disposition stands.

19 On Contention 45, the water hammer. First, I
20 would like to make a general observation about water
21 hammers.

22 That is that these water hammers don't seem to be
23 able to read these decisions. They seem to keep happening.
24 But there is no assurance that water hammers won't impact
25 the safety of Shearon Harris.

Generic resolutions of the type that were put

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1 forward here are not acceptable.

2 JUDGE WILBER: Why?

3 MR. EDDLEMAN: Because they haven't got a
4 specific analysis of the Shearon Harris that says you are
5 not going to have a water hammer here that is going to be
6 safety significant.

7 JUDGE GOTCHY: Was the generic finding that there
8 would be no water hammers or that there would be no water
9 hammers resulting in safety-related problems?

10 MR. EDDLEMAN: The latter. However, this is
11 evidently in error. You have water hammers that are doing
12 things that have safety significance, and you don't have a
13 specific on Shearon Harris that says you can't have one at
14 Shearon Harris that won't have safety significance.

15 I think that the Licensing Board went beyond the
16 proper bounds in granting summary disposition on this.

17 JUDGE WILBER: You are saying the resolution that
18 has been offered for the unresolved safety issue is not
19 adequate on a generic basis?

20 MR. EDDLEMAN: That is right. It has got to be
21 specific to the plant.

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JUDGE WILBER: They didn't come in on summary disposition with the actions they were taking?

3 MR. EDDLEMAN: They did.

4 JUDGE WILBER: Did that go with NUREG -- what is
5 it -- 09?? 0927, I believe.6 MR. EDDLEMAN: I am not certain of the number.
7 They made a number of commitments of what things would be
8 done, and so on. A number of those were challenged. It is
9 all in the record.10 Again, the question of what they can promise to
11 do is, I don't think, an adequate basis for summary
12 disposition. I can promise to fly to the moon next week.
13 It wouldn't necessarily be valid.14 Contention 132 is in the brief. The rest I will
15 just leave to the brief.16 Contention 9(g) about fraudulent test and
17 qualification by similarity, pages 28 and 29 of the brief,
18 this was, I think, unreasonably narrowed at hearing, and
19 there is an apparent contradiction between the discovery
20 saying not every test failure needs to be reported and the
21 testimony that says all test failures must be documented.22 This narrowing of the issue basically allows the
23 Applicants to reverse the burden of proof or to not have the
24 burden of proof of showing that there is not fraudulent
25 documentation in their environmental qualification of

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electrical equipment for Shearon Harris.

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On 65, the asbestos board, the finding relies -- this is page 30 on the brief -- relies on some unidentified inspector. There is no showing that that inspector was unavailable, no showing that I couldn't bring this person in to testify.

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So we don't think that was justified, and there is also evidence that the code was in fact violated. NRC Staff admitted there was a code violation in the concrete concerning the additional --

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JUDGE WILBER: Can you tell me which code that was? I couldn't find the ACI code number.

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MR. EDDLEMAN: I can't cite it to you off the top of my head either. I think it is in the record.

14

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JUDGE WILBER: There were several codes in there, but I am not sure which one they said.

16

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MR. EDDLEMAN: There is one specific one that requires that you have no sample below 75 percent of rate strain, and they had one below 75 and one below 50 after five.

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Applicants' argument is that they just keep taking samples until they get three above 75 no matter how many fall below it, and the Staff witness didn't agree either. The Staff witness says that was a violation.

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JUDGE WILBER: If I am reading ACI 318.77

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1 correctly, that is precisely what it says, to check testing
2 accuracy, locations represented by erratic core strengths
3 may be retested.

4 It was my understanding you are talking core
5 samples now, not the cylinders, is this correct?

6 MR. EDDLEMAN: Right. These are actually drilled
7 samples out of the concrete in place.

8 JUDGE WILBER: It was my understanding of those
9 five samples that of the two that failed there were other
10 samples within just a few inches of them.

11 MR. EDDLEMAN: The code requires that you don't
12 have any below 75 percent.

13 JUDGE WILBER: I don't think that is what it
14 says. It is what I just read to you.

15 MR. EDDLEMAN: Let's look at it logically, then.
16 Okay, you are saying, well, this one is too low and the one
17 right next to it is okay. Therefore, the okay one is the
18 one that is right.

19 It doesn't seem to me to make a lot of sense.
20 You can say that the one that is okay here has got one next
21 to it that is not okay. Therefore, it is not okay either.

22 I don't think you can infer because you have got
23 a good sample at one point that a bad sample at a nearby
24 point is not a valid measurement. It is a measurement of
25 the actual strength of the concrete at that point.

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JUDGE MOORE: Mr. Eddleman, you have just a few minutes left for your rebuttal. So you had better wrap up.

MR. EDDLEMAN: I will end at this point. Thank you.

ORAL ARGUMENT ON BEHALF OF THE APPLICANT BY

MR. BAXTER

MR. BAXTER: Good morning.

The Applicants and Staff are going to attempt to divide their time roughly equally.

Before I begin addressing the appeal, I want to update just briefly our November 22nd brief on the status of the proceeding, which since then we have seen a third partial initial decision issued by the Licensing Board on December 10, 1985, resolving three safety contentions tried in 1984 and most of the emergency planning part of the case.

The Licensing Board now has only four contentions remaining before it -- the Conservation Council's WB-3, which has been tried and proposed findings are in; two emergency planning exercise contentions are in the final stages of the summary disposition process; and one emergency planning contention that was tried in November is being reopened for a limited hearing by the Licensing Board on March 4.

We are hopeful that shortly thereafter we will

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1 receive the Licensing Board's final partial initial
2 decision.

3 We also continue to look forward to the earliest
4 possible results of the Appeal Board's review, so that any
5 deficiencies or errors that you have found can be addressed
6 promptly.

7 JUDGE MOORE: Mr. Baxter, what is your present
8 fuel load date?

9 MR. BAXTER: June 1986.

10 JUDGE MOORE: Has that slipped from your last
11 one?

12 MR. BAXTER: It was March at the time we filed
13 our brief in November.

14 The Intervenors have appealed, among other
15 things, four contentions, which were the subject of
16 evidentiary hearings, and as Mr. Runkle indicated today, a
17 great deal of attention was devoted to their Joint
18 Contention 1 on management capability.

19 There were eight days of hearings. Applicants
20 presented 13 witnesses, representing their corporate
21 management, the management of their Brunswick, Robinson, and
22 Shearon Harris nuclear plants and the management responsible
23 for the nuclear training function.

24 Essentially, the Licensing Board and the parties
25 were exposed to the entire senior nuclear management team

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of Carolina Power and Light Company.

2 As the Licensing Board noted, there are no
3 precise standards under NRC regulations by which to assess
4 management competence. So their decision understandably
5 focuses principally on the areas of controversy raised by
6 the Intervenors during cross-examination and in their
7 proposed findings to the Board.

8 You should not overlook, however, the fact that
9 the record contains considerable evidence on the operation
10 of CP&L's Robinson plant, which has been operated, I would
11 say by any standard, very successfully since it began in
12 1971, and considerable record also on our plans for
13 operating the Shearon Harris plant.

14 Neither of those two aspects of the record, which
15 are substantial, were addressed much by the Intervenors, and
16 therefore the Licensing Board did not pay a great deal of
17 attention to them either.

18 The problem with the Intervenors' case, both here
19 today and in their brief on appeal and before the Licensing
20 Board, is that they are hopelessly mired in the past. There
21 is really not a lot of controversy about the operation of
22 the Brunswick facility from 1979 to 1982.

23 The Applicants -- CP&L's executives acknowledged
24 that there were management shortfalls during the period of
25 that time. What Mr. Runkle says today is essentially that

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1 CP&L ought to be punished for that performance back then by
2 being denied an operating license for the Shearon Harris
3 plant.

4 Because he refuses to recognize the substantial
5 improvements that have been made in the operation of the
6 Brunswick plant since that time, he stands here today and
7 says that we are asking you to rely on promises. Quite the
8 contrary, we are asking you to rely on the demonstrated
9 performance of that facility and CP&L's other facilities in
10 the period of time since 1982, when the substantial
11 improvement programs were undertaken at the Brunswick
12 plant.

13 And the Licensing Board didn't have to just rely
14 on Mr. Bemis. Although I think the attack on his
15 credibility is both specious and unsubstantiated, the
16 Licensing Board had before it, in addition to our own
17 witnesses, the fruits of the SALP review process, which has
18 been either wholly misunderstood or misrepresented by
19 Mr. Runkle here today.

20 The SALP review is not the fruit of any one
21 inspector's views and evaluations. The SALP process
22 involves a collegial process with representatives from many
23 disciplinary sections of the region as well as NRR here in
24 Bethesda. The SALP process involves a secret ballot by
25 votes of a SALP board, and my quick review of the SALP-4

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1 report indicates that Mr. Bemis was not even a member of
2 that four-member board. He is listed as one of the 13 SALP
3 Board attendees who obviously had a lot of technical
4 contributions and assistance to make in the writing of the
5 report. After CP&L comments on the SALP report, the final
6 ratings then are approved, and the report is approved by the
7 regional administrator.

8 So to theorize that Mr. Bemis somehow was able to
9 distort that entire NRC review process for his own motives I
10 think is totally frivolous. It doesn't even make sense to
11 me that Mr. Bemis would have an interest in doing that.

12 His assignment was not that described by
13 Mr. Runkle here today. He wasn't in charge of managing the
14 operation of CP&L's nuclear facilities. He was in charge of
15 overseeing them and reporting back to the NRC about the
16 progress that was being made, indeed making suggestions as
17 they were appropriate, but I don't think it is reasonable to
18 assume that his supervisors would judge him unfairly if CP&L
19 had continued to do poorly in the management of those
20 plants.

21 I think he would have been considered to have
22 done his job appropriately if he had continued to identify
23 any deficiencies if they continued to exist.

24 I would also note, while it is not in the record,
25 this Board and the parties have recently received, on

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1 January 15, 1986, the result of a fifth SALP report, which
2 continues to document the vast improvements in management at
3 the Brunswick plant, and that SALP process was entirely
4 without Mr. Bemis' participation, who is no longer with the
5 Nuclear Regulatory Commission.

6 I think that in spite of what Mr. Runkle said
7 today it is clear that their subpoena requests for
8 Mr. O'Riley before the Licensing Board was based on totally
9 different grounds than he now asserts on appeal. He was
10 asking for Mr. O'Riley because he asserted Mr. O'Riley would
11 have a better view about CP&L's performance than Mr. Bemis.

12 He had every opportunity. He hasn't been shy in
13 the past in asserting precisely the reason for relief
14 requested by the Licensing Board.

15 As to the motion to reopen the record, the
16 Licensing Board found that it was both untimely and that
17 even if true, the allegations in the Vanh Vo affidavit, for
18 example, would have been at best of marginal relevance to
19 the issue of the management capability to operate Shearon
20 Harris.

21 The concerns in that affidavit addressed
22 construction activities at Shearon Harris, which was not
23 the focus of the contention, and the question of whether
24 the CP&L executives were correct in stating that employees
25 had not brought safety concerns to them I think would be

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at most of marginal relevance to the ultimate conclusion.

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The reason we cited the Vanh Vo deposition is simply -- of course, the Licensing Board, when it is looking at a motion to reopen must rely on after-the-record materials to some extent. That deposition was not available at the time.

7

We did have from the Board an affidavit from an outside investigator CP&L had contracted to look into the allegations. His report said that in meetings with Mr. Vanh Vo, Mr. Utley and Mr. McDuffy, that mainly Mr. Vanh Vo's views of how to run the operation were brought forward and were not safety concerns.

13

We simply cited that deposition because it later concerned, in Mr. Vanh Vo's own words, the accuracy of that investigator's conclusions.

16

JUDGE GOTCHY: Are you referring to the Cobb report here?

18

MR. BAXTER: Yes, sir.

19

JUDGE GOTCHY: I got a feeling that a lot of the Cobb report was, as described by Intervenors, second and thirdhand information.

22

Is that right?

23

He went around and talked to a lot of people.

24

MR. BAXTER: Mr. Vanh Vo was no longer -- I don't believe he was in the area at the time. He had been dismissed in February or he had resigned in February of

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1 1985, and this investigation -- the affidavit came forward
2 later in the fall.

3 But I must say Mr. Cobb's conclusions were also
4 verified by the Office of Investigations.

5 In any case, ultimately they did get a contention
6 on the basis of Mr. Vanh Vo's affidavit. That is the
7 subject of ultimate dismissal by the Licensing Board in a
8 decision that was not appealed, at least here when it should
9 have been.

10 But as to the motion to reopen the record, we
11 think the Licensing Board was fully justified in denying
12 it.

13 JUDGE MOORE: Mr. Baxter, what was the timing on
14 when it was filed and when the information first became
15 available to him and the motion could have been filed?

16 MR. BAXTER: The motion was filed on November 13,
17 1984, is my memory. The record had been closed on
18 management roughly two months earlier.

19 Mr. Vanh Vo's complaint to the Department of
20 Labor, with the same allegations, was filed in August 1984.

21 His counsel sat next to Mr. Runkle throughout the
22 management hearing. Mr. Runkle posed questions to the
23 Applicants' witnesses, which lead us to believe he had
24 knowledge of the contents of that report -- of that
25 affidavit and the Department of Labor complaint, and later

1 DAVbur 1 he admitted that he was aware of the existence of the
2 Department of Labor complaint.

3 But I think timeliness need not be the only --

4 JUDGE GOTCHY: Are you aware of the substance of
5 that complaint?

6 MR. BAXTER: I don't know whether he was,
7 Dr. Gotchy, but I bet he could have found out very easily
8 when it was received by the Department of Labor in
9 Washington on August 29, 1984. I don't believe these are
10 confidential.

11 Fundamentally, though, as I have said, I think
12 that the Licensing Board did an excellent job of reviewing
13 the record on the management contention. I think it has to
14 be said that they responded in their decision explicitly to
15 all the major points that the Intervenors raised below and
16 in their proposed findings, and the continued speeches today
17 notwithstanding, there is a substantial record that
18 performance at Brunswick has improved.

19 And I would submit that, as opposed to a utility
20 that is about to operate its first nuclear plant, Carolina
21 Power & Light is uniquely positioned as a result perhaps of
22 these experiences to do an excellent job in the startup and
23 operation of Shearon Harris.

24 With respect to Joint Contention 4 -- I am
25 sorry. Judge Wilber, you looked like you were about to ask
26 a question -- on the thermoluminescent dosimeters, I believe

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we were to some extent in the wrong forum.

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I believe the record, as a result of the two series of tests at the University of Michigan, demonstrates conclusively that CP&L has both state-of-the-art dosimetry equipment and excellent processes for assuring the accuracy of their measurement program by any standard that one might consider -- which the Licensing Board considered at least. We passed those tests by a wide margin.

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The Licensing Board's interest as to whether the Commission ought to adopt the ANSI standard or the ICRP standard is really something neither for the Licensing Board nor for this Board, but for the Commission to take care of in rulemaking. I feel this is also where Mr. Runkle should go if he feels that Part 20 limits ought to be lowered somehow due to the accuracy of measurement equipment.

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JUDGE GOTCHY: I might point out for Mr. Runkle that there is a new version of the Part 50 which is out for public comment, I believe, at the present time.

4 MR. BAXTER: Part 20.

5 JUDGE GOTCHY: Yes, the first revision since it
6 came out in 1965 -- '60. 1960.7 MR. BAXTER: Mr. Eddleman's appeal on Contention
8 9(g) does not challenge the substantive qualification of the
9 Rockbestos cable utilized at Shearon Harris, but rather
10 complains, belatedly I believe, that the contention was
11 unduly narrowed.12 It was not. The Licensing Board relied on the
13 clear language of the contention and its reference and
14 simply did not allow Mr. Eddleman to take an opportunity
15 there to pore through any recent equipment qualification
16 issues that occurred to him.17 On Contention 65, the containment concrete issue,
18 I am really surprised that we are even continuing to talk
19 about this today.20 The contention, as it initially started out,
21 addressed 106 placements in the containment dome, outer
22 walls and base mat. It was narrowed to 13 placements as a
23 result of summary disposition. It was narrowed to six
24 placements as a result of Mr. Eddleman's witness changing
25 his mind at the hearing, and now on appeal we are talking

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about two.

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I believe the record is clear that Mr. Eddleman continues not to be a concrete expert. I don't criticize him for that. I am not either. But I don't attempt to apply the ACI code and interpret it in the face of unanimous testimony by the expert witnesses that it has been properly applied at Shearon Harris.

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He talks about the core drill samples taken in the one base mat placement. The record is clear that the 90-day cylinder compressive strength test for that placement conclusively established that it passed design requirements. Those cores were taken just as an extra precaution. It was not that we kept drilling cores till we found some we liked. It happened that they were taking very small samples and that two of them failed because of test procedures and three of them clearly confirmed the 90-day compressive strength.

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But I add, they were not required to be taken in any case --

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JUDGE WILBER: Is a 90-day sample, testing of that, a relief that is offered in the code somewhere?

23

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MR. BAXTER: It is certainly contemplated in EBASCO's design specifications for our containment. It is answered in the code, but I couldn't answer the question without looking at the record, Judge Wilber.

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2 But you take those 90-day, 45-day, and 20-day
3 tests routinely in the event you do have a problem with the
4 rate tests you are doing initially.

5 So it is a clearly contemplated test procedure
6 and criterion.

7 As to the summary disposition rulings, we have
8 seven contentions that are raised in very passing fashion in
9 the Intervenors' brief. There is not a single citation to a
10 Licensing Board decision on the record.

11 I think it is clear from Mr. Eddleman's
12 discussion here today that he is not familiar with the basis
13 upon which these contentions of his were decided. He filed
14 no response to four of those contentions, including the
15 water hammer issue he raised today.

16 While that does not dispose of the matter, it
17 seems to me he has a unique burden on appeal to be precise
18 about where he feels the Applicants failed in carrying their
19 burden on those summary disposition motions, and he hasn't
20 done it by any stretch of the imagination.

21 Simply to stand up here as a layman and say he
22 doesn't think we have got adequately specific resolution to
23 the water hammer contention when the affidavits clearly
24 showed how the design of the Shearon Harris systems have
25 taken water hammer into account and are designed to minimize
the occurrence of that phenomenon and utilize the generic

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1 resolution and apply it.

2 Clearly, as to the three contentions on which he
3 did file a reply before, none of them were supported by
4 affidavit, and to a great extent I would say they
5 essentially conceded the contention on 132, that we have a
6 reactor vessel level indicator, on Contention 11 that we do
7 not have polyethylene cable insulation.

8 I believe that the Licensing Board applied the
9 correct standard in all those summary disposition rulings.

10 In terms of the rejected contentions, I believe
11 we heard some of them mentioned today that we didn't argue
12 in our briefs. Again, it seems Mr. Eddleman is not even
13 clear as to which contentions he voluntarily withdrew, let
14 alone the basis for the Licensing Board's ruling.

15 We did the best job we could, guessing on what
16 the basis for the appeal was. I am not sure we hit it in
17 every case.

18 JUDGE MOORE: We thought you did an admirable
19 job. We were guessing more than you, I think.

20 MR. BAXTER: I am sure you were.

21 Thank you very much.

22 ORAL ARGUMENT ON BEHALF OF NRC STAFF BY

23 MR. BARTH

24 MR. BARTH: Chairman Moore, Dr. Gotchy,
25 Mr. Wilber, I am Charles A. Barth, of the Office of the

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Executive Legal Director. I will present the Staff's argument today.

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In our view, the Staff's brief on appeal adequately addresses all the matters raised in Intervenors' brief. Nothing I have heard here today from Mr. Eddleman or from Mr. Runkle would incline me to modify or change that brief.

I have listened just now to Mr. Eddleman and Mr. Runkle partially set forth their views to you. I remain convinced that they have not identified for this Appeal Board any error of fact or of law propounded by the Licensing Board below or in the record below which require a reversal in whole or in part of the partial initial decision on safety matters. In our view, the partial initial decision on safety matters should be affirmed on appeal.

I would like to take this opportunity to address as succinctly as I can the specific matters Mr. Eddleman has addressed in his oral presentation to you this morning.

Before I do so, I would like to say that I have listened to Mr. Baxter, for the Applicants, set forth his views. We have no differences from the views he has expressed so far.

The Joint Contention 1 released the management of Carolina Power & Light to manage and operate the Shearon Harris facility when and if licensed by the NRC. A great

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1 deal of reliance was set forth by Mr. Bemis, who was the
2 Staff's principal witness below.

3 Mr. Bemis came on the scene in 1982, when the
4 regional office and Carolina Power & Light decided to shut
5 down the Robinson and Brunswick facility and to put all of
6 the Shearon Harris plants under the control of one man or
7 the office who would have input regarding all Carolina Power
8 & Light's activities.

9 The Licensing Board went to great length in its
10 partial initial decision in 22 NRC, 246 through 252, to
11 discuss the SALPs, which you have heard. There was a reason
12 for this.

13 The Licensing Board articulated that the SALP
14 reports represent a more collegial process than listening to
15 the testimony of one NRC witness, although his testimony of
16 course was based on his reading of past SALPs, all of the
17 IND report, and his own visits to the plant. The Licensing
18 Board basically --

19 JUDGE MOORE: Mr. Barth, let me interrupt a
20 moment.

21 The alleged bias that Mr. Bemis suffers from in
22 the views of the Intervenor, is that bias just any -- more
23 or less that any Staff member has who has to oversee any
24 particular aspect of the construction of a plant?

25 MR. BARTH: As Mr. Runkle has articulated before

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1 the Board in his appeal, in my view, you have correctly
2 summarized this. It is only that an NRC Staff employee
3 would look better if the task that he has improved in the
4 long run or the short run. There is no other bias alleged
5 or set forth.

6 JUDGE MOORE: And in most that would just go to
7 the weight of his testimony, in any event, would it not?

8 MR. BARTH: It would go to the weight of his
9 testimony wherever properly raised and challenged, which was
10 not below, your Honor. I would like to address that
11 separately.

12 The Licensing Board felt that the SALPs from 1982
13 and the earlier SALPs evidenced not the best history of
14 operation of a nuclear power plant, but what was more
15 relevant was the coming on in 1986 or 1987 of Shearon
16 Harris. What is today being done is more important than the
17 mistakes of the past.

18 Mr. Runkle stated for you that the management of
19 Brunswick is the same today as it was in its bad days, or
20 less than good days. That is an incorrect statement of the
21 record.

22 Since then, Mr. Patrick Howe was put in at
23 Brunswick as a vice president in charge of the site. Every
24 single person, the record will show, in a position of
25 authority at Brunswick, has been changed. A new director of

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1 health physics has been changed.

2 The payroll has gone from some 400 employees to
3 well over 800. The staff has doubled. An enormous amount
4 of money was put into Brunswick during the reorganization of
5 the Brunswick improvement plan. At the insistence of the
6 Staff, 3000 operating procedures were put in.

7 New computers were put in to tag inspection
8 dates. That is in layman's terms -- since I don't know
9 computers -- you walk in on Monday, you plug the computer to
10 see what kinds of inspections need to be made the next
11 month, and the readout comes on what they are. This is one
12 measure they have taken to obviate the lack of inspection,
13 which was the cause of the \$600,000 fine.

14 Enormous remedial measures have been taken by
15 Carolina Power & Light at the Brunswick station.

16 The Applicants have noted that all of their
17 officers testified. The Licensing Board had the opportunity
18 to see these people and question them, and that also is in
19 evidence.

20 There is, in our view -- and I attended all of
21 the management hearings -- there is no evidence to the
22 contrary that since 1982 Carolina Power & Light could not
23 reasonably operate the Shearon Harris facility.

24 Mr. Baxter referred to the most recent SALP,
25 which is not in the record, that SALP for all three of the

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1 Carolina Power & Light facilities has improving in their
2 trends or constant. There is no degradation or backsliding
3 in the most recent SALP that was presented.

4 I would like to address the matter of the
5 subpoena. Mr. Runkle addressed the Licensing Board and
6 requested a subpoena for Mr. O'Riley. The grounds of the
7 subpoena were that Mr. Bemis had been on the job for two
8 years, Mr. O'Riley had been at the regional office longer,
9 and he wanted Mr. O'Riley because he had been around
10 longer.

11 We are talking about pre-1982. Mr. Bemis had
12 been on the job since 1982.

13 A telephone conversation with the Licensing Board
14 was held. The same grounds were reiterated.

15 At the conclusion of the management hearings, the
16 Licensing Board again, having deferred ruling on the
17 subpoena, requested that Mr. Runkle address this matter. He
18 again addressed this matter, that he wanted Mr. O'Riley,
19 because he had been around longer than Mr. Bemis.

20 Not once was the ground that Mr. O'Riley would
21 produce testimony which would impeach Mr. Bemis ever brought
22 forward below. We do not feel it can be argued how now.

23 There is no showing below that Mr. O'Riley knew
24 facts that Mr. Bemis did not know. Mr. Bemis reported to
25 Mr. O'Riley. Mr. O'Riley was a regional administrator. He

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1 was not an inspector who went in that plant and had personal
2 knowledge of the plant and the operations which Mr. Bemis
3 did not.

4 10 CFR 2.7, 208.2(i) requires the showing of
5 special circumstances -- or for an NRC employee that he has
6 a special knowledge of facts not known to the witnesses.
7 This was not shown below, and we do not feel it can be
8 argued now on appeal.

9 In our view, the Licensing Board correctly denied
10 the motion for subpoena for Mr. O'Riley. I would like to
11 point out they denied it on the basis that his testimony
-12 would be duplicative of Mr. Bemis and there were no other
13 special circumstances.

14 This ruling by the Licensing Board has not been
15 challenged in this appeal.

16 In regard to the allegation that it was an error
17 for the Licensing Board not to reopen for the Chan Vanh Vo
18 allegations, I would like to call to your attention that the
19 deposition of Chan Vanh Vo was not taken in relationship to
20 the motion to reopen the record. It was taken in
21 relationship to other contentions proffered, and it has no
22 part in this thing.

23 JUDGE GOTCHY: Didn't it deal with some of the
24 same issues that were presented in his affidavit the
25 previous year?

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1 MR. BARTH: It dealt with the same issues, and
2 the Licensing Board dealt with those issues, too,
3 Dr. Gotchy.

4 They denied the motion to reopen on the basis
5 that it was late, that the information was previously
6 available, and that the information contained in the
7 document was of marginal significance to the management
8 contention; that is, could Carolina Power & Light
9 successfully manage the Shearon Harris plant when and if it
10 were ever licensed by the NRC?

11 JUDGE GOTCHY: I am not challenging that. I was
12 just asking about the deposition in relation to the
13 affidavit.

14 MR. BARTH: Yes, sir, you are correct. The
15 Licensing Board took into account the substance of the
16 affidavit when it made its decision that that substance was
17 marginally related to the issue of Joint 1, which is
18 management capability.

19 There have been two recent decisions --

20 JUDGE MOORE: You mean the affidavit preceded the
21 deposition, did it not?

22 MR. BARTH: Yes, sir.

23 There have been two recent decisions which I
24 would like to note at this time: Philadelphia Electric,
25 Limerick Generating Units 1 and 2, which is ALAB 828,

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1 January 16, 1986. Dr. Gotchy sat upon that Board. They
2 stated that a motion to reopen must raise a significant
3 safety issue or environmental concern.

4 The Commission reaffirmed this just a few days
5 ago in CLI 86-1, issued on January 30, 1986 in the Louisiana
6 Power & Light, Waterford. There on page 3 in the slip
7 opinion, the Commission again reiterated that standards for
8 reopening are whether the motion to reopen is timely -- and
9 the Licensing Board found that it was not in this case, and
10 there is no evidence to the contrary -- or that the
11 information raises a significant safety or environmental
12 concern.

13 There is no evidence before us that the motion to
14 reopen did, and further information might have led the
15 Licensing Board to a different result. There is nothing in
16 this record which would indicate that the Licensing Board
17 would have come to a different result had it reopened for
18 the Chan Vanh Vo allegation insofar as related to management
19 capability.

20 The Intervenors today have mentioned Joint
21 Contention 4 regarding the TLDs.

22 JUDGE WILBER: Before you leave the management,
23 you mentioned that the Brunswick upper management had been
24 completely changed.

25 Are you relying on Hal Deak's testimony on that?

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1 MR. BARTH: That is part of the basis,
2 Mr. Wilber. Also, part of the basis is the testimony of
3 Edwin Utley, Executive Vice President, and his
4 cross-examination by Mr. Runkle regarding who was at the
5 site. Part of the reliance is also upon Mr. Bemis'
6 statement on cross-examination regarding the new Health
7 Physics Department at the Brunswick site.

8 JUDGE WILBER: You said upper management. I read
9 the tables in their testimony, and I am not sure what you
10 mean by upper management.

11 Are you talking about division heads? That table
12 is very extensive, as I recall.

13 MR. BARTH: I am talking about the people who ran
14 the Brunswick facility. I am not talking about the
15 corporate officers.

16 JUDGE WILBER: I understand that, but you are not
17 going below division head, is that correct?

18 MR. BARTH: Correct.

19 JUDGE WILBER: I see. All right.

20 MR. BARTH: And, of course, a great deal must
21 have changed if you have gone from 400 employees to well
22 over 800 employees, also.

23 With regard to Joint Contention 4 on TLDs, I
24 would like first of all to set forth what the Licensing
25 Board did find in regard to the partial initial decision in

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1 22 NRC.

2 On page 259, they found that there are no
3 regulatory standards which apply to the processing of TLDs.

4 They found that Carolina Power & Light meets the
5 proposed ANSI 13-11, the International Council on Radiation
6 Protection standards, the National Council on Radiation
7 Protection standards, the proposed rule, and not only do
8 they do that, they meet the old proposed ANSI 13-11, which
9 was an average performance statistics, Dr. Gotchy, with two
10 standard deviations. The new one is slightly less, with one
11 standard deviation, but it also changes the performance
12 statistic on the yellow band slightly.

13 The Licensing Board also found that the
14 Applicants' program is appropriately described and controls
15 the source of error in dosimetry processing. This finding
16 has never been challenged in this appeal.

17 They found that Mr. Eddleman's new proposal in
18 his proposed findings 13 and 14, which appears upon page 18
19 of the Intervenors' brief, really is a challenge to the
20 regulation. Mr. Eddleman seeks to impose a new and
21 different and another standard for dose.

22 The Licensing Board concluded that the
23 Applicants' program is commendable and that they comply with
24 the NRC regulations.

25

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1 In our view, the Licensing Board decision with
2 regard to the thermoluminescent dosimeter process, which is
3 what is before us, is adequate. The record supports this,
4 and the Licensing Board should be affirmed there. There was
5 one rejected contention mentioned by Dr. Wilber and by
6 Mr. Eddleman. That is Mr. Eddleman's 132-A. The discussion
7 between the two of you gentlemen has really sufficiently
8 finished this matter. Mr. Eddleman has indicated that the
9 contention should not have been rejected. 121 was not
10 rejected. It was abandoned by. On Contention 132-D, they
11 withdrew the contention. The Licensing Board did not impose
12 any kind of burden upon them. The Licensing Board's
13 decision in regard to these decisions, we feel, is correct.

14 Mr. Eddleman mentioned that contentions, 47, 48
15 and 49, were improperly dismissed by the Licensing Board.
16 In our view, Mr. Eddleman withdrew his Contention 47, which
17 relates to fast fracture. Transcript page 377, note that 16
18 NRC 2098 of the Licensing Board's order, the basis of
19 Contention 47 provides the same factual basis for
20 Contentions 48 and 49.

21 In the Board's order, the Board noted this. This
22 is no time now to appear out of nowhere and say the
23 Licensing Board made a mistake. No protect or request for
24 reconsideration was ever made by Mr. Eddleman of that
25 Licensing Board's order, which dismissed Contentions 47,

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1 48 and 49.

2 JUDGE MOORE: By that, you mean he filed no
3 objection after the prehearing conference?

4 MR. BARTH: Or after the Board's order, sir,
5 which was published.

6 JUDGE GOTCHY: Did that also include Contention
7 50? I think you said 48 and 49. I think it also included
8 50, and also, I think, 130.

9 MR. BARTH: 50 was rejected by the Licensing
10 Board, who thought that it had no authority to halt
11 construction. That's 16 NRC 2098. You referred to 51,
12 Dr. Gotchy?.

13 JUDGE GOTCHY: No, 50. Did that still have a
14 basis in 47?

15 MR. BARTH: The 50 was rejected. 50 asked the
16 Licensing Board to halt construction.

17 JUDGE GOTCHY: I realize that.

18 MR. BARTH: I think it was on the same basis as
19 theirs, but it was denied upon another ground. It was
20 rejected on another ground, although the basis was
21 identical. You are correct.

22 In regard to Contentions 65-A and B, Mr. Eddleman
23 argued that the Board improperly rejected these, because the
24 Applicants withheld information. This is somewhat of a
25 puzzling argument. There was Contention 65, which was

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1 accepted, which related to concrete and containment. 65-A
2 was proffered by Mr. Eddleman in regard to the structural
3 integrity of voids, outer zone specifications and improper
4 vibrations.

5 The Licensing Board said these are the same
6 things you're doing under Contention 65. We denied 65-A,
7 because it's the same thing as 65, and you can litigate
8 these under 65. He was given a full opportunity to litigate
9 his concerns with regard to voids, improper vibration and
10 out of tech slump, which was discussed here with Mr. Wilber
11 under the aegis of 65, which was admitted.

12 65-B was related to a water stop cad weld. The
13 Licensing Board ruled that that was filed untimely. There
14 has been no showing by the Intervenors that it was filed
15 timely, that it had a safety significance of great
16 importance for the Licensing Board to reach another and
17 different conclusion.

18 JUDGE WILBER: Mr. Barth, you said in your brief
19 they were allowed to litigate that issue. I wonder, could
20 you cite the general transcript area where that was
21 litigated.

22 JUDGE GOTCHY: I think you say in your brief that
23 the Board did not admit Contention 65-B, but in fact,
24 Mr. Eddleman was permitted to litigate his concerns. Is
25 that a typographical error there?

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1 MR. BARTH: I do not really think so. The Staff
2 testimony was filed prior to the time of the rejection of
3 65-B. Mr. Eddleman's testimony addresses the water stop cad
4 weld, which has been corrected. As far as being allowed to
5 litigate, Mr. Eddleman, for the Licensing Board, proffered
6 an affidavit by a man by the name of Stokes. Part of the
7 Stokes affidavit regarded the water stop cad weld problem.
8 Mr. Eddleman voluntarily withdrew that part of his testimony
9 before the Licensing Board himself and cannot now be heard.

10 JUDGE WILBER: I know you cited four pages there
11 of transcript, but I didn't see where he withdrew it on any
12 of those four pages. I had a little difficulty interpreting
13 that. That was a general trend of what he was striking from
14 Mr. Stokes' testimony, as I recall.

15 Now if you're inferring, because it was stricken
16 from the testimony, and that's where he said that the
17 testimony was taken out, there were certain parts of it that
18 were taken out. Is that what you mean by your transcript
19 cites?

20 MR. BARTH: The transcript cites are 6048, 6107
21 and 6108. They are that Mr. Eddleman voluntarily withdrew
22 the cad weld allegation. The Licensing Board didn't strike
23 it. He withdrew this himself, with regard to the cad weld.

24 JUDGE GOTCHY: That was not directed. Wasn't
25 that done, as I understand it, on the basis of the Board's

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1 previous finding that they rejected 65-B?

2 MR. BARTH: There are two things I am arguing.
3 First of all, the Licensing Board stated that 65-B was
4 untimely. It was rejected on that basis.

5 May I briefly point out that in spite of this,
6 the cad weld matter was still in the Stokes affidavit when
7 it was submitted to the Licensing Board. Mr. Eddleman
8 himself withdrew that.

9 JUDGE WILBER: Only because 65-B was rejected.
10 If you look at transcript 6059, it was at the request of the
11 Applicant that that was removed. That could still be
12 voluntarily. I don't know what your definition of voluntary
13 is.

14 MR. BARTH: Mr. Eddleman listened to the
15 Applicant's testimony on the concrete, and the Licensing
16 Board then called and said, we should think about this. And
17 Mr. Eddleman withdrew enormous parts of this affidavit
18 himself, on the basis of what he had previously heard.

19 That is what I mean by voluntary. The Licensing
20 Board did not strike this.

21 Mr. Eddleman has before you a question on the
22 matter of water hammer. That is his Contention 45.
23 Basically, what he says is, he does not like the Staff's
24 resolution on the generic basis as applied to the Harris
25 facility. I would like to point out that this comes at a

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1 bad time. Mr. Eddleman did not reply to the Applicant's
2 motion for summary disposition of Contention 45, and now he
3 can hardly be heard in an argument for the first time which
4 was not heard below. The Applicant's affidavits by their
5 experts and by the NRC experts state that the measures to
6 mitigate or obviate water hammer and equipment to be used at
7 Harris adequately conform to the Staff's generic resolution
8 of the issue. Nothing has been presented before you to show
9 any error in this. And for myself as a lawyer, I think the
10 matter should be terminated upon the basis that he did not
11 reply to contention 45 below, and the facts thereby taken by
12 experts who have proper credentials must be taken as true.

13 In regard to Rockbestos, this is really, I think
14 an overblown argument by Mr. Eddleman. The contention
15 states the program for environmental qualification is not
16 good, because Rockbestos had problems with their tests. I&E
17 turned out information on this 84-44, which provided various
18 methods for qualifying Rockbestos. The Applicant elected to
19 do that by qualifying performed by another utility. They
20 did not rely upon the Rockbestos tests of the Rockbestos
21 itself. Therefore, the issue of whether Rokcbestos properly
22 did those tests or committed fraud or error does not
23 pertain.

24 In regard to Mr. Wilber's questions to
25 Mr. Eddleman regarding the containment concrete, I would

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1 like to point out in regard to the code -- like Mr. Baxter I
2 am also not an expert, sir -- that Jack Harris for the NRC,
3 who is an inspector in the Atlanta Regional Office, at page
4 17, following transcript 6320, testified that there were no
5 problems. He is an expert with regard to Code compliance.

6 The Carolina Power & Light testimony before the
7 Board below on page 66 and 67, showed there was compliance
8 with the Code. We have not had any demonstration by
9 Mr. Eddleman as to how there was any noncompliance. The
10 brief is replete with lack of citations. There is no
11 citation in his proposed findings or his appellate brief as
12 to what was wrong, what section of the Code was violated,
13 what code was violated. All we have are these
14 generalities. Things were not good. The NRC Staff put on
15 an expert who does this every day, Mr. Harris, who testified
16 on page 17, that there was no problem with compliance.

17 JUDGE WILBER: You've mentioned pages 66 and 67.

18 MR. BARTH: That is the Applicant's brief,
19 Dr. Wilber.

20 This concludes my argument upon the points urged
21 to you by Mr. Eddleman and Mr. Ruckle today.

22 I would like to summarize our position very
23 briefly.

24 On those matters which went to hearing --
25 management competency, the TLDs, the Rockbestos and the

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1 containment concret, the evidentiary record fully supports
2 Licensing Board partial initial decision, not only by the
3 proponderance of the evidence, but, in our view, by all of
4 the evidence. The Intervenors have introduced no evidence
5 below which is adverse to the partial initial decision on
6 safety. On those matter which did not go to hearing,
7 proffered contentions which were not admitted and admitted
8 contentions which were dismissed upon motions for summary
9 disposition or abandoned, the record supports the Licensing
10 Board's actions.

11 The Intervenors did not contest by probative
12 affidavit or otherwise the facts affirmed by CP&L and Staff
13 experts on the motions for summary disposition which have
14 been appealed.

15 The proffered motions which were denied
16 either had no basis or were late or duplicated other
17 contentions withdrawn by the Intervenors themselves.

18 The partial initial decision on safety in regard
19 to the appeal and otherwise, in our view, was correct as to
20 law and fact, and is fully supported by the evidentiary
21 record below.

22 Its conclusion are fully articulated, and the
23 basis and rationale for those conclusions is set forth.

24 The partial initial decision should be affirmed.

25 I thank you gentlemen kindly for your

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1 attention and consideration this morning.

2 JUDGE MOORE: Mr. Eddleman, do you have any
3 rebuttal?

4 Limit yourself to the five minutes you have
5 left.

6 MR. EDDLEMAN: Yes, sir.

7 FURTHER ORAL ARGUMENT ON BEHALF OF CCNC AND
8 PRO SE BY WELLS EDDLEMAN.

9 MR. EDDLEMAN: Mr. Baxter and Mr. Barth both
10 refererd to the SALP 5 report which is not in evidence. I
11 think if you're going to consider it at all, these points
12 should be raised.

13 First, Mr. Barth was saying everything was going
14 up, but if you look in SALP 5, you'll find from CP&L's
15 ratings going from a 2 to 3 and a 1 to a 2 in various
16 categories, even though the Staff still says these are
17 improving trends. As you know, 1 is highest, 2 is middle,
18 and 3 is lowest.

19 Also with respect to SALP 5, I'd like to cite to
20 you a problem with nondestructive examination and management
21 thereof at Brunswick, which begins in November '85, two
22 months after the Shearon Harris Management hearings. So
23 these failures were identified in November of '84, and CP&L
24 was told what they needed to improve. They still hadn't
25 made the improvement in March of '85. They still had not

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1 made them after a major outage began April of 1985. They
2 still had problems in May 1985, and the Enforcement
3 Conference was called by Region 2 in June of '85 with CP&L
4 senior management. The problem was identified as management
5 failure.

6 I don't have to emphasize to you, I think, that
7 nondestructive examination is vital to assuring the safety
8 of major piping repairs and rewelding, such as was going on
9 at the Brunswick plant at this time, due to the IGSCC
10 situation.

11 I'd like to also briefly mention just a few
12 things here about the other issues. On Element 9, the
13 Rockbestos issue includes the acceptance of an audit done by
14 another utility. They said, well, somebody else did this
15 audit, and that makes it okay. The audit's not in
16 evidence. They don't have a basis on that.

17 On 65, Mr. Baxter said that these two cores
18 drilled out of the concrete failed, due to test procedures,
19 if I'm quoting correctly. I don't believe that's in the
20 record. I think if you'll look at the testimony of
21 Ms. Wendy Woltz, that you will see that those tests were
22 done by normal procedures.

23 Also concerning the concrete code, I think that's
24 in my Proposed Findings on 65, with respect to the water
25 stop testimony, I believe Mr. Barth had the water stop

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1 portion of Staff's testimony stricken from the record. And
2 it's true, the Stokes affidavit that was put in as testimony
3 on 65 was the original affidavit that he gave on summary
4 disposition, which included the water stop issue.

5 So when I was withdrawing that, it was because
6 the Board had already ruled it out. I think it's real clear
7 that the Board has said you can't do this. So I didn't see
8 any point in doing it there, but I do raise it on appeal. I
9 think it's very obvious that leaking containment is a major
10 safety issue, that water stop is to keep water from leaking
11 into the foundation of the containment. If water can leak
12 in, it can certainly leak out.

13 Concerning water hammer, I think the burden of
14 proof, even on summary disposition, is not mind, and in the
15 detection program that the Applicants put forward, there are
16 a great many promises in there about what they'll do. I
17 don't think you can rely on promises.

18 That's all I have. Thank you very much.

19 JUDGE MOORE: Mr. Runkle, do you have anything to
20 add?

21 MR. RUNKLE: No, sir.

22 JUDGE MOORE: Thank you, Mr. Eddleman. The case
23 will be submitted.

24 We have one additional matter to bring to your
25 attention. In connection with the appeal of Joint

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1 Intervenor and Wells Eddleman, from the Licensing Board's
2 February 20, 1985 partial initial decision on environmental
3 issues that we presently or currently have pending before
4 us, the parties shall file a supplemental brief answering
5 the following questions:

6 Are CCNC's Contentions 16, 17 and 18 barred from
7 litigation in the Operating License proceeding by the
8 doctrine of collateral estoppel, or in accordance with the
9 Commission's decision in Alabama Power Company, CLI-74-12 7
10 AEC 203, 1974, are there any changed circumstances or
11 special public interest factors that preclude the operation
12 of that doctrine in this instance?

13 Those briefs shall be filed two weeks from today,
14 February 19, 1986.

15 We stand adjourned.

16 (Whereupon, at 11:30 a.m., the Oral Argument was
17 adjourned.)

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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)

DOCKET NO.: 40-400 OL

PLACE: BETHESDA, MARYLAND

DATE: WEDNESDAY, FEBRUARY 5, 1986

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

(sig)

(TYPED)

DAVID L. HOFFMAN

Official Reporter

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