

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

November 12, 1985

DOCKETED
USNRC

NOV 14 A10:53

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCHBEFORE THE ATOMIC SAFETY AND LICENSING BOARDGlenn O. Bright
Dr. James H. Carpenter
James L. Kelley, Chairman

In the Matter of

CAROLINA POWER AND LIGHT CO. et al.
(Shearon Harris Nuclear Power Plant,
Unit 1)

Docket 50-400 OL

ASLBP No. 82-468-01
OLMotion to Subpoena Dr. M. Reada Bassiouni et al.
As Witnesses on Eddleman Contention 57-C-3

Pursuant to the Board's oral order on 5 November, 1985, Wells Eddleman hereby moves to subpoena Dr. M. Reada Bassiouni and his team of experts who made the review summarized at Transcript 9873-9879 (5 November, 1985); I also move here to subpoena Bob Black of CP&L and Ben Furr of CP&L, who are not covered by this order, but whom I find it necessary to subpoena in light of information I have received.

I believe it would be best for all concerned if all of the above persons were called as Board witnesses so that all parties might cross-examine them. It is clear that the above-named persons are independent of all parties to the proceeding except the Applicants, Carolina Power & Light Co. However, since the information presented by them may be adverse to CP&L's position, CP&L should also be allowed to cross-examine them. Moreover, the status of Board witnesses would not associate the witnesses involuntarily with any party. In the alternative, if it is impossible to make these above-named persons Board witnesses, I seek (only in that case) to have them called as witnesses for me, and in that case to allow me to ask leading questions of any or all of them.

DS03

STATEMENT OF BACKGROUND FACTS

During the weekend before the hearing on Contention 57-C-3 (Night-Time Alerting in the EPZ) was to begin, I received an anonymous tip which invited me to check out certain allegations from the tipster. Among these were allegations that 10 decibels (dB) above ambient would not be sufficient to awaken essentially all of the people in the EPZ if they were sleeping indoors; that Dr. Bassiouni was not called to testify in this matter by CP&L because Dr. Bassiouni did not support the positions some persons at CP&L wanted taken; and that FEMA was putting pressure on CP&L not to take additional measures, such as installing additional sirens, to add to the protection of the public and the effectiveness of the EPZ siren (primary) alerting system.

One way I checked on these allegations was to contact Dr. Bassiouni on November 4 at his office before the hearing began (his home phone is not a published number so I was unable to reach him on the weekend) with the basic results that I described on the record at the outset of the hearing on November 4. The Licensing Board followed up on this, after hearing from the other parties, and requested the review that Dr. Bassiouni and his associates (named on Tr. 9870-71) gave on November 5 (Tr. 9873-79). After hearing from Dr. Bassiouni and the parties, the Board scheduled a filing date for this Motion and November 22 for responses.

Another fact, stated on the record by me November 4, 1985, was the existence of my interrogatory G11, which seeks any information Applicants possess, including expert opinion, which undermines or contradicts, in whole or in part, responses to interrogatories on Contention 57-C-3. The response, never updated, was that Applicants "have no such information". Evidently, however, Applicants had employed Dr. Bassiouni with respect to Contention 57-C-3 since he made an affidavit concerning it on summary disposition (November 1984).

Another check I made was to obtain from a confidential source the names of persons at CP&L working on siren matters, namely Mr. Black and his boss, Mr. Furr. This was done later, after the hearing.

ARGUMENT

1. The named persons meet the standard to be subpoenaed.

This Board's responsibility is to make a finding that adequate protective measures can and will be taken in the event of a nuclear accident at the Shearon Harris Nuclear Power Plant (10 CFR 50.47(a)(1)), based on a sound record, with reasonable assurance. The evidence of Dr. Bassiouni and the other ATI employees, on the face of their presentation to the Board and Parties November 5, shows professional disagreements with virtually every major point of FEMA's case in this proceeding. Since the FEMA findings are a "rebuttable presumption" 10 CFR 50.47(a)(2) (note, I am not aware of any FEMA findings other than the testimony re Eddleman 57-C-3 concerning the adequacy of night-time notification and waking people up in the Harris EPZ), and this evidence (assuming Dr. Bassiouni and associates stand behind the information they gave at the Board Chairman's request, with a strong accompanying statement of professionalism and high standards, (Tr. 9873-4) which no one has advanced any credible reason to doubt), the testimony of Dr. Bassiouni and his associates is clearly relevant under 10 CFR 2.720(a), the standard for issuing a subpoena.

Moreover, because the differing professional judgments of Dr. Bassiouni and his associates were not made available to me before the pre-filing deadline, under my interrogatory G-11 or other relevant interrogatories to CP&L, I would be under no obligation to request them to be subpoenaed until I had learned they had such information. On receiving an anonymous tip that they had such information I promptly contacted Dr. Bassiouni and then communicated the results to the Board and parties within one hour or so of contacting him. You can't get much more prompt than that, and I contacted him as soon as I could reach him, i.e. at the start of business the first business day after getting

the tip.

Since Dr. Bassiouni and his associates have clearly stated relevant information they possess, and Dr. Bassiouni's expertise is shown by the Applicants re his affidavit on summary disposition in various acoustics-related contentions including this one, it is obviously appropriate to subpoena him and his associates who prepared with him the review read to the Board and Parties November 5 (Tr. 9873-79).¹

Regarding Messrs. Black and Furr, they are in the best position to know whether FEMA in fact was pressuring CP&L not to take additional measures (e.g. install more sirens) to produce better alerting or better night-time awakening. If such actions were being taken by FEMA, it would cast doubt on the impartiality of FEMA's management and thus on the impartiality of FEMA's entire review of the Harris Off-site Emergency Plan, conducted under that management. This is clearly relevant, not only to this contention, but to numerous others by myself and other parties. Since the anonymous tipster's information checked out with regard to Dr. Bassiouni's firm, this serious allegation needs to be explored for the Board to assure itself and the public that FEMA is indeed putting protection of the public first in its review of emergency planning for the Shearon Harris Plant. This is true for the siren system and for other areas. (N.B. This allegation is not about FEMA's witnesses or matters they would be expected to have knowledge of. Nor do CP&L's witnesses, who do not include CP&L personnel dealing with FEMA on the siren matters, cover this issue in their presumed knowledge.)

2. This is a Matter of Concealed Information, not
A Situation Like V.C. Summer.

¹Should CP&L argue that the ATI personnel do not contradict their case, I would note first the conflict of interest involved in doing that since ATI is under contract with CP&L for a FEMA-43 related job on the Harris sirens; second, CP&L's position and method of arriving at it is very close to that of FEMA which the ATI group criticizes in all major respects; CP&L witnesses gave alerting percentages quite comparable to FEMA's for siren wake-up (71% FEMA, 69% CP&L -- Board examination by Judge Carpenter et al.).

In V.C. Summer (ALAB-663, 14 NRC 1140 (1981)) the Appeal Board held that a licensing board "should not" call upon independent consultants to supplement an adjudicatory record except in that most extraordinary situation in which it is demonstrated beyond question that a board simply cannot otherwise reach an informed decision on the issue involved. 14 NRC at 1140. While I will argue below that this standard could be met by the facts of this matter, it is not necessary to apply it here.

It is clear that the Licensing Board in Summer sought to call additional experts sua sponte on issues that the Board itself had particularized. There was no element of suppressed evidence and apparently no request by any party to bring forth the evidence of other witnesses, much less the situation here where the existence of evidence contradicting in its major points the testimony of a party, comes to light only within days of a hearing.

The Summer ASLB particularized its concerns well in advance of the hearing (14 NRC at 1143) and the Staff committed to respond to these concerns in its testimony and an SER revision (ibid.).

While the Summer intervenor did not present witnesses (ibid.), nothing in ALAB-663 says he attempted to call them. On the contrary, the Summer licensing board itself, (evidently sua sponte) about 2 weeks after the hearings, informed the parties that it was considering "retaining" its own experts. 14 NRC at 1143. It then confirmed this action (ibid.) and went on to identify specific areas of concern.

It is clear from the ensuing recitation (14 NRC 1143-48, to the end of section I of ALAB-663) that the Summer board was carrying the ball on its own, dealing with its concerns.

This case is quite different. Here, Applicants were under an interrogatory (a continuing interrogatory, phrased for its continuing nature in the same language that Applicants basically use in their own interrogatories to parties in this proceeding) to provide any information that would contradict or undermine, in whole or in part, THEIR ANSWERS to other interrogatories. This they did not do, and yet it strains credibility that the positions of Dr. Bassiouni, who had signed an affidavit for them upon summary disposition of Eddleman contention 57-C-3, were not known to Applicants.

Applicants' counsel Ridgeway stated on the record that she had provided (after the filing of testimony) numerous documents to intervenor Eddleman, in the nature of discovery (although her letter of 10-22-85 transmitting the documents does not mention discovery or any request by the intervenor for the documents). A party so willing to go out of its way to fully respond to continuing interrogatories (e.g. for the production of documents underlying analysis by or for Applicants) can hardly claim it was not under an obligation to produce information responding to continuing interrogatory G-11.

Another Eddleman general interrogatory sought the identity and other information desired of anyone CP&L "intends or expects" to call as a witness (interrogatory G2). This interrogatory specifically seeks such information "if such information has not been previously supplied, or has changed since such information was last supplied..." (G-2(a)) and asks "Please state when you first contacted each such person with regard to the possibility of such person's testifying for Applicants, if you have contacted such person." (G-2(c)) and "Please identify all documents or parts thereof upon which such witness is expected to, plans to, or will rely, in testifying or in preparing testimony" (G-2(e)).

Instead of supplying information responsive to these interrogatories (G-11 and G-2, e.g.) regarding Dr. Bassiouni's positions and opinion, CP&L provided nothing. This is true even though G-2 is logically the very interrogatory for which CP&L provided back-up documents to the testimony it did present.

If CP&L knew Dr. Bassiouni's positions, it is in default with respect to these interrogatories. CP&L counsel obviously reviewed them again before the hearing (I believe counsel so state on the record of November 4 or 5, but haven't located the cite(s)). As noted above, it is incredible that CP&L would not know the position of its own consultant. This, then, provides a strong inference that CP&L is withholding information not only from the Intervenor, but from the Board and the public. A sound record cannot be developed in such a situation.

In this case, unlike Summer, the question is one of suppressed information, information that an intervenor has actively pursued and seeks to have brought before the Board and parties on his initiative, not the Board's. Moreover, that suppressed information contradicts the FEMA evidence which is specifically stated in the Rule covering emergency planning (10 CFR 50.47(a)(2)) to be a rebuttable presumption. The Board cannot allow the Applicants to suppress evidence which does, on its face, rebut FEMA's presumption on all its major points.

In this case, the information came from an anonymous tipster through a party, and the Board has been responding to it (along with the Applicants and other parties). The most appropriate response in light of the fact that the information does directly contradict FEMA's evidence here in all its most major points, is to call Dr. Bassiouni and his colleagues as Board witnesses in an effort to get to the bottom of this matter and assure a sound record.

The Nuclear Regulatory Commission ordered a remanded hearing in this very docket, 50-400, in 1978, concerning suppression of an inspector's concerns over management capability by NRC staff. Thus, it is perfectly reasonable to infer that this Board's obligation to insure a sound record requires it to act likewise on information that contradicts the position of FEMA staff on this contention.

(Since Messrs. Black and Furr are not being called as experts, but as witnesses to factual matters of their knowledge and information, the Summer case does not apply to them at all.)

3. Even if the Summer standard were applied, the Board must call Dr. Bassiouni and his colleagues on this contention.

In Summer, the Licensing Board had unresolved concerns of its own (114 NRC, 1140, e.g. at 1143, 1144, 1142) and sought independent expert review sua sponte. In this case, the Board, acting on request of an intervenor, has before it information that contradicts the testimony of FEMA Staff. This information is unsworn, but there is no reason to doubt that it would be given as evidence if its authors were called to the stand.

This contradictory evidence is not a "deficiency" in the sense that it can be cured by any additional evidence of FEMA Staff or Applicants. Instead, the only way to resolve this problem is to hear the evidence of Dr. Bassiouni and his colleagues, and any rebuttal evidence FEMA or CP&L might offer.

The Board, beyond question, "simply cannot otherwise reach an informed decision on the issue involved" without this testimony, since the issue obviously includes the matters to which FEMA witnesses testified (and CP&L witnesses basically agreed to) which Dr. Bassiouni et al.'s review contradicts. You can't reach an informed decision

on the question of whether effective measures can and will be taken to wake people up in the Harris Emergency Planning Zone in a nuclear emergency without hearing the available contradictory evidence.

Likewise, you can't reach an informed decision between the position "The sirens will wake up enough people and informal alerting will do the rest well enough" and its opposite, simply by asking the proponents of the CP&L/FEMA position to say it again. Given that contradictory evidence (not just concerns of the Board) exists, the Board cannot resolve the issue or reach an informed decision, without hearing that evidence.

4. In the alternative, All the Above-named persons should Be Called as Intervenor's Witnesses.

The relevance of the testimony of Dr. Bassiouni et al, and of Messrs. Black and Furr, is given in 1. above. I didn't know anything about the matters the tipster communicated to me, until I was told. At that point I followed up with reasonable speed, and under 10 CFR 2.720 am entitled to subpoena those persons for my own case on this contention. While I believe it is far preferable, and fully justified, to call them all as Board witnesses, I believe my interest and the public interest and a sound record require the testimony of all the above-named persons and I quite seriously request that the attached subpoenas be executed by the Board on my behalf if not to have these witnesses appear on its own behalf, at a time and place agreeable to the Board and parties.

11 November 1985 (served Nov. 12)

Wells Eddleman
Wells Eddleman

Intervenor pro se

United States of America

NUCLEAR REGULATORY COMMISSION

In the matter of: Carolina Power & Light Co.,
et al.

(Shearon Harris Nuclear Power Plant,
Unit 1)

DOCKET NO. 50-400

TO Dr. M. Reada Bassiouni
Kathy Minassian
Ann Harris
Robert Woodhaver
David Kleppe
Claudia Markovitch (last 5 names spelled per Tr. 9870-71)
ATI, Inc., 22 Union Wharf, Boston, MA 02109

YOU ARE HEREBY COMMANDED to appear before the Atomic Safety.....
and Licensing Board.....
in the city of Raleigh, N.C.....
on the.....day of.....19.....at.....0'clock M.
to testify on behalf ofthe Licensing Board, on Wells Eddleman.....

in the above entitled action and bring with you the document(s) or object(s) described :

all documents and records which in your
opinion support any views you hold on matters concerning
Eddleman contention 57-C-3.

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

BY _____

Wells Eddleman, pro se

ATTORNEY FOR _____

....., 19.....

806 Parker St.

Durham NC 27701

TELEPHONE _____

919/688-0076

10 C.F.R. 2.720 (f)

On motion made promptly, and in any event
at or before the time specified in the subpoena
for compliance by the person to whom the sub-
poena is directed, and on notice to the party at
whose instance the subpoena was issued, the

presiding officer or, if he is unavailable, the
Commission may (1) quash or modify the sub-
poena if it is unreasonable or requires evidence
not relevant to any matter in issue, or (2) con-
dition denial of the motion on just and reasonable
terms.

United States of America

NUCLEAR REGULATORY COMMISSION

In the matter of: Carolina Power & Light Co.
et al.

Shearon Harris Nuclear Power Plant

DOCKET NO. 50-400

TO Bob Black
Ben Furr
Carolina Power & Light
Box 1551
Raleigh, NC 27602

YOU ARE HEREBY COMMANDED to appear before the Atomic Safety
and Licensing Board
in the city of Raleigh, NC
on the day of 19..... at 0'clock M.
to testify on behalf of the Board, or Wells Eddleman

in the above entitled action and bring with you the document(s) or object(s) described :

All records of written or oral communications
or
with FEMA personnel, State emergency planners, State or County officials
or employees, or with Dr. Bassiouni or others working with or employed
by Acoustic Technology Inc. concerning Eddleman contention 57-C-3
or modifications to the Harris
EPZ siren system. BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD
BY

Wells Eddleman, pro se

ATTORNEY FOR

....., 19.....

806 Parker St.

Durham, NC 27701

TELEPHONE

919/688-0076

10 C.F.R. 2.720 (f)

On motion made promptly, and in any event
at or before the time specified in the subpoena
for compliance by the person to whom the sub-
poena is directed, and on notice to the party at
whose instance the subpoena was issued, the

presiding officer or, if he is unavailable, the
Commission may (1) quash or modify the sub-
poena if it is unreasonable or requires evidence
not relevant to any matter in issue, or (2) con-
dition denial of the motion on just and reasonable
terms.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of CAROLINA POWER & LIGHT CO. Et al.
Shearon Harris Nuclear Power Plant, Unit 1

Docket 50-400
O.L.

CERTIFICATE OF SERVICE

I hereby certify that copies of Motion to subpoena Dr. M. Reada Bassi-
ouni et al. as Witnesses on Eddleman Contention 57-C-3

HAVE been served this 12 day of November 1985, by deposit in
the US Mail, first-class postage prepaid, upon all parties whose
names are listed below, except those whose names are marked with
an asterisk, for whom service was accomplished by hand, or a double
asterisk (express mail service)

* Judges James Kelley, Glenn Bright and James Carpenter (1 copy each)
Atomic Safety and Licensing Board
US Nuclear Regulatory Commission
Washington DC 20555

* George F. Trowbridge (attorney for Applicants)
Shaw, Pittman, Potts & Trowbridge
1600 M St. NW
Washington, DC 20036
Ruthanne G. Miller
ASLB Panel
USNRC Washington DC 20555

* Office of the Executive Legal Director
Attn Dockets 50-400/401 O.L.
USNRC
Washington DC 20555
E Plan Only
Spence W. Perry
FEMA Room 840
500 C St. SW
Washington DC 20740

Docketing and Service Section (3x)
Attn Dockets 50-400/401 O.L.
Office of the Secretary
USNRC
Washington DC 20555
Dan Read
CHANGE/FLP
5707 Wavercross
Raleigh, NC 27606

* John Runkle
CCNC
307 Granville Rd
Chapel Hill NC 27514
Travis Payne
Edelstein & Payne
Box 12607
Raleigh NC 27605
Richard Wilson, M.D.
729 Hunter St.
Apex NC 27502
** (E plan only)
Steve Rochlwis
FEMA-Suite 700
1371 Peachtree St. NE
Atlanta GA 30309
Robert Gruber
Exec. Director
Public Staff
Box 991
Raleigh NC 27602
Dr. Linda W. Little
Governor's Waste Mgt. Bd.
513 Albemarle Bldg.
325 N. Salisbury St.
Raleigh, NC 27611
Bradley W. Jones
USNRC Region II
101 Marietta St.
Atlanta GA 30303

Certified by W. Eddleman

*Al Cole
Attorney General's Office
Box 629, Raleigh NC 27602