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January 12, 2000

Administrative Judge G. Paul Bollwerk, Chairman  
Administrative Judge Frederick J. Shon  
Administrative Judge Dr. Peter S. Lam  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

In the Matter of Carolina Power & Light Company  
(Shearon Harris Nuclear Power Plant),  
Docket No. 50-400-LA, ASLBP No. 99-762-02-LA

**Re: Request for Conference Call to Address Certain Procedural Matters in Advance  
of the Subpart K Oral Argument Scheduled for January 21, 2000**

Dear Chairman Bollwerk, Judge Shon and Judge Lam:

Applicant Carolina Power & Light Company ("Applicant") requests the Board to convene a Conference Call with the parties in advance of the Subpart K Oral Argument scheduled for Friday, January 21, 2000. The purpose of the Conference Call is to address certain procedural matters, outlined below, that have arisen as a result of new arguments made in the Board of Commissioners of Orange County's ("BCOC") filing, dated January 4, 2000. These matters should be addressed prior to the Subpart K Oral Argument pursuant to the Board's authority under 10 C.F.R. § 2.718(e) and (h), so that all parties will have the same understanding of the order of argument, the burden of proof, and the scope of the issues in Contentions 2 and 3. We suggest that the Conference Call be convened on Tuesday, January 18, 2000, at the convenience of the Board, to ensure the participation of BCOC's counsel, Ms. Diane Curran, who, we understand, is scheduled to have returned from her vacation by that time.

## **BURDEN OF PROOF**

BCOC argued in its January 4 filing<sup>1</sup> that "the Licensing Board must assign the burden of proof to the Applicant in determining whether there is a genuine and substantial

<sup>1</sup> "Detailed Summary of Facts, Data and Arguments and Sworn Submission on which Orange County Intends to Rely at Oral Argument to Demonstrate the Existence of a Genuine and Substantial Dispute of Fact with the

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dispute of fact on any material issue.” BCOC Summary Contention 3 at 9-11 (section IV.A) (initial capitals deleted). This position is directly contrary to the Commission’s directive that “the burden of demonstrating the existence of a genuine and substantial dispute of material fact [is] on the party requesting adjudication.” 50 Fed. Reg. 41,662, 41,667 (1985). BCOC is the only party requesting adjudication here, and therefore has the burden of proof. The Board should clarify the burden of proof, and resulting order of presentation, for the January 21, 2000 Oral Argument.

## **NEW LEGAL CONTENTION**

BCOC has argued for the first time in its January 4 filing that “CP&L may not be granted an operating license amendment unless and until (a) the terms of a new or amended construction permit are approved, and (b) the construction is completed in conformance with the construction permit and the regulations.” BCOC Summary Contention 3 at 16; see also 2-3, 12-16. This is a novel argument, not previously raised by BCOC. This legal contention is not part of Contention 3 as admitted by the Board. If BCOC desires to raise this new legal contention, BCOC must follow the rules for late-filed contentions set forth in 10 C.F.R. § 2.714(a)(1).

## **IMPERMISSIBLE REFORMULATION OF CONTENTION 2**

### **New Legal Basis**

BCOC has substituted a new legal basis for Contention 2 in its January 4 filing.<sup>2</sup> BCOC abandons its original legal basis and now takes the position that “[c]oncededly, any physical measure has some administrative component, and any administrative measure has a physical component,” but only some administrative measures are permitted under General Design Criterion 62, while other administrative measures (specifically, those proposed by Applicant) are not. BCOC Summary Contention 2 at 21, 21-24 (section IV.B.2). This new

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Licensee Regarding the Proposed Expansion of Spent Fuel Storage Capacity at the Harris Nuclear Power Plant with Respect to Quality Assurance Issues (Contention TC-3),” dated January 4, 2000 (“BCOC Summary Contention 3”).

<sup>2</sup> “Detailed Summary of Facts, Data and Arguments and Sworn Submission on which Orange County Intends to Rely at Oral Argument to Demonstrate the Existence of a Genuine and Substantial Dispute of Fact with the Licensee Regarding the Proposed Expansion of Spent Fuel Storage Capacity at the Harris Nuclear Power Plant with Respect to Criticality Prevention Issues (Contention TC-2),” dated January 4, 2000 (“BCOC Summary Contention 2”).

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legal basis is directly contrary to Basis 1 of Contention 2, as admitted, which states that "GDC 62 prohibits the use of administrative measures." LBP-99-25, 50 NRC 25, 35 (1999) (Board's Ruling on Standing and Contentions). BCOC did not request reconsideration to reformulate Basis 1, and NRC case law clearly establishes that a party cannot reformulate its contention when it submits a new pleading. If BCOC desires to raise this new legal basis, BCOC must follow the rules for late-filed contentions set forth in 10 C.F.R. § 2.714(a)(1).

## **Four New Fact Bases**

BCOC argues in its January 4 filing that "the Board summarized the thrust of [Basis 2] in a manner that is overly narrow and inconsistent with the contention." BCOC Summary Contention 2 at 42. As admitted by the Board, Basis 2 asserts that "one failure, misplacement of a fuel assembly, could cause criticality if credit for burnup is used[.]" raising a question of fact: "[w]ill a single fuel assembly misplacement, involving a fuel element of the wrong burnup or enrichment, cause criticality in the fuel pool ...?" LBP-99-25, 50 NRC at 36. In contrast, BCOC now seeks to reformulate and dramatically expand Basis 2 "to permit the litigation of whether CP&L's criticality analysis satisfies the accident analysis criteria set forth in Draft Reg. Guide 1.13 ...." BCOC Summary Contention 2 at 43. BCOC now argues four new fact questions should be included in Basis 2:

1. Applicant failed to evaluate the universe of two or more concurrent accident conditions;
2. Applicant failed to evaluate the likelihood and independence of each accident condition;
3. Applicant failed to demonstrate that fuel assembly misplacement is an unlikely event; and
4. Applicant assumed that a single error will lead to only one fuel assembly misplacement.

Id. at 42-46. All four new bases impermissibly exceed the question of fact in Basis 2, a single fuel assembly misplacement. See LBP-99-25, 50 NRC at 36. BCOC did not request reconsideration of the Board's statement of Basis 2. If BCOC desires to raise these four new contention bases, BCOC must follow the rules for late-filed contentions set forth in 10 C.F.R. § 2.714(a)(1).

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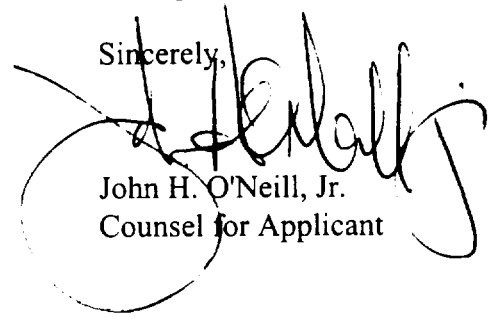
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We respectfully request the Board to convene a Conference Call to clarify both the burden of proof and the scope of the issues in Contentions 2 and 3 prior to the January 21, 2000 oral argument. Applicant has discussed this request with NRC Staff counsel, Ms. Susan Uttal, and Ms. Uttal concurs in both the scope and substance of this request.

Sincerely,

A handwritten signature in black ink, appearing to read "John H. O'Neill, Jr.", is written over a circular stamp or seal. The signature is fluid and cursive.

John H. O'Neill, Jr.  
Counsel for Applicant

cc: Service List

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
CAROLINA POWER & LIGHT	)	Docket No. 50-400-LA
COMPANY	)	
(Shearon Harris Nuclear Power Plant)	)	ASLBP No. 99-762-02-LA

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing letter dated January 12, 2000 requesting a conference call to address certain procedural matters in advance of the Subpart K Oral Argument scheduled for January 21, 2000, were served on the persons listed below by U.S. mail, first class, postage prepaid, and by electronic mail transmission, this 12th day of January, 2000.

G. Paul Bollwerk, III, Esq., Chairman  
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Attention: Rulemakings and Adjudications  
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\* by mail only



William R. Hollaway