

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)
DUKE POWER COMPANY, et al.)
(Catawba Nuclear Station,)
Units 1 and 2))

Docket Nos. 50-413
50-414



APPLICANTS' OBJECTIONS TO
PALMETTO ALLIANCE FIRST SET OF
INTERROGATORIES AND REQUESTS TO PRODUCE

Duke Power Company, et al. ("Applicants") object to answering Palmetto Alliance's ("Palmetto") First Set of Interrogatories and Requests to Produce, filed April 20, 1982, pending final resolution by the Licensing Board, Appeal Board or Commission itself, if necessary, of their and NRC Staff objections to the Licensing Board's March 5, 1982 Memorandum and Order.

I. INTRODUCTION

By Memorandum and Order of March 5, 1982, this Atomic Safety and Licensing Board ("Licensing Board") ruled on proposed contentions filed in the captioned proceeding. Therein, the Licensing Board, inter alia, conditionally accepted Palmetto proposed Contentions 6, 7, 18, 40 and 43. 1/ The

1/ Intervenor Carolina Environmental Study Group's ("CESG") Contentions 13 and 17 are identical to Palmetto Contentions 40 and 43. Accordingly, the instant objections regarding Palmetto Contentions 40 and 43 would apply to any discovery request filed by CESG with regard to its Contentions 13 and 17.

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Licensing Board found these contentions to be lacking in the requisite specificity, but held that such specificity could be provided after discovery on these contentions. Order of March 5, 1982 at p. 13.

Subsequently, on March 31, 1982, Applicants filed its objections to the Board's March 5 Order in the form of a Motion for Reconsideration. Therein, Applicants questioned, inter alia, the use of the discovery process to cure defective contentions. Applicants expressed their belief that, if such ruling were not reversed and Intervenors were not made to specify the factual bases for their contentions, Applicants would be subject to serious adverse effects because of broad and unrestricted Intervenor discovery requests regarding these vague, nonspecific contentions. See Applicants March 31, 1982 Objections...at pp. 38-42. 2/ The NRC Staff supported Applicants' position in this regard. See NRC Staff's Objections to Licensing Board's March 5, 1982 Order on Admission of Contentions, dated April 4, 1982.

On April 9, 1982, Applicants filed interrogatories upon Palmetto and CESG. Those interrogatories were directed solely to the underlying factual bases of a number of Palmetto's

2/ Applicants' March 31, 1982 Motion for Reconsideration alternatively requested that the matters therein be certified to the Appeal Board. The NRC supported Applicants' certification request. See NRC Staff's Response to Applicants' Motion For Certification of Certain Rulings In Licensing Board's Prehearing Conference Order, dated April 20, 1982.

and CESG's contentions, with particular emphasis on those contentions which the Licensing Board admitted to the proceeding subject to greater specificity after discovery. 3/

By Order of April 13, 1982, the Licensing Board informed the parties that, given the "other adjudicatory responsibilities of the Board" it would be unable to "consider and decide the objections raised by the parties" until late May or early June. However, the Licensing Board also directed that discovery proceed as if the March 5 Order would "remain in full force and effect." In short, though all but one of Palmetto's contentions and all of CESG's contentions are the subject of objections by both Applicants and Staff, the Licensing Board has chosen to order discovery to continue on those contentions pending any ruling by it. The Licensing Board did indicate that it would entertain objections to discovery requests on those contentions, but such an objection could only be raised on the grounds that discovery on that contention is "unusually burdensome." 4/ (emphasis in original). Thus, the Licensing

3/ Those contentions included Palmetto Nos. 6, 7, 18, 40 and 43 and CESG Nos. 13 and 17.

4/ The Board directed that even the permissible objections must be accompanied by a request for an "early ruling" on certain specific contentions. Even then objections could be raised only on interrogatories addressed to those contentions which the Board had admitted on the condition that the Intervenor provide the requisite specificity following discovery. The Board specifically stated that the "early ruling procedure" (and, Applicants

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Board's April 13 Order, taken in combination with its admission of defective contentions subject to the requisite specificity through discovery, has the effect of removing from Applicants the ability to object to interrogatories on otherwise valid grounds, such as failure to seek relevant information, vagueness, calling for legal conclusions, and not reasonably calculated to lead to admissible evidence.

II. ARGUMENT

The Board's April 13, 1982 Order provides for the filing of objections to discovery requests if the discovery request is (1) based upon a contention which has been objected to, and (2) unusually burdensome. 5/ The Commission's regulations (10 CFR §§2.740b(b) and 2.741(d)) also provide for the filing of objections. Pursuant to these authorities Applicants file

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assume, the limited right to object granted by the Board) does not apply to those contentions which the Board admitted on the condition that Intervenor provide the requisite specificity following availability of pertinent NRC Staff and Applicants documents. Order of April 13, 1982 at p. 2.

5/ Commission regulations and case law contemplate that a Motion for Protective Order be filed contemporaneously with objections. See Susquehanna, infra, 12 NRC at 322-323. Applicants are filing such a Motion on this date.

the instant objections. 6/ Applicants would note that Commission case law does not favor general objections to discovery. Pennsylvania Power & Light Co., et al. (Susquehanna Steam Electric Station, Units 1 & 2), ALAB-613, 12 NRC 317, 323 (1980); Boston Edison Company, et al. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 583 (1975). Rather, it is necessary for the objecting party to address a request individually, viz. "to show that the interrogatory should not be answered - that the information called for is...

6/ Applicants are cognizant of the Licensing Board's language that objections filed pursuant to its April 13 Order should be accompanied by a "request for a ruling on the reconsideration request as to that contention." Applicants have not requested such an "early ruling." Rather, Applicants have requested that this Board expeditiously rule on its objections, or alternatively, certify its objections to the Appeal Board. Applicants reasons stem, in part, from the adverse impact the Board's rulings will have, and indeed, as described in the above text, are having, on the proceeding. Under such a circumstance, Applicants are of the view that piecemeal resolution of objections will only exacerbate the situation and accordingly, the early ruling procedure is not requested.

Applicants position takes on added significance in light of their pending request for suspension or stay of discovery. See Applicants' Renewed Motion For Certification, dated April 26, 1982 at p. 4, n.5. It is Applicants view that it is first necessary to resolve what issues are in controversy, before proceeding with discovery. A suspension or stay of discovery permits this Board, and the parties, the time necessary to resolve the issues in the first instance. See 10 CFR Part 2, Appendix A, Section IV(a) which provides:

Once the key issues in controversy are identified in the special prehearing conference order (§2.751a(d)), discovery may proceed and will be limited to those matters.

in some other way not the proper subject of an interrogatory." Pilgrim, supra, 1 NRC at 583. However, these cases address the situation wherein issues have been admitted to the proceeding upon a proper showing of specificity and bases by an Intervenor. See Pilgrim, supra, 1 NRC at 585. Such is not the case in this instance.

Palmetto has filed discovery requests which are directed to contentions Applicants have objected to in their March 31, 1982 Motion for Reconsideration and their April 26, 1982 Renewed Motion for Certification. As noted, the NRC Staff has similarly objected to these contentions. Applicants submit that sound legal reasons support both their and the Staff's objections. Accordingly, pending disposition of such Motions, Applicants submit that they should not be required to respond to Palmetto's discovery request. Indeed, to do so would result in relinquishing a position that is at issue in Applicants' Motions viz., that it is contrary to Commission regulation and agency case law to allow an intervenor to cure a defective contention through the discovery process. 7/

7/ By filing the instant objections in lieu of specific objections, Applicants' do not waive their right to file such specific objections if it becomes necessary.

Deferring discovery in this case 8/ until a decision is issued on Applicants' outstanding Motions is fully consistent with the practice under the Federal Rules of Civil Procedure.9/ As Professor Moore states, "When it appears that burdensome expense and effort may be avoided if any pretrial consideration may obviate it, the court may delay discovery until the determination of the possibly determinative issue." 4 Moore's Federal Practice, §26.70[2], n.10 (1981-82 Supp.). See also 4A Moore's Federal Practice, §33.27, n.32. A case in point is Equal Employment Opportunity Commission v. Hickey-Mitchell Company, 372 F.Supp. 1117 (E.D. Mo. 1973). There the EEOC sought an injunction against an employer's alleged discrimination in employment. The defendant moved for a protective order to postpone discovery pending a decision on whether it had a defense that the EEOC failed to make a good faith investigation of the claim of the charging party prior to bringing suit. The court granted the protective order "for the reason that the expense and burden placed on the defendant...might be obviated" by a decision on the substantive question. (372 F.Supp. at 1121). A deferral of discovery

8/ See n.6, supra, which references Applicants' pending request for deferral of discovery.

9/ The Commission in seeking guidance regarding discovery practice has consistently looked to legal authorities and court decisions construing the Federal Rules. See, e.g., Susquehanna, supra, 12 NRC at 322, n.6 and cases cited therein.

has also been held appropriate where there is a pending motion for summary judgment. See Brennan v. Local Union No. 649, International Brotherhood of Teamsters, 494 F.2d 1092, 1100 (D.C. Cir. 1974). See also O'Brien v. Avco Corporation, 309 F.Supp. 703, 705 (S.D. N.Y. 1969). 10/

The NRC Staff likewise sees the merit in suspension or stay of discovery pending resolution of outstanding Motions. In its pleading of May 7, 1982, the Staff stated that absent a short delay,

Going forward prior to resolution of underlying specificity objections to the Board's March 5, 1982 Order will inevitably lead to delay far beyond the intended deadlines for conclusion of this discovery. See NRC Staff Response to Applicants' Renewed Motion For Certification ...at p. 10.

Further, the implication on schedule should not be great in light of Applicants' revised schedule of operation. See attached letter.

Applicants also maintain that to respond to Palmetto's discovery request prior to a dispositive ruling on objections would be an undue burden. The Board has admitted nonspecific contentions. In order to ascertain the nature, basis and

10/ Applicants would request that any deferral of discovery to include a preservation of their right to file Motions to Compel with regard to the interrogatory responses from Palmetto and Carolina Environmental Study Group. Applicants have deferred filing such motions pending Board action on its suspension or stay request. If the Board denies Applicants' request for a suspension or stay of discovery, Applicants will file such Motions forthwith.

specific aspects of the several contentions Applicants filed interrogatories seeking that information from Palmetto and CESC. However, Palmetto's responses are so totally devoid of information that it is readily apparent that the contentions are lacking in specificity and basis. 11/ To extraciate

11/ Examples of the insufficiency of Palmetto's response, and thus, of the lack of specificity and basis of Palmetto contentions, are set forth below:

Palmetto Contention 6

1. Q. What do you mean by the term "substandard workmanship"?
A. Design, fabrication, construction, and testing below applicable standards.
2. Q. What standard do you contend has not been met?
A. Those required for safe operation, including 10 CFR Part 50 Appendix A General Design Criteria for Nuclear Power Plants.
3. Q. How do you contend that standard has not been met by the workmanship at the Catawba station?
A. Intervenor at present lacks sufficient knowledge to answer and is awaiting responses to its Interrogatories and Requests to Produce served April 20, 1982, with regard to this subject.
4. Q. What "workmanship" is the subject of this contention?
A. Design, fabrication, construction, and testing of safety related structures, systems and components.

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itself from this perilous position, Palmetto has now, as noted, served discovery upon Applicants. However, Palmetto's discovery request regarding Palmetto contentions 6, 7, 18, 40 and 43 consists in great measure of the vague, non-specific "fishing-expedition" type interrogatories of the sort proscribed by 10 CFR Part 2, Appendix A, Section IV(a). Indeed, it is clear from a reading of this discovery that Palmetto is seeking to have Applicants provide the requisite specificity

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5. Q. Please specify the activities and areas of plant construction for which you contend the workmanship is substandard?
- A. Intervenor at present lacks sufficient knowledge to answer and is awaiting responses to its Interrogatories and Requests to Produce served April 20, 1982, with regard to this subject.

With regard to its diesel generator contention (Palmetto Contention 18) Palmetto stated in the January prehearing conference that it could provide greater specificity. See Tr. 176-177. However, when Applicants asked specific questions as to the meaning of, and basis for, quoted portions of the contention itself, Palmetto provided no useful information. Rather, in twenty-six instances it stated:

Intervenor at present lacks sufficient knowledge to answer and is awaiting responses to its Interrogatories and Requests to Produce served April 20, 1982, with regard to this subject.

When asked the meaning of terms central to its contentions, such as adequate design, operation and sufficiently high reliability, Palmetto replied "common meaning."

for its contentions. 12/ Such a course is clearly an improper shifting of the obligation imposed upon Palmetto by 10 CFR §2.714.

12/ Examples of Palmetto's non-specific fishing-expedition interrogatories are set forth below:

Palmetto Contentions 4 and 40

3. Does the Duke Power Company Quality Assurance program comply with each of the criteria of Appendix B to 10 CFR Part 50?
8. Does workmanship in the actual design, fabrication, construction and testing of safety-related structures, systems, and components meet or exceed all applicable standards?
9. Identify and describe in detail all standards applicable to the actual design, fabrication, construction and testing of safety-related structures, systems, and components.
13. For each activity under license by NRC or AEC conducted by Duke Power Company or its contractors and subcontractors involving any nuclear facility or operation, including but not limited to Catawba, identify each deficiency, as defined in 10 CFR Section 50.55(e), which represents a significant breakdown in any portion of the Quality Assurance program conducted in accordance with the requirements of Appendix B to 10 CFR Part 50;....

Palmetto Contention 7

3. Do you agree that Duke Power Company has consistently failed to adhere to required NRC operating and administrative procedures provided for in Commission rules and regulations, and that, therefore, no reasonable assurance can be had that the facility can be operated without endangering the public health and safety?

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4. If your response to No. 3 is negative, explain in detail the respects in which you do not agree.

11. Describe in detail each instance of Duke Power Company noncompliance with NRC operating and administrative procedures provided for in Commission rules and regulations.

Palmetto Contention 18

7. What has been the testing and operating experience of the emergency diesel generators, the components and related components identified in No. 6 and the use of such for safe shutdown and reactor control in the event of loss of off-site power in testing and actual use at operating nuclear power plants, plants under construction, and other installations? Identify each other nuclear facility, or other installation under construction or in operation, at which components of the same, or substantially similar design are employed and describe in detail the testing and operating experience at such installation including each Licensee Event Report or other record reflecting such experience.

19. For each of the types of on-site electrical system malfunctions listed below what features of this facility's design, fabrication, construction and proposed operation, if any, provide assurance that such malfunction will not occur or impugn the health and safety of the public?

- I. Offsite Circuits and Startup Transformers...
- II. Switchyard Breakers and Autotransfer Logic...
- III. Load Shedding Systems...
- IV. Engineered Safety Features Loss of Normal Power Protective Logic...
- V. Diesel Generator Air Starting Systems...
- VI. Diesel Generators...
- VII. Diesel Generator Load Sequencers...
- VIII. Battery Charger Systems...
- IX. Station Batteries...
- X. Inverters and DC/AC Motor Generator Sets...
- XI. Fusing and Protective Relating....

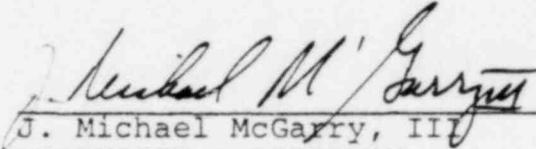
To respond to such broad-sweeping discovery requests would require an extensive commitment of Applicants' resources. Indeed, to require Applicants to respond to such limitless discovery would in essence result in permitting Palmetto essentially unrestricted access to all Applicants' files that relate in any degree whatsoever to the general topics of quality assurance, operations, diesel generators and corbicula. Such an expansive inquiry is contrary to the nature of discovery, whose purpose it is to refine and narrow the issues, not expand upon them. See Susquehanna, supra, 12 NRC at 322 quoting Pacific Gas & Electric Company (Stanislaus Project), LBP-78-20, 7 NRC 1038, 1040 (1978). In view of the pending Motions regarding this issue "which may obviate such interrogatories altogether," Applicants maintain that to respond at this time would constitute an unusual burden. This is particularly the case when subsequent Licensing or Appeal Board or Commission review may, as Applicants suggest, dismiss the subject contentions, thereby obviating any discovery whatsoever with respect to such contentions.

III. CONCLUSIONS

For the foregoing, Applicants maintain that they should not be required to respond to Palmetto's First Set of

Interrogatories and Requests to Produce, pending final resolution of outstanding Motions.

Respectfully submitted,



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May 10, 1982

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NUCLEAR REGULATORY COMMISSION

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In the Matter of)
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Objections to Palmetto Alliance First Set of Interrogatories and Requests to Produce"; "Applicants' Motion for Protective Order"; and Letter to Board in the above captioned matter, have been served upon the following by deposit in the United States mail this 10th day of May, 1982.

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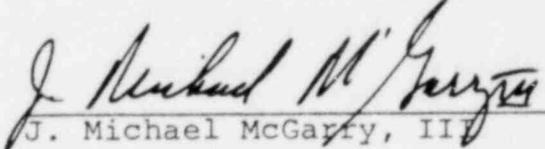
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