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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DUKE POWER COMPANY, <u>et al.</u>)	Docket Nos. 50-413
)	50-414
(Catawba Nuclear Station,)	
Units 1 and 2))	

APPLICANTS' MOTION TO COMPEL
OR IN THE ALTERNATIVE, TO
DISMISS CONTENTIONS

Pursuant to 10 CFR §2.740(f), Duke Power Company, et al. ("Applicants") hereby move the Atomic Safety and Licensing Board ("Board") in the captioned proceeding to issue an order compelling Intervenor, Palmetto Alliance, to respond to Applicants' Interrogatories and Requests to Produce regarding Palmetto Alliance Contentions 16 and 27 dated August 9, 1982 and Palmetto Alliance Contention 8, dated August 16, 1982. Alternatively, Applicants hereby move that the Board reconsider its earlier decision to admit Contentions 8, 16 and 27, and to dismiss those contentions as issues in the proceeding.

I. Background

On August 9 and August 16, 1982, Applicants served upon Palmetto Alliance Interrogatories and Requests to Produce concerning Contentions 16 and 27 and concerning Contention 8 respectively ("August 9 or August 16 Request to Produce").

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Applicants' Interrogatories sought only to elicit from Palmetto Alliance the nature of its concerns, as reflected in its contentions, and the bases for those concerns. The interrogatories addressed specific Palmetto Alliance Contentions, asking for a definition of each material term in those contentions; whether Palmetto Alliance contends that requirements governing these terms are set forth in NRC requirements and, if so, whether Palmetto Alliance contends that Applicants have not satisfied those requirements; what Palmetto Alliance contends Applicants must do to meet those requirements if Palmetto Alliance contends they are not satisfied; what Palmetto Alliance contends Applicants must do to ensure the public health and safety if NRC requirements do not apply to an area of concern raised in Palmetto Alliance contentions; and the technical bases for responses to the foregoing questions. In addition, general requests for documents were propounded, along with a series of general interrogatories.

Palmetto Alliance responded to these requests and interrogatories on August 30, 1982. No substantive information was provided in response to the interrogatories propounded by Applicants. Instead, almost exclusively, Palmetto Alliance asserted that it lacked sufficient knowledge to answer or that its use of a particular word or phrase is to be given its "common meaning." Specifically, with respect to interrogatories addressing its language in its contentions,

Palmetto Alliance responded, "Intervenor at present lacks sufficient knowledge to answer" to approximately 76 interrogatories and "common meaning" to approximately 32 interrogatories. Intervenors further asserted that discovery requests of both the Staff and Applicants caused it "annoyance, embarrassment, oppression, undue burden and expense,"¹ and characterized Applicants' requests as a "discovery offensive...border[ing] on harrassment."² Intervenors further claimed that certain documents prepared by their counsel are confidential and, as such, not discoverable.³

Palmetto Alliances' "Responses" must be read in light of its representations that it has committ[ed] itself to abide by the spirit of the discovery rules" (Motion at p. 1); that it has responded to each of Applicants' discovery requests "to the best of its ability" (Intervenor Response at p. 2); and

¹ "Palmetto Alliance Responses to Applicants' Interrogatories and Requests to Produce Regarding Palmetto Alliance Contentions 8, 16 and 27 and to NRC Staff's Second Set of Interrogatories and Document Production Requests" ("Intervenor Response"), August 30, 1982, at p. 2.

² "Palmetto Alliance Motion for Protective Order," ("Motion") August 30, 1982, at p. 1.

³ Id. at p. 2.

that "virtually all information known to Intervenor [on its own contentions] has already been fully disclosed on the record of the prehearing conference." Motion at p. 1.⁴

In light of these responses and representations, Applicants submit that only one of two conclusions can be drawn. On the one hand, if Palmetto Alliance does indeed have the information on its own contentions sought by Applicants, then Palmetto Alliance seeks to evade its responsibilities as a participant in this proceeding by failing to disclose that material, and the Board should issue an order compelling Palmetto Alliance to file responsive answers. On the other hand, if Palmetto Alliance's representations that it has in fact met the spirit of the discovery rules and answered Applicants' interrogatories to the best of its ability are to be taken at face value, then, based on this new development, the Board should reconsider its earlier decision to admit contentions 8, 16 and 27. Obviously, if in fact Palmetto Alliance cannot furnish the very basic information sought by Applicant with respect to its contentions, then clearly 10 CFR §2.714(b) has not been satisfied and those contentions should not have been

⁴ A review of the prehearing conference transcript discloses that in fact no substantive information was offered at that time by Palmetto Alliance in support of its Contentions 8, 16 and 27. See Prehearing Conference Transcript at pp. 129-130; 170-79; and 251-56 (January 12-13, 1982).

admitted. Thus, Applicants alternatively move the Board to reconsider its admission of those contentions and upon such reconsideration to dismiss them as issues in this proceeding.

II. Argument

A. The Board Should Compel Intervenor to Respond Fully to Applicants' Discovery Request

Applicants submit that the Board should compel Palmetto Alliance to respond fully to its earlier discovery requests. First, Palmetto Alliance apparently misconceives the purpose and scope of discovery in NRC licensee proceedings by refusing to identify the nature of its concerns as reflected in its contentions and to reveal the bases for those contentions. Second, Intervenor apparently misunderstands the respective burdens allocated between it and the Applicant with respect to contentions advanced by the Intervenor.

Purpose and Scope of Discovery Rules.

Discovery in NRC licensing proceedings is intended to insure that "the parties have access to all relevant, unprivileged information prior to the hearing." Matter of Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 582 (1975). Moreover, it is well-established that

interrogatories seeking specification of the facts upon which a claim or contention is based are wholly proper, and the party may be required to answer questions which attempt to ascertain the basis for his

claim or, for example, what deficiencies or defects were claimed to exist with respect to a particular situation or cause. [Id. at 582.]

That such an obligation may be imposed on Palmetto Alliance is not surprising. "It is . . . incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency [and the applicants] to the intervenors' position and contentions." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978). And, as the Appeal Board recently stated, "to permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record." Matter of Pennsylvania Power & Light Co., et al. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 338 (1980), quoting with approval p. 6 of the August 24, 1979 unpublished Memorandum and Order of the Licensing Board in that proceeding.

It bears repeating: Applicants' interrogatories to Palmetto Alliance were limited to the plain language of its contentions, and sought only to have Intervenor specify the nature of its concerns, as reflected in its contentions, and to reveal the bases for those concerns. Specifically, they are designed to enable Applicants to understand how Palmetto Alliance defines the material terms in its contentions; what the areas of safety concern (if any) raised by Palmetto Alli-

ance encompass; what actions (if any) Applicants should take, according to Palmetto Alliance, to assure the safe operation of Catawba; and what the technical bases (if any) for Palmetto Alliance's positions are.

Intervenor's responses to Applicants' discovery request totally ignore the purpose and scope of discovery as set forth above. Contention 8 presently states:

No reasonable assurance can be had that the facility can be operated without endangering the public health and safety because the Applicants' reactor operators and shift supervisors lack sufficient hands-on operating experience with large pressurized water reactors. The resumes of Catawba Plant Supervisors show that only a very few of these individuals who will have primary management responsibility for safe operation of the plant, FSAR, Table 1.9-1, p. 2, have experience at large PWR's like Catawba. NUREG-0737, Clarification of TMI Action Plan Requirements, I.C.3. Resumes of Senior Reactor Operators and Reactor Operators show similar lack of experience.

A number of possible issues are subsumed within this contention. For example, what does Palmetto Alliance mean by "sufficient hands-on operating experience"? Does Palmetto Alliance simply contend the Applicants do not meet the applicable NRC requirements governing training? Or does Palmetto Alliance contend that such requirements are satisfied but that for some undisclosed reason Catawba should be governed by more

stringent staffing requirements? Or, for that matter does Palmetto Alliance believe that the NRC requirements themselves are per se inadequate?

Similarly, it is difficult to understand the scope of Contention 8. Does it extend to reactor operators, shift supervisors, senior reactor operators and plant supervisors? If so, does Palmetto Alliance contend that each of these individuals must have "sufficient hands-on operating experience"? And does "sufficient" experience depend on whether the Palmetto Alliance is discussing a reactor operator or a plant supervisor?

As a result of these ambiguities, Applicants propounded a series of interrogatories concerning Contention 8 which sought nothing more than an explanation of the dimensions of and bases for Contention 8. For example, Applicants asked in Interrogatory 1 in its August 16 Interrogatories and Request to Produce what Palmetto Alliance meant by "hands-on operating experience". Palmetto Alliance responded by stating that it "at present lacks sufficient knowledge to answer." Intervenor Response at p. 9. Applicants received the identical response in response to its interrogatory asking whether it contends that "hands-on operating experience" is necessary to satisfy the applicable NRC requirements. Id. In short, Palmetto

Alliance simply failed to disclose any information to shed any light whatsoever on the language which it used in its contention.

The identical situation also exists with respect to Contention 16. It presently states:

Applicants have not demonstrated their ability safely to store irradiated fuel assemblies from other Duke nuclear facilities so as to provide reasonable assurance that those activities do not endanger the health and safety of the public.

From the express language of this contention it is impossible to determine why Palmetto Alliance claims that Applicants have not demonstrated their ability safely to store irradiated fuel assemblies from other Duke nuclear facilities. Does Palmetto Alliance claim the irradiated fuel assemblies to be stored are for some reason defective? Or does it claim the storage facilities at Catawba are somehow inadequate? And, if Intervenor contends that the applicable NRC standards are inadequate to protect the public health and safety, what standards would Palmetto Alliance have the Applicants meet?

In order to clarify these issues, Applicants asked Palmetto Alliance (for example) what activities it believed constitute any aspect of the word "safely" and what it meant when it alleged that Applicants "have not demonstrated" their ability to store irradiated fuel assemblies. August 9 Interrogatories and Request to Produce at B.1 and B.19. In response to both questions, Palmetto Alliance blandly asserted

that "Intervenor at present lacks sufficient knowledge to answer." Intervenor Response at Responses 1 and 19, p. 12. Applicants received an identical response to its interrogatory asking if Palmetto Alliance believes that Applicants have failed to satisfy the applicable NRC requirements. Id. at Response 19, p. 12.

The situation is no clearer with respect to Contention 27, which states:

The Applicants should be required to place real time monitors capable of reading gamma radiation levels around the site in order to provide emergency operations personnel with the information required to make decisions necessary to reasonably assure the health and safety of the public under conditions of radiological release to the environment.

Thermoluminescent dosimeters are only accurate within about + 30% and only provide a post hoc assessment of conditions.

Applicants do not know, and have no way of learning, the dimensions of and bases for this contention except through discovery. Apparently Intervenor has concluded that thermoluminescent dosimeters are inadequate to assure the public health and safety under conditions of radiological release, presumably during emergency conditions. However, it is either unwilling, or unable, to specify the nature of its concern, or to disclose the bases for such assessment. Nor does the Intervenor state how many "real time monitors" it believes are necessary and where they should be located. And, as was the

case with Contentions 8 and 16, Applicants are unable to determine whether Intervenor contends that NRC requirements are not satisfied or whether such requirements are themselves somehow inadequate.

Again, to ascertain the bases for and dimensions of this contention, Applicants propounded a series of basic interrogatories, without receiving any meaningful responses. For example, when asked if Palmetto Alliance contends that Applicants failed to meet any regulatory requirements related to this contention, Palmetto Alliance responded that it lacks sufficient knowledge to answer. Intervenor Response at Response 2, p. 13. The identical response was elicited in response to a question as to whether there are devices available other than real time monitors which meet its criteria for capability (Id. at Response 39, p. 13) and what configuration of real time monitors it contends is necessary to assure the public health and safety (Id. at Response 51, p. 14).

To summarize, the law as developed during other licensing proceedings makes absolutely clear that the purpose and scope of discovery is to assure that all parties have access to all relevant information and that those intervening in a proceeding disclose the dimensions of and bases for each of their contentions. Intervenor's responses to Applicants' discovery request fail to do so and suggest a fundamental misunder-

standing as to both the purpose and scope of discovery. The Board, therefore, should compel Palmetto Alliance to respond to applicants interrogatories and requests to produce.

Burden of Proof.

In addition to misconceiving the scope and purpose of discovery and failing to set forth any valid objections to Applicants' discovery requests, Intervenor apparently does not understand fully the allocation of the burden of proof in this licensing proceeding. For example, Intervenor states:

To observe the obvious: it is not the Intervenor who is seeking to operate or license the Catawba Nuclear Station, it is not this Intervenor who is on trial, and it is not this Intervenor who controls the evidence relevant to the health, safety and environmental effects of the Catawba Nuclear Station's proposed operation. On the contrary it is the Applicants and NRC Staff who propose the action adversely affecting Palmetto's members and who, presumably control the evidence regarding the effects of its operation. [Intervenor response at p. 3.]

Thus, apparently Intervenor believes that because the Applicants have the burden of proof in demonstrating that Catawba should be licensed to operate, Intervenor has no responsibilities in the proceeding other than to raise questions.

Applicants fully agree with Intervenor that they must assume the burden of proof in justifying the issuance of an operating license for Catawba and they assume that burden willingly. Applicants, however, emphatically disagree that

Intervenor need only sit back and raise issues for it to have satisfied its responsibilities as a participation in this proceeding.

In Susquehanna, supra, ALAB-613, 12 NRC at 339-41, the Atomic Safety and Licensing Appeal Board addressed a situation in which Intervenors responded to a motion to compel in this way:

[T]he issues raised in contention are matters about which the Applicant and Staff should be well prepared already, if the license is to issue, regardless of whether or not the Intervenors can supplement their initial responses to interrogatories. In an Operating Licensing proceeding, it is the business of the Applicant to prove it is entitled to a license. It is the responsibility of an Applicant to take whatever preparatory measures it deems appropriate to justify its claim that it should be granted a license. The Intervenors are not paid consultants of the Applicant. If this Applicant cannot prepare its case without the assistance of these Intervenors, then certainly the license should not issue. [Id. at 339.]

The Appeal Board rejected this position in the strongest possible language:

The [Intervenor's] understanding of [its] role is simply wrong. To be sure, the license applicant carries the ultimate burden of proof. But intervenors also bear evidentiary responsibilities. In a ruling that has received explicit Supreme Court approval, the Commission has stressed that an intervenor must come forward with evidence "sufficient to require reasonable minds to inquire further" to insure that its contentions are explored at the hearing. Obviously, interrogatories designed to discover what

(if any) evidence underlies an intervenor's own contentions are not out of order. [Id. at 340 (citations omitted).]

In short, a "litigant may not make serious allegations against another party and then refuse to reveal whether any of those allegations have any basis." Id. at 339.

Accordingly, Applicants urge the Board to compel Intervenor to respond to their discovery requests.

B. The Board Should Dismiss Contentions 8, 16 and 27.

The foregoing discussion rests on the assumption that Palmetto Alliance does, in fact, possess the information sought in Applicants' discovery requests but that for some reason Palmetto Alliance has chosen to ignore its responsibilities in this proceeding by not disclosing it. If, however, Palmetto Alliance does not possess such information, then the Board should, upon reconsideration of its earlier decisions, dismiss those contentions. Applicants' basis for its request is that, Palmetto Alliance's responses demonstrate that it has no bases whatsoever for Contentions 8, 16 and 27. As such, Palmetto Alliance could not have satisfied previously the requirements of Section 2.714⁵

In both its March 5, and July 8, 1982 Memoranda and Orders, the Board recognized the need for Palmetto Alliance to set forth the bases for its contentions. In addition, by

⁵ Applicants wish to emphasize that at this time they seek no sanctions, beyond a Board order compelling discovery, against Palmetto Alliance as a result of its failure to respond meaningfully to Applicants' discovery requests.

admitting those contentions unconditionally, the Board had to have found that Palmetto Alliance made such a showing. See 10 CFR §2.714(b). Indeed, the Commission's Rules on intervention presume that the parties have specific factual bases for their contentions. Pilgrim, supra, LBP-75-30, 1 NRC at 585.

The August 30 responses filed by Palmetto Alliance in response to Applicants discovery requests, if they are taken at face value, demonstrate that Palmetto Alliance is both unable to specify its concerns, and has no bases for those concerns as set out in its contentions. Applicants submit that those responses must be so taken for, at numerous points in its response, Palmetto Alliance states that it "has diligently responded" to the Applicants discovery requests "to the best of its ability." Intervenor Response at 2. However, as described above, Palmetto Alliance has not been able to provide any substantive information with respect to even the most basic questions regarding the scope of and bases for its own contentions.

Moreover, if Palmetto Alliance intends to use discovery against the Applicant as a means to obtain sufficient information to demonstrate retrospectively compliance with the specificity and basis requirements of 10 CFR 2.714(b) for its Contentions 8, 16 and 27, such course of conduct has already been prohibited by the August 19, 1982 Memorandum and Order of the Appeal Board:

[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189(a) of the [Atomic Energy] Act nor Section 2.714 of the Rules of Practice permits the filing of a vague contention, followed by an endeavor to flesh it out through discovery against the applicant or staff. [Matter of Duke Power Co., et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, ___ NRC ___ (August 19, 1982), slip op. at 13]].

Applicants thus submit that the responses of Palmetto Alliance to Applicants' discovery request constitute new information as to whether the requirements of 2.714(b) have been met. Applicants further submit that if those responses are indeed the best that Palmetto Alliance can do to explain the scope of and bases for its own contentions, then the Board should, upon reconsideration of its earlier decision to admit Contentions 8, 16 and 27, dismiss those contentions in view of the failure of Palmetto Alliance to satisfy 2.714(b).

III. Conclusion

In light of the foregoing, Applicants request that the Board issue an order compelling Intervenor, Palmetto Alliance, to respond to Applicants' Interrogatories and Requests to

Produce regarding Intervenor Contentions 8, 16 and 27 or,
alternatively, issue an order dismissing those contentions.

Respectfully submitted,

Albert V. Carr, Jr. / LBH
William L. Porter
Albert V. Carr, Jr.
Ellen T. Ruff
DUKE POWER COMPANY
P.O. Box 33189
Charlotte, North Carolina 28242
(704) 373-2570

J. Michael McGarry, III
DEBEVOISE & LIBERMAN
1200 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for Duke Power
Company, et al.,

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