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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, et al.	)	Docket No. 50-413
	)	50-414
(Catawba Nuclear Station, Units 1 and 2)	)	

APPLICANTS' ANSWER TO PALMETTO ALLIANCE'S MOTION TO COMPEL

Duke Power Company, et al. ("Applicants"), pursuant to 10 C.F.R. § 2.730(c), submit their response in opposition to Intervenor Palmetto Alliance's Motion to Compel ("Motion"), filed October 4, 1982. Applicants hereby move the Licensing Board ("Board") in this proceeding to issue an order denying the Motion as lacking in merit.

I. BACKGROUND

On September 3, 1982, Palmetto Alliance filed "Palmetto Alliance Second Set of Interrogatories and Requests to Produce" (hereafter cited as "Palmetto Alliance Interrogatories"), which dealt with Palmetto Alliance Contentions 8 (on operator qualifications) and 27 (on radiation monitoring). Applicants submitted timely responses to these Interrogatories and requests to produce by filing "Applicants' Responses to

'Palmetto Alliance Second Set of Interrogatories and Requests to Produce'" (hereafter cited as "Applicants' Response") on September 22, 1982. In their Response, Applicants included a full, explicit and responsive answer to each relevant general and specific Interrogatory, or part of such Interrogatory, which was propounded, and indicated the availability for inspection and copying of those documents (not subject to privilege or objections) requested by Palmetto Alliance. In response to those Interrogatories to which Applicants objected either in part or in full, Applicants set forth with specificity both the reasons and the supporting factual bases for each of their objections.

Upon receiving Applicants' Response, Palmetto Alliance filed the instant Motion, in which it seeks from this Board an order requiring Applicants to supplement their responses to its interrogatories, on the grounds that Applicants' Responses "assert numerous unsubstantial and unwarranted objections to Palmetto Alliance's interrogatories and requests, and certain numerous evasive and incomplete answers and responses." (Motion at 1).

In Applicants' view, as will be set forth in detail below, Palmetto Alliance's Motion fails utterly to justify the issuance of such an order. The Motion is totally devoid of the supporting arguments required by Commission regulations, relying instead upon unsubstantiated and blanket assertions of

impropriety and inadequacy. Palmetto Alliance simply alleges, without more, that Applicants' Responses are "evasive" and "incomplete" and that objections made by Applicants are "unsubstantial and unwarranted." Palmetto Alliance, however, chooses to gloss over the fact that Applicants were obliged to interpret and clarify Contentions 8 and 27 in light of Palmetto Alliance's refusal or inability to do so, and that its assertions that Applicants' Responses are incomplete and evasive must be read in that light. Thus, for Palmetto Alliance to prevail on its assertions regarding the inadequacy of Applicants' Responses, it is necessary for it to specify precisely the scope of its contentions, explain why the information which it sought in its Interrogatories is relevant to those contentions, and demonstrate that Applicants' Responses are deficient. As Palmetto Alliance has failed to do this, the Motion must be denied. Moreover, it should be noted that Palmetto Alliance has offered no argument as to why the claim of privilege asserted by Applicants should not be honored, and thus its Motion to Compel with respect to that assertion must be denied as well.

II. ARGUMENT

A. Palmetto Alliance's Motion Lacks The Requisite Supporting Arguments and Should be Denied

Palmetto Alliance alleges that Applicants' Interrogatory Responses "assert numerous unsubstantial and unwarranted objections . . . and certain numerous evasive and incomplete answers and responses." (Motion at 1). This statement is apparently intended to provide support for the relief requested in this Motion. However, Palmetto Alliance fails to supplement these bare allegations with any specific evidence as to why Applicants' Responses, or their objections, are either improper, inadequate, or unwarranted. Accordingly, Applicants submit that Palmetto Alliance has failed to supply the "arguments in support of the motion" required by 10 C.F.R. § 2.740(f)(1), and that the Motion should therefore be denied.

Applicants' Interrogatory Responses Are Not "evasive" Or "incomplete"

In order to evaluate Palmetto Alliance's allegations that Applicants' Interrogatory Responses are "evasive" and "incomplete," the circumstances under which Applicants' Responses were formulated must be considered. The approach which Applicants took in responding to these Interrogatories is governed by the fact that, despite their best efforts since

the outset of this proceeding, Applicants have been unable to determine the scope of Palmetto Alliance's Contentions 8 and 27. (Applicants' Response, pp. 1-6.)

Applicants attempted through the discovery process to determine the specific concerns, and the bases for those concerns, in Palmetto Alliance's Contentions 8 and 27.[1] More specifically, Applicants' requests sought information from Palmetto Alliance as to how it defines the material terms which appear in its contentions; the standards which it contends Applicants do not meet; why it contends that Applicants do not meet these standards; what it believes Applicants must do, in light of these contentions, to operate Catawba safely; and the bases (if any) for its contentions. Such information is available only to Palmetto Alliance, and Applicants are entitled to that information. Pennsylvania Power and Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334-35 (1980); Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 582 (1975).

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1 "Applicants' Interrogatories to Palmetto Alliance and Requests to Produce Regarding Palmetto Alliance's Contentions 16 and 27," filed August 9, 1982, and "Applicants' Interrogatories to Palmetto Alliance and Requests to Produce Regarding Palmetto Alliance's Contention 8," filed August 16, 1982. (hereafter cited as "Applicants' Interrogatories").

However, as the Board is aware (Tr. at 611, 618,621), Palmetto Alliance's response (filed August 30, 1982) to Applicants' Interrogatories provided absolutely no substantive information on its contentions.[2] On the contrary, Palmetto Alliance's responses to the most basic inquiries concerning its contentions were limited to either representations that it "lacks sufficient knowledge to answer" or bald assertions that the "common meaning" of various material terms is to control. See "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," August 30, 1982. Given Palmetto Alliance's obvious and persistent unwillingness or inability to define its own contentions, it was necessary for Applicants to provide those definitions itself in responding to Palmetto Alliance's Interrogatories. This procedure was necessary not only to protect Applicants' right to assert valid objections to Interrogatories which go beyond permissible limitations, but also to prevent Palmetto Alliance from using the discovery process to bootstrap its contentions into compliance with NRC

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[2] At the prehearing conference on October 8, 1982, the Licensing Board granted Applicants' September 9, 1982 "Motion to Compel, or in the Alternative, to Dismiss Contentions," but has allowed Palmetto Alliance thirty days to either file responsive answers or frame proper objections to Applicants' Interrogatories. (Tr. 628, 630). Palmetto Alliance's response is due November 8, 1982.

regulations--a practice which the Appeal Board has explicity proscribed. Duke Power Company, et al., (Catawba Nuclear Station, Units 1 and 2), ALAB-687, ___ NRC ___ (August 18, 1982), slip op. at 13.

Accordingly, Palmetto Alliance's apparent objection to the fact that Applicants' Responses reflected their interpretation of Palmetto Alliance's contentions,[3] and its related allegations that Applicants' Responses are "evasive" and "incomplete," or their specific objections are "unwarranted," are not well-founded. On the contrary, since Applicants were in the position of having to respond to extremely broad discovery requests without any concrete knowledge as to the concerns underlying these contentions, their undertaking to interpret and clarify these contentions was both reasonable and necessary.

In sum, Applicants submit that Palmetto Alliance's failure in the instant Motion to provide any rationale for the relief it requests reflects its continuing disregard or misconception of its responsibilities under NRC discovery rules. As the Supreme Court has recognized, "[i]t is . . . incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the

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[3] Palmetto Alliance states on p. 2 of its motion that "Applicants choose to respond only to those questions which they deem relevant to their characterization of Intervenor's concerns . . . ."

agency [and the applicants] to the intervenors' position and contentions." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978). 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.

This, however, is precisely what Palmetto Alliance is attempting to do in this proceeding. In its responses to Applicants' Interrogatories Palmetto Alliance has not disclosed any information whatsoever as to the bases, the scope, or even the connotations of the terminology used in its contentions; yet it now complains, without more, in this Motion that Applicants' efforts to respond to its Interrogatories on these contentions are unsatisfactory. Applicants submit that in order for these complaints even to be considered, Palmetto Alliance must first explain, with requisite specificity, the dimensions of and the bases for its contentions. Following such an explanation, Palmetto Alliance must then address each of its Interrogatories as to which it asserts Applicants' Responses are "evasive" and "incomplete" or their objections

are "unwarranted," demonstrating with respect to each such Interrogatory why the information sought is relevant to the subject matter of its contention and, in light of that assessment, how and why Applicants' Response or objection is deficient. In the absence of such a fundamental analysis regarding its own contentions, Palmetto Alliance cannot be heard to allege that Applicants' Responses to these contentions are "evasive" or "incomplete", or that its objections to the contentions are "unwarranted." In view of its failure to address any of these subjects, Palmetto Alliance's Motion should be denied.

Applicants' Answers Regarding Specific Responses Cited In Motion

On pp. 2-3 of its Motion, Palmetto Alliance refers to several of Applicants' Responses, apparently to support its claim that such Responses are inadequate. However, the Motion fails totally to demonstrate the inadequacy of such Responses, and Applicants submit that they are fully responsive to Palmetto Alliance's Interrogatories. Thus, in light of the fact that Palmetto Alliance has failed to supply "arguments in support of the Motion," the Motion should be denied. 10 C.F.R.§2.740(f)(1).

Palmetto Alliance first cites Applicants' Response to an Interrogatory on Contention 8 as an alleged example of an "evasive" answer. As explained in the preceding section, Applicants were obliged to determine for themselves the primary focus of Palmetto Alliance's contentions. In Applicants' view, the fundamental concern of Contention 8 is whether Applicants can safely operate Catawba in light of Palmetto Alliance's assertion that Catawba "reactor operators and shift supervisors lack sufficient hands-on operating experience" with large PWRs. Given this concern, the only relevant areas of inquiry are facts relating to the direct and related work experience of Catawa's reactor operators and senior reactor operators. The "disadvantages," if any, of hands-on operating experience (which is the subject of Interrogatory 14 on Contention 8), are thus beyond the scope of this contention,[4] as Applicants stated in their Responses. If Palmetto Alliance disagrees with Applicants' reading of Contention 8, the Motion fails so to indicate (or to offer an alternative interpretation).

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[4] Palmetto Alliance also cites Applicants' Responses to Interrogatories 13 and 23, apparently as examples of "evasive" responses. However, the Motion fails to specify any deficiencies in these responses. Applicants note that Interrogatory 23 was essentially the same question asked in Interrogatory 13, and was so treated by the Applicant.

Similarly, with respect to Contention 27, Applicants determined that Palmetto Alliance's primary concern was whether Applicants' offsite radiological monitoring system would accurately measure offsite dose rates during a potential emergency condition at Catawba. Given this concern, Applicants furnished that information relevant to the measurement of offsite dose rates during a radiological emergency condition, which they defined as a condition resulting in a measurable release of radioactivity beyond Catawba site boundaries. Accordingly, Interrogatories which sought information as to alternative offsite radiation measurement methods (Interrogatory 4), the costs associated with Applicants' system, (Interrogatory 6), offsite radiological monitoring systems used at other Duke facilities (Interrogatories 10, 11 and 12), and the attendant advantages and disadvantages, if any, of using alternative monitoring systems (Interrogatories 21, 22 and 23) are clearly not relevant to the subject matter of Contention 27. Applicants so indicated in their Responses, and Palmetto Alliance has failed totally to tell the Board why it believes the Responses are "evasive" or "incomplete."

Moreover, it should be noted that, with respect to each of Palmetto Alliance's Interrogatories to which Applicants objected, such objections were set forth fully in their Response, including an explanation of the reasons for and

grounds supporting such objections. Palmetto Alliance has not addressed a single such objection, other than to assert that Applicants' objections are "unsubstantial and unwarranted." In that Palmetto Alliance has failed completely to address these objections, its Motion with respect to such should be denied.

In sum, Applicants submit that Palmetto Alliance's Motion fails to make the evidentiary showing which is required to justify the issuance of an order compelling further responses to discovery. Intervenors have provided no factual basis for their dissatisfaction with Applicants' Responses and objections, nor have they offered any valid criticism of the interpretations of the contentions which underlie Applicants' Responses and objections. The Motion should therefore be denied.

B. Palmetto Alliance's Motion Fails to Refute Applicants' Claim of Privilege

The deficiences in Palmetto Alliance's Motion are equally apparent in its failure even to address the claim of privilege asserted in Applicants' Response.[5] Palmetto Alliance's General Interrogatory 4 inquired of Applicants whether "your position on contention[s] [8 and 27 is] based upon conversations, consultations, correspondence, or any other type of

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[5] The Motion merely states that "[Applicants] assert that communications with respect to these contentions are privileged and not subject to discovery." (Motion at 1).

communications with one or more individuals;" and sought, in addition, information as to the identity of such individuals and the nature of any communications between or among such individuals. (Palmetto Alliance Interrogatories at 4). Applicants properly objected to this Interrogatory on the ground that conversations, correspondence, or other types of communications within the scope of Palmetto Alliance's General Interrogatory 4 are privileged, and thus not subject to discovery. See Applicants' Response at pp. 8-9.

As Applicants explained, (Response at pp. 8-9) Palmetto Alliance's General Interrogatory 4 can only be directed either to the position which Applicants have taken before the Licensing Board on Palmetto Alliance's contentions, or to the manner in which Applicants have interpreted and responded to Palmetto Alliance's Interrogatories. In either case, communications between and among individuals are protected under the attorney work-product doctrine.

With respect to the former, the positions which Applicants have taken on Palmetto Alliance's contentions before the Board at various stages of this proceeding are guided solely by legal strategy developed in anticipation of litigation after consultation among Applicants' legal counsel and between such counsel and members of Applicants' staff. Similarly, the positions taken in Applicants' Responses to Palmetto Alliance's Interrogatories were formulated solely on the basis

of discussions among Applicants' legal counsel, developed during, and because of, ongoing litigation. These positions were subsequently communicated by Applicants' counsel to Applicants' staff during meetings and telephone conference calls in order to guide staff members in drafting responses, and supplying information to be used in drafting responses, to Palmetto Alliance's Interrogatories.

Applicants' legal positions on Palmetto Alliance's contentions and Interrogatories, and the communications among Applicants' legal counsel and between legal counsel and Applicants' staff which underlie these positions, constitute precisely the type of information which the U.S. Supreme Court has held to be protected under the attorney work-product doctrine. In Hickman v. Taylor, 329 U.S. 495 (1945), the Court ruled that "[p]roper preparation of a client's case demands that [a lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." Such preparation, reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways," 329 U.S. at 511-12 -- is entitled to protection from discovery as the work-product of an attorney. See also Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP ___, ___ NRC ___ (Sept.

21, 1982), which holds that the "opinion work product" of an attorney (i.e., his mental impressions, legal theories and opinions, and conclusions) prepared in anticipation of litigation carries an even stronger presumption of non-disclosure than that applicable to his non-opinion "work product" (slip op. at 28-29).

In this regard, Applicants disagree with Palmetto Alliance's statement at the prehearing conference (Tr. at 616) that Applicants' invocation of the attorney work-product doctrine is indistinguishable from the privilege claim asserted by Palmetto Alliance in its Motion for Protective Order of August 30, 1982 and opposed by Applicants in their Response in Opposition to Palmetto Alliance's Motion for Protective Order. Palmetto Alliance ignores the fact that, as the foregoing discussion points out, Applicants have been asked to provide Palmetto Alliance with documents and records of other communications regarding Applicants' legal position on Palmetto Alliance's Contention 8. This is, as Applicants have shown, a textbook example of the type of information which the attorney work-product privilege is designed to protect, in that it is a compendium of the mental impressions, views, legal theories and strategy of Applicants' legal counsel, developed solely in anticipation of, and during ongoing, litigation.

By contrast, the information which Palmetto Alliance sought to protect from disclosure is purely factual. As set forth on p. 5 of this Answer, Applicants' Interrogatories sought to obtain from Palmetto Alliance only the basic information which bears directly on the meaning, scope and bases for Palmetto Alliance's Contentions 8 and 27. Surely Palmeto Alliance recognizes that if these contentions are to be litigated in this proceeding, such information will have to be disclosed, and that it is therefore now subject to discovery. Moreover, NRC case law has explicitly recognized that factual information on contentions such as that sought by Applicants is not privileged. Boston Edison Company, supra, 1 NRC 579.[6] See also Matter of Pennsylvania Power & Light Co., supra, 12 NRC 317, 340.

The attorney work-product doctrine, which is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure and is clearly recognized in NRC decisions,[7] does not confer an absolute privilege from disclosure. However, "the general policy against invading the privacy of an attorney's course of

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6 "[Where] the discovery request seeks to elicit the factual basis for the contention, the intervenor cannot defend against such interrogatory by claiming that the facts are 'privileged.'" 1 NRC 579, 585.

7 Discovery before the NRC is of course governed by provisions based generally on the Federal Rules of Civl Procedure. Boston Edison Co., et al., (Pilgr m Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 581 (1975).

preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production . . ." Hickman v. Taylor, 329 U.S. at 512. It is clear that, as a matter of law, Palmetto Alliance has completely failed to meet this burden--or, indeed, to suggest any reason at all why Applicants' claim of privilege should not stand. Accordingly, to the extent that Palmetto Alliance's Motion to Compel is based upon a challenge to Applicants' assertion of privilege, the Motion should be denied.

III. CONCLUSION

In light of the foregoing, Applicants urge that the Board issue an order denying Palmetto Alliance's Motion to Compel.

Respectfully submitted,

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October 22, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer To Palmetto Alliance Motion To Compel" in the above captioned matter, has been served upon the following by deposit in the United States mail this 22nd day of October, 1982.

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