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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

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

Duke Power Company, et al. ("Applicants"), pursuant to 10 C.F.R. § 2.740(f), hereby move the Atomic Safety and Licensing Board ("Board") in the captioned proceeding to issue an order compelling Intervenor Palmetto Alliance to respond further to Applicants' Interrogatories and Requests to Produce regarding Palmetto Alliance Contentions 6 and 7. With regard to Contention 7, Applicants hereby move in the alternative that the Board reconsider its decision to this contention and, upon such reconsideration, dismiss Contention 7 as an issue in this proceeding.

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I. BACKGROUND

On April 9, 1982, Applicants served upon Palmetto Alliance "Applicants' First Set of Interrogatories and Requests to Produce" (hereafter cited as "Applicants' Interrogatories"), which dealt, inter alia, with Palmetto Alliance Contentions 6 (on allegedly substandard workmanship and quality control) and 7 (on Applicants' managerial and technical competence). Those portions of Applicants' Interrogatories which are relevant here attempted to elicit from Palmetto Alliance the precise nature of the concerns expressed in Contentions 6 and 7, and the bases for those concerns. Specifically, these Interrogatories sought only the most basic information as to the definition of the material terms in these contentions, the nature and effect of the "deficiencies," "company pressure" and "faulty workmanship" alleged in Contention 6, and the nature and effect of the "consistent failure to adhere to . . . operating and administrative procedures" alleged in Contention 7; whether Palmetto Alliance contends that the requirements governing these terms are set forth in NRC requirements and, if so, whether Palmetto Alliance contends that Applicants have not satisfied those requirements; and the technical bases and sources for all

of the foregoing information. In addition, general requests for documents were propounded, along with a series of general interrogatories.

On April 28, 1982, Palmetto Alliance filed "Palmetto Alliance Responses to Applicants' First Set of Interrogatories and Requests to Produce" (hereafter cited as "Palmetto Alliance Responses"),¹ and a Motion for a Protective Order. These Responses contained little substantive information. In answer to Interrogatories regarding the meaning of key terms or allegations in its contentions, Palmetto Alliance in several instances replied "common meaning," or "same as meant by NRC," or, as to quoted phrases, "meaning intended by author." In other instances, it provided only brief and generalized definitions of such terms.

¹ In its Responses Palmetto Alliance objected to answering interrogatories and requests to produce relating to certain of its contentions, on grounds that these contentions were subject to revision upon receipt of then-unavailable documents and that the information sought was irrelevant, not calculated to lead to the discovery of admissible information, and would be unduly burdensome to obtain. Applicants would note, however, that this objection was not directed at Applicants' Interrogatories on Contentions 6 and 7. (Palmetto Alliance Responses at pp. 2-3).

Palmetto Alliance's replies to Interrogatories which sought specific information as to alleged deficiencies in plant construction, examples of alleged "company pressure" to approve "faulty workmanship," or alleged failures to adhere to "operating and administrative procedures" were similarly unresponsive, as were its answers to questions which sought to pinpoint specific violations of NRC requirements. In answer to Interrogatories directed at its language in its contentions, Palmetto Alliance frequently asserted that "Intervenor at present lacks sufficient knowledge to answer."² The Intervenor further asserted that Applicants' discovery requests caused it "annoyance, embarrassment, oppression and undue burden or expense" (Motion for Protective Order at p. 1), and characterized Applicants' requests as a "discovery offensive" which bordered on harrassment. (Id. at p. 2).

² In those responses in which it recited that "Intervenor at present lacks sufficient knowledge to answer," Palmetto Alliance further stated that it was "awaiting responses [from Applicants] to its Interrogatories and Requests to Produce served April 20, 1982 with regard to this subject."

As will be demonstrated below, Applicants submit that the information sought in Applicants' Interrogatories relating to Contentions 6 and 7 was for the most part not contingent upon any data to be supplied by Applicants.

Intervenors also claimed that certain documents prepared by their counsel are privileged, and, as such, are not discoverable. (Id. at p. 3).

On April 20, 1982, before filing its Responses, Palmetto Alliance served upon Applicants interrogatories concerning, inter alia, its Contentions 6 and 7. Applicants objected to answering these discovery requests pending final resolution of the Applicants' and the NRC Staff's objections to the Licensing Board's March 5, 1982 Memorandum and Order.³ Accordingly, Applicants did not file responses at that time. Subsequently, in its Order of July 8, 1982, the Board did suspend discovery on all contentions with the exception of Palmetto Alliance 8, 16 and 27. This suspension applied to "all pending matters in the discovery process, including . . . motions to compel" (July 8 Order at p. 18).⁴

³ See "Applicants' Objections to Palmetto Alliance First Set of Interrogatories and Requests to Produce," May 10, 1982. Applicants noted therein (p. 8, n. 10) that they were deferring the filing of any motions to compel regarding Palmetto Alliance's Responses pending Board action on Applicants' request for a suspension or stay of discovery.

⁴ See also the Licensing Board's Memorandum and Order of May 25, 1982.

However, in its recent December 1, 1982 Order the Board ruled that discovery may be resumed on all admitted contentions except for DES-22. Applicants have accordingly committed to providing responses to Palmetto Alliance's Interrogatories on its Contentions 6 and 7 by December 30, 1982.⁵ Applicants also maintain, in light of this Order, that a Motion to Compel further responses by Palmetto Alliance to Applicants' Interrogatories is now appropriate.

Contention 6 was recast by the Board in its December 1 Order so that it is now essentially limited to the last sentence of the original contention. To the extent that Applicants' Motion to Compel applies to Contention 6, it will therefore be limited to those of Applicants' Interrogatories and Palmetto Alliance's corresponding Responses which are pertinent to the re-worded contention. Palmetto Alliance's Responses must be read in light of its representations that it has "demonstrated diligence in meeting the reasonable obligations of participation in this proceeding" (Motion for Protective Order at p. 2); that it has committed itself to "abide the spirit of the discovery rules--to disclose information known to it which bears on

⁵ See "Applicants' Motion Regarding Discovery on Matters Previously Suspended," December 9, 1982, at p. 2.

the case and thereby avoid trial by surprise" (Id. at pp. 2-3); and that "virtually all information known to Intervenor [on its own contentions] has already been fully disclosed on the record of the prehearing conference."⁶ (Id. at p. 2).

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 these contentions which Applicants seek, then Palmetto Alliance is apparently seeking 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 to Applicants' Interrogatories to these two contentions.

If, on the other hand, Palmetto Alliance's representations that it is committed to acting in the spirit of the discovery rules and has diligently attempted to answer Applicants' Interrogatories are to be taken at face value, then the Board should reconsider its earlier decision to

⁶ A review of the prehearing conference transcript discloses that in fact little substantive information was offered at that time by Palmetto Alliance in support of its Contentions 6 and 7. See Prehearing Conference Transcript at pp. 116-129 (January 12-13, 1982).

admit Contention 7. While many of Palmetto Alliance's Responses to Interrogatories on Contention 6 are deficient, consisting of no more than evasive and/or incomplete answers to valid inquiries on this contention, its answers to questions on Contention 7 are virtually nonexistent. Clearly, if in fact Palmetto Alliance cannot furnish even the fundamental information sought by Applicant with respect to Contention 7, the specificity and basis requirements of 10 C.F.R. §2.714(b) have not been satisfied, and this contention should therefore not have been admitted. Applicants accordingly move in the alternative that the Board reconsider its admission of Contention 7 and, upon such reconsideration, dismiss it as an issue 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 more fully to its earlier discovery requests. Intervenor's failure to identify in greater detail the nature of the concerns reflected in Contentions 6 and 7, or to reveal the discrete legal and technical bases for each of these contentions, reflects

either a misconception of the purpose and scope of discovery in NRC licensing proceedings or a continuing disregard of its obligations under NRC discovery rules.

Discovery of The Specific Concerns and Factual Bases Underlying Intervenors' Contentions is Permitted

Discovery in NRC licensing proceedings is intended to insure that "the parties have access to all relevant, unprivileged information prior to the hearing." Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 582 (1975). Accordingly, Applicants are allowed essentially unrestricted discovery into the legal and factual underpinnings of Intervenors' contentions:

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 should be imposed upon Palmetto Alliance as a party to this proceeding is hardly surprising, since the U.S. Supreme Court has explicitly ruled that "[i]t is . . . incumbent upon intervenors who wish to participate [in an NRC licensing proceeding] to

structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978). And as the Appeal Board has stated:

The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the position of the intervenors, discharging that burden may be impossible. 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. [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 August 24, 1979 unpublished Memorandum and Order of the Licensing Board in that proceeding.]

Applicants acknowledge that in responding to discovery requests, a party "need only reveal information in its possession or control," and that, "[a]ssuming the truthfulness of the statement, lack of knowledge is always an adequate response," Susquehanna, supra, 12 NRC at 334. Applicants are also aware that Palmetto Alliance had not received Applicants' interrogatory responses on Contentions 6 and 7 at the time it prepared its own Responses,

and that some of its answers might conceivably have been different had it then had access to the data provided by Applicants.

Even assuming this to be the case, however, Applicants submit that Palmetto Alliance should not be allowed to hide behind the unavailability of Applicants' interrogatory responses to avoid answering basic questions on Palmetto Alliance's contentions. A consistently asserted "lack of knowledge" by the proponent of a contention cannot suffice as an adequate discovery response when the interrogatory is directed at information that Palmetto Alliance was required to have in its possession when it proffered the contention as an issue for litigation in the proceeding. In this regard, the Appeal Board has stated that

[A]n intervention petitioner has an iron-clad 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. [Duke Power Co., et al., (Catawba Nuclear Station, Units 1 and 2), ALAB-687, ___ NRC ___, slip op. at 13].

These and numerous other pronouncements of the Commission have made it clear that in order to satisfy their obligations as participants in NRC proceedings intervenors must do more than simply raise issues. As the Appeal Board has pointed out,

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. [Susquehanna, supra, 12 NRC 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.

This, however, is precisely what Palmetto Alliance is apparently attempting to do in this proceeding. In its Responses to Applicants' Interrogatories Palmetto Alliance fails in many instances to answer inquiries as to the specific concerns reflected in Contentions 6 and 7 or to delineate the legal and technical bases for these concerns. Applicants accordingly believe that Palmetto

Alliance's Responses ignore the proper purpose and scope of discovery in NRC licensing proceedings, as set forth above.

Interrogatories on Contention 6

As recast by the Board, Palmetto Alliance's Contention 6 now reads as follows:

Because of systematic deficiencies in plant construction and company pressure to approve faulty workmanship, no reasonable assurance exists that the plant can operate without endangering the health and safety of the public.

The series of Interrogatories which Applicants propounded on Contention 6 sought nothing more than an explanation of the dimensions of, and the bases for, this contention. Applicants submit that while Palmetto Alliance's Responses do provide some general information on the concerns underlying the contention (i.e., the allegations of Messrs. Hoopingartner and McAfee), they still lack requisite specificity in many instances. In addition, the bases for the various aspects of Contention 6 require further clarification.⁷

⁷ Because Intervenor has supplied some minimal information with respect to Contention 6, Applicants do not request that the alternative motion to dismiss set forth herein be applied to this contention.

For example, an examination of Palmetto Alliance's Response to Interrogatory No. 80, containing the statements of Messrs. Hoopingarner and McAfee, reveals allegations of substandard workmanship, poor quality control and deficient plant construction which Applicants have not corrected (Interrogatories 5, 28, 29, 30, 31, 44, 47, 48, 49, 50, 51, 82, 88 and 105); however, Palmetto Alliance states that it "lacks sufficient knowledge" to identify specific instances of such problems.^{8 9} (see

⁸ Applicants are aware of the Board's statement on p.5 of its December 1, 1982 Order that "proof of [Contention 6], presumably involving specific instances of misfeasance, need not be adduced at this stage." However, Applicants interpret this statement as applying to the stage of the proceeding at which the contention was admitted, not to the discovery phase of the proceeding. Moreover, in view of the general information already supplied by Palmetto Alliance on Contention 6, Applicants submit that the type of additional detail sought by these interrogatories should be within Palmetto Alliance's possession.

⁹ In response to Interrogatories which sought specific information as to the exact location and exact time of the occurrence of these "deficiencies" (Interrogatories 97 and 98), and the names of the individuals who supposedly performed deficient work (Interrogatory 99), the Intervenor stated "Refer to Answers to Nos. 3 and 80." (see Response at p. 15). An examination of Palmetto Alliance's response to Interrogatory No. 80 reveals that it contains none of the information sought by these Interrogatories. Reference to Palmetto Alliance's response to Interrogatory No. 3 is similarly unresponsive, since Intervenor states therein that it "at present lacks sufficient knowledge to answer"

Responses at pp. 7, 9-11, 13-15). Another area in which Palmetto Alliance's Responses are clearly deficient throughout is its inability or refusal to specify the regulatory requirements which have allegedly been violated by the events described. This information is crucial and must be supplied. See Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2) _____ NRC _____ (November 17, 1982), slip op. at p. 9, wherein the Board stated:

In conclusion, this Board believes that the basis with reasonable specificity standard requires that an intervenor include in a safety contention^[10] a statement of the reason for his contention. This statement must either allege with particularity that an applicant is not complying with a specified regulation, or allege with particularity the existence and detail of a substantial safety issue on which the regulations are silent. In the absence of a 'regulatory gap,' the failure to allege a violation of the regulations or an attempt to advocate stricter requirements than those imposed by the regulations will result in a rejection of the contention, the latter as an impermissible collateral attack on the Commission's rules (10 CFR §2.758).

Intervenor's failure to specify the particular NRC standards and requirements affected by the construction deficiencies alleged in this contention constitutes a

¹⁰ Applicants submit that this standard also applies to environmental contentions.

clear violation of the Seabrook rule. Specifically, though Palmetto Alliance contends in its Responses to Interrogatories 6 and 51 that the workmanship and construction at Catawba do not satisfy NRC requirements, and that Applicants are aware of this, it does not indicate which aspects of Appendix A, 10 C.F.R. Part 50 have not been met; nor which additional requirements "for safe operation" have not been satisfied (Interrogatory 7; see Responses at p. 7); nor the manner in which the workmanship at Catawba fails to meet Appendix A standards. (Interrogatory 3; see Responses at p. 7). Palmetto Alliance further asserts that it "lacks sufficient knowledge" to relate particular aspects of the "sub-standard workmanship" alleged in its Response to Interrogatory 2 to any particular NRC requirements. (Interrogatory 8; see Responses at p. 7).

Intervenor's answer to Interrogatory 12 is similarly evasive. By stating that NRC requirements relating to quality control have "not necessarily" been violated, Palmetto Alliance not only avoids giving a direct answer to this inquiry, but also avoids having to supply any

specific references to NRC regulations which may not have been met (Interrogatories 12, 13 and 14; see Responses at p. 8).

Further examples of Palmetto Alliance's failure to relate its allegations of construction deficiencies to specific NRC regulations are found in its Responses to Interrogatories 38 and 39. Here again, while it contends that applicable NRC requirements have not been met (see Response to Interrogatory 37), Intervenor does not indicate how Appendix A has been violated or which other NRC requirements or standards have not been satisfied. (Interrogatories 38 and 39; see Responses at p. 9).

Moreover, by its failure to indicate, in answer to Interrogatory 39, which "NRC standards" are the subject of this contention, Palmetto Alliance also avoided having to supply examples of plant construction affected by these NRC standards (Interrogatory 40; see Responses at p. 9); examples of "safety-related areas" to which these standards apply, and how these safety areas relate to the safe operation of the plant (Interrogatories 41, 42 and 43; see Responses at pp. 9-10); and the relationship of these

safety areas to alleged examples of poor quality control and substandard workmanship (Interrogatories 45 and 46; see Responses at p. 10).

A similar pattern appears in Palmetto Alliance's Responses relating to Applicants' QA program. Intervenor indicates in response to Interrogatory 55 that it contends Applicants have not developed and implemented an appropriate QA program (see Responses at p. 11). However, when asked to "explain in detail the substance of [its] contention" (Interrogatory 56), Palmetto Alliance's answer (see Responses at p. 11) does not include a single reference to NRC regulations which might provide specificity to this allegation. Indeed, Palmetto Alliance asserts in answer to Interrogatory 62 that it "lacks sufficient knowledge" to name any specific requirement of Appendix B, 10 C.F.R. Part 50 which Applicants' QA program fails to satisfy. Intervenor is similarly unable to support its allegations of deficiencies set forth in its Response to Interrogatory 80 with any specific references to NRC requirements allegedly violated by these "deficiencies." (Interrogatory 100; see Responses at p. 15).

Similarly, while it asserts that Applicants have failed to develop and implement an "appropriate quality assurance program" (Interrogatory 55; see Responses at p. 11), Palmetto Alliance's Response fails to explain in detail the substance of this assertion (see Responses at p. 11). Nor does Intervenor explain the basis for its stated concern that Applicants' policies, instructions and procedures for implementing its QA program are inadequate, other than to state that "the program does not work." (Interrogatories 59, 60 and 61; see Responses at p. 11).

Other examples of evasive or incomplete answers appear in the sequence of Interrogatories on alleged deficiencies in construction beginning with #102. Palmetto Alliance indicates in response to this question that it does not believe that all of the alleged deficiencies in plant construction have occurred in systems important to safety. (see Responses at p. 15). This leads one to assume that some deficiencies may involve non-safety systems. However, Intervenor fails to identify non-safety systems affected by the alleged deficiencies and/or the impact which such deficiencies would have on plant operation (Interrogatory 104; see Responses at p. 15).

Palmetto Alliance's answers to Interrogatories relating to Intervenor's allegations of "company pressure to approve faulty workmanship" are similarly lacking in specificity and basis. The only instance of such "company pressure" noted by Palmetto is a reported disagreement between McAfee, then a QC Inspector, and a supervisor as to whether an anchor bolt was of sufficient length, and how the length should be verified (see Response to Interrogatory 108). The name of the supervisor, although requested in the Interrogatory, was not given. Nor could Palmetto Alliance identify any other individuals on whom "company pressure" was alleged brought to bear (see Interrogatory 109), the manner in which such "pressure" manifested itself (Interrogatory 110), or any instance of inadequate construction which it contends resulted from this alleged "pressure." (Interrogatory 112; see Responses at p. 16).

The same situation exists with respect to Applicants' Interrogatories which sought specific information on the alleged approval of "faulty workmanship." While it contends that QC inspectors gave their approval to sub-standard workmanship (see Interrogatories 116, 117, and 118 and Responses at p. 17), Palmetto Alliance professes

itself unable to provide the basis for these allegations by identifying the person who gave such approval (Interrogatory 119), or the specific approval given for particular tasks (Interrogatory 120), or any instances of "faulty workmanship" which exist at the Catawba facility (Interrogatory 122) (see Responses at p. 17). Because of its answer to Interrogatory 122, Intervenor also failed to answer questions as to the date and time such "faulty workmanship" occurred (Interrogatory 123) and the name and address of the individuals who performed it (Interrogatories 124 and 125)(see Responses at p. 17).

Palmetto Alliance's answers to those Interrogatories which attempted to establish the bases for its Responses present a somewhat different problem. In reply to each such question (Interrogatories 9, 19, 35, 52, 57, 81, 94, 101, 114 and 121), Intervenor referred to its answer to Interrogatory 9, which states:

Applicants' Application, Final Safety Analysis Report and pleadings; Intervenor's Petitions, Supplements, Affidavits and pleadings; NRC Staff's Safety Evaluation of the Catawba Nuclear Station Unit Nos. 1 and 2, Systematic Assessment of Licensee Performance Review Group; Licensee Assessments, NUREG-0834, and pleadings; oral and written communication by Palmetto Alliance members Nolan R. Hoopingarner, II, and William R. McAfee to

counsel; The United States Constitution; The Atomic Energy Act of 1954, as amended, and Title 10 Code of Federal Regulations.

The Appeal Board has recently ruled that interrogatory answers which respond to a request for specific information by referring to a list of documents will not suffice under NRC discovery rules:

Answers should be complete in themselves; the interrogating party should not need to sift through documents or other materials to obtain a complete answer. 4A Moore's Federal Practice §33.25(1) at 33-129-130 (2d ed. 1981). A broad statement that the information sought by an interrogatory is to be found in a mass of documents is also insufficient. Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc., 64 F.R.D. 459, 463 (S.D.N.Y. 1974). Instead, a party must specify precisely which documents cited contain the desired information. Martin v. Easton Publishing Co., 85 F.R.D. 312, 315 (E.D. Pa. 1980). See also Nagler v. Admiral Corp., 167 F. Supp. 413 (S.D.N.Y. 1958). [Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1421, n.39 (1982)].

Under this standard, each of Palmetto Alliance's Responses to Interrogatories seeking the bases for its answers to previous questions is clearly deficient.

Responses to Interrogatories on Contention 7

Palmetto Alliance's Contention 7 reads as follows:

No reasonable assurance can be had that the facility can be operated without endangering the public health and safety because of Duke's consistent failure to adhere to required Commission operating and administrative procedures provided for in Commission rules and regulations. "The Nuclear Regulatory Commission has the statutory responsibility for prescribing licensing standards to protect public health and safety and for inspecting the industry's activities against these standards. The Commission does not thereby certify to the industry that the industry's designs and procedures are adequate to protect its equipment or operations." Federal Tort Claim of General Public Utilities, Corp., et al., CLI-81-10, 13 NRC 773, 775-776 (1981). At both Oconee and Catawba facilities of Duke Power Company the Systematic Assessment of Licensee Performance Review Group found "weaknesses in personnel adherence to operating and administrative procedures" and "failure to follow procedures." NUREG 0834, Licensee Assessments, August 1981, pp. A-3, B-1. As long ago as 1977 Duke, Licensee for the Oconee facility, was assessed civil penalties of \$21,500 where "the history of repetitive and chronic non-compliance, when considered in conjunction with failure to institute effective corrective action and management controls, demonstrates that management is apparently not conducting licensed activities with adequate concern for the health, safety or interest of its employees or the general public." Ernst Volgennau, Director, Office of Inspection and Enforcement, USNRC, to Carl Horn, Jr. President, Duke Power Company, March 29, 1977, Docket Nos. 50-269, 50-270, 50-287.

As with Contention 6, Applicants propounded a series of basic Interrogatories on Contention 7 which sought to ascertain the specific nature of the concerns reflected in

the contention and the legal and factual bases for those concerns. From the answers provided by Palmetto Alliance, it appears that Intervenor has virtually no information to support its allegations in this contention. Intervenor responded that it "at present lacks sufficient knowledge to answer" to 22 out of 55 Interrogatories on Contention 7. Moreover, because many of Applicants' Interrogatories depended upon an affirmative or negative response to preceding questions, by use of this device Palmetto Alliance avoided having to respond to a number of other Interrogatories.

Specifically, Palmetto Alliance asserts that it "at present lacks sufficient knowledge to answer" inquiries as to the specific "operating procedures" and "administrative procedures" which are the subject of Contention 7 (Interrogatories 1 and 2; see Responses at pp. 17 and 19); the activities which these operating and administrative procedures are intended to govern (Interrogatories 2 and 14; see Responses at pp. 18-19); the individuals who are to have developed and implemented these procedures (Interrogatories 3, 4, 15 and 16; see Responses at pp. 18-19); whether such development and implementation has already taken place and, if so, when (Interrogatories 5, 8, 13 and

19; see Responses at pp. 18-19); and whether the "administrative procedures" in question have been employed at Catawba (Interrogatory 20; see Responses at p. 19).

Palmetto Alliance also indicates in its answers that although it contends in Contention 7 that Applicants have failed to comply with NRC regulations, and that they remain in non-compliance with applicable requirements, it "lacks sufficient knowledge" to specify the NRC requirements which it asserts have not been met,¹¹ the activities which allegedly do not meet those requirements, the time when such non-compliance occurred (Interrogatory 25; see Responses at pp. 19-20), or the activities which cause Applicants to remain in non-compliance (Interrogatory 27; see Responses at p. 20).

Applicants also sought an explanation of how Palmetto Alliance proposes to relate the SALP Review Group findings recited in Contention 7 to conditions at Catawba. Here again, Palmetto Alliance's Interrogatory Responses were clearly deficient. For example, when asked its interpretation of the language used in the NRC Review Group's findings, Intervenor replied "meaning intended by author." (Interrogatories 44 and 49; see Responses at pp. 20-21).

¹¹ Applicants submit that such information must be provided. See the Licensing Board's ruling in Seabrook, supra, p. 15.

When asked to specify the particular "weaknesses" allegedly present at Catawba, Palmetto Alliance replied, contrary to the language in its contention, that this term "refers to Oconee." (Interrogatory 45; see Responses at p. 20). And in response to requests to specify which of the referenced procedures in NUREG-0834 it intended to rely upon (Interrogatory 46; see Responses at pp. 20-21) and the names of the "personnel" who had allegedly not adhered to these referenced procedures (Interrogatory 48; see Responses at p. 21), Intervenor stated that it lacked sufficient knowledge to answer.

The same response was given to Interrogatories which attempted to pinpoint the actual "failures to follow procedures" referred to in the contention. Palmetto Alliance asserted that lacked sufficient knowledge to specify any actual "failures" or "procedures" (Interrogatories 52 and 50; see Responses on p. 21) or the personnel allegedly involved in such failures (Interrogatory 54; see Responses p. 21).

In response to Interrogatories which requested the specific bases for its Responses (see Interrogatories 11, 22, 31, 34, 43, and 55), Palmetto Alliance again supplied only a reference to a lengthy list of documents (some of

them allegedly privileged) set forth in its Response to Interrogatory 11. Applicants reiterate their objection to this method of responding to specific requests for documents, and incorporate herein the legal argument set forth on pp. 22, supra, which makes clear that a "broad statement that the information sought is to be found in a mass of documents is . . . insufficient." Byron, supra, 15 NRC at 1421, n.39.

In sum, 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 specify the nature of the concerns expressed in their contentions and the bases for these concerns. Intervenor's Responses to Applicants' discovery requests fail to do so and suggest either a continuing misunderstanding of its discovery obligations in this proceeding or a continuing disregard of such obligations. Applicants therefore urge the Board to compel Palmetto Alliance to respond further to Applicants' Interrogatories.

B. The Board Should Dismiss Contention 7

The foregoing discussion rests on the assumption that Palmetto Alliance does, in fact, possess the information sought in Applicants' discovery requests but has for some reason misconstrued or chosen to ignore its responsibilities in this proceeding by not disclosing it. If, however, Palmetto Alliance does not possess such information, then Applicants submit that the Board must reconsider the admission of Contention 7 as an issue in this proceeding and, upon such reconsideration, dismiss this contention for failure to satisfy the specificity and basis requirements of 10 C.F.R. §2.710.

The Board has expressly recognized throughout this proceeding the need for Palmetto Alliance to set forth the exact nature of the concerns reflected in its contentions, and the legal and technical bases for these concerns, as required by the Commission's regulations. The Board's admission of Contention 7 in its December 1, 1982 Order reflected its finding that Palmetto Alliance had met this requirement (see December 1, 1982 Order at p. 6). Indeed, the Commission's Rules on intervention presume that parties have specific factual bases for their contentions. Pilgrim, supra, 1 NRC at 585.

However, if the April 28, 1982 Responses filed by Palmetto Alliance are taken at face value, they demonstrate that the Intervenor is unable to state either the nature of its specific concerns in Contention 7 (i.e., what are the "consistent failure[s] to adhere to required Commission operating and administrative procedures" alleged in Contention 7?), or the specific bases for this contention, relying instead on blanket references to a list of documents. Applicants submit that these Responses must be so read in light of Palmetto Alliance's representations that it has "demonstrated diligence in meeting the reasonable obligations of participation in this proceeding" (Motion for Protective Order at p. 2). Despite such diligence, Palmetto Alliance has failed to satisfy minimum Commission standards for admissibility of contentions.

Having entered a vague contention, Palmetto Alliance may not now refuse to specify its concerns while at the same time attempting to force Applicants to provide it with the information it needs to litigate its contentions. The Appeal Board has explicitly prohibited the use of

discovery against the Applicant as a means of obtaining sufficient information to bootstrap a contention into compliance with 10 C.F.R. §2.714(b):

[A]n intervention petitioner has an iron-clad 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. [Catawba Nuclear Station, supra, _____ NRC _____ (August 19, 1982), slip op. at 13].

See also Appendix A.IV.(a) to 10 C.F.R. Part 2, which prohibits the use of discovery procedures as a "fishing expedition" by the parties.

Applicants accordingly submit that when Palmetto Alliance's Responses to Applicants' Interrogatories on Contention 7 are carefully reviewed, they provide new (or heretofore unconsidered) 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 provide specificity and bases for its own contention, then the Board should, upon reconsideration of its earlier decision to admit

Contention 7, dismiss that contention in view of the failure of Palmetto Alliance to satisfy Commission Rules of Practice.

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 Palmetto Alliance's Contentions 6 and 7. With respect to Contention 7, Applicants

request in the alternative that the Board issue an order dismissing this contention.

Respectfully submitted,

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December 20, 1982