UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' RESPONSE IN OPPOSITION TO
PALMETTO ALLIANCE'S
MOTION FOR PROTECTIVE ORDER

Duke Power Company, et al. ("Applicants"), pursuant to 10 CFR §2.730(c), hereby move the Atomic Safety and Licensing Board ("Board") in the captioned proceeding to issue an order denying the motion of Intervenor Palmetto Alliance ("Palmetto Alliance") for a protective order regarding discovery served upon it by Applicants. 1/

I. INTRODUCTION

On April 9, 1982, Applicants served upon Palmetto Alliance "Applicants' First Set of Interrogatories" (hereafter cited as "Applicants' Interrogatories"), which dealt, inter alia, with Palmetto Alliance Contentions 6 and 7. Applicants' Interrogatories were limited in scope, directed to the plain language of Palmetto Alliance's contentions, and sought only to have Palmetto Alliance specify the nature of its concerns, as reflected in its contentions,

1/ On September 9, 1982 Applicants filed a similar response with regard to Palmetto Alliance Contentions 16 and 27. Whil that response could be incorporated by reference, for the convenience of the Board and parties it is repeated.

and to reveal the bases for those concerns. Palmetto Alliance "responded" to Applicants' Interrogatories on April 28, 1982 [2] and accompanied its "response" with the instant motion.[3]

In its Motion, Palmetto Alliance asks this Licensing Board to issue a protective order which it asserts is necessary "to protect [it] from annoyance, embarrassment, oppression and undue burden or expense in the compilation and production of matters not properly discoverable as sought by Applicants." Motion, p. 1. Palmetto Alliance asserts that such a protective order is justified because it claims that Applicants seek the disclosure of certain confidential communications between its members, officers and employees with its counsel regarding legal opinions and advice. Motion, p. 2. [4] With respect to this claim, Palmetto

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2/ That "response" is the subject of "Applicants' Motion to Compel or, In the Alternative, to Dismiss Contentions" also filed this date.

3/ "Palmetto Alliance Motion For Protective Order" ("Motion") April 28, 1982.

In its Motion, Palmetto Alliance characterizes Applicants' Interrogatories as a "discovery offensive" against it, directed "largely [to] subjects for which virtually all information known to Intervenor has already been fully disclosed on the record of the prehearing conference." Palmetto Alliance asserts that Applicants' discovery requests of it "border[] on...harrassment" but nonetheless "commits itself" to meet the spirit of the discovery rules. Motion, p. 2.

Applicants' views on the nature and extent of Palmetto Alliance's compliance with its commitment to meet the "spirit" of the discovery rules is set forth in its "Motion to Compel or, In the Alternative, to Dismiss Contentions" also filed this date.

4/ Palmetto Alliance's Motion also seeks protection with regard to Interrogatories concerning Contentions 3, 4, 26 and 35. Given the Board's December 1, 1982 Order, these contentions are no longer of moment.

Alliance apparently believes that both the attorney-client privilege and the attorney work produce doctrine bar much of the discovery Applicants seek.

In Applicants' view, as will be set forth in detail below, Palmetto Alliance has failed to demonstrate the need for the Licensing Board to issue such an order. Palmetto Alliance's Motion is impermissibly vague and for that reason alone should be denied. In any event, Palmetto Alliance has totally failed to demonstrate that either the attorney-client privilege or the attorney work-product privilege applies to any information Applicants seek to discover. Moreover, Palmetto Alliance has failed to demonstrate that Applicants' discovery requests are unduly burdensome.

II. ARGUMENT

A. Intervenor's motion for a protective order is impermissibly vague and should be denied.

It is well-established that any party objecting to interrogatories or requests to produce may eliminate or modify its obligation to respond to such request by moving that the licensing board issue a protective order. However, the movant seeking such an order must establish good cause before it is issued. 10 CFR §2.740(c).

Regardless of its basis for seeking a protective order (e.g., attorney-client privilege, proprietary information, undue oppression), the moving party has certain obligations which it must satisfy. Chief among them is the obligation to set forth with specificity why each particular interrogatory or group of

related interrogatories or request for the production of documents is objectionable. It must also set forth the factual basis supporting each and every one of its objections. Houston Lighting & Power Company et al. (South Texas Project, Units 1 and 2), LBP-80-11, 11 NRC 477, 480 (1980). It is not enough simply to assert in general that discovery requests are improper.

> [T]he objections posed against...interrogatories must...be reasonable and specific, and may not utilize generalized "maxims" or recite legal rote. References to "the Applicant's burden of proof" as an objection, for example, are unavailing to avoid a party's obligation to respond to a proper discovery request for information in its possession. [Matter of Boston Edison Company et al. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 585.]

In short, in order to meet its burden of demonstrating that certain information or documents within its knowledge or possession are entitled to protection on the basis of privilege, it is incumbent on one asserting such a privilege to: (1) identify or specify the nature of the information or document for which it asserts the privilege, and (2) explain with respect to such information or document why it believes the privilege is warranted. 4A Moore's Federal Practice (1982 ed.). ¶33.27, pp. 33-163 through 33-168.[5/]

[5/] Because the NRC discovery rules are based on the Federal Rules of Civil Procedures, judicial decisions construing the latter are often relied upon by NRC tribunals in resolving discovery disputes. Matter of Toledo Edison Co. (Davis-Besse Nuclear Power Station, ALAB-300, 2 NRC 752, 760 (1975). Such judicial decisions confirm that the burden imposed on those objecting to an interrogatory on the basis of privilege is to specify the nature of the privileged information and to explain why the claim of privilege is warranted. See, e.g., Miller v. Doctor's General Hospital, 76 F.R.D. 136, 139 (W.D. Okla. 1977); Biliske v. American Live Stock Insurance Co., 73 F.R.D. 124, 126 (W.D. Okla. 1977); Camco, Inc. v. Baker Oil Tools, Inc., 45 F.R.D. 384 (S.D. Tex. 1968); Payer, Hewitt &

(footnote continued)

Even a cursory reading of Palmetto Alliance's Motion reveals that it has failed to satisfy these most basic procedural requirements imposed on any party in NRC proceedings wishing to prevent the disclosure of information otherwise discoverable. The Motion is a textbook example of one which simply recites "generalized 'maxims'" and "legal rote." Intervenor has not specified which Interrogatories or Requests to Produce it finds objectionable. Nor has it provided the Board with any factual basis for its objections. And, perhaps even more importantly, its Motion does not disclose the extent of the protection it seeks from future discovery. Thus, on these grounds alone, Palmetto Alliance's Motion should be denied.

B. Palmetto Alliance has failed to demonstrate that either the attorney-client privilege or the attorney work product doctrine applies to information Applicants seek to discover.

The deficiencies in Palmetto Alliances' Motion become even more apparent when examined in light of the prevailing legal standards relevant to the privileges it seeks to assert. Palmetto Alliances' Motion is not a model of clarity, but it appears that it is attempting to assert both the attorney-client privilege and the attorney work product doctrine as grounds for the sought protective order. It is clear that, as a matter of law, Palmetto Alliance has failed to demonstrate that either the

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(footnote continued from previous page)
Co. v. Bellanca, 26 F.R.D. 219 (D. Del. 1960); cf. General Dynamics Corp. v. Selb Manufacturing Co., 481 F.2d 1204, 1212 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974).

attorney-client privilege or the attorney work-product privilege applies to information or documents Applicants seek to discover from it.

In general, confidential communications made by a client to an attorney in the course of obtaining legal assistance are protected from disclosure under the attorney-client privilege.[6] Statements and advice by the attorney to the client are also privileged.[7] The purpose of this privilege is to assure that a client's confidences to his attorney will be protected and, therefore, to encourage clients to make a full disclosure of facts to their legal counsel.[8]

Like all evidentiary privileges, the attorney-client privilege is narrowly construed because it has the effect of withholding relevant information from the fact finder. Accordingly, its use is limited to those situations in which the purpose of the privilege will be served[9] and it "protects only those disclosures - necessary to obtain informed legal advice - which might not have been made absent the privilege."[10]

It should be noted that the attorney-client privilege does not apply to documents or information which existed prior to the formation of the attorney-client relationship. Similarly,

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[6] Fisher v. United States, 425 U.S. 391, 403 (1976).

[7] Mead Data Central v. U.S. Dept. of Air Force, 566 F.2d 242, 254 n. 25 (D.C. Cir. 1977).

[8] Fisher v. U.S., supra, 425 U.S. at 403.

[9] Coastal States Gas Corp. v. U.S. Dept. of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980).

[10] Fisher v. United States, supra, 425 U.S. at 403.

materials which were prepared or communicated for independent reasons (i.e., matters of independent knowledge), are not privileged merely because they are in the possession of an attorney.[11] And, communications made to an attorney which the attorney must make public in discharging his duties, as a matter of logic, do not fall within this privilege.

Although the attorney-client privilege and the attorney work-product doctrine are derived from the same common law basis,[12] the work product principle is distinct from the attorney-client privilege.[13] The work product doctrine, recognized in Hickman v. Taylor, 329 U.S. 495 (1947) and codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure,[14] confers a qualified[15] privilege from disclosure upon certain information gathered by an attorney in anticipation of possible litigation.

In Hickman, the Supreme Court ruled that the attempt of one party to obtain from another "written statements, private memoranda, and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties" fell "outside the arena of discovery..." even though they were not

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11/ Grant v. United States, 227 U.S. 74 (1913).

12/ In re Grand Jury Proceedings, 473 F.2d 840, 844 (8th Cir. 1973).

13/ United States v. Nobles, 422 U.S. 225, 238 n.11 (1975).

14/ Of course, discovery before the NRC is governed by provisions based generally on the Federal Rules of Civil Procedure. Pilgrim, supra, LBP-75-30, 1 NRC at 581.

15/ United States v. Nobles, supra, 422 U.S. at 239.

within the scope of the attorney-client privilege.[16] While emphasizing the need for a lawyer to prepare his case unfettered by unnecessary intrusions by opposing parties, the Court intimated that if a party seeking disclosure of such material made an adequate showing of need, which was not done in Hickman, the material could be made available:

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of these facts is essential to the preparation of one's case, discovery may be properly had. [Id. at 511.]

Subsequent decisions have clarified this teaching and indicate that "documents containing the work product of attorneys which contain the attorney's thoughts, impressions, views, strategy, conclusions, and other similar information produced by the attorney in anticipation of litigation are to be protected when feasible, but not at the expense of hiding the non-privileged facts from adversaries or the courts." Xerox Corporation v. International Business Machines Corporation, 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974). Thus, it is well-established that, to the extent possible, documents must be made available with the privileged information expunged.

Palmetto Alliance has failed to demonstrate that information and/or documents which it seeks to protect are entitled to the privileges which it asserts. Indeed, the nature of the information sought by Applicants clearly is not subject to protection.

16/ Hickman v. Taylor, supra, 329 U.S. at 509-11.

In their Interrogatories and Requests to Produce, Applicants sought from Palmetto Alliance the basic information which bears directly on the dimensions of and bases for Palmetto Alliance's Contentions 6 and 7. Those discovery requests seek no more than to elicit from Palmetto Alliance precisely how it defines the material terms in each of its contentions; the standards which it contends Applicants do not meet; why it contends Applicants do not meet those standards; what it believes Applicants must do, in light of its contentions, to operate Catawba safely; and the technical bases (if any) for each of its contentions. If Palmetto Alliance intends to participate in the upcoming hearings in a responsible manner, then it follows that these matters will have to be disclosed during such proceedings. Thus, under the standard discussed above, such information is discoverable.

In NRC practice it has been recognized that information of the nature sought by Applicants is not subject to either privilege. In Pilgrim, supra, LBP-73-30, 1 NRC 579, intervenor sought a protective order against applicants' discovery, asserting both privileges. The licensing board rejected intervenor's claim with respect to attorney-client privilege, noting that such does not extend to information obtained from other people or sources even though the attorney may have acquired such information while representing his client. The board also stated that this privilege does not apply to the discovery of facts within the knowledge of an attorney if the facts were not communicated or confided to him by his client.

The Board reasoned that, because the NRC intervention rules assume that parties have specific factual bases for their contentions:

> [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." [Id. at 585.]

The Board also noted that "it is untenable to object to an interrogatory or to refuse to answer on the claim that [it] involves 'the work product of an attorney' or the 'attorney-client relationship'" in the form of a general objection. In short, in order to prevail on that assertion, detailed objections must be made. See pp. 3-5, supra. For the reasons set forth above, this Board should deny Palmetto Alliance's Motion for a Protective Order.

C. Applicants' discovery requests are not unduly burdensome.

In an attempt to deflect attention from its unwillingness (or inability) to respond to Applicants' discovery requests, Palmetto Alliance makes the blanket assertion that such discovery requests are annoying, embarrassing, oppressive and unduly burdensome or expensive, asserting that they constitute a "discovery offensive" that "borders on...harrassment." Motion, p. 2. Palmetto Alliance apparently intends this characterization to serve as support for the relief requested its Motion. However, such a blanket complaint cannot serve to justify issuance of a protective order.

First, as shown above (p. 9, supra.) Applicants seek through discovery only information to which they are entitled. Moreover, it is well-settled that general objections such as those raised by Intervenor in this regard cannot provide the basis for a protective order. As the Appeal Board stated in Pennsylvania Power & Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980), general objections do not provide good cause for issuing a protective order.

> General objections, such as the objection that the interrogatories...are unreasonably burdensome, oppressive, or vexatious, or that they seek information that is as easily available to the interrogating as to the interrogated party, or that they would cause annoyance, expense or oppression to the objecting party without serving any purpose relevant to the action...are insufficient. [4A Moore's Federal Practice (1982 ed.), ¶33.27 at pp. 33-164 through 33-167.]

Palmetto Alliance's objections to Applicants' discovery requests almost track verbatim the type of general objection the Appeal Board in Susquehanna criticized. See also Pilgrim, supra, LBP-75-30, 1 NRC at 579.

Second, Applicants' discovery requests do nothing more than seek to determine the dimensions of and bases for Intervenor's contentions. 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 Alliance encompass; what actions (if any) Applicants should take according to Intervenor to assure the safe operation of Catawba; and what the technical bases (if any) for Palmetto Alliance's position are. If it is

"unduly burdensome" for Palmetto Alliance to supply this information, then Applicants suggest that Palmetto Alliance narrow the scope of its allegations so that discovery no longer presents such difficulties. See Susquehanna, supra, ALAB-613, 12 NRC at 330-35.

III. CONCLUSION

In light of the foregoing, Applicants urge that the Board issue an order denying Palmetto Alliance's Motion for a Protective Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Response To Palmetto Alliance's Motion For A Protective Order" and "Applicants' Motion To Compel Or, In The Alternative, To Dismiss Contentions" in the above captioned matter have been served upon the following by deposit in the United States mail this 20th day of December, 1982.

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