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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges:

James L. Kelley, Chairman  
Dr. A. Dixon Callihan  
Dr. Richard F. Foster

SERVED AUG 29 1983

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

Docket Nos. 50-413 OL  
50-414 OL  
(ASLBP No. 81-463-01 OL)  
August 26, 1983

MEMORANDUM AND ORDER  
(Ruling on Applicants' Motion  
for Partial Summary Disposition  
of Contention 6)

Introduction. Pursuant to 10 C.F.R. § 2.749, the Applicants have filed a motion, supported by affidavits, for partial summary disposition of Palmetto Alliance's Contention 6. The motion addresses various concerns of two former Duke employees at the Catawba project, William Ronald McAfee and Nolan R. Hoopingarner II, and argues that there are no genuine issues of material fact with respect to those concerns. The NRC Staff has filed an answer, supported by an affidavit, in which it addresses the same McAfee and Hoopingarner concerns and supports the Applicants' motion. Palmetto has filed an answer, not supported by

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affidavits, in opposition to the motion, urging its denial. The Applicants' motion for summary disposition is being granted in part and denied in part. As we describe specifically, we find genuine issues of fact with respect to certain of the McAfee and Hoopingarner concerns. As to the remainder of those concerns, we find either that no genuine issue of fact exists on the record before us or that the concern is not within the scope of Contention 6. We first discuss several general issues and then turn to the specific concerns.

Access to Transcripts. Palmetto asks for a continuance "to permit the review of the transcripts of deposition testimony in the possession of the NRC which are the subject of a pending" FOIA request. Palmetto refers specifically to several depositions, including those of McAfee and Hoopingarner, the only depositions we looked at in ruling on this motion.

This continuance request is denied primarily because it comes too late. We have been on a relatively tight schedule leading to hearing for many months, and all parties are fully aware of that. This request should have been made promptly upon receipt of the Applicants' motion, at least three weeks before it was made as a part of Palmetto's reply. If there had been a timely request for a continuance, it might have been possible to arrange for timely placement of these depositions in the Public Document Room in Rock Hill or in Columbia. Indeed, Mr. Johnson's letter of August 12, 1983 to Mr. Guild, copy to all parties, confirms

that 31 depositions in the case (presumably including those in question) had been sent to Rock Hill by that date.<sup>1</sup>

The Board recognizes that Palmetto is in the process of obtaining low-cost copies of depositions from the NRC under the FOIA. That may be a helpful way for an intervenor group with limited resources to cut litigation costs. But the FOIA approach is independent of the licensing process, and it tends to be quite slow. Its availability does not necessarily give the intervenor a right to delay the proceeding while

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<sup>1</sup> Related to this continuance request is Palmetto's objection during the telephone conference of August 11, 1983 to the Board's considering depositions supplied to it by the Applicants, copies of which had not been served on Palmetto. See Tr. 1148-1152. Palmetto reads such a requirement into the NRC Rules of Practice; the Applicants disagree. The Commission's rules, as we read them, are not entirely clear on this point. The general rule on service of documents, 10 C.F.R. § 2.712, does not enumerate which documents are to be served. This represents a departure from the analogous Federal Rule of Civil Procedure, which does enumerate certain types of documents for service. F.R. Civ. P.5. The NRC Rule on motions, 10 C.F.R. § 2.730, does explicitly require that they be "served on all parties." On the other hand, the NRC deposition rule only requires that the original of the deposition be forwarded to "the Commission," which means the Licensing Board. 10 C.F.R. § 2.740 a(e). And the summary judgment rule requires Boards to consider, among other matters, "depositions" in the case. 10 C.F.R. § 2.749(d). Thus the NRC Rules of Practice are ambiguous on this question. We think that in the future it would be the better practice for a movant for summary judgment who relies on depositions (or portions thereof) to serve copies of relatively short depositions (or portions of long depositions) on any opposing parties who do not have copies. But in the particular circumstances of this case, as described in the text, Palmetto does not have a substantial complaint against the Applicants for their failure to serve on Palmetto copies of the McAfee and Hoopingarner depositions.

that approach is being pursued, at least where, as here, some reasonable alternative is available.

We believe that Palmetto could and should have responded fully and in a timely manner to the pending motion. As previously mentioned, the depositions could have been sent to Rock Hill or Columbia earlier. Moreover, we assume that Palmetto has tape recordings of all these depositions. While not as convenient as typed transcripts, the tapes could have been used to prepare a defense against this motion. After all, these were not tape recordings of hostile witnesses, but of Palmetto members McAfee and Hoopingarner. In the totality of these circumstances, we find no basis for granting the requested continuance.

Scope of the McAfee and Hoopingarner Concerns. The Applicants state that:

It was Applicants' intention in taking the depositions of Messrs. McAfee and Hoopingarner that each and every concern they had with respect to Contention 6 be enunciated. Both gentlemen stated that the deposition reflected each and every concern they had with respect to Contention 6. See McAfee Deposition ("MD") at Tr. 99-100, 114-115; Hoopingarner Deposition ("HD") at Tr. 107.

The Staff supports this reading of the depositions. Staff answer, pp. 1-2. Our review of the deposition transcripts likewise confirms Messrs. McAfee and Hoopingarner's statements that they were raising all of their quality assurance concerns about Catawba at that time.

Palmetto's answer nevertheless contains unsupported denials that the depositions of McAfee and Hoopingarner "reflect each and every

concern [they] have with respect to Palmetto Alliance Contention 6." These denials are not entitled to any weight, for two reasons. First, the depositions contain statements under oath to the clear effect that all of the deponents' concerns about Contention 6 were being raised. See Tr. citations, supra. Before this Board would give any consideration at this juncture to still other concerns, we would have required at the very least an affidavit from the deponents recanting or in some fashion explaining their earlier sworn statements.

Second, the Palmetto denials are general; they include no particulars about concerns other than those addressed in the depositions.<sup>2</sup> Palmetto implies that this lack of further particulars resulted because it "had no control over the discovery questions asked or the manner of presentation of testimony." Answer at 6. To be sure, those factors would affect how much a deponent might say. But they would not affect his ability to at least raise particular areas of concern, where, as here, the deposing party was seeking to elicit just such information.

In light of the foregoing, the Board finds that each and every concern of Messrs. McAfee and Hoopingarner within the scope of Contention 6 was raised in their depositions by the Applicants and is addressed in the pending motion for summary deposition. Any other other

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<sup>2</sup> The pertinent portion of the summary disposition rule provides that "a party opposing the motion may not rest upon the mere ... denials of his answer; his answer ... must set forth specific facts showing that there is a genuine issue of fact."

concerns of that nature which they failed to raise at that time will not be considered in this proceeding.

Appropriateness of Summary Disposition. Citing an earlier statement by this Board, Palmetto opposes the summary disposition motion "fundamentally on the grounds that this subject matter is not 'answerable to this procedure'." Answer at p. 3. We used the quoted phrase in an earlier Order to indicate that we did not view the welding dispute as appropriate for resolution by summary disposition. See Memorandum and Order of June 13, note 2 and of June 20, note 3. We took that view because, on the evidence then available to us, the welding dispute appeared to be quite complex and likely to involve many credibility issues. Similar considerations apply to some of the concerns that have been raised by Messrs. McAfee and Hoopingarner, but not to others. For example, we are denying the motion for summary disposition with respect to their concerns about welding to allow their testimony to be considered along with other evidence on that subject. But we are granting the motion with respect to several other concerns which are suitably addressed by summary procedure -- e.g., simple and isolated events where the Applicant and Staff responses on the merits are uncontradicted, and concerns outside the scope of Contention 6.

Palmetto's Failure to Address Specific Concerns. The bulk of the Applicants' motion, pages 13-38, discusses particular concerns of Messrs. McAfee and Hoopingarner and their response to each. Similarly, the

Staff's supporting answer addresses the same concerns in a lengthy affidavit by an NRC Region II official. The Palmetto answer in opposition says nothing whatever about these specific concerns. Rather, Palmetto confines itself to attacks on the credibility of the affiants for the Applicants and Staff -- this despite its argument that credibility issues should not be resolved on summary disposition. Palmetto's failure to address specifics weighed heavily in favor of the Applicants' motion. We deny relief only with respect to certain specific concerns where, even in the absence of particularized opposition, the Applicants did not meet their burden of showing the absence of a genuine issue of material fact. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 156-161 (1970); Cleveland Electric Illuminating Co. (Perry Plant), 6 NRC 741, 752-754 (1977).

Specific Concerns. We consider these concerns in the order of their discussion in the pending motion.

1. Mr. McAfee's Concerns:

a. Pouring concrete in rain. Motion denied. The Applicant and Staff comments on this concern indicate that concrete pouring in the rain does not necessarily raise a safety issue. However, those comments do not foreclose the particular concern in light of Mr. McAfee's statements.

b. QA waiver of requirements on concrete forms. Motion denied. Again, the comments on this concern do not meet the burden of

foreclosing it. It is claimed that waivers are sometimes appropriate, but we do not know if the waiver in question was appropriate. The matter should be explored in test only.

c. Anchor bolts. Motion granted. The NRC Staff provides a complete and convincing answer to this concern. That the complaint involved a single anchor bolt indicates that this concern is not significant. In the absence of a denial, including specifics, there is no reason to pursue this matter.

d. Poor document control. Motion granted. The record reflects the insignificance of this concern, involving only one incident that was corrected.

e. Rain in the control room. Motion denied. This concern rests on a possibly serious event with safety implications that should be explored at hearing. The Applicant and Staff comments say nothing about why this apparent negligence was allowed to occur in the first place.

f. Protection of cables. Motion denied. This concern arises from alleged carelessness with cables, in violation of regulations. The Applicant and Staff comments make no attempt to counter the particular allegations. As with the preceding concern, the Board wishes to explore at hearing attitudes and practices about protecting cables as they relate to Contention 6.

g. Welding inspector stress. Motion denied. This concern may fit with other concerns about welding on which we are going to hearing. Moreover, we wish to explore with Mr. McAfee directly his



expressed concern about pressure to get jobs approved, in his words, "whether the job is actually done correctly or not."

h. Inadequate QA Inspector Training. Motion granted. This concern has nothing to do with "systematic deficiencies in plant construction and company pressure to approve faulty workmanship." It is outside the scope of Contention 6.

i. Instructions not to write nonconforming incidents (NCIs). Motion denied. This is a comparatively complex matter that cannot be adequately resolved on the papers before us. Although an NCI may not be required for minor defects, that does not tell us whether proper standards were followed in the determinations in question, at least not in the face of a claim to the contrary. Moreover, this concern, if it has a solid foundation, goes to the heart of the "company pressure" allegation in Contention 6.

j. Blue-print changes to reflect construction error. Motion granted. The Staff's explanation of the blue-print correction process (Bryant affidavit at 8-9) is clear and straightforward. In the absence of any reply affidavit raising further questions, there is no remaining issue of material fact about this concern.

k. Welding inspector sign-off. Motion granted. This concern relates to the efficiency of construction at Catawba; it has nothing to do with safety.

l. Unstable scaffolding. Motion granted. Like the preceding concern, this concern has no relevance to safety. Both concerns are outside the scope of Contention 6.

m. Inadequate testing of QA electrical inspector candidates.

Motion granted. This training concern, like the concern in paragraph h above, is outside the scope of Contention 6.

2. Mr. Hoopingarner's Concerns:

a. Electrical cables. Motion denied. This concern is similar to the McAfee concern in paragraph f, above, and the same reasons for denying the motion apply.

b. and c. Improper welding procedures and welding. Motion denied. While seemingly marginal by themselves, these concerns, like the McAfee concern in paragraph g, above, may gain significance in relation to the larger case on welding.

d. Pressured not to talk to NRC. Motion denied. This is a very serious concern if substantiated at a hearing. The Applicants note Mr. Hoopingarner's statement that his supervisors "withdrew that direct order that they gave me pertaining to I can't approach the NRC man." Tr. 18. But this only makes one wonder whether and why such an order was given in the first place. This concern is at the core of Contention 6.

e. and f. Water in UHI building and improper scaffolding. Motion granted. Neither of these concerns, as presented, raise any plant safety issue.

g. and h. Improper contact between steels and wet concrete forms. Motion granted. Mr. Hoopingarner does not appear to attach any

safety significance to these concerns. In any event, the Applicants provide straightforward and uncontradicted comments which we accept.

i. Valves installed backwards. Motion granted. Mr. Hoopinger apparently has no personal knowledge of this concern. The uncontradicted comment of the Applicants and Staff dispel this concern.

j. and k. Flooding of diesel generator room and rain in the control room. Motion denied. These are rather complex occurrences, the safety significance of which is not fully negated by the Applicant and Staff comments. We have already bound over for hearing a similar concern of Mr. McAfee in paragraph l.e, above.

l. Misalignment of pipes. Motion granted. This concern does not rest on any personal knowledge of Mr. Hoopinger that pipes were actually misaligned. Absent any specific response to the Applicant and Staff comments, it raises no safety issue.

m. Harassment. Motion denied. The discussion of harassment in the deposition (Tr. 49-50, 72-73) is unclear. It appears to refer both to personal grudges among employees and possibly to pressure not to find fault with workmanship, nor report problems to the NRC. If the latter meanings were intended, they are obviously relevant to Contention 6. This can be clarified at the hearing.

n. Pipe and rebar lying on floor. Motion denied. This is similar to the concern described in paragraph a, above. While it is reassuring that subsequent testing procedures may detect flaws, a question remains about why the equipment was not stored and handled properly in the first place.

o. Drugs and alcohol. Motion granted. Mr. Hoopingarner expresses concerns at some length (Tr. pp. 51-58) about use of alcohol and drugs (pot smoking) on the job. As he points out, alcohol and drug use can have a bearing on plant safety because it can affect the quality of the user's work. Nevertheless, that kind of safety problem has at best a remote relationship to Contention 6, which focuses on alleged deliberate corner-cutting and intimidation of employees by plant management. Furthermore, to embark on a collateral inquiry into alcohol and drug use at a major construction site over a period of years would not be worth the time and effort involved. In light of these considerations, we rule that alleged alcohol and drug use are beyond the scope of Contention 6.

p. Work-related concerns. Motion granted. Mr. Hoopingarner referred to a series of alleged unsafe or improper working conditions, as described by the Applicant at pp. 34-35. We agree with the Applicants and Staff that these concerns do not raise plant safety issues.

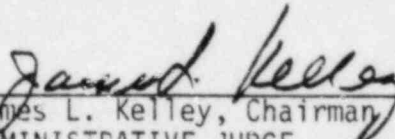
3. Allegations Concerning QA Program Compliance with 10 C.F.R. Part 50, Appendix B.

The Applicants point to various places in Mr. McAfee's deposition where he states that some aspect of the Catawba QA program does not comply with Appendix B. Motion at 37-38. The Staff also discusses these matters (Bryant affidavit at pp. 9-10) and concludes that no violations of the criteria in question have been shown. These essentially legal issues are not appropriate for summary disposition treatment.

When and if Mr. McAfee appears as a witness, we will be interested in his testimony about the facts. We will not be interested in his views on legal questions, e.g., whether some criteria of Appendix B was or was not violated, except perhaps for some narrow purpose, such as his understanding of his legal obligations under the QA program. We have already ruled that two of the matters now referred to a second time in this context -- control room leaking and preparation of NCIs (see paragraphs 1.e, i, above) -- may be the subject of testimony at the hearing. After we have heard that factual testimony from the witnesses, the lawyers will argue and the Board will determine whether it establishes non-compliance with Appendix B.

Summary and Conclusion. The Applicants' motion for summary disposition is granted with respect to the concerns described in paragraphs 1.c, d, h, j, k, l, m and 2.e, f, g, h, i, l, o and p of this Order. These concerns are excluded from this proceeding. The Applicants' motion is denied with respect to the concerns described in paragraphs 1.a, b, e, f, g, i and 2.a, b, c, d, j, k, m and n of this Order. Messrs. McAfee and Hoopingarner will be allowed to testify with respect to those concerns but, as explained at pp. 4-6 of this Order, only with respect to those concerns.

FOR THE ATOMIC SAFETY AND LICENSING BOARD

  
James L. Kelley, Chairman  
ADMINISTRATIVE JUDGE

August 26, 1983,  
Bethesda, Maryland.