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ORIGINAL

NUCLEAR REGULATORY COMMISSION

In the Matter Of:

DUKE POWER COMPANY, et al
(Catawba Nuclear Station,
Units 1 & 2)

Docket No: 50-413 OL
50-414 OL

TELEPHONE CONFERENCE

Location: Bethesda, Maryland

Pages:
12,657 - 12,717

Date: Thursday, June 21, 1984

*TRO1 original
o/i To: Jack Whetstone
EW-499*

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 BEFORE THE ATOMIC SAFETY & LICENSING BOARD PANEL
4 TELEPHONE CONFERENCE

5 -----
6 In the Matter of:

7 DUKE POWER COMPANY, et al. Docket No's.
8 (Catawba Nuclear Station, 50-413 OL
9 Units 1 & 2) 50-414 OL
ASLB No. 81-463-01
10 -----

11 Bethesda, Maryland
12 Thursday, June 21, 1984
13

14 The telephone conference call in the above-
15 entitled matter was convened at 11:00 a.m., pursuant to
16 notice.

17 APPEARANCES:

18 Board Members:

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20 Administrative Law Judge
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P R O C E E D I N G S

1
2 JUDGE KELLEY: We'll go on the record now. A couple
3 of background points. Last week, I believe it was, Mr.
4 McGarry called me and the purpose of his call was to deter-
5 mine whether the Board viewed them as under any obligation
6 to respond to a motion to compel and discover on the subject
7 of diesel generators in light of the Commission's order
8 of June 8, I believe it is.

9 MR. GUILD: Yes, June 8.

10 JUDGE KELLEY: Yeah, the Commission order of June 8,
11 and I'd not spoken with the other Judges. I'd simply said
12 well, I understood, what I thought Mr. McGarry's view to
13 be and he should check it out with Mr. Guild and then if
14 there was a difference of opinion, we would take it from
15 there. And if not, perhaps there would be nothing further
16 to do. So we left it that way.

17 Since then, I have received, and I believe we've
18 all received from Mr. McGarry a letter dated June 18, ad-
19 dressed to the three members of the Board and its main
20 purpose, if I may paraphrase it, simply state the applicant's
21 reading of the Commission order and the effect that order
22 on this Board, the extent of this Board's jurisdiction over
23 diesel generators. You have that letter?

24 MR. CARR: I've yet to receive that letter, but I
25 understand it's substance. Mike and I have talked about it.

1 JUDGE KELLEY: Okay, there's one sentence here, I just
2 looked it over again, that I'll read just to put in the
3 record here. In the last paragraph is a sentence that says
4 as follows: that in our view the Commission's order of
5 June 8, '84, dismisses the Board's Sua Sponte contention
6 from the proceeding and as the Board itself recognizes ac-
7 cording to transcript, that contention was a sole diesel
8 generator contention in the proceeding.

9 And, as I understand the applicant's position,
10 they say the Board now has nothing before it on diesel
11 generators. I won't characterize beyond that.

12 And the other thing I want to mention is that day
13 before yesterday, I was in Raleigh on a brief hearing in
14 Sharon Harris, and Mr. Guild and I had a conversation and
15 he indicated his interest at that time in having an opportu-
16 nity to make a motion before the Board on the subject of
17 diesel generators and I indicated to him that I thought
18 we could do that but that he should be aware that we're
19 finalizing our opinion on the record of the hearing last
20 fall and early winter and that we expected to finish it
21 shortly.

22 I believe I indicated to him and I can indicate
23 further that I think there's a good chance that we will re-
24 lease that opinion tomorrow. More about that later.

25 But in any event, it appeared that if Mr. Guild

1 wanted to make a motion on diesels prior to our acting,
2 today was about the only time that it could be done. So we
3 agreed to try to set up this phone conference and have done
4 so.

5 That's the background on it as I know and I guess
6 I'll turn it over to Mr. Guild to proceed at this point,
7 unless there's something else by way of background that
8 ought to be stated. Is there anything else that anybody
9 wants to raise?

10 MR. GRAY: Nothing from the Staff.

11 JUDGE KELLEY: Gentlemen, as we go through this, I
12 think we've done this in the past, could you, for the re-
13 porter's benefit, state your name first, before you start
14 talking so he can get all the voices straight. With that,
15 I'll turn it over to Mr. Guild.

16 MR. GUILD: This is Mr. Guild. As Chairmen of the
17 Board, at this time, I want to bring before the Board,
18 by way of three distinct motions, the subject of the safety
19 and reliability of the Catawba Emergency Diesel Generators.

20 JUDGE KELLEY: Could you speak a little louder, Mr.
21 Guild?

22 MR. GUILD: Yes, sir. Did the reporter get that far?

23 JUDGE KELLEY: I think he's okay, yeah.

24 MR. GUILD: Without belaboring a long history, let me
25 outline where I intend to do and start and get there. We

1 agree with the observation by Commissioner Gallinsky in the
2 Commission's June 8 order, his separate views, that the
3 results, the status if you will, now, the diesel generator
4 matters before this Board is what can only be characterized
5 as the product of arcane legal maneuvering that avoids
6 reaching the weighty and important safety concerns that
7 we've had before this Board, raised properly by the
8 parties and by the Board itself sua sponte, since last
9 December.

10 However you want to get to the point, our view
11 which we urge upon the Board today, is that we as litigants
12 in this proceedings, properly having brought substances
13 questions as to the safety of these machines before the
14 Board, are entitled to have those claims adjudicated on
15 the record in this proceeding and are not consistent with
16 the Atomic Energy Act in which, Administrative Procedure
17 Act, in the due process clause, left only to trust that
18 the NRC staff will look out for all at some future point
19 outside of the context of this proceeding.

20 So what we intend to do is to bring before the
21 Board and parties the issues that we think are properly
22 opposed by way of contention that raise the question for
23 litigation as to the adequacy of those diesel generators.

24 First, what I would like to do is to make clear
25 that what I intend to do today is to raise, by way of

1 requests for renewed consideration, the Palmetto
2 Alliance and Carolina Environmental Study Group, diesel
3 generator contentions that have been previously raised in
4 this proceeding, can have received consideration which the
5 record will reflect, leading ultimately to the dismissal of
6 those contentions and, in addition, then to seek by way of
7 motion for the first time, the readmission of the substantive
8 contention with respect to the safety of the diesel genera-
9 tors, that up until June 8th was the Boards own sua sponte
10 contention.

11 MR. CARR: I'm sorry, I lost that. This is Al Carr,
12 I just can't hear you.

13 MR. GUILD: Okay, Al, can you hear me now?

14 MR. CARR: Yes.

15 MR. GUILD: I'll try to keep my voice up.

16 MR. CARR: Okay.

17 MR. GUILD: Essentially we have all totalled some
18 eight diesel generator contentions that have been before
19 the Board and parties. Three by way of Palmetto and CESG's
20 December 5th motion on the record of the proceeding. Three
21 by way of our March 23rd motion and two, if you count the
22 Board's initial and then revised sua sponte contentions.

23 As of now, none of those contentions remain before
24 this Board formally, although all, of course, have been
25 raised on record at the times states. We think that it's

1 simply unconscionable to leave this record without pro-
2 viding these parties an opportunity to litigate in some
3 form or fashion the monstrable questions about the safety
4 of the Catawba diesel generators. Whatever way you have to
5 go reach that conclusion, we believe this Bo. is obligated
6 to get there and by these motions we're putting these issues
7 back before the Board in party.

8 First, we renew motion to admit the original
9 diesel generator contention. And that motion was made on the
10 5th of December and is reflected at hearing transcript
11 9618, 9659 through 9675. Those contentions are summarized
12 at page 3 of this Board's February 23rd order and to para-
13 phrase reflect a question as to the reliable operation
14 of the emergency diesel generators in service in performing
15 their safety functions in three particulars. First, the
16 design of the crank shaft. Second, quality assurance at
17 the manufacturer Transamerica Diesel Valve. And third,
18 with respect to the operating history of Transamerica Diesel
19 Valve, Diesel Generators at other nuclear facilities.

20 And I direct the Board's attention, party's
21 attention, to the arguments that had previously been made
22 with respect to those contentions. I would note that the
23 Board's treatment of those contentions is reflected in its
24 2/23 order, its 2/27 order which referred, rejected portions
25 of those contentions for consideration by the Appeal Board.

1 That's the first motion, then, to renew the
2 December 5th contention. The second motion is to renew the
3 contentions that I've characterized as the amended diesel
4 generator contentions reflected in Palmetto and CESG's
5 pleading of March 23rd, 1984. And those diesel generator
6 contentions are reflected in that motion at page 2 and
7 without reading the text, I'd ask that the record reflect
8 that the contentions that I seek at this a renewed considera-
9 tion of are set forth at that page of the pleading.

10 To summarize, paraphrase, they first reflect
11 applicant Duke Power Company, et als, failure to oversee
12 quality assurance at Transamerica Diesel Valve in the pro-
13 curement, design, construction, etc., of the Catawba
14 specific diesel generators.

15 Second, they reflect the identified potentially
16 significant problems occurring in the DSRF 16 diesel genera-
17 tors identified by the TDI Owners Group, and those are
18 enumerated in the text of subpart 2 of the contention, I
19 won't repeat them specifically. But they identify specific
20 components which may have potentially significant problems.

21 The third aspect of the March 23rd contentions
22 reflect the inadequate testing and inspection program by
23 Duke, et al, to demonsrate the absence of significant
24 safety defects in the Catawba specific, Transamerica
25 Diesel Valve, Diesel Generators.

1 Thirdly, we ask that the Licensing Board treat
2 the Board's own sua sponte diesel generator contentions as
3 revised, as a contention now submitted for litigation by
4 Palmetto Alliance and Carolina Environmental Study Group.
5 The Board's revised contention appears, the Board's original
6 contention appears at Page 2 of its February 27th, 1984,
7 order admitting a Board contention. And revised it reads
8 as follows, it's short, so I'll read it, whether there is
9 reasonable assurance that the TDI Emergency Diesel Genera-
10 tors at the Catawba Station can perform their function
11 and provide reliable service, because of the problems that
12 have arisen in the course of testing and inspections with
13 the Catawba Diesel Generators, such as the problems reported
14 in the applicant's letter to the Board of February 17th,
15 1984.

16 Now, that's the request for release that we wish
17 to present to the Board. Briefly, it supports, I just this
18 morning had the actual text of the Commission's order before
19 me. I was, I told Mike McGarry and Al Carr that I was
20 operating under, I think a justifiable but erroneous
21 assumption that the Commission couldn't possibly have done
22 what they did to us up until a couple of days ago. And
23 just returned to Charlotte and have in hand now a copy of
24 the order, the short and the long of it is, our view is
25 that the Commission's order treats specifically only the

1 procedural device by which this Licensing Board raised its
2 own sua sponte diesel generator contention and explicitly
3 treats, but not treat, the contentions or the subject
4 itself as raised by the pleadings of the parties.

5 The Commission specifically concludes that the
6 problems identified in the Board's sua sponte contention in
7 turn those problems identified in correspondence or counsel
8 to the Board reflecting testing problems, in themselves do
9 not reflect the serious safety matter which is required to
10 be found in 10 CFR 2.760a, prior to a Licensing Board's
11 adopting a matter for litigation sua sponte, such as here.

12 The fundamental point is that no such threshold
13 requirement, no such threshold finding of seriousness or
14 serious safety matter or any analogous requirement of sub-
15 stantive proof need be shown in order to raise a matter
16 for litigation before the Licensing Board. And whatever
17 threshold showing is required that goes to the substance
18 of the contentions, the subject matter of the contention
19 raised, there seems to be, there can be no doubt intervenors
20 have met. None of the Board's previous rulings passing
21 on our earlier diesel generator contentions implicated
22 any question as to the seriousness of the issues that were
23 raised, or the factual foundation for the contentions raised.
24 And none really could be, since all of the bases for inter-
25 venors contentions rest upon the documented evidence

1 produced by the NRC staff in its own investigation of the
2 safety of these machines than by applicant's in their own
3 reporting as to specific problems that have been identified.

4 So, the first point I want to make is that we
5 don't believe that the Commission's order substantively
6 disposes of the question of whether or not that there are
7 before this Board properly litigable questions about the
8 safety of the Catawba Diesel Generators. We think that it
9 is only by way of procedural fluke that this point in time
10 there happens to be no other contention before this Board
11 short of the motions that we now make.

12 And we think that, in short, this Board is obli-
13 gated to take up the site specific question that have been
14 previously presented to it, with respect to the safety of
15 the Catawba Diesel Generators.

16 We appreciate that consideration of these matters
17 implicates reference to the five factors contained in
18 10 CFR 2714A1, the Commission's decision previously in
19 this proceeding as Catawba order of June 30th, 1983, all
20 which bear on the admissability of late filed contentions.

21 We would state only that we rely primarily on
22 arguments previously made reflected in the pleadings,
23 reflected particularly most recently in the March 23rd
24 motions made to this Licensing Board in support of the
25 revised diesel generator contentions, and before that,

1 December 5th, 1983, in support of our original diesel
2 generator contentions. We also ask that this Board consider
3 the memorandum that was submitted by Palmetto Alliance and
4 CESH on March 23rd, to the Atomic Safety and Licensing
5 Appeal Board, with respect to the diesel generator subject
6 that had been referred to that Appeal Board by this
7 Licensing Board under 10 CFR 2730F, and the authorities
8 that are relied upon in that memo.

9 Let me only add here, with respect to the good
10 cause issue, this motion is made at this time we believe
11 promptly and in timely fashion, in light of the Commission's
12 decision reflected in its June 8th order. We don't think
13 there's any question about us acting promptly to bring
14 this matter before the Board and parties and would have
15 done it by way of written pleading but for the expected
16 issuance of this Board's opinion and therefore the need
17 to bring the matter to the attention of the Board and
18 parties today. So we do that today.

19 But the basis for raising these issues today
20 is most recently the Commission's June 8th order which we
21 learned about only last couple of days. I think I spoke
22 with Mike and Al on Monday or Tuesday of this week and I
23 believe I learned specifically of the decision on Monday.

24 Now, it should be clear that prior to the Commis-
25 sion's decision, we had an agreed upon schedule for

1 litigation of site specific diesel generator matters at
2 Catawba. WE had ongoing discovery underway, we had a
3 hearing set for the first week in August. And, so, we all
4 were proceeding under the assumption, I think, assumption
5 is still a valid one, that litigation of these issues would
6 be required. And, so, we believe that good cause clearly
7 exists on the basis of the previously asserted facts and
8 additions in light of the Commission's decision of June 8th.

9 We rely on the previously argued points with res-
10 pect to factors 2 and 4, the availability of other means to
11 protect petitioner's interest and other parties to represent
12 that interest on this matter. We think that it's clear
13 that where the staff has a general obligation to assure
14 itself of the safety of these machines before operation,
15 the staff's performance of its general regulatory respon-
16 sibilities is not a substitute either here nor generally
17 for the parties protecting their own interests through
18 litigation. We believe that point is well supported by
19 the authorities, reflects our rights under the due process
20 clause to best protect our own interest.

21 We think on the point of ability to contribute
22 to the development of a sound record that this party and
23 this counsel's performance and contributions in the past
24 demonstrate the likely ability to make a contribution on
25 this issue, same as reflected in the participation by

1 CESG and its representative, Mr. Riley. And we would note
2 that as previously stated, we expect and anticipate that
3 we will have available the assistance of others who have
4 expertise in the area of function of these machines, who
5 are likewise interested in resolution of these issues,
6 since facilities near which they reside also are troubled
7 by these Transamerica Diesel Valve machines.

8 The last point, and that is the delay and issue
9 broadening question, we would submit that that factor weighs
10 more favorably to the admission of these contentions at
11 this time than it has at any point where this Board has
12 considered the issue to a fault.

13 First, again point out, we've already scheduled
14 hearings to be conducted on these subjects and we have al-
15 ready undertaken discovery, it's in process. The only
16 hiatus there has been is the hiatus between the time, the
17 most of the Commission's June 8th decision and now, and
18 probably only between the time of applicant's determination
19 to take those further steps on discovery, and communicated
20 by what I understand it was June 18th letter and now.

21 So we don't think there's any delay that is
22 attributable to raising these issues now. We'd also note
23 that I've been informed that applicants have recently
24 notified the Board of a further revision in their fuel
25 loading schedule. And, Mike, now I don't have that date

1 in front of me, but I understood that it slipped now from
2 June 16th, sometime in July, and I just got that word from
3 Jesse Riley over the phone, but I would point out that the
4 original target, it was the basis for weighing the delay
5 factor, of course, was a May 1 fuel load date. That May 1
6 date was the date that was before the Board when they con-
7 sidered the previous diesel generator contentions and
8 bore significant weight in the treatment of what this Board
9 reviewed as the generic aspects of earlier contentions,
10 and their dismissal.

11 We think the fact that fuel load did not occur
12 May 1 and, in fact, did not occur June 16 and is now pro-
13 jected to occur sometime later, makes clear that a hearing
14 date in early August on diesel generator matters cannot be
15 found to be causing undue delay or issue broadening and
16 that that factor should weigh more favorably toward ad-
17 mission of these contentions today than in the past.

18 So that's the short and the long of what I wanted
19 to say, except I want to add by way of citation to authority
20 that we think that the Commission's decision in the Point
21 Beach case makes absolutely clear the bottom line funda-
22 mental point that we are entitled to be heard on these
23 matters on the record in this adjudicatory proceeding. And
24 that is Wisconsin Electric Power Company Point Beach
25 CLI 73-4 6AEC6. The specific passage at page 7, it's a

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1 1983 decision. And just briefly it states there however
2 reasonable or logical that results, the result of not
3 taking up such an issue, may have appeared to the Appeal
4 Board, it does not adequately take into account the demands
5 of the Atomic Energy Act and the Administrative Procedure
6 Act. Both statutes provide that whenever an agency is
7 required to conduct an adjudicatory hearing on an operating
8 license application, all parties have the right to an oppor-
9 tunity to participate in the resolution of properly contes-
10 ted issues. Such procedural flexibility as adheres and
11 the system does not go so far as to authorize elimination
12 of that opportunity.

13 The point we make is that while the Commission
14 in its wisdom may have determined that it is not appropriate
15 for this Board, on its own sua sponte to attempt to resolve
16 the issues that are included in the Board's sua sponte
17 contention, we think it cannot be disputed under the Point
18 Beach authority, under the Constitution, those substantive
19 issues if placed in litigation by parties, must be consid-
20 ered by this Licensing Board, and by the Commission, in
21 order to reach a decision in this matter.

22 They cannot be similarly left to Staff resolution.
23 That may be suitable for matters that otherwise would not
24 be in litigation, but for a Licensing Board action. But
25 certainly cannot dispose of the adversary rights of a party

1 which we bring before you at this time.

2 So, on that basis, we would ask ~~that~~ the Board
3 consider the originally filed diesel generator contentions,
4 the revised diesel generator contentions of March 23rd and
5 its own sua sponte contention as adopted by Palmetto and
6 CESG for admission at this time.

7 The fundamental point we want to have litigated,
8 members of the Board, is the site specific concerns as to
9 the safety of the Catawba Diesel Generators. Now, I think
10 it's open to adversary argument about what the parameters
11 are of the site specific considerations, but the bottom
12 line minimum is this Board itself has determined that the
13 problems reflected in testing and inspection of the
14 Catawba machines, must be at the bare minimum the problems
15 that this Board should properly consider in an adjudicatory
16 context, and we think that that's the minimum that we are
17 entitled to have heard in this proceeding.

18 And that's the end of my pitch.

19 JUDGE KELLEY: Okay, Mr. Guild, Judge Kelley.

20 MR. GUILD: Yeah.

21 JUDGE KELLEY: I think you're right and I think the
22 other parties should take the same approach, that we don't
23 have to go back over in detail the five factor type of
24 debate. We did it on the December original contentions.
25 We did it again in March and then I think it is not

1 necessary. There is one specific point that I want to ask
2 you about.

3 We have underlined in the past. There's some
4 noise on this, can people still hear me?

5 MR. GUILD: Yes, sir.

6 JUDGE KELLEY: Okay. We have underlined in the past
7 our view that the factor about likelihood of making a
8 contribution and particularly the factor of having an ex-
9 pert available was particularly important on these diesel
10 generator issues. More important, for example, than a less
11 technical QA type of dispute and indeed we dismissed the
12 crank shaft issues for that very reason.

13 Now, suppose we were to consider reinstating the
14 sua sponte issue and making it your issue. It seems to
15 me that's technical, too. It's cracked cylinder heads and
16 things of a fairly technical nature.

17 You did avert to the expert point and I've got
18 the impression that as of now, you don't have an expert to
19 work with you on these contentions or contention, if they
20 were to be admitted and we decided this WASHINGTON Public
21 Power Case in the past on that proposition to the effect
22 that not only you need to name an expert, you need to even
23 outline his testimony.

24 So, my question is where are you and where do you
25 reasonably expect to get on the expert question.

1 MR. GUILD: Well, two points. First, we think that
2 bottom, that that authority is not despositive of the right
3 to have these issues raised. The intervenors have a right
4 to prove their case in a variety of fashions, including at
5 the very bottom, the right to confront applicant's case and
6 prove all position through cross-examination. The burden
7 is on applicants and we don't think that that authority,
8 which says, as you say, stands for the proposition that it
9 shifts the burden to intervenors because of the late filing
10 rule or that it disposes of our due process rights to raise
11 these issues and have them litigated.

12 On the point of expertise, we don't dispute that
13 expertise is useful and helpful and that we're looking for
14 it and want to have it. But where we stood right now on
15 the sua sponte contention that we are planning on litiga-
16 tion for, is very early in the course of discovery and
17 preparation, where we stood was essentially having completed
18 litigation of emergency planning issues, having a slight
19 breather, we filed a motion to compel believing that there
20 was very serious deficiencies in applicant's discovery
21 responses. That was before the Board at the time of the
22 June 8th order.

23 We frankly believe that we need to have the
24 results of discovery and more importantly, the results of
25 the site specific testing and inspection program which have

1 not yet been complete nor have they been circulated to the
2 parties.

3 MR. CARR: Excuse me, this is Al Carr. You have the
4 results, Mr. Guild. They were forwarded to you on June 1st
5 when we forwarded the report to the NRC staff.

6 MR. GUILD: Well, if that's the case, Al, I didn't
7 mean to misstate. I haven't seen them. If they're there
8 someplace, then fine. My only point is that at least as the
9 matter of discovery were early in the game, the schedule
10 that we all agreed to that lead to a hearing in early
11 August, was on the assumption that while we were still in
12 litigation on Emergency Planning matters and I submit to
13 you on June the 1st, I was getting ready for hearings that
14 went from June the 5th through June the 8th and on the day
15 that the Commission entered its decision, I, along with
16 Al Carr, Mike McGarry, and everyone else, were litigating
17 emergency planning matters. The point is, we can't be
18 burdened with, however you slice it on the expert question,
19 with having obtained and presented that source of expertise at
20 a point where we have been obligated to litigate the
21 emergency planning issue bifurcated proceeding. And that's
22 the whole point of the agreement that we reached about
23 suspending discovery and then getting back on the track of
24 discovery and hearing preparation after the emergency
25 planning phase was over. That's where we stand right now.

1 So I submit to you that however, that one, that
2 authority is not dispositive of the right to have these
3 issues admitted. Two, we're entitled to prove our case
4 through a variety of means including relying on cross
5 examination. Three, whatever expertise we will obtain and
6 offer by way of expert testimony or systems and contributing
7 to the development of a sound record.

8 It's expertise, that we cannot be charged with
9 obtaining until we fairly have an opportunity to prepare
10 from the discovery and tests and inspection results that
11 are not yet forth.

12 By way of explanation of where we stand on trying
13 to get expertise, the licensees, Duke, etc., have partici-
14 pated in a TDI owners group that has attempted to marshall
15 their resources and not have to hire independent experts
16 for each individual utility, but to rely on some generic
17 treatments of these issues. And, in a similar fashion,
18 although obviously with considerably less resources, a
19 great deal more informality, the Transamerica Dealer
20 Valve intervenor's group, if you will, and I'm using that
21 term as my own creation, have actively shared information
22 and consulted about the availability of expertise on speci-
23 fic issues.

24 But we're not even at a stage where we know what
25 the most important problems with the Transamerica Dealer

1 Valve machines are. I mean, I know what Mike McGarry's
2 letter, two letters, letter and then subsequent notice about
3 specific problems that occurred that were the text of the
4 Board's sua sponte contention. But I don't know the univer-
5 sal problems with those machines, and I don't think we're in
6 a position to be charged with getting an expert to present
7 evidence on those at this stage.

8 I just don't think that that's, that can be fairly
9 relied upon as a basis for disposing of these issues. Now,
10 summary disposition is another question. You know, dis-
11 missal after hearing is another question. But I don't think
12 that is dispositive of the issue, whether the contention
13 itself must be admitted.

14 JUDGE KELLEY: If I understand you, as of now, today,
15 you don't have an expert.

16 MR. GUILD: I don't have somebody on retainer who has
17 prepared testimony to present on any of these issues. I
18 can't afford to, amount of money to have somebody standing
19 by ready to

20 JUDGE KELLEY: I understand, all I want is his name,
21 Joe Smith, automotive engineer, something like that, but
22 you don't have that, right?

23 MR. GUILD: Judge, I could get it if you gave me time
24 to do it, if that was the dispositive point. But I don't
25 believe it properly should be. I don't have automotive

1 engineer Joe Smith standing by here. I don't employ any
2 of those people and we could obtain them with some diffi-
3 culty, would intend to obtain that assistance. I don't
4 have a man with testimony available right now. It was highly
5 unfair to charge us with the duty to do that.

6 JUDGE KELLEY: Mr. McGarry?

7 MR. MCGARRY: Yes, sir. We think that the only issue
8 that's before the Board today is the status of the Board's
9 sua sponte engine and whether or not the substance of that
10 contention should take another form, i.e. an intervenor's
11 contention and be admitted in this proceeding.

12 Now, with respect to the Commission's order as
13 our letter of June 18 makes clear, applicant's position
14 is that the Commission's order disposes of the sua sponte
15 diesel generator issue. And we go further, it is our
16 view that the Commission takes the position that it does
17 not wish, that the Transamerica Dealer Valve diesel genera-
18 tor issue be litigated in Catawba. We make reference to
19 the second page of the order where the Commission takes
20 comfort in the fact that the Staff will not authorize opera-
21 tion of nuclear power plants with TDI diesels until problems
22 with those diesels have been addressed. And continues stating
23 that the Commission believes that such Staff action will
24 provide the appropriate means for considering the diesel
25 problems which have lead to the sua sponte adoption of this

1 issue.

2 Interestingly, they site the TMI decision and in
3 reading the TMI decision, there the Commission was faced
4 with similar situation. It did not involve diesel genera-
5 tors, but it involved repair of corroded steam generator
6 tubes, cracking and some high pressure nozzles and possible
7 distorting of auxiliary speed water spargers.

8 A technical problem involved cracking, corrosion,
9 impingement. By analogy, similar to the diesel generator
10 issue. And there, in a two page decision, the Commission
11 indicated that this matter could possibly be left to the
12 Staff.

13 MR. GRAY: But, this is Gray. I would interject, in-
14 dicate that I was involved in the TMI decision and in point
15 of fact, what happened there was that the Appeal Board sought
16 to raise sua sponte issues which were not, were unrelated
17 to the TMI restart proceeding and unrelated to the reasons
18 for which the Commission ordered that TMI remained shut
19 down until its concerns that caused it to shut down the
20 proceedings were resolved.

21 Among those concerns were not the matters or
22 issues which the Appeal Board sought to raise and which the
23 Commission ultimately said should be dealt with by the
24 Staff and not in the context of the TMI restart adjudicatory
25 proceedings. So I did want to point out that distinction.

1 MR. MCGARRY: I don't see the distinction so I'll
2 continue. I think the Commission there states unequivocally
3 the Commission agrees with the Appeal Board that these are
4 important issues which must be satisfactorily resolved
5 before the Commission makes a decision on the restart of
6 Unit 1.

7 However, it does not believe that these matters
8 should be adjudicated in this instance by the Appeal Board.
9 Each of the three issues can and will be dealt with by the
10 NRC staff and the Commission as part of the review of
11 uncontested issues which takes place prior to a decision on
12 restart.

13 Now, we think that's an important decision, and
14 obviously the Catawba Commission likewise thought it was an
15 important decision, because they referenced it in the
16 June 8th Catawba decision. So, we do take comfort in the
17 TMI decision as well as the language stated in this order.

18 To ~~cas~~ulize, we believe that the Commission has
19 said they think that the TDI diesel generator issue should
20 be left to the resolution of the Staff.

21 JUDGE KELLEY: Mr. McGarry, let me ask you now, the
22 opinion that we're looking at, the June 8 opinion, only
23 refers to our sua sponte contention that makes no reference
24 that I can see to the Palmetto and CESG contention that
25 we had either let in or shut out. Is that right?

1 MR. MCGARRY: It does not speak to the others, that
2 is correct.

3 JUDGE KELLEY: But you're arguing that there's sort
4 of a implicit message there, that this Board shouldn't get
5 into diesels in any way, shape or form?

6 MR. MCGARRY: I think that's what the Commission is
7 saying to you, if you read page 2, and then to read the
8 TMI decision.

9 JUDGE KELLEY: They certainly didn't say it very
10 clearly. TMI decision was about sua sponte, also, was
11 it not?

12 MR. MCGARRY; That is correct.

13 MR. CARR: Judge Kelley, this is Al Carr. If I could
14 interject just a second. I think one thing we have to keep
15 in mind here is the Commission did not describe this
16 Catawba matter with respect to TDI diesels in a vacuum.
17 The Commission knows full well what's been going on with
18 TDI diesels. Indeed, in the last month to six weeks,
19 the specific issue of TDI diesels has been before them at
20 least three times, at least once at Shoreham and I believe
21 twice in Grand Gulf.

22 So I think that, as I said, this has to be kept
23 in mind. They are fully aware of what's been going on with
24 the TDI diesels in various cases around the County.

25 MR. GUILD: Mr Chairman, this is Guild. The parties

1 never had an opportunity to even heard by the Commission.

2 JUDGE KELLEY: Excuse me, Mr. Guild. I just want to
3 keep this thing in some kind of sequence.

4 MR. GUILD: Yes, I'm sorry.

5 JUDGE KELLEY: Why don't you just save your point.
6 You'll get a brief reply opportunity. Mr. McGarry, have
7 you basically stated your position?

8 MR. McGARRY: No, sir. I wanted to then get to the
9 site specific.

10 JUDGE KELLEY: All right.

11 MR. McGARRY: Our initial point is the Commission has
12 said diesel generators need not be considered in the
13 Catawba proceedings. However, let's take your question
14 and expand upon that and that's our second argument.

15 Let's assume that right now the Board has before
16 it the motion to include as an intervenor contention the
17 substance of the Board's sua sponte contention.

18 JUDGE KELLEY: Well, why can't we do more than assume.
19 Don't we, I mean, he made the motion. You may be against
20 the motion, but he made the motion.

21 MR. McGARRY: Right, we now have a motion before us.

22 JUDGE KELLEY: Okay.

23 MR. McGARRY: And our response is that motion should
24 be denied and one then has to look to the five factors
25 because indeed it is a late filed contention. And we think

1 in a balance of the five factors, that the motion should be
2 denied.

3 First of all, could the motion have been, is there
4 good cause for the late filed contention? We maintain there
5 is not. We maintain that this issue could have been raised
6 by the intervenors months ago. I think that's clear.

7 The second point is, second and fourth points,
8 whether or not the matter could be raised in another forum
9 or whether or not there is an existing party who can repre-
10 sent the intervenor's interest. With all due respect to the
11 Appeal Board, we still maintain that the 2206 avenue is
12 available and we also maintain that the Staff's resolution
13 of the matter should be relied upon by the Licensing Board.

14 We recognize the Appeal Board's language in
15 ALAB 747, that's the Washington Public Power Supply
16 System case to the contrary. However, it is clear in NRC
17 case law that factors two and four are given minimum,
18 you know, given minimum weight. So if this Licensing
19 Board must focus upon is good cause, contribution and
20 delay. And those three we think weigh against the
21 intervenors.

22 We've already talked about good cause. With
23 respect to contribution, I believe this Licensing Board's
24 already made the inquiry. I think past contribution can
25 be weighed by the Board. We've made reference to such lack

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1 of contribution in our judgment in prior pleadings and we
2 rely upon them.

3 With respect to delay, now given the posture, if
4 one assumes that there is no diesel generator contention
5 before the Board, any admission of a diesel generator con-
6 tention will have the impact of delay. I think that's
7 clear.

8 I think those three factors which are indeed the
9 important factors, would weigh against the admission of
10 this contention.

11 JUDGE KELLEY: Let me ask you a couple of questions.
12 On the factor of good cause, why isn't Mr. Guild right when
13 he says I thought the sua sponte issue was in and I could
14 litigate the site specific matters under that, so I didn't
15 do anything until after the Commission decision. Why isn't
16 that a valid point?

17 MR. McGARRY: I'm sorry, sir. Can you repeat that?

18 JUDGE KELLEY: I understood Mr. Guild to say that he's
19 coming in now with this motion because up until he got the
20 Commission decision he thought he could litigate these
21 questions under the sua sponte contention. Why isn't that
22 good cause?

23 MR. McGARRY: Why isn't it good cause for Mr. Guild
24 to assume that since the Board had an issue that he could
25 sit back and not raise an issue? That's what we're saying.

1 JUDGE KELLEY: Well, I don't think it's quite what I'm
2 saying. He had, the sua sponte contention was before the
3 Board, right?

4 MR. McGARRY: That's right.

5 JUDGE KELLEY: Okay, so Guild said I'll litigate my
6 concerns under that issue and he sits back, if you want to
7 call it that, he doesn't file new contentions, because he
8 figures he can raise what he wants to raise under that.
9 And then on the 8th of June, it's gone. But that was only
10 10 days ago.

11 MR. McGARRY: Couldn't he have filed months ago, prior
12 to your ruling on the sua sponte issue, a contention in that
13 regard? I think the answer is yes. And if indeed he could
14 have.

15 JUDGE KELLEY: Our contention came in on the 27th of
16 February, correct?

17 MR. McGARRY: That is correct.

18 JUDGE KELLEY: So at least since the 27th of February,
19 he's had a basis for thinking that he could litigate some-
20 thing under that contention.

21 MR. McGARRY: That's correct, but let's go back in
22 history. We remember that this matter first came to Mr.
23 Riley's knowledge in the fall of 1983. I think there was
24 not an August memorandum, may have been in late summer.
25 The matter was raised in November or December of 1983, by

1 the intervenors on the record.

2 So this is something that goes back well before
3 the February 27th date.

4 JUDGE KELLEY: The February 27th contention is keyed
5 to your letter to the Board shortly before that contention
6 was let in, right?

7 MR. McGARRY: That is correct.

8 JUDGE KELLEY: Cracked cylinder heads and those other
9 things?

10 MR. McGARRY: That is correct.

11 JUDGE KELLEY: Along comes the Board and raises a
12 sua sponte contention so CESG and Palmetto think well, at
13 least they can litigate that and now they come along on
14 the 21st of May or of June because the Commission threw
15 that out on the 8th of June. Is that so late?

16 MR. McGARRY: Not if one is going to look at the 8th
17 of June versus the 20th of June. I'm saying that's not the
18 proper time frame to focus upon. I'm saying could they
19 have raised a contention similar to the sua sponte conten-
20 tion months ago, prior to February 27th. And I say yes.

21 MR. CARR: This is Al Carr again. Just as one point,
22 Your Honor. The issue of cracked cylinder heads was
23 nothing new with TDI diesels. We reported it to the Board
24 in February, when we detected it at Catawba.

25 JUDGE KELLEY: Yeah, right.

1 MR. CARR: But that issue had been generic to TDI
2 diesels for months. It was one of the first things that
3 came up in the Board notifications that began coming out in
4 the fall of '83 which intervenors were served with.

5 JUDGE KELLEY: Okay, let me just, one other question on
6 the question of delay. If things were geared up for a
7 hearing, discovery and a hearing on the site specific
8 issues under the Board's sua sponte contention until
9 the 8th of June, and if we're being asked to let in a con-
10 tention along those same lines, why does it cause any more
11 than the difference between June 8 and June 21 in delay?

12 MR. McGARRY: Well, again, if you then ask him the
13 question what does 10 days do to you or 11 days, obviously
14 we can't say it does that much. It may ultimately result in
15 10 or 11 days delay.

16 But I ~~am~~ again say the proper focus is if one were
17 to assume there's no sua sponte issue, then there's no
18 diesel generator contention. Now ask yourself, if there's
19 a diesel generator contention, will it result in delay.

20 I think the practical answer is yes, it is gonna
21 result in delay regardless. Regardless of whether it's a
22 sua sponte issue or regardless of whether it's a newly
23 admitted contention. Because if we try this case on
24 August the 6th, and we get it done in one week and unless we
25 can get some tight proposed finding schedule and unless the

1 Board can come out with a decision in a very prompt fashion,
2 I think that there's a prospect that this matter won't be
3 resolved until December, the end of December, to get to
4 the fuel load dates.

5 The fuel load date now is the first of July, is
6 that correct, Al?

7 MR. CARR: The 29th of June.

8 MR. McGARRY: The 29th of June. Now, that should
9 give us several months. But come about July, August, some-
10 time September, October, the plant's gonna need some addi-
11 tional authority. And litigation of diesel generators,
12 appears to us, to have every prospect of impacting that
13 additional authority.

14 JUDGE KELLEY: According to Mr. Owens' schedule,
15 if you got the authority, well, you've already got the
16 authority to load fuel and do precritical testing, that
17 would carry you to September the 14th, according to that
18 affidavit.

19 MR. McGARRY: That's right, that's right.

20 JUDGE KELLEY: All right.

21 MR. McGARRY: So I'm saying it'd come probably toward
22 the end of September, beginning of October, we'll need
23 some additional authority and that's if I'm correct in
24 my analysis of the various data points and the resolution
25 of the diesel generator issue, we may not have resolution

1 until December.

2 JUDGE KELLEY: Well, if we had a relatively short
3 hearing and by that I mean five days or less, in August,
4 that's pretty digestible, why couldn't the Board rule from
5 the bench?

6 MR. McGARRY: If we get to that, we'd welcome it. We
7 hope we don't get to that point.

8 JUDGE KELLEY: Okay. Go ahead, are you through, Mr.
9 McGarry?

10 MR. McGARRY: Al, I think that covers the points,
11 doesn't it?

12 MR. CARR: Yes, it does. If I could take just a
13 second, Your Honor, with respect to the arguments about,
14 that Mr. Guild made about not knowing where he stands
15 because he's unaware of what's been going on, let me just
16 say that on March 21st, we, Duke, met with the NRC staff
17 and outlined in some detail to them, with slides and a
18 spoken presentation, what problems we had found at Catawba,
19 both Catawba specific and generic and our tested inspection
20 program. That meeting was attended by a representative
21 of intervenors. So they were fully aware, at that time,
22 of what was going on.

23 In fact, we sent the handouts to the Board and
24 all the parties with our letter to the Board of March 27th.
25 Again, on April the 5th, by letter of Mr. Tupper to Mr.

1 Dents, we gave a synopsis and some further information on
2 our test and inspection program to the NRC staff, at their
3 request, and again copies of that document which set out
4 each of the problems that we had experienced through the
5 test program and a test and inspection program itself, set
6 that out in the document. Intervenors were served with a
7 copy of that document.

8 On June 1st, as I mentioned earlier, we served
9 a substantial document on the NRC staff, which essentially
10 set out the results of the test and inspection program on the
11 1A diesel. Intervenors were served with a copy of that
12 document. And finally, I would note that with respect to each
13 Board notification, and as we all know they've been
14 numerous, intervenors have been served with copies of
15 those.

T2 16 Some months, the intervenors may not have read
17 it, but it is there and they should have some idea of
18 whether they've got experts and where they intend to go
19 with their case.

20 JUDGE KELLEY: Okay, thank you. Mr. Gray?

21 MR. GRAY: This is Gray. In terms of the Commission's
22 order of June 8th as to the Board's sua sponte issue, the
23 Staff would view that order as for present times removing
24 the Board's sua sponte issue from the proceeding. We don't
25 read the Commission's order to preclude the Board from

1 raising the sua sponte issue by making affirmative findings
2 like 10 CFR 2.760 would require as well as the Commission's
3 decision in Commacheteak, that's CLOI 81-36, which indicates
4 a Board must make the affirmative.

5 JUDGE KELLEY: Excuse me, I'm afraid. I thought I
6 knew where you were going, and then I got lost. Could you
7 just restate that, please?

8 MR. GRAY: Yes, we don't view the Commission's June 8th
9 order as precluding the Board from attempting to raise the
10 diesel generator issue on its own.

11 JUDGE KELLEY: You don't?

12 MR. GRAY: Do not.

13 JUDGE KELLEY: What leads you to that conclusion?

14 MR. GRAY: What the Commission said in its order is
15 that the Board did not make the affirmative findings and
16 that it should terminate its considerations.

17 JUDGE KELLEY: When you say we didn't make an affirma-
18 tive finding, what are you referring to?

19 MR. GRAY: Those findings of

20 JUDGE KELLEY; To 27060?

21 MR. GRAY: 2760A, that there is a serious safety,
22 environmental or common defense security matter which exists.

23 JUDGE KELLEY: Well, let me just tell you for your
24 information. We most certainly did with respect, when you
25 view those problems that surfaced at Catawba against the

1 context of all the other things that are going on with
2 TDI diesels, but the Commission says we understand it is
3 we should have split off the site specific problems, looked
4 at them in a vacuum and decided whether they were safety
5 problems. Which indeed we didn't do, it never even
6 occurred to us to do that. But that's how we think we
7 read that.

8 That may not be controlling, but just as a point
9 of information that I think is how we see it.

10 MR. GRAY: I read the Commission's order which says
11 the Licensing Board did not find that these problems by
12 themselves.

13 JUDGE KELLEY: By themselves, that's a key phrase.

14 MR. GRAY: Constituted a serious safety matter for
15 purposes of 10 CFR 2760A.

16 JUDGE KELLEY: They're absolutely right about that.
17 We did not take, take the cracked cylinder head, for
18 example, we did not say gee a cracked cylinder head is a
19 big problem, whether it's a TDI or a Mercedes Benz or a
20 Ford. We simply said it was a big problem against the con-
21 text of all the other TDI stuff. That's what we had in
22 mind.

23 MR. GRAY: My point is that basically the Commission
24 is saying that the Board did not make the 2760A findings
25 with regard to the sua sponte contention and that being the

1 Commission believes that the Board should terminate its
2 consideration of that sua sponte issue, leaving the matter
3 to the Staff.

4 On the other hand

5 JUDGE KELLEY: I should just say I think you're dead
6 wrong. I mean, after all the Commission, they can't think
7 we're that dumb. We know we have to make a safety finding
8 under 2760 in order to raise a sua sponte issue. We cited
9 it, we made a finding and for them to say now we didn't
10 do it is I think stands the world on its head. Where it's
11 gonna take us on these other things, I'm not sure, but I
12 think you're wrong.

13 MR. GRAY: Well, my point was though, we believe that
14 the Board could, nevertheless, make the sua sponte findings
15 through the procedure of going to the Commission for auth-
16 ority to raise a sua sponte issue and we raise this itself.

17 JUDGE KELLEY: In the space of that opinion, you think
18 we could turn around now, make a safety finding and send
19 it back up?

20 MR. GRAY: Yes, sir.

21 JUDGE KELLEY: Well

22 MR. GRAY: That is not to say that the Commission
23 would view it favorably. But we cannot see that this
24 Commission order precludes that.

25 JUDGE KELLEY: Well I can, but go ahead.

1 MR. GRAY: In any event, that is assessed view of that
2 Commission order. As to the intervenor's three motions
3 here, the first two renewing the request for admission of
4 the contentions previously filed. As to those, there is
5 simply nothing new here that would warrant the Board's re--
6 considering admission of those contentions. They've been
7 ruled on, the late filing criteria were weighed and balanced
8 and the Board decided those contentions should not be
9 admitted. The mere fact that the Commission rejected the
10 Board's sua sponte issue has no bearing on a Board's
11 previous action on those contentions. And there is just no
12 reason to revisit that now.

13 JUDGE KELLEY: But you're saying the Commission's
14 order of June 8 doesn't speak to those one way of the
15 other, right?

16 MR. GRAY: That's correct.

17 JUDGE KELLEY: Okay, go ahead.

18 MR. GRAY: As to the third motion in which the inter-
19 venor seeks to now raise the Board's sua sponte contention
20 which the Commission has just rejected, in fact, the ad-
21 mission of that contention needs to be determined based on
22 a weighing of the late filing criteria.

23 The Staff would essentially agree with the appli-
24 cants that the late filing criteria would appear to weigh
25 against admission of that contention. Admittedly, the

1 intervenors reliance on the Board's sua sponte contention
2 may have been a factor since February and the intervenor's
3 not raising that contention themselves.

4 But, there was a substantial amount of informa-
5 tion on problems with diesel generators, the TDI diesel
6 generators, generally available for some period of time
7 since last fall and there is no good cause to delay since
8 that time to raise the issue now themselves, the Staff's
9 view.

10 JUDGE KELLEY: Why do you say that in light of the
11 fact that the specific problems tha Catawba didn't come to
12 the Board and the parties until sometime in February, I
13 think.

14 MR. GRAY: Yes, as I understand, it was sometime in
15 February.

16 JUDGE KELLEY: Whereupon this Board raised a sua
17 sponte issue.

18 MR. GRAY: But, nevertheless, there was information
19 available on generally the types of problems, some of which
20 have not been found with the Catawba diesel generators.
21 Sufficient in the Staff's view that a more specific and
22 site specific contention could have been raised back some-
23 time ago.

24 JUDGE KELLEY: Are you saying that these problems should
25 have been raised sometime ago, as you put it, because there

1 was knowledge on behalf of the intervenors, that the par-
2 ticular problems we eventually raised sua sponte apply to
3 Catawba?

4 MR. GRAY: Could apply to Catawba.

5 JUDGE KELLEY: Oh, you're not contending that there
6 was any site specific knowledge?

7 MR. GRAY: As far as we know, prior to the time of
8 the applicant's Board notification on specific problems
9 identified for the very Catawba diesel generators, there
10 was not that specific information available.

11 JUDGE KELLEY: So are you saying they should have
12 come in prior to February with some kind of laundry list
13 of specific things, gleaned out of various staff reports
14 and alleged they applied to Catawba?

15 MR. GRAY: Alleged, the answer is yes, alleged that
16 Catawba, having utilizing the same sort of machines is
17 likely to have the same sort of problems which need to be
18 explored and addressed.

19 JUDGE KELLEY: Go ahead.

20 MR. GRAY: As to the contributions to the record,
21 there are Appeal Board decisions that say for late filed
22 contentions, a bill of particulars on the contributions
23 must be presented. Mr. Guild indicates relying on Point
24 Beach, I believe, well, or, other cases that a party can
25 make a case defensively without the need to present

1 affirmative evidence

2 That is true as to the party's method of addressing
3 contentions and issues in a proceeding. But the matter of
4 needing to demonstrate contribution of the record, or ability
5 to contribute arises not in the context of how a party
6 makes its case on admitted contentions, but on the context
7 of whether a contention filed late should be admitted.

8 And there the Appeal Board has said that a par-
9 ticular and specific showing on the contributions that
10 can be made must be demonstrated. As far, the same circum-
11 stance with regard to this Catawba site specific contention,
12 as we were with regard to the prior contentions which the
13 intervenors submitted. That is, there is no indication,
14 other than that the intervenors would appear at hearing
15 and cross-examine and helped to develop a record in that
16 regard, no indication that the intervenors might make sort
17 of a contribution that the Appeal Board appears to be
18 looking for in the way of affirmative evidence, expert
19 testimony.

20 So as Staff, you, that factor would weigh against
21 admission of the contention at this point.

22 JUDGE KELLEY: Could you get a little more specific
23 on this contribution point? We had thought it important
24 that we have an expert on these issues and you'll recall
25 the crank shaft problem. We dismissed that contention for

1 lack of an expert. Do you think that was correct? Do you
2 think we should take the same approach here?

3 MR. GRAY: Yes, that would be one approach, the inter-
4 venor's ability to present an expert who may, is qualified
5 to address the issues. I would, I guess, go back to the
6 various Appeal Board decisions which have said that a bill
7 of particulars as to contribution should be presented,
8 such as identification of experts who will be able to
9 make an affirmative contribution to the record, identifi-
10 cation of, I believe, expert cross-examiners who would
11 be able to fully examine the experts of other parties and
12 that sort of thing.

13 As to the two factors two and four on availability
14 of other parties, or other forum

15 JUDGE KELLEY: Do you think they're particularly
16 important?

17 MR. GRAY: The Appeal Board has told us that they
18 are of relatively lesser importance than the other factors.
19 In any event, though, the staff would disagree with the
20 applicants that the staff provide either another forum
21 or through 10 CFR 206, I'm sorry, another forum there or
22 another party who could represent the intervenor's interest
23 here.

24 The Appeal Board has, I believe, made it fairly
25 clear that, in fact, the Staff may be considering a problem

1 does not mean the Staff would represent the intervenor's
2 interest. And the fact tha the 10 CFR 2.206 procedure
3 for requesting show cause order is available, does not
4 provide another forum.

5 So, those two factors, I believe would weigh in
6 favor of admission in this late filed contention, but as
7 the Appeal Board somewhere has pointed out, they're to be
8 given relatively less weight compared to the other factors.

9 Finally, on the delay factor, I believe that that
10 needs to be examined relative to where we stand today.

11 Where we stand today is that there is no diesel generator
12 issue in the proceedings. Clearly, were one now to be
13 reinserted into the proceedings, there would be a broadening
14 of the issues as it stands. Relative to the way it stands
15 now and a likely some further delay in the proceeding.

16 On the other hand

17 JUDGE KELLEY: Would you identify that, please?

18 What delay?

19 MR. GRAY: Pardon?

20 JUDGE KELLEY: What delay do you envision?

21 MR. GRAY: As it stands today, there is no diesel
22 generator issue.

23 JUDGE KELLEY: I understand that.

24 MR. GRAY: Proceeding, as it stands today, presumably
25 the Licensing Board's decision, it is about the issue as

1 well as the decision that the Emergency Planning Licensing
2 Board will issue sometime, as I understand it, likely near
3 the end of September, would constitute the adjudicatory
4 decisions in the proceeding.

5 If there were to be, now, I, another diesel
6 generator contention inserted into proceedings requiring a
7 litigation, first of all, this Licensing Board's upcoming
8 decision and the Emergency Planning and Licensing Board's
9 upcoming decision would not be the vast and closing deci-
10 sions in the proceeding. But there would be the need for
11 first of all further litigation and an additional Board
12 decision.

13 And, obviously, that will take sometime.

14 JUDGE KELLEY: What kind of time do you think it will
15 take? I'm not with you on this, so far yet. I don't see
16 where you've shown any delay whatever.

17 MR. GRAY: Relative to today, where there is no issue
18 on diesel generator's in the contention?

19 JUDGE KELLEY: That's correct.

20 MR. GRAY: In the proceeding?

21 JUDGE KELLEY: That's correct. I'm assuming that if
22 we were to let in the Board's sua sponte contention as an
23 intervenor contention, there could be a hearing on it some-
24 time in August.

25 MR. GRAY: Yes.

1 JUDGE KELLEY: That's my assumption.

2 MR. GRAY: Yes.

3 JUDGE KELLEY: And then what's, I don't understand your
4 problem. Your delay hypothesis, I don't understand it.

5 MR. GRAY: Is there been a contemplation that the
6 Board would issue a further initial decision covering the
7 diesel generator issue?

8 JUDGE KELLEY: I assume so.

9 MR. GRAY: And it's the Board's contemplation, also,
10 that that could be issued along about the same time as
11 the Emergency Planning Decision from the other Board
12 which, as I understand it, is projected for possibly some-
13 time in September? If that is possible, then there would
14 be no delay.

15 JUDGE KELLEY: If you're assuming that we would have
16 to go through the whole exercise with a hearing followed
17 by proposed findings and reply findings and all the rest
18 of that, yeah, that sounds like a delay.

19 If on the other hand you can hear some issues on
20 these diesels without building some massive record, then
21 it seems to me that you wouldn't necessarily have to go
22 through all of that, don't you agree?

23 MR. GRAY: If all that could be done, yes. If the
24 Board could rule from the bench, for example.

25 JUDGE KELLEY: Yeah.

1 MR. GRAY: Then it could be accommodated such that
2 the proceeding as a whole might not be delayed. Clearly,
3 however, relative to as the proceeding stands today, with
4 no diesel generator issue in it, admitted and pending for
5 litigation, admission of this would broaden the issue.

6 DR. PURDOM: Judge Kelley, this is Purdom, could I be
7 excused for a couple of minutes, be right back on?

8 JUDGE KELLEY: Sure.

9 MR. GRAY: Overall then, the Staff would view this
10 as probably weighing somewhat against admission of the
11 contention.

12 JUDGE KELLEY: And what's your bottom line?

13 MR. GRAY: Late filing factors overall weigh against
14 admission of the contention.

15 JUDGE KELLEY: Okay. Judge Foster?

16 DR. FOSTER: Yes.

17 JUDGE KELLEY: Any questions?

18 DR. FOSTER: No. I don't, I have one question relative
19 to the Appeal Board decision, in the WPPSS number 3 case,
20 where there was a required list of particulars for an
21 expert. I was trying to locate that decision, but it occurs
22 to me that there was a clause in there that said it was not
23 completely, one should not completely rule out the aspect
24 of cross examination. I couldn't find that while I'm sitting
25 here at the desk, I couldn't locate that particular decision

1 but it seemed to me one of the Appeal Board members tacked
2 that addition on to that decision.

3 DR. PURDOM: Judge Kelley, this is Purdom, I'm back
4 on on.

5 JUDGE KELLEY: Okay, fine.

6 DR. FOSTER: I'll just bring that up as a question.

7 JUDGE KELLEY: I'm sorry, have you got a question now?

8 DR. FOSTER: No further, no.

9 JUDGE KELLEY: Okay. Walt, do you have questions?

10 -- I don't have any questions.

11 JUDGE KELLEY: Mr. Guild, do you want a sort of brief
12 opportunity to respond?

13 MR. GUILD: Yes, sir.

14 JUDGE KELLEY: Okay, but I would say, the point's
15 been pretty well chewed over on both sides and I think
16 you should do it in a few minutes, go ahead.

17 MR. GUILD: At the foundation we believe that the
18 results of dismissing these contentions and leaving no issue
19 in here just cannot square with due process of law. I
20 don't care how arcane a legal maneuvers are that get us to
21 this point, if the result of our diligence and pleading
22 these issues, beginning, going as far back as December 5th,
23 a stack of paper that exists on this stuff in terms of
24 legal pleadings from our side, promptly if we got new
25 information, trying to respond to every concern this Board

1 had, every concern the Appeal Board had and now the last
2 machination of all an that of the Commission.

3 If it produces a result that we're not entitled
4 to have these issues heard, that process cannot square with
5 what the Constitution mandates in terms of the right of a
6 party to be heard before this agency. That's the bottom
7 line. We think that interpreting any Commission authority
8 to the contrary, will run afoul of the fundamental protec-
9 tions.

10 We don't think you can read it that way and we
11 don't think that when you consider Point Beach which says
12 just that any further result than allowing in the site
13 specific consideration should be the bottom line.

14 The Commission issued its decision, they didn't
15 give any notice to the parties. The matters were not
16 briefed, there was no appearance or opportunity to be heard
17 by intervenors or by applicant, for that matter, it was
18 simply pursuant to a sua sponte rule, they reached down,
19 they did what they did.

20 But we think to read into that decision, a deci-
21 sion which implicates disposition of anything other than
22 what is explicitly set forth in their contravenes is all
23 right for due process. We weren't heard, they certainly
24 couldn't decide on matters that weren't presented to them.

25 Secondly, with respect to the old contentions and

1 the ease with which the applicants and the NRC staff dispose
2 of any consideration of those contentions. It should be
3 noted that this Board's treatment of those old contentions
4 was on the basis of the specific considerations that were
5 before it and that are reflected in the decisions that it
6 entered. For example, the Commission's treatment of the
7 first set of contentions, it was specifically found that
8 on its view as to the inappropriateness of the treatment
9 of what it called a generic issue contained in those
10 contentions, in this individual proceeding.

11 And we agree with the Licensing Board's concerns
12 about that and supported that view on referral. I'm
13 quoting specifically page 7 of the Board's February 23rd
14 order. In addition, we were also strongly influenced by
15 the fact that the TDI quality assurance and operational
16 performance issues are generic in the sense that they
17 potentially effect some 15 different buildings.

18 That we lost those issues, although the Board
19 very explicitly said that there was a close question. We
20 maintain because the view was they were generic and not ap-
21 propriately tried in this case. We tried to remedy that
22 through amendment and revision of those contentions and in
23 the subsequent order that dismissed the revised, rejected
24 the revised contention, this Board very explicitly said
25 what it was interested in trying in this case were the site

1 specific concerns that were reflected in the report of
2 problems made by applicant.

3 And this Board specifically, in rejecting the
4 revised contentions by intervenors, amended its own original
5 sua sponte contention so as to capture all of those problems.

6 It's clear then we all have a target, and that
7 target that we had before us when we agreed on a suspension
8 of discovery we that we could finish emergency planning,
9 a hearing date in this case, and when we move forward towards
10 that hearing date, where are the site specific concerns
11 about that exist at the Catawba case. And on the basis of
12 those site specific concerns, is applicant's testing and
13 inspection program adequate to assure that machines don't
14 have problems that exist else where and therefore can
15 operate safely.

16 We believe that serious concerns exist, they
17 won't go away, simply because of the legal maneuvers
18 that have occurred so far. And we think we as a party
19 that, you know, have to live with this plant, are entitled to
20 be heard on the question of the resolution of those safety
21 concerns, not simply to leave it to the NRC staff in
22 Washington.

23 The thing that's new here with respect to those
24 first two contentions, then, is the fact that the NRC, the
25 Commission itself, has entered its decision. That's what's

1 new about raising the two sets of initial contentions is
2 that the Commission's changed the ball game. As of
3 February 27th, we had before us, the Commission's, the
4 Licensing Board's sua sponte contention that joins the
5 issues of site specific testing and inspection problem.
6 And I don't think there's any way, shape or form you can
7 charge this party with a duty to go beyond the Board's
8 admitted sua sponte contention and file a duplicative
9 redundant contention of our own. If we filed one, it
10 would have been laughed out of the hearing. I mean, we
11 would have heard from applicants, you know, it's redundant,
12 superfluous, cumulative and shouldn't be considered because
13 the Board already has such a thing.

14 We think we've been diligent in doing everything
15 we could to raise what site specific issues, see whatever
16 site specific issues were before or were known to us were
17 included for litigation.

18 Now, the ~~last~~ point I want to make is with respect
19 to the effect of authority represented by this WPPSS
20 decision. Let's stand back a moment. Originally when this
21 Board considered our first diesel generator complaint,
22 it said explicitly, these contentions or these contentions
23 in some form, in three aspects, all three of them, would
24 be admitted as contentions on the basis of specificity and
25 basis and whatever other legal standard exists for initial

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1 admission of contention.

2 Plus for the question as to timeliness, all
3 right. All this debate, then, flows from the fact that
4 these contentions were not filed at the beginning of this
5 proceeding, at the time when intervenors were charged with
6 filing a supplement raising contentions. Now, we've been
7 through the mill with Catawba on appeal and Catawba at the
8 Commission about the late filing rule.

9 But the point I want to make right now is this,
10 if what becomes dispositive is intervenors employment of an
11 expert under the interpretation of the WPPSS decision that
12 applicants and the NRC staff urge, and that results, and
13 it results in a dismissal of these contentions from the
14 proceeding, then it makes a cruel joke of the Commission's
15 assurances that we will only be charged with the effects
16 of our own conduct on the delay of the that flow neces-
17 sarily from our actions.

18 Such a result contrary to that principal just
19 flies in the face of due process of law. The bottom line
20 is you can't contort the late filing principal in such a
21 way that the effect here would be to throw out these sub-
22 stantive issues solely because we didn't raise them at the
23 beginning of these proceedings. And I submit to you that
24 it is impossible for us to do that and this Licensing
25 Board's observations about the Catch-22 effect of doing that

1 that are manifestly applicable to such a result. WE don't
2 think it's possible, we don't think it's fair, makes sense,
3 and we don't think it conforms with the due process of the
4 constitution.

5 We urge that this Board admit the contention and
6 proceed on the present schedule for litigation through the
7 first week in August.

8 JUDGE KELLEY: Okay. Let me ask my colleagues, Judge
9 Foster, Judge Purdom, any further comments or questions?

10 JUDGE FOSTER: This is Foster, I have one further
11 question for the staff. That is, if there's any further
12 information on when the Staff expects to come out with
13 its, I'll call it a supplemental SER for the Catawba
14 emergency diesel generators?

15 MR. GRAY: This is Gray. Checking, as far, excuse
16 me, my checking has indicated that the Staff SER, still
17 presently on line for issuance about mid-July.

18 JUDGE FOSTER: All right, thank you.

19 JUDGE KELLEY: Walt? Any questions? Judge Purdom?

20 JUDGE PURDOM: Yes.

21 JUDGE KELLEY: Any questions?

22 JUDGE PURDOM: No questions.

23 JUDGE KELLEY: Okay. Gentlemen, we've heard you all
24 now on this issue. We indicated earlier that we thought we
25 might be in a position to get our partial initial decision

1 out tomorrow. Let me just say in that regard a couple of
2 things. We may not make it. I think there's a good chance
3 we will, but we just might not get it done. And what
4 we've just been talking about here, isn't gonna speed it
5 up any, obviously, with writing and renumbering pages and
6 all the rest.

7 And having said all that, and any expectation that
8 maybe we can issue our opinion tomorrow, we will like to
9 line this up. We might give you a call when we're ready
10 to release it and then what we would propose to do would
11 read you just a very brief summary over the phone so you
12 know what the bottom line is and then you can make whatever
13 arrangements you want to make to pick up a copy for
14 yourself.

15 I dare say the normal downtown service copies
16 won't be out until, well, they wouldn't even get it out
17 on Monday, it's long. But, you can come over here and pick
18 one up if you wish. Maybe Gap or somebody from there could
19 come up here, Mr. Guild, if you want to get one that way.

20 MR. GUILD: All right, sir.

21 JUDGE KELLEY: So, what I would propose is giving you
22 a call and we'll set a time, tell you what we've basically
23 done and that you can come and get an opinion and then we
24 will reflect in some fashion the motion that we've just
25 heard. Don't necessarily expect an elaborated rationale

1 for obvious reasons. But we have to speak to it one way
2 or the other. It may be not very much more than a bottom
3 line.

4 We could, I suspect, in addition, if we take that
5 approach, we could tell you when we call you up tomorrow
6 some of our reasoning, I don't know if I can get a reporter
7 or not, but I can spell it out a little bit more and then
8 if we need to, we can elaborate somewhat later. Possibly
9 we'll be able to come to grips with this and put it up in
10 the opinion so that that won't be necessary.

11 Would it be possible, and I'm assuming you're
12 interested in hearing the results, would it be possible for
13 us to give you a call tomorrow, say around 3:00?

14 MR. GUILD: Around what o'clock, sir?

15 JUDGE KELLEY: 3?

16 MR. GUILD: Yeah, I'll be here. Ask for Mrs. Clarke.

17 JUDGE KELLEY: Somebody from the Staff want to tune
18 in?

19 MR. GRAY: Yes, sir, I will, Mr. Gray, will be out of
20 town tomorrow and I would ask that the call go to Mr. Jack
21 Goldberg on 27619.

22 JUDGE KELLEY: Just a moment. 27619?

23 MR. GRAY: Yes, sir.

24 JUDGE KELLEY: Mr. Guild, could we reach you?

25 MR. GUILD: Yes, sir, in Columbia, please.

1 JUDGE KELLEY: What's the Columbia number again?

2 MR. GUILD: 803-254-8132.

3 JUDGE KELLEY: 803-245-8132.

4 MR. GUILD: Right.

5 JUDGE KELLEY: Around 3. Okay, well, we'll attempt
6 to do that. I'll say just once more, you've all wrestled
7 with these big documents and alot of references and foot
8 notes and stuff. We just may not get done tomorrow, in
9 which case there'll be some delight, but we'll try to
10 get it done tomorrow.

11 I think that's all we have, any questions from
12 Mr. McGarry:

13 MR. McGARRY: No, sir.

14 JUDGE KELLEY: Mr. Guild?

15 MR. GUILD: No, sir.

16 JUDGE KELLEY: Mr. Gray?

17 MR. GRAY: No, sir.

18 JUDGE KELLEY: Okay, could I ask my colleagues to
19 just hang on for a second, and we'll say good bye to the
20 rest of you. Thank you.

21 Walt?

22 JUDGE PURDOM: Yes?

23 JUDGE KELLEY: You there?

24 JUDGE PURDOM: Yes.

25 JUDGE KELLEY: And Dick?

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JUDGE FOSTER: Foster's still here, yes.

JUDGE KELLEY: Okay. How about if we, off the record.

ClearCase
Very Cotton

CERTIFICATE OF PROCEEDINGS

This is to certify that the attached telephone conference
before the NRC COMMISSION

In the matter of: Duke Power Company
Docket No. 50-413 OL
50-414 OL
(Catawba Nuclear Station
Units 1 & 2)

Date of Proceeding: Thursday, June 21, 1984

Place of Proceeding: Bethesda, Maryland

TOM BERRY

Official Reporter

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