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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '84 SEP 13 A9:30

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

APPLICANTS' RESPONSE TO BOARD ORDER OF SEPTEMBER 4, 1984

In its Memorandum and Order of September 4, 1984 (pp. 7-8), the Atomic Safety and Licensing Board ("the Board") acknowledged the submittal of the Applicants' August 3, 1984 and the NRC Staff's August 31, 1984 reports on that portion of the "foreman override" issue as to which the record is still open, and directed the parties to submit their views on "what action should be taken next" on this remaining issue. The position of Duke Power Company, et al. ("Applicants"), which requests that the record be closed on this matter, is set forth below.

I. Introduction

Resolution of the Welder B and related foreman override concerns is the only issue remaining open before this Board and as such, is the only remaining obstacle to the authorization of a low-power operating license for the Catawba Nuclear Station.[1] June 22, 1984 Partial Initial

[1] In addition to the condition relating to the Welder B concerns, the Board also conditioned its order in its (footnote continued)

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Decision at 271-72.

In its Partial Initial Decision, the Board noted that Applicants were then conducting an extensive investigation of the foreman override concerns raised by an individual identified as Welder B,[2] and that the NRC Staff would

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June 22, 1984 Partial Initial Decision upon "demonstration to this Board of reasonable assurance that the emergency diesel generators at the Catawba Station can perform their function and provide reliable service with reference to the concerns encompassed by the Intervenors' late contention admitted June 22, 1984." Partial Initial Decision at 272.

Applicants submit that this condition has been met, since in its August 22, 1984 Order the Board dismissed Intervenors' diesel generator contention and cancelled the evidentiary hearing scheduled on that contention. See also the Board's September 4, 1984 Memorandum and Order. The Board found in both its August 22, 1984 Order (at 1-2) and its September 4, 1984 Order (at 7) that Palmetto Alliance and CESG had not demonstrated their ability to make a significant contribution to the record on the highly technical diesel generator contention, despite the Board's repeated direction that a failure to do so would result in the dismissal of the contention. See Partial Initial Decision at 273, n.50; July 20, 1984 Memorandum and Order at 5; Tr. 12,815. Given the dismissal of this contention, there is no longer any diesel generator issue over which the Board should retain jurisdiction. In this regard, the Board pointed out in its September 4, 1984 Memorandum and Order (p. 7) that the "safety of the Catawba diesel generators is now a matter for Staff resolution."

The Board's Order was also subject to Applicants' making certain minor procedural changes related to their Quality Assurance program. The Board did not retain jurisdiction on this issue, ruling instead that the conditions were to be met "to the satisfaction of the Staff." Partial Initial Decision at 271.

[2] This Board has defined "foreman override" as actions
(footnote continued)

subsequently review the findings of this investigation and submit its own report to the Board. In light of the then-pending investigations, the Board held the record open on that issue "for the purpose of reviewing reports from the Applicants and Staff on their resolution of these concerns." Partial Initial Decision at 237-38. In addition, the Board conditioned its order authorizing the Director of Nuclear Reactor Regulation to issue a low-power operating license for Unit 1 of Catawba upon Applicants' demonstration to the Board of "a reasonable assurance that the 'Welder B' and related concerns . . . do not represent a significant breakdown in quality assurance at Catawba." Id. at 272.

As discussed in section III, below, Applicants believe that this condition has been satisfied by the submittal of the Applicants' and the Staff's reports. These reports conclusively demonstrate, without further evidence, that the Welder B and related foreman override concerns investigated by both the NRC and Duke do not represent a "significant breakdown" in quality assurance at Catawba. The reports thus satisfy the criteria established by the Board for closing the record on this remaining issue. Accordingly, Applicants take the position that the foreman override issue warrants no

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by supervision that "resulted in defective work or a violation of QA procedures." Partial Initial Decision at 238.

further attention on the part of this Board; that this Board should close the record on this single remaining issue; and that this Board should remove the sole remaining condition to its order (i.e., the satisfactory resolution of the Welder B issue), which would have the effect of enabling the Director of NRR to issue a low-power operating license for the Catawba Nuclear Station.

The "reasonable assurance" provided by these two reports that the "Welder B" and related foreman override concerns do not reflect a "significant breakdown" in QA at Catawba is, in itself, sufficient to warrant the Board's promptly closing the record on this remaining aspect of Contention 6. Applicants also demonstrate herein, however, that due process has been satisfied by allowing the parties this opportunity to comment on the disposition of this remaining Board issue (see section IV, below); and that other factors such as the interests of administrative finality and the cumulative nature of the material in the Applicants' and the NRC Staff's reports (see section V below) argue compellingly against allowing either discovery or additional hearings on these foreman override allegations.

Still another important factor to be considered is the need for timely resolution of this one remaining open issue. Applicants are presently proceeding under the authority of a license, issued July 18, 1984, which

authorizes only the loading of fuel and conduct of certain pre-critical testing activities. As noted in the attached affidavit of Warren H. Owen, Duke Power Company Executive Vice-President of the Engineering, Construction and Production Group, Applicants' current schedule calls for achieving initial criticality on October 17, 1984; thus additional licensing authority is required by that date.3/ While Applicants would normally have moved for the issuance of a 5% license,4/ we note that in this instance the Board's June 22, 1984 Partial Initial Decision has already authorized the issuance of such a license by the Director of NRR upon the satisfaction of the two conditions stated therein. Partial Initial Decision at 271. Since it is our position in this document that both of these conditions have now been met and that the license may now be issued, the filing of a separate motion requesting issuance of a low-power license appears

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3/ Resolution of this issue by the Board, however, is necessary prior to that date in order to allow the NRC Staff to process and issue the license in a timely fashion.

4/ In the May 15, 1984 "Stipulation Among The Parties," Applicants indicated (p. 2) that should it become necessary, they intended to seek "further authority from this Board with respect to achieving criticality and low-power testing," and that they would file an appropriate motion with the Board and parties seeking authorization of such activities. The subsequent issuance of the June 22, 1984 Partial Initial Decision makes such a motion unnecessary at this time.

redundant and unnecessary. Applicants will of course submit such a motion if time constraints make it necessary to do so.

II. Background

The in camera concerns initially raised by Board witness Sam Nunn included an allegation of "foreman override." The Board carefully noted that this concern, as well as the other in camera concerns, were not separate contentions; rather, "they were merely examples of matters that fell within the broad scope of Contention 6." Partial Initial Decision at 17. As discussed below, the "Welder B" and related foreman override concerns which are the subject of the Applicants' and the Staff's reports are only a narrow aspect of the in camera issue dealing with foreman override.

At the Board's request, the Staff began investigating the "foreman override" allegations raised by one of the in camera witnesses during the safety hearings. Staff Exh. 27 at 1. (NRC Inspection Report 50-413/84-03 and 50-414/84-03 became Staff Exh. 26 and the accompanying "Summary of Investigative Interviews" became Staff Exh. 27. These were served on the Board and the parties January 20, 1984). In following up on these concerns, the Staff conducted personal interviews with numerous Duke employees to determine whether foreman override was a broad generic problem at the Catawba site. These interviews revealed

that "there is not a pervasive problem with the issue of foreman override and . . . there have been only isolated incidents involving this issue." Staff Exh. 27 at 2. (See also NRC Inspection Report 50-413/84-31 and 50-414/84-17 at 3, which was served on the Board and parties on April 26, 1984.) Indeed, the Staff stated:

> Under the subject of foreman override, the inspector found that while some individuals may have held their foreman in relatively low esteem in terms of qualification and ability to manage the crew this was not pervasive and may have been a personality problem. The vast majority of the craft interviewed spoke very favorably of their past and present field supervisors (foremen).

Staff Exh. 26 at 5. However, during these interviews an individual referred to as "Welder B" indicated possible irregularities involving one particular foreman. Staff Exh. 27 at 2. See also the Staff's April 26, 1984 Report at 3.

Accordingly, after informing the Board that foreman override was not a pervasive problem, Region II then focused its inspection more narrowly on the specific welding foreman named by Welder B and on this foreman's crew. The Staff summarized the findings of this round of interviews as follows:

> During the numerous interviews conducted by the Region II Staff, each interviewee was specifically asked if he had ever experienced any problems regarding foremen directing them to work out of procedure or to engage in work activity in violation of procedure. The interviewees were primarily from the welding and pipefitters craft with several foremen and quality control inspectors also interviewed.

> Almost all had worked on various crews and had worked for several foremen during their employment at Catawba. Only Welder B and individuals subsequently interviewed in connection with the "Welder B issue" identified problems they experienced and this was only with the second shift welding crew foreman. No other information was developed that indicated there were problems involving other foremen and the Region II Staff concentrated inspection efforts on the second shift welding crew.

April 26, 1984 Staff Report at 3-4.

During March, 1984, Duke was informed of the various issues raised during the NRC Region II Staff's inquiry[5/] and promptly began its own investigation into these issues. The Staff noted in its April 26, 1984 Report that it was identifying two unresolved action items (relating to fabrication of socket welds and unauthorized removal of arc strikes) as a result of these allegations.

On August 3, 1984, Applicants submitted "Duke Power Company's Investigation of Issues Raised by the NRC Staff in Inspection Report 50-413/84-31 and 50-414/84-17" (the

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5/ These allegations were characterized by the Staff as follows:

> 1) welders working on stainless steel sockets may have violated interpass temperatures, 2) arc strikes may have been removed from a valve without proper documentation, 3) socket welds may have been made out of procedure in that one side of the socket was completely welded and then the other side welded, 4) the lead man on the crew reportedly acted as a 'look out' for licensee QC inspectors when welding procedures were being violated, 5) welders perceived the foreman to be applying pressure for quantity, and 6) the foreman allegedly instructed welders to weld without being in possession of proper welding documentation.

April 26, 1984 Staff Report at 2.

"Duke Report"), which was served on the Board, the parties and NRC Region II. This report addressed all of the allegations raised in the Staff reports. The Duke report also addresses additional employee concerns raised during Duke's investigative interviews. Some, although not all, of these concerns related to foreman override; accordingly, Applicants' report addresses both the foreman override allegations and various other technical concerns that are not before this Board.

On August 31, 1984 the NRC Staff submitted to the Board and parties its final report on the Welder B foreman override issue, Inspection Report 50-413/84-88 and 50-414/84-39 (the "August 31 Staff Report"), wherein it closed out the two remaining open items and thus brought this matter to a satisfactory conclusion.

The overall effect of these reports -- the several by the NRC Staff and Applicants' August 3 report -- is simply to confirm the Board's findings on foreman override set forth in the June 22, 1984 Partial Initial Decision. In other words, these reports confirm that there is no evidence foreman override is a widespread problem at Catawba, and thus support the Board's finding that this issue should be resolved in Applicants' favor. See Partial Initial Decision at 238.

III. The Applicants' and the Staff's reports provide reasonable assurance that the Welder B concerns do not reflect a significant breakdown in quality assurance at Catawba

As previously noted, the Board had left the Welder B matter open for the limited purpose of determining whether such presents a significant breakdown in quality assurance at Catawba. Applicants submit that the Duke Report conclusively demonstrates that the "foreman override" concerns raised by Welder B and several other employees at Catawba do not reflect a significant breakdown in quality assurance. Nor do such concerns indicate the existence of "systematic deficiencies in plant construction" or "company pressure to approve faulty workmanship," which were the focus of Contention 6. On the contrary, Duke's extensive investigation, which included interviews with 217 individuals representing approximately 10,000 work-years of experience on over one million work items at Catawba, found that high quality construction standards are being met at Catawba and that "foreman override" is not a problem at the site. Duke Report at 1-2.

While it is true that during these interviews a few allegations of foreman override were made by Duke employees, two points (both of which are discussed in detail in Applicants' Report) should be made with respect to these allegations. First, no alleged instance of foreman override resulted, or would have resulted, in work which was deficient in any way. Second, these few

allegations provide no evidence that there exists, or has existed, at Catawba a pattern of pressure by supervision on craftsmen to violate procedures, to perform less than satisfactory work, or to sacrifice the quality of work in order to meet production schedules.

As explained in the Duke report, the latter conclusion is bolstered by two factors. The first is the extremely small number of supervisory personnel implicated during Duke's investigation and the small number of incidents alleged. In interviews with 217 employees, less than a dozen specific instances of possible foreman override were mentioned, of which fewer than six incidents could be even partially substantiated. Most of these incidents involved one welding foreman, although three other supervisors were also named in connection with isolated events. Each of the several isolated incidents of foreman override that appear to have occurred reflected procedural violations which every individual involved agreed were not intended to result, and could not have resulted, in deficient work. None of the interviewees indicated that such instances reflected a widespread pattern or practice at Catawba. Nevertheless, all the allegations were thoroughly investigated and the resulting work found acceptable.

Second, the conclusion that foreman override is not a problem at Catawba is also supported by the clearly random and isolated nature of the alleged incidents, which does not reflect widespread attitudes or practices by supervisory personnel. In short, the instances determined by Duke to constitute foreman override do not fall into any pattern suggesting that Duke supervision or management systematically or consistently ignored quality considerations in order to meet construction schedules, or that the company's policy was to sacrifice quality for quantity of work performed.

Given Contention 6's focus upon "systematic" and widespread deficiencies, and upon pervasive "company pressure to approve faulty workmanship," this lack of any discernible pattern of foreman override is particularly significant. It should be recalled that in evaluating the in camera allegations of foreman override, the Board in this proceeding has focused upon whether such occurrences were indicative of a pervasive "pattern of foreman pressure to 'get the job done' without regard to quality." Partial Initial Decision at 238. The same focus should apply in evaluating these few remaining foreman override concerns. While evidence of pervasive, persistent and company-condoned foreman override could call into question the safety of the plant, this Board has recognized that:

> As the Appeal Board pointed out in Callaway, we do not expect that a project of the size and complexity of Catawba will be constructed

> without some lapses in construction and quality assurance procedures. The question is whether such lapses were of such a magnitude and so pervasive that the safe operation of the plant may have been compromised.

Id. at 33. The Board concluded that there was no such compromise of quality with respect to the Contention 6 allegations discussed in its Partial Initial Decision. Id. As discussed below, that same conclusion applies to the foreman override allegations discussed in the Applicants' and the Staff s reports.

The August 31 Staff Report on the Welder B foreman override concerns supports and confirms Applicants' findings that these concerns do not indicate a "significant breakdown" in quality assurance at Catawba. In its Report, the Staff indicates its approval of the manner in which Duke's investigation was conducted. The "conduct and depth" of the licensee's investigation was reviewed periodically by the Staff, which satisfied itself that the Duke employees selected to conduct interviews were "well qualified" and that the company's "investigative plan and proposals to initiate resolution of the concerns expressed by employees" reflected a "valid and logical approach." August 31 Staff Report at 4. The Staff also notes that Duke's inquiry was "initiated from a high level of licensee management" and that responsibility for the investigation "was fixed at the highest levels of licensee management." Id. at 4.

In addition, the Staff states in its August 31 Report that during Duke's investigation, Region II contacted several individuals interviewed during the investigation to determine their view of the process. These employees reported to the Staff that "they were satisfied that their interviews were conducted in a professional manner and that they were given ample opportunity to express their concerns to the licensee." Id. After completion of Duke's investigation, the NRC also contacted at home (to protect privacy) 27 of the 37 individuals who had expressed concerns to Duke, to determine whether these employees were satisfied with the company's resolution of their concerns. The Staff reports that: "[the employees] have all stated that they were satisfied with the results of the licensee investigation and they felt that their concerns were appropriately addressed during the investigation."6/ Id. at 6.

Even more significant is the fact that the Staff's August 31 Report closes out both of the unresolved items identified by the Staff in its April 26, 1984 Report. One of these unresolved issues was the fabrication of socket welds allegedly without proper process control, without regard for interpass temperatures, and without regard for authorized weld bead deposit sequence procedures.

6/ The Staff will continue to attempt to contact the remaining individuals, but will not amend the report unless these employees voice a different opinion. August 31 Staff Report at 6.

As to the allegations that a foreman had instructed workers to weld when they did not have proper documentation (process control) in their possession, Applicants' investigation revealed that, of those incidents wherein the employee alleged direct knowledge of such occurrences, there appear to have been two occasions where workers were asked to begin work but were not required to do so when they explained to their supervision that they had no documentation in their possesion. There also appear to have been three instances in which welders worked for a short time on minor preparatory activities with their documentation in or near the work area, but not in their physical possession. While the temporary removal of their documentation constituted a violation of the language of process control procedures, in each instance the worker knew what parameters were to be followed and thus the intent of the procedures was satisfied. See the Duke Report, Attachment A, Section III.

The August 31 Staff Report affirms Duke's conclusions with respect to the process control allegations. It reiterates Duke's findings that there has not been "a widespread problem" in this area and that "[t]here was no evidence of defective work due to the fact that in each case the worker involved was aware of the work requirements." August 31 Staff Report at 1. The Staff

also noted with approval the corrective action to be taken, consisting of meetings with employees to re-emphasize procedural requirements in this area.

With respect to interpass temperatures, Applicants found that out of the 134 welders interviewed, only four welders stated that they had direct knowledge of interpass temperature violations. Further interviews and testing both by Duke and an independent research laboratory demonstrated that in all likelihood no actual interpass temperature violations occurred. If such violations did occur, they were isolated instances which, according to the tests performed, would not have had an adverse impact upon the integrity of the welds. See the Duke Report, Attachment A, Section I.

The August 31 Staff Report notes the extensive testing and metallurgical analyses conducted by both Duke and by the Brookhaven National Laboratory (BNL) to determine whether the alleged violations of interpass temperature would have created defective welds. The Staff states that the results of the analyses by both BNL and Duke showed that all the sample welds met acceptable standards for susceptibility to intergranular stress corrosion cracking. August 31 Staff Report at 2. The Staff also concurs with Duke's conclusion that violations of interpass temperature requirements were isolated, and that such occurrences would not have affected the

integrity of the welds in question. Id. Finally, the Staff does not dispute Applicants' finding that interpass temperature violations were not directed by the foreman of the welder in question. However, the Staff states that "there is reason to believe" that the few incidents that did occur were "probably" due to "the welder's perception that his foreman was directing him to ignore the procedure to meet the schedule." Id.

Applicants were unable to document one employee's allegation that on several welds in a tight or awkward location he had altered the welding sequence from the sequence described in the applicable procedures. The individual in question did not identify any specific welds done in this manner. Even if it did occur, however, this alteration of the welding sequence is not significant since the technique described is a viable method for making difficult welds and does not constitute a violation of ASME or Duke procedures. This individual was therefore incorrect in his belief that he had violated procedures. See the Duke Report, Attachment B, Section II. The August 31 Staff Report agrees with Applicants' conclusion that "there was no technical violation of the procedure." August 31 Staff Report at 3. The Staff expresses concern, however, that "welders did the work with the perception that they were in violation of the procedure." Id.

The other unresolved issue identified by the Staff in its April 26, 1984 Report was the removal of arc strikes from welds allegedly without the proper approval. This issue arose during an NRC interview with a Catawba employee, who expressed concern that on one occasion his foreman had filed arc strikes from the socket region of a valve (i.e., near the weld) and instructed him to do the same if the arc strikes were "not too bad." Applicants' investigation determined that the foreman's decision to remove the minor arc strikes was proper. Process control procedures for the system in question permit the welder (or the foreman, who is responsible for his crew's work) to remove arc strikes from the weld zone. Moreover, all valves in critical socket weld systems welded by this foreman's crew were examined for indications of improper filing. No file marks were found outside the weld region, indicating no violations of procedure occurred. See Duke Report, Attachment B, Section I.

In its August 31 Report, the Staff cites without dispute Applicants' findings that "there was no evidence that ARC strikes were removed from anywhere but the weld zone without proper authorization and documentation," and that "the allegation that a foreman had removed an ARC strike without authorization could not be substantiated."

August 31 Report at 3. The Staff also reiterated that "the hardware that was purported to be involved showed no evidence of ARC strike removal." Id.

In its April 26, 1984 Report, the NRC Staff had also identified the allegations of a lead man acting as a "lookout" and foremen applying pressure for quantity. (See p. 8, n.5, supra.) These concerns, which were incorporated by the NRC Staff into the two unresolved issues, are discussed in detail by Duke in its August 3 report. With respect to the allegation that craftsmen acted as "lookouts" for QC inspectors while welding procedures were violated, Applicants determined that out of the six instances of this nature alleged to have occurred, only one constituted a violation of procedures and this incident raised no safety concerns. The foreman involved has been removed from his supervisory position. See the Duke Report, Attachment A, Section II.

As to the Staff's general concern that welders perceived the foreman to be "applying pressure for quantity," Duke asked all employees interviewed whether they believed the quality of any of their work had been affected by production pressure, and, if so, whether they recalled the work in question. Six specific incidents raised by employees were then investigated. Applicants determined that even assuming that there was excessive production pressure in these incidents, the quality of the

work done (and, accordingly, the safety of the hardware involved) was not affected. Moreover, appropriate corrective action has now been taken with respect to the supervisory personnel involved. See the Duke Report, pp. 18-19 and 24-27; Attachment A, Sections I and VIII.

In response to Applicants' investigation of these two unresolved items, the Staff's August 31 Report closed out both issues (see pp. 1-3), indicating the Staff's acceptance of Duke Power Company's resolution of these concerns. Had the Staff disagreed with Applicants' conclusions, or believed that Duke's investigation had not satisfactorily dealt with the open items, it would have indicated as much in its August 31 Report. That it did not do so confirms the Staff's position in Staff Exh. 27 and reiterated in the Staff's April 26, 1984 Report that foreman override is "not a pervasive problem" at Catawba and that "there have been only isolated incidents involving this issue."

In sum, it is clear that the investigative efforts of Applicants and Staff have provided sufficient information to provide the Board with reasonable assurance that the Welder B and related concerns do not represent a significant breakdown in quality assurance at Catawba. This Board needs nothing further to satisfy itself with regard to this issue.

IV. Due process does not require further consideration of the foreman override concerns in an evidentiary hearing

An examination of both judicial and administrative precedent as well as the Welder B reports submitted by the Applicants and the NRC Staff demonstates that further hearings on this Board issue are not required to provide due process to Intervenors. Having raised the matter of foreman override, the Board is now free to close the record based upon a finding that the reports by the Applicants and the NRC Staff satisfactorily resolve the issues.

It is significant that the foreman override issue is not an issue raised by the Intervenors in this proceeding. Rather, it is a Licensing Board issue and it is up to the Board to decide whether, and to what extent, it believes additional information and witnesses are necessary to satisfy itself that foreman override does not constitute a "significant breakdown" of quality assurance at Catawba. It is Applicants' position that, given the current posture of this proceeding and the results of the Welder B investigations conducted by the Applicants and the Staff, there is no need for the Board to call additional witnesses and conduct further hearings.

The requirements of due process vary with the circumstances, both factual and legal, of the particular proceeding.7/ In a Civil Aeronautics Board proceeding, for example, the Board in reaching its decision relied on updated data obtained after the close of hearings. The Court of Appeals ruled that "fundamental fairness" required the CAB to allow other parties to file their own version of the relevant factual developments over the last three years and to comment on the new data on which the Board relied. See Delta Air Lines, Inc. v. CAB, 561 F.2d 293, 306 (D.C. Cir. 1977), cert. denied, 434 U.S. 1045 (1978). The court required these written submissions from the other parties to be entertained only because of four factors: (1) there was a long (three year) delay since the parties had been able to submit evidence, during which time peculiar changes in air transportation occurred; (2) the Board's adjustment of the record with new data was significantly detrimental to a particular party; (3) that party had presented plausible arguments refuting the

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7/ The Supreme Court has held in a variety of settings that due process does not require cross-examination of witnesses. See, e.g., Vitek v. Jones, 445 U.S. 480, 496 (1980)(transfer of prisoners to mental institutions); Parham v. J.R., 442 U.S. 584, 607-08 (1979)(commitment of children to mental institutions); Goss v. Lopez, 419 U.S. 565, 581-83 (1975)(ten-day suspension from school); Wolff v. McDonnell, 418 U.S. 539, 567-68 (1974)(prison disciplinary proceedings). See also Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1283-87 (1975).

Board's interpretation of the facts; and (4) the Board had arguably attached a different weight and significance to some of the data than in prior CAB practice. Id.

This limited written submission of evidence and comments on other parties' evidence was required by due process only because of these four factors. Similar factors are not present in the Catawba proceeding. In this case: (1) there has only been an eight month delay since the Staff first reported on "Welder B"; (2) acceptance of the new information on foreman override by this Board does not "adjust" the balance of the evidence to the Intervenors' detriment, but rather is simply confirmatory of prior evidence; (3) the Intervenors have presented no arguments or contrary evidence that refute the Board's initial decision on foreman override; and (4) the Board has not deviated from prior NRC practice. Thus the circumstances under which fundamental fairness required additional written submissions by the parties when the CAB updated the record are not present in the Catawba proceeding. Absent such facts, due process requires no further action by the parties.

Significantly, even if due process were to require some further proceedings, they would need to be no more elaborate than submission of written comments on information already before the Board. In Delta Air Lines, supra, written submission and comments were all that due

process required. The Court of Appeals did not require further discovery or evidentiary hearings with an opportunity for cross-examination. Due process cannot be said to require such elaborate, formal procedures in response to the Licensing Board's receipt of the Welder B reports. See also Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1281 and n.79 (1975).

In this case the Board's September 4, 1984 Order calling for comments by the parties provided due process to all concerned. Only if the Intervenors file an evidentiary submission in response to this order would there be any need for further comments, and then only from the Applicants and the Staff. The Intervenors currently have the opportunity to comment on the Applicants' and the Staff's reports. Even a generous interpretation of due process requires no more. See also Northeast Airlines, Inc. v. CAB, 345 F.2d 484, 487 (1st Cir.), cert. denied, 382 U.S. 845 (1965); Cross-Sound Ferry Services, Inc. v. United States, 573 F.2d 725, 730 (2d Cir. 1978).

Indeed, Judge Friendly has offered insightful criticism of the various "[l]ofty sentiments" and references provided in support of a purported constitutional right to cross-examine witnesses in administrative hearings. See Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1283-85 (1975)(citing references to the Bible, Wigmore, the Emperor Trajan, and Wild Bill Hickock). Judge Friendly explained:

> While agreeing that these references were wholly appropriate to the witch-hunts of the McCarthy era and that cross-examination is often useful, one must query their universal applicability to the thousands of hearings on welfare, social security benefits, housing, prison discipline, education, and the like which are now held every month -- not to speak of hearings on recondite scientific or economic subjects. In many such cases the main effect of cross-examination is delay . . . .

Id. at 1284-85 (footnotes omitted).

Furthermore, the Intervenors are not entitled to another hearing on foreman override simply because they may claim that material factual issues are in dispute. See 10 C.F.R. §2.749; Fed. R. Civ. P. 56(c). Material factual issues, by definition, are those which can affect the outcome of the proceeding. Black's Law Dictionary 881 (5th ed. 1981). The only facts subject to dispute are the technical resolutions to the employee concerns voiced during the investigations. This is because during their investigations both the Applicants and the NRC Staff accepted all allegations as being founded in fact. No credibility judgments were made. The Intervenors would have to challenge these technical resolutions to raise material facts. Yet even in the context of summary disposition under §2.749 or Fed. R. Civ. P. 56(c), it is not enough simply to disagree with a fact to put it in dispute or in issue. There must be specific facts set forth to show that there is a genuine issue of fact. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power

Station, Unit 1), July 24, 1984, slip. op. at 6-9; 10 C.F.R. §2.749(b). Furthermore, there is no material fact in dispute (and clearly no need for further hearings) if the Intervenors simply question the credibility of Applicants' commitments to the Board and the NRC Staff, or if the Intervenors question the NRC's enforcement of those commitments. See Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System, 646 F.2d 868, 869-70 (4th Cir. 1981).

In any event, because of the special status of foreman override as a Board issue, the Board is not compelled to hold further hearings even if there is a material factual issue in dispute. The claim that a dispute as to material factual issues mandated hearings was recently rejected by the United States Court of Appeals. In a suit challenging an NLRB investigation of alleged misconduct during a union certification election, the court endorsed the NLRB's resolution of those disputed material facts based on an investigative report despite the employer's claims of violation of due process. See NLRB v. ARA Services, 717 F.2d 57, 66-67 (3d Cir. 1983)(en banc).

The Court explained its reasoning as follows:

> [The employer] contends that the failure to hold an evidentiary hearing as to the agency status of [several employees] violated its due process right, which it equates with the standards for evidentiary hearings in Fed. R. Civ. P. 56(c). We reject that contention. The strict standard of Rule 56(c) is derived not from the due

> process clause of the fifth amendment, but from the seventh amendment. It could be changed with respect to proceedings in which jury trial is not required. What sort of factual investigation is required by due process depends upon a number of variables. See Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). Certainly the inquisitorial model of procedure selected by Congress for certification matters in section 159(c) of the Act satisfies due process even though the hearing officer, under 19 C.F.R. §102.64(a) merely reports, without resolving credibility issues or making recommendations. A fortiori investigations of election irregularities, which are entirely creatures of Board regulation, do not require evidentiary hearings satisfying Rule 56(c) standards.

Id. at 67; see also Weinberger v. Hynsun, Wescott & Dunning, 412 U.S. 609, 621-22 (1973).

In this NRC proceeding, unlike the NLRB proceeding in ARA Services, part of the difficulty arises from the fact that there are no clear procedural guidelines in the statutes or the regulations to govern the situation at hand. It is clear, however, as explained in ARA Services, that there is no requirement in the due process clause of the U.S. Constitution that any further hearings be held. The matter of a Board-mandated election in NLRB proceedings can constitionally be resolved without a hearing. The final resolution of this NRC Licensing Board's foreman override issue can similarly be resolved without a hearing. The foreman override issue, which is a "creature[] of [the] Board," can and should be resolved on the current evidentiary record. See also Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. at 1289-91.

The precedent of Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972) is instructive and supports the proposition that no further adjudicatory hearings on the Applicants' and NRC Staff's Welder B reports are warranted. In that case, the hearing record was closed by the Federal Power Commission (FPC) hearing examiner despite the "absence of usable data" on one environmental issue, fish conservation.8/ A comprehensive report, issued after the close of the hearing record, was relied upon heavily by the FPC in its final order because of the inadequate factual record developed at the hearings. Thus, no opportunity was offered to address this report in the context of an adjudicatory hearing. Despite the Intervenors' challenge to the adequacy of the FPC's consideration of this issue, the Court of Appeals affirmed the FPC's order based on this post-hearing report in Scenic Hudson Preservation Conference v. FPC, 453 F.2d at 476-77.

A subsequent Court of Appeals case involving new information on the same issue did not alter this principle. See Hudson River Fishermen's Ass'n v. FPC, 498

8/ The facts underlying Scenic Hudson Preservation Conference are not fully described in the court's opinion. See 453 F.2d at 469-70, 476-77. A subsequent Court of Appeals case provides the basis for the above summary of the facts. See Hudson River Fishermen's Ass'n v. FPC, 498 F.2d 827, 830, 834 (2d Cir. 1974)(discussed infra).

F.2d 827 (2d Cir. 1974). In 1972-73, a subsequent study (this time conducted by the AEC) substantially called into question the original report relied upon by the FPC. The FPC, however, refused to take any further action. Upon review of this action, the Court of Appeals ordered the FPC to conduct further hearings on fish conservation pursuant to a provision of the facility license granting a "continuing jurisdiction" to the FPC over the fish conservation issue. Id., 498 F.2d at 831-32. The FPC's refusal to correct the apparent error in the initial report it relied on was accordingly vacated. Further hearings, solely on the fish conservation issue, were ordered, primarily because there were now two contradictory reports, neither of which had been subjected to hearings. Id., 498 F.2d at 834-35.

Numerous differences between that challenged FPC action and the Catawba operating license proceeding are apparent. In Catawba, hearings have been held on the issue. Additionally, the subsequent reports on foreman override support, rather than contradict, one another. Thus the Licensing Board may rely on uncontradicted reports filed after the hearings in a manner similar to that approved in Scenic Hudson Preservation Conference v. FPC. Indeed, the error reversed in Hudson River Fisherman's Ass'n v. FPC, not present in the Catawba proceedings, was a refusal by the agency to take further

evidence after a reliable subsequent study (by another agency) raised substantial questions about the reliability of the first report. In contrast, the confirmatory subsequent reports received by the Catawba Licensing Board support closing the record and reaffirming the Board's Partial Initial Decision on foreman override.

The Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981) also supports final resolution of the foreman override issue on the current evidentiary record. Because, as discussed supra, due process does not require evidentiary hearings on the Welder B reports, the Board should be extremely reluctant to engage in unnecessary hearings which will cause costly licensing delay with little resultant benefit to the protection of the public health and safety. See CLI-81-8, 13 NRC at 453. In light of the fact that the evidentiary record on foreman override has been confirmed by the Welder B reports, and that due process requires no further hearings, the Board should meet the objective of the Commission's Statement of Policy by closing the record and affirming the Partial Initial Decision on foreman override.

Closing the record without further hearings is consistent with prior reasoning of the Board. As the Board explained in the context of denying further formal discovery, "these are, after all, Board witnesses. Our

primary concern is whether the concerns of these, our witnesses, is addressed." Tr. 11,220, Kelley 12/13/83. The lengthy investigations of the NRC Staff and the Applicants have clearly addressed the concerns of the Board witnesses, the concerns of "Welder B," and indeed all of the other concerns which were raised during the investigation. This then satisfies the above quoted concern of this Board, without the need for further evidentiary hearings.

Some further guidance on the propriety of closing the record without further adjudicatory hearings is provided by the Commission's action in the Zimmer proceeding. See Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 16 NRC 109 (1982). In Zimmer, the Licensing Board refused to admit eight late quality assurance contentions under §2.714 as contentions of the Intervenor. Because of the seriousness of the issues raised, though, the Board sought to admit them sua sponte as Board issues pursuant to § 2.760a. The Commission, however, directed the Licensing Board to dismiss the contentions because it had already initiated a separate investigation into the same issues, revealing a number of quality assurance problems and prompting the requirement of a comprehensive quality confirmation program at Zimmer. Yet despite the apparent seriousness of the issues investigated, the Commission directed the

Licensing Board in Zimmer not to undertake duplicative hearings on these same issues, but instead chose itself to resolve the issues outside the adjudicatory process. Zimmer, CLI-82-20, 16 NRC at 109-11.

Even more so in the case of Catawba, where the concurrent NRC investigation has revealed there to be no significant problems, the Zimmer precedent suggests the Board should not undertake hearings on this Board issue when there has also been a separate NRC investigation of the matter. In Zimmer the Commission expressed a preference for handling such late-arising allegations through a Staff investigation, even when the allegations are serious. Now that the investigation into the Welder B issue is complete and the reports have been submitted, the Board can close the record on foreman override.

In light of the limited requirements of due process in this setting, NRC precedent, and the confirmatory nature of the Welder B reports, the Board should close the record now and finalize its resolution of the foreman override issue. The Board itself is the one that needs to be satisfied as to the resolution of the foreman override issue. It can and should close the record to reaffirm the conclusion reached in the June 22 Partial Initial Decision, based on the in camera testimony as confirmed by the investigative reports filed by the Applicants and the NRC Staff.

V. Other factors argue against allowing further discovery or hearings on these foreman override concerns

As demonstrated in Section III above, the recent reports by Duke Power Company and the NRC Staff on the Welder B and related foreman override concerns provide reasonable assurance that these concerns clearly do not reflect a "significant breakdown of quality assurance at Catawba." There is, therefore, no reason not to close the record on these concerns since the standard in the June 22, 1984 Partial Initial Decision has been met. Moreover, as discussed in section IV, above, closing the record on this issue would not constitute a denial of due process for the Intervenors in this proceeding. While Applicants believe that the arguments set forth in sections III and IV constitute ample authority for closing the record on the foreman override issue without further actions such as discovery or hearings, we note that other factors also support this course of action. These considerations are discussed below.

A. The need for administrative finality mandates closing the record

In assessing the extent to which the interests of administrative finality support the closing of the record on the foreman override issue without additional discovery or hearings, the present posture of this proceeding should be considered. The Catawba operating license proceeding has been going on for more than three years, since the

notice of the operating license application appeared in the Federal Register on June 25, 1981. The safety phase of this proceeding has involved at least three prehearing conferences, consideration by the Board of 75 contentions, and approximately fifteen months of discovery,[9/] during which voluminous pleadings were exchanged. Forty-five days of hearings were held, during which almost 14,000 pages of transcript were compiled. (Almost all of this hearing time was devoted to Contention 6.) The Board heard testimony from 85 witnesses (and, in addition, called four witnesses of its own) and admitted over 280 exhibits into evidence. Two interlocutory appeals were filed during this phase of the proceeding, both of which were also considered by the Commission.

A separate Board was convened in 1984 to hear ten emergency planning contentions. Approximately six months was allowed for discovery on these contentions, and one interlocutory appeal was filed. The emergency planning hearing lasted sixteen days and resulted in a record of approximately 4000 transcript pages. Testimony from fifty witnesses was heard and 72 exhibits were admitted. Moreover, a diesel generator contention was admitted in this proceeding. Discovery on this contention began in late February, 1984 and ran through July, 1984. The

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9/ Discovery began in March, 1982 and ended in July, 1983. Discovery on some, but not all, of the admitted contentions was stayed by the Board between June and December, 1982.

Applicants and the Staff prepared extensive pre-filed testimony on this contention which was submitted to the Board and parties. However, given the Intervenors' inability to contribute to the record on this issue, the contention was dismissed by the Board just prior to the commencement of the scheduled hearing.

Given the protracted nature of this proceeding and the full record that has already been compiled on the one remaining open issue, Applicants submit that further consideration of the foreman override concerns is unwarranted.

The need to call an end to further rounds of administrative litigation has been emphasized on various occasions by the U.S. Supreme Court. The Court's well-known language in ICC v. City of Jersey City is particularly instructive in the circumstances of this case:

> One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be

> consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to discretion. And likewise, it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body.

322 U.S. 503, 514-15 (1944)(emphasis added). This language has been quoted and reaffirmed by the Supreme Court in several recent decisions. See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 554-55 (1978); Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281, 294-95 (1974); United States v. ICC, 396 U.S. 491, 521 (1970). The protracted nature of the proceedings in Jersey City, with requests for further hearings and resultant delays, is not unlike that experienced by the parties in this proceeding.

The facts of the Jersey City case are instructive. In that rate case the ICC held three separate sets of hearings, issued four decisions which fixed subway fare rates at three different levels, entertained two petitions for modification or reconsideration, and reopened the hearings once sua sponte, only to have a three-judge district court invalidate the last two rate orders of the ICC and order a fourth set of hearings. 322 U.S. at 505-512. On appeal, the Supreme Court reversed the district court, explaining the practical necessity in administrative litigation of bringing hearings to an end

despite the fact that "some new circumstance has arisen, some new trend has been observed, or some new fact discovered." Id. at 514. Significantly, the Court stated:

> The Court has held that administrative tribunals "have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services." Federal Communications Commission v. Pottsville Broadcasting Co. [309 U.S. 134, 142 (1940)].

Id. at 516-17.

In this proceeding, the Board, having initiated the inquiry into foreman override, should exercise its control and close the issue. The public interest would not be served by repetitive hearings on matters already resolved to the satisfaction of the NRC Staff. In addition to the original case on Contention 6, the Board has also heard extensive additional testimony on foreman override from numerous witnesses, and received in evidence numerous NRC Staff reports on the subject, and has before it for its consideration the Applicants' and the Staff's Welder B reports. See Apps. Exh. 112; Staff Exhs. 26 and 27; IC Tr. 181-86, 11/9/83; Tr. 12,215-59, 1/30/84; Tr. 12,339-93, 1/31/84; IC Tr. 1275-1327, 1/31/84. These reports demonstrate that not just the foreman override issue, but indeed all the issues raised involving Welder B have been

resolved. It is significant that in Jersey City, even though there appeared to be more recent evidence that could alter the basis for the ICC's decision, the Supreme Court reversed the district court's order requiring further hearings. See 322 U.S. at 512.

By contrast, in this operating license proceeding, all of the recent investigations support, rather than undermine, the reasonable assurance found by the Licensing Board in its June 22, 1984 Partial Initial Decision. Nothing in the Applicants' or the Staff's Reports indicates that any of the Board's findings should be changed. Thus, in this proceeding even more so than the ICC proceeding reviewed in the Jersey City case, it is necessary to recognize the need for administrative finality and close the record.

The need for administrative finality has been recognized in a variety of other settings, all of which are directly applicable to the issue of foreman override in this proceeding in its current status. In Seacoast Anti-Pollution League v. NRC, 598 F.2d 1221 (1st Cir. 1979), the Court of Appeals upheld the NRC's decision, after several administrative and federal court appeals, to conduct no further consideration under NEPA of alternate sites which were not proposed in a timely manner. The court explained that "[t]he administrative process has to have structured time limits, lest decisions never be

reached . . . ." Id., 598 F.2d at 1230, quoting ICC v. City of Jersey City. In the Catawba proceeding, the late-arising issue of foreman override similarly requires no further evidentiary evaluation. The time for such has passed.

Guidance on closing the record on foreman override is also provided by NLRB v. Miami Coca-Cola Bottling Co., 403 F.2d 994 (5th Cir. 1968). In that case the employer alleged that the hearing examiner abused his discretion by failing to reopen the hearing on the basis of newly discovered evidence. The employer raised claims not unlike those raised by the Intervenors in connection with the in camera hearings: it claimed that because of a denial of prehearing discovery it had not learned the identity of one individual with relevant knowledge on one issue until the hearing. The employer investigated after the hearing and obtained information that contradicted the testimony presented during the hearing. Yet, the Court of Appeals held that it was not an abuse of discretion for the hearing examiner to refuse to reopen the record: "There comes a time when even labor hearings must draw to an end." Id., 403 F.2d at 997.

Even more so in this operating license proceeding, where the purported "new evidence" (in the Welder B reports) confirms the prior evidence, rather than contradicting it, there is even less of a need either to

burden the evidentiary record on foreman override or to prolong this administrative proceeding. See also Friends of the River v. FERC, 720 F.2d 93, 98 n.6 (D.C. Cir. 1983); RSR Corp. v. FTC, 656 F.2d 718, 720-22 (D.C. Cir. 1981); Tri-State Motor Transit Co. v. United States, 570 F.2d 773, 778 (8th Cir. 1978); Greene County Planning Board v. FPC, 559 F.2d 1227, 1233 (2d Cir. 1976), cert. denied, 434 U.S. 1086 (1978). In accordance with the Jersey City line of cases, the Board should now recognize the need for administrative finality and close the record.

B. The holding of hearings on Applicants' and Staff's Welder B reports would result in cumulative evidence and would needlessly burden the record

Another argument against further consideration in this proceeding of the Welder B and related foreman override concerns is that the material in these reports constitutes cumulative evidence. When placed within the overall context of Contention 6, it is clear that these foreman override concerns are quite similar to, and in many instances identical to, the Quality Assurance concerns already litigated under Contention 6. Indeed, a number of the allegations addressed in the Welder B investigations, including both the general subject of "foreman override" and several of the specific technical concerns allegedly resulting from foreman override, were in fact litigated during the forty-five day safety phase hearings in this proceeding. Applicants therefore submit

that the material in the Duke Report and in the August 31 Staff Report is essentially cumulative, and that additional consideration of this material in this proceeding is not necessary.

The issue of "foreman override," which underlies the Welder B investigations, was first raised on November 9, 1983 by Board witness Nunn. I.C. Tr. 181-86, Nunn 11/9/83. Nunn alleged that certain welder foremen at Catawba would order welders to perform work in a manner contrary to prescribed procedures or to the welder's concept of correct welding. These allegations came to be referred to collectively as "foreman override." The Applicants and the Staff presented testimony from fourteen different witnesses on foreman override, including those identified by Mr. Nunn as having been the subject of what he perceived to be improper instructions. The Intervenors, including Mr. Nunn himself, cross-examined these witnesses extensively. See Apps. Exh. 112; Tr. 12,215-59, 1/30/84; Tr. 12,339-75, 1/31/84; IC Tr. 1275-1327, 1/31/84. The Board also admitted the NRC Staff's January 20, 1984 Report and identified the attached "Summary of Investigative Interviews" as Staff Exhs. 26 and 27. Tr. 12,319, Kelley 1/31/84. Additionally, Mr. Nunn testified and was examined by the Board and the parties during the

safety hearings. IC. Tr. 153-294, 11/9/83; Tr. 12, 159-91, 1/30/84; Tr. 12,376-93, 1/31/84; see generally Partial Initial Decision at 232-38.

As noted, during these hearing sessions a number of the technical issues subsequently raised in the Welder B investigations by Applicants and the Staff were addressed and resolved. For example, the allegation of foremen directing workers to perform work without having adequate process control documentation in their possession was addressed in detail at the hearing. The identical concern was also addressed in the Welder B investigations. See Duke Report, Attachment A, Section III; see Partial Initial Decision, ¶¶38, 46, pp. 233, 235-36; see also Apps. IC PFF, ¶75, pp. 49-50. Similarly, incidents of alleged cold springing were litigated during the hearings as well as investigated in connection with Welder B. See Duke Report, Attachment B, Section III; Partial Initial Decision, ¶¶20-29, at pp. 214-17. Allegations involving fit-up inspections were also litigated during the safety phase as well as subsequently investigated in connection with Welder B (Duke Report, Attachment B, Section XV; Partial Initial Decision ¶¶18-19, p. 214), as were concerns relating to preheating before welding (Duke Report, Attachment B, Section VI; Partial Initial Decision, ¶¶26-29, pp. 173-75); working on nonconformed items (Duke Report, Attachment A, Section IV; Partial

Initial Decision ¶¶46-48, pp. 82-83), and stenciling of welds (Duke Report, Attachment A, Section VI; Partial Initial Decision ¶¶17-18, pp. 73-74).

Based upon all of the evidence, the Board found with respect to Nunn's assertions that "there is no indication of a pattern of foreman pressure to 'get the job done' without regard to quality." Partial Initial Decision at 238. The Board further found with respect to these concerns that "there has been no compromise of the QA program at Catawba, but on the contrary, the evidence indicates the program is effective." Id.

As discussed above, the Applicants' and the Staff's subsequent inquiries into the foreman override concerns raised initially by Welder B corroborate the Board's conclusion. Interviews with 217 individuals at Catawba (which represented approximately 10,000 work years of experience on over one million work items at the plant) revealed fewer than twelve specific incidents of possible foreman override, of which fewer than six could be even partially substantiated. Of the latter group, each incident involved procedural violations that everyone involved agreed were not intended to result, and could not have resulted, in work below acceptable standards. All such allegations were investigated and all work was found to be acceptable.

Given the previous adjudication and Board ruling on Mr. Nunn's foreman override concerns, and the similarity between the types of foreman override concerns raised by Mr. Nunn and those dealt with in Applicants' report, Applicants submit that the Welder B reports recently submitted by the Applicants and the Staff constitute cumulative evidence. While not all of the specific technical concerns and factual situations investigated therein had been raised earlier, the conclusions reached were the same: there is no "company pressure to approve faulty workmanship" at Catawba. There is, therefore, no need for any further consideration of the foreman override issue in this proceeding. To permit further discovery and, possibly, litigation on this subject would be particularly inappropriate given the extensive hearing time already devoted to similar concerns raised under Contention 6, and the fact that the Board has already ruled in Applicants' favor on this contention. Partial Initial Decision at 268-69.

Both federal precedent and the NRC regulations make clear that repetitive and cumulative evidence need not be considered. In Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP ___ (Emergency Planning Proceeding), August 13, 1984, slip op. at pp. 6-7, the Board cites MCI Communications v. American Telephone and Telegraph Co., 708 F.2d 1081, 1171 (7th Cir. 1983), wherein the court of appeals stated:

> Litigants are not entitled to burden the court with an unending stream of cumulative evidence [citations omitted]. As Wigmore remarked, "it has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment and whim. . . . The rule should merely declare the trial court empowered to enforce a limit when in its discretion the situation justifies this." 6 Wigmore, Evidence §1907 (Chadbourne Rev. 1976). Accordingly, Federal Rule of Evidence 403 provides that evidence, although relevant, may be excluded when its probative value is outweighed by such factors as its cumulative nature, or the 'undue delay' and 'waste of time' it may cause. Whether the evidence will be excluded is a matter within the district court's sound discretion and will not be reversed absent a clear showing of abuse. Hamling v. United States, 418 U.S. 87, 127, 94 S.Ct. 2887, 2912, 41 L.Ed.2d 590 (1974); Chapman v. Kleindienst, 507 F.2d 1246, 1251 n.7 (7th Cir. 1974).

See also 10 C.F.R. § 2.743(c), which provides that "[o]nly relevant, material and reliable evidence which is not unduly repetitious will be admitted," and 10 C.F.R. § 2.757, which provides that "[t]o prevent unnecessary delays or an unnecessarily large record, the presiding officer may . . . (b) strike argumentative, repetitious, cumulative or irrelevant evidence." A licensing board is authorized to regulate the course of the proceeding and the conduct of the participants. 10 C.F.R. §2.718. In light of this authority, Applicants submit that no further hearings on these cumulative issues are warranted.

C. Additional Discovery Is Not Warranted

As noted above, the Applicants' and Staff's investigation of the "Welder B" and related foreman override concerns grew out of the foreman override allegations raised by witness Nunn during the in camera hearing sessions on Contention 6. The Board has already made clear its position that no additional discovery is warranted on any of the in camera issues, including foreman override.

On December 13, 1983, immediately before the evidentiary hearing on the in camera issues, Palmetto Alliance made a belated request for postponement of, and formal discovery on, these issues (I.C. Tr. 534-42, 12/13/83), which the Board denied. Tr. 11,217-221, Kelley 12/13/83.10/ The bases for that ruling, which included the tardiness of the motion, the availability of informal voluntary discovery to Palmetto Alliance during that time, Intervenors' failure to make a "persuasive showing" of their need for discovery, and the fact that these were Board issues, are set forth in the record. Id. Moreover, on pp. 16-18 of its Partial Initial Decision the Board

10/ See also Tr. 12,335 (1/31/84), wherein the Board denied Palmetto Alliance's motion to reveal the names of those people interviewed by the NRC in connection with the Staff's January 20, 1984 Report (see Staff Exh. 27). Ruling that the Intervenors' request was "in the nature of further discovery", which it characterized as "entirely inappropriate," the Board further noted that it had similarly denied previous discovery motions on this subject "time and again." Tr. 12,335-36, Kelley 1/31/84.

made the following points to provide a further statement of its views on the purported need for discovery on the in camera concerns:

> First, contrary to its apparent claim (I.C. Tr. 534), Palmetto was not automatically entitled to formal discovery on the in camera concerns as a matter of right under the Rules of Practice. Under 10 C.F.R. §2.740(b)(1), discovery is based only on an admitted contention. Discovery begins after the first prehearing conference and concludes before the final prehearing conference, except upon leave of the Board for good cause shown. The in camera concerns were not themselves individual "contentions;" they were merely examples of matters that fell within the broad scope of Contention 6. A brief chronology will place this aspect of the matter in perspective. Discovery on Contention 6 began in December 1982 (16 NRC 1795, 1810) and closed in May, 1983, subject to an extension the Board granted to allow Palmetto until mid-July to conduct depositions concerning quality assurance concerns in welding. 17 NRC 1121. The final prehearing conference on Contention 6 was held on September 12, 1983 and hearings began on October 4, 1983. The in camera concerns were first expressed on November 8-10, 1983. Palmetto's motion for still more discovery on Contention 6, based on the in camera concerns, was not made until December 13, 1983, three days before we largely closed the record on that Contention.
>
> As this chronological outline suggests, it would be impractical to recognize formal discovery rights based on a broad range of employee concerns that surface late in the case, as they did here. At least if the full panoply of discovery devices were to be allowed -- depositions, interrogatories, motions to compel, answers, etc. -- it might take several additional months to complete the proceeding. This would mean, in turn, that the Commission's policy of attempting to complete operating license proceedings before the Applicant's anticipated fuel load date probably could not be implemented in some cases, including this case. In our judgment, such a delay should not usually be necessary for a "fair and thorough hearing

process", and certainly was not necessary in this case. See Statement of Policy on Conduct of Licensing Proceeding, 13 NRC 452, 453 (1981).

The Board also pointed out that:

> [m]ore importantly, except in unusual circumstances not presented here, formal discovery on particular quality assurance concerns raised by individual employees is not necessary for an adequate exploration of the concern . . . . It is the broader/generic concerns -- not individual pipes and concrete pours -- on which prehearing discovery may be necessary.

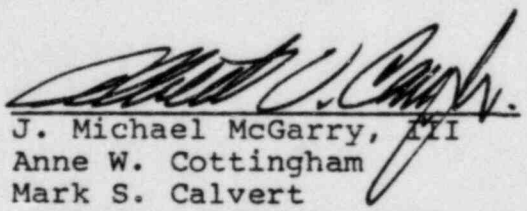
Id. at 18-19. The concerns identified by Welder B and by several other craftsman at Catawba are specific and technical in nature. These concerns have been investigated by both the Applicants and the Staff, have been determined to be isolated rather than generic in nature, and have been appropriately resolved.

VI. Conclusion

Given the fact that the Applicants' and the Staff's reports on the foreman override issue provide "reasonable assurance" that this issue does not reflect a significant breakdown in quality assurance at Catawba, the case law which holds that due process does not require that hearings be held, the advanced stage of this proceeding, the interests of administrative finality, the fact that the concerns addressed in these reports constitute cumulative evidence on matters already litigated in this proceeding, the fact that virtually every issue discussed in Applicants' report arose from facts occurring before

the close of discovery on Contention 6, and the fact that the remaining foreman override question is a Board issue and thus may be resolved at the Board's discretion, Applicants urge that the entire record in this proceeding be closed. No measurable benefit would be obtained by allowing further discovery and additional hearings on an issue that has been thoroughly investigated by the Applicants and resolved to the satisfaction of the NRC Staff. Moreover, the needless delay to operation of the plant (which is presently scheduled to go critical on October 17, 1984) that would be occasioned by additional consideration of this issue would create significant expense for the Applicants.

Respectfully submitted,



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September 12, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
DUKE POWER COMPANY, et al.	)	Docket No. 50-413 50-414
(Catawba Nuclear Station Units 1 and 2)	)	

AFFIDAVIT OF WARREN H. OWEN

My name is Warren H. Owen. I am Executive Vice President of the Engineering, Construction and Production Group, Duke Power Company. I am a member of the Board of Directors and of the Executive Committee. In these capacities I am responsible for, among other things, the fuel loading, testing and power ascension phases for the Catawba nuclear units. Schedules have been developed for these phases which take into account Duke's experience with such activities at its five operating nuclear reactors.

The purpose of this affidavit is to inform the Licensing Board of the schedule for achieving criticality and testing at power levels not to exceed 5%, and for power ascension to levels above 5%. This schedule reflects progress to date in completing pre-critical testing.

Our current schedule for Catawba Unit 1 reflects the following:

Fuel Load	Commenced July 19, 1984; completed July 23, 1984.
Pre-Critical Testing	Commenced July 23, 1984; to be completed October 17, 1984.
0-5% power testing (plant critical)	Commence October 17, 1984; to be completed November 1, 1984.

5-100% power testing — Commence November 1, 1984; to be completed March 19, 1985.

I, Warren H. Owen, of lawful age, being first duly sworn, state that I have reviewed the foregoing affidavit and that the statements contained therein are true and correct to the best of my knowledge and belief.

Warren H. Owen

Warren H. Owen

Sworn to and subscribed before me this 22 day of September, 1984.

Notary Public

Commission Expires 10-27-85

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response To Board Order Of September 4, 1984" in the above captioned matter has been served upon the following by deposit in the United States mail this 12th day of September, 1984.

James L. Kelley, Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
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