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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of:

DUKE POWER COMPANY, ET. AL.

(Catawba Nuclear Station,  
Units 1 and 2)

Location: Bethesda, Maryland

Pages: 12,922-13,002

Date: September 28, 1984

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

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 In the matter of: :  
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 DUKE POWER COMPANY, ET AL. : Docket Nos.  
 : 50-413  
 : 50-414  
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 (Catawba Nuclear Station, :  
 Units 1 and 2) :  
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September 28, 1984  
4350 East West Hwy.  
Bethesda, Maryland

The Board met pursuant to notice at 11:00 a.m.

BEFORE:

JUDGE JAMES L. KELLY, Chairman  
Administrative Judge  
Atomic Safety and Licensing Board  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

DR. PAUL W. PURDOM  
Administrative Judge  
235 Columbia Drive  
Decatur, Georgia 30030

DR. RICHARD F. FOSTER  
Administrative Judge  
P. O. Box 4263  
Sunriver, Oregon 97702

## 1 APPEARANCES:

2 On behalf of the Applicants:

3 ALBERT V. CARR, JR. ESQ.  
4 Duke Power Company  
5 P. O. Box 33189  
6 Charlotte, North Carolina 38242

7 On behalf of the Regulatory Staff:

8 BRAD JONES  
9 Office of the Executive Legal Director  
10 U. S. Nuclear Regulatory Commission  
11 Region 2  
12 Atlanta, Georgia

13 On behalf of the Intervenor:

14 ROBERT GUILD  
15 Palmetto Alliance  
16 Columbia, South Carolina

17 Other Participants:

18 JESSE RILER  
19 Carolina Environmental Study Group  
20 Charlotte, North Carolina21 J. MICHAEL MCGARRY, III, ESQ.  
22 ANN COTTINGHAM  
23 Bishop, Liberman, Cook,  
24 Purcell and Reynolds  
25 1200 Seventeenth Street, N.W.  
Washington, D. C. 20036

P R O C E E D I N G S

1  
2 JUDGE KELLEY: This is Kelley. I just stepped  
3 out to have my secretary again call the operator to  
4 determine whether she is still trying to wire in Judge  
5 Purdom and Brad Jones from Atlanta. I think it might be  
6 reasonable for the group now on the phone...we have got  
7 a quorum of the board. By the way, are we on the record  
8 now?

9 Okay, so we are on the record. We do have a  
10 quorum of the board, and we are missing the staff; but  
11 the staff could check transcript on this. What occurs  
12 to me is we could begin to talk about Duke's filing,  
13 and Duke's privelege claims and whatever objections  
14 Palmetto may have to the Duke ascertions of privelege,  
15 and then save the staff until hopefully later we have  
16 got them wired in. Does that seem like a reasonable way  
17 to proceed?

18 MR. GUILD: Judge this is Bob Guild. One  
19 problem is that is, unfortunately, I just received a  
20 phone call that the staff's submission to the board had  
21 arrived in Raleigh about five minutes ago, and someone  
22 read real quickly the cover letter to me. I have gct  
23 rough notes from that, but I understand essentially  
24 that the base their claim of privelege in part of sort  
25 of a... well, interlocking claim that the information



1 is available from the Applicants which we dispute. But,  
2 I am afraid that it may just overly complicate matters.  
3 There is a clear inter-relationship of privilege or  
4 confidentiality between applicants and staff. Frankly,  
5 we have some factual questions about the extent to  
6 which staff has disclosed identifying information to  
7 Applicants, and Brad Jones is probably the person most  
8 directly knowledgeable about that, so, I hate to --

9 JUDGE KELLEY: No. No. Let me ask my secretary  
10 what the word is here, just a minute. Her note says  
11 Purdom and Jones are on an Atlanta line. The operator  
12 is still having trouble getting through. Is she going  
13 to continue to work that, I assume she will?

14 Well, maybe we could get a few things spoken  
15 for, bearing in mind your points Mr. Guild. I still  
16 think there are some things in here we could speak to.  
17 They are probably entirely, or virtually entirely  
18 outside the interest and pervuew of the staff. Let's  
19 try that, and then if you feel that we are not going to  
20 get a full picture on something because of Brad Jones's  
21 absence, then we can consider waiting for him. Is that  
22 okay with the Applicants?

23 MR. CARR: Yes sir.

24 JUDGE KELLEY: What I had, for example, the  
25 first thing we can speak to, I think clearly, is just

1 Duke's concern that they filed with the board some  
2 documents with respect to which they claim the  
3 attorneys were product priveleged, and it is an in  
4 camera filing in that the actual documents were  
5 submitted to the board but not to the parties. Do you  
6 know what I am referring to, Mr. Guild. This is  
7 referred to in the letter.

8 MR. GUILD: I know that they reference it in  
9 it.

10 JUDGE KELLEY: Right, sure. I think I can say  
11 without betrysayng anything in there that what these  
12 documents are, they are essentially a couple of  
13 matrix's, matrixes if that is the proper plural form.  
14 Essentially, listing a lot of names of employees, and  
15 then listing a lot of areas of concern the employee  
16 grazed. It is a little bit like, the parties might  
17 remember Neil Alexander had a matrix of non-technical  
18 concerns with names on one margin and concerns listed  
19 out and x's and checks put in. It is that kind of a  
20 thing. The privelege is claimed under the document  
21 against Taylor document work product. We think it sits  
22 within that area. We are going to sustain the claim.  
23 The thing I would like to stress is there is absolutely  
24 no information in these documents. All of the  
25 information in these matrixes is already contained in

1 the papers that have been turned over to Palmetto. It  
2 is a matter of arranging that information. It is also a  
3 matter to some extent that council of judgement had to,  
4 what fits in what box. But, we think that's what the  
5 Hechman Taylor doctrine is really about, so we are  
6 going to sustain that claim of work product privelege.

7 MR. GUILD: Judge, if we may restate our  
8 position for the record for a minute.

9 JUDGE KELLEY: Go ahead.

10 MR. GUILD: I would like an opportunity to do  
11 that. It would surmise that that was the nature of  
12 information from the pretty brief description given the  
13 Applicant's cover letter. It is our view that it does  
14 represent basic facts which are not subject to the  
15 attorney client privelege or the work products of it,  
16 not the fact that they are necessary to be produced and  
17 discovered. They clearly do not reflect the  
18 confidentiality of attorney product judgement that  
19 represents, a counsel that represents the kind of  
20 advice that is a matter of policy the Supreme Court  
21 exempts from exposure in litigation. In the interest of  
22 encouraging confidential communication among attorney  
23 and client, here the root issue in this case is if you  
24 will complete the Applicant's investigation of these  
25 concerns upon which it founds its conclusions that

1 there are no significant problems. I mean, to the  
2 extent that there are factual matters contained in an  
3 analysis that purports to, reflects such a review of  
4 completement, even if prepared by a lawyer, and clearly  
5 it is prepared by someone else and used by the lawyer,  
6 even if at the lawyer's request that is by an expert  
7 witness or technical assistant. We do not believe that  
8 such information should be shielded from disclosure.  
9 The fact that the substance of information may be  
10 available in a desparate and ona collated and analyzed  
11 form does not make it not discoverable in our view, and  
12 we think frankly that such an analytical tool would be  
13 useful not only for the board but to the parties in  
14 trying to come to grips with the issues that are before  
15 us. Finally, we would ask that this information be  
16 disclosed, and finally the recognition to the Board's  
17 decision to the contrary at least in our decision, we  
18 would ask that the information not be considered as  
19 information of record for use in the decision, not  
20 subject to scrutiny by the party.

21 JUDGE KELLEY: Well, let me just comment on  
22 two or three things. One, it won't be information of  
23 record. It is being held from the record, as we  
24 understand it. If it were introduced, that would be a  
25 different matter. Now, we didn't call for argument,



1 because it was submitted in-camera, and we didn't  
2 frankly see what argument would produce, since you  
3 can't see what these papers are beyond the very general  
4 description. We have given, we certainly note your  
5 objection to the lodging of this claim of privilege and  
6 it is duly noted. Beyond that, I would say again that  
7 there are elements of judgement in this as we see it,  
8 and we think it is within the Hickman, the Taylor  
9 doctrine. We also think that that doctrine can extend  
10 as it does here with respect to one of these sets of  
11 papers to work done under the direction of a lawyer is  
12 not crucial, that the work itself be done by the lawyer  
13 personally as we understand it. Okay.

14 MR. GUILD: Can I just ask sir. I don't know  
15 how you preserve this to the extent that I gather  
16 security matters assisted you in camera, and as such  
17 there at least in the record for later review, although  
18 subject to the in-camera received. To that extent, I  
19 would ask that you consider matters of record that the  
20 Appeal Board or somebody else later on could take a  
21 look at.

22 JUDGE KELLEY: They, sure. They have been  
23 submitted to the board. They are in the record in that  
24 sense. They are not in the evidentiary record, and they  
25 won't be in the evidentiary record. Beyond that



1       though, should there come a day when you are appealing  
2       the adverse ruling that you just got on this, the  
3       papers themselves would be before the appeal board for  
4       appealant review.

5               MR. JONES: This is Brad Jones. I am in on the  
6       call now. I came in on the middle of Mr. Guild's  
7       conversation. Maybe you can tell me if I am way behind  
8       or just a little.

9               JUDGE KELLEY: Well, my point was when we went  
10       into that was we thought we could cover this without  
11       your being on. I am happy to have you, but it had to do  
12       with the Duke claim of attorney work products and  
13       documents and didn't seem to us that you would have  
14       much interest in that.

15              MR. JONES: That's fine.

16              JUDGE KELLEY: Now, with you on, is Judge  
17       Purdom on? I guess they must still be working on Judge  
18       Purdom. Well, let's at least get a few more things  
19       done, and hopefully he will be wired on very soon.  
20       Sticking with the Applicants's papers, since that is  
21       where we started, you do have those papers, do you not  
22       Mr. Guild?

23              MR. GUILD: Yes sir, all of those I gather,  
24       except for the work product document.

25              JUDGE KELLEY: Right, but you got the big box,

1 and I will describe what it is that I have here, and I  
2 think you can tell whether you have the same thing. I  
3 assume that you do. What I was going to refer to now,  
4 just so that we know what we are talking about. There  
5 is a package, oh, two or three inches thick of  
6 affidavits, most of them signed I believe. The package  
7 begins with a hand printed list of names, several  
8 pages, beginning with number one, J. G. Abernathy, and  
9 going over to number 222, Phil Edwards. Right after  
10 that list, you come to the first affidavit, which is  
11 the J. G. Abernathy affidavit. So that's, do you know  
12 what I am talking about? Does everybody know what I am  
13 referring to?

14 MR. MCGARRY: Yes sir, this is McGarry.

15 JUDGE KELLEY: Okay.

16 MR. GUILD: Yes sir. This is Guild. Judge,  
17 maybe I can make a suggestion. Since the issue of  
18 whether this should be treated in-camera is going to be  
19 argued later, in order to identify what you are talking  
20 about, I don't see any need for identifying names or  
21 numbers. I certainly know what you are speaking of, and  
22 perhaps we could simply remove your identification of  
23 those two people from the transcript we wouldn't have  
24 any need to secure it at this point. I don't envision  
25 discussing matters that, camera protection from my

1 part.

2 JUDGE KELLEY: Alright. I was just for  
3 identification using that name. When we get through  
4 this entire discussion, can we reconsider whether we  
5 have to go back and erase the two names that I just  
6 mentioned from the transcript. We can do that if that  
7 seems to be called for. I have a note saying that they  
8 are having trouble getting Judge Purdom. They are still  
9 trying.

10 So, we can call that the affidavit package.  
11 We will know what we mean by that. Now, there are two  
12 other packages that we are dealing with. One is the  
13 first page is called review board report, welder B  
14 concerns dated September 24, 1984, and inch and a half.  
15 Do you know know what I mean by that? Applicants?

16 MR. MCGARRY: Yes sir.

17 JUDGE KELLEY: Mr. Guild?

18 MR. GUILD: Yes sir, I have one that has that  
19 cover on it.

20 JUDGE KELLEY: Have you got these documents  
21 Mr. Jones?

22 MR. JONES: I haven't got them in my office  
23 yet. No, they may have come in, but I haven't got them  
24 up here.

25 JUDGE KELLEY: Alright. Now, the last and

1 largest stack, four or five inches maybe is called  
2 stack two, and there is a note that says this goes  
3 behind stack one. Now, I won't break that down any  
4 further for the moment. We all know what that is, the  
5 so called stack two?

6 MR. MCGARRY: Yes sir.

7 JUDGE KELLEY: Mr. Guild, are you with me?

8 MR. GUILD: Let me hang on one second, Mr.  
9 Chairman, and see if I got that one. I have got another  
10 stack, but I don't see any identification on it. One  
11 second. I think we're finding that.

12 JUDGE KELLEY: Well, it will make it easier  
13 for purposes for discussion if we can break these out,  
14 I think initially as I just suggested there may be  
15 other places that one needs to break it, but just so we  
16 can be understood. I will be referring, as we talk  
17 about the Applicant's filing to the affidavit stack to  
18 the review board report stack in stack two. That is  
19 all, I understand, to have been submitted. Am I leaving  
20 anything out, Mr. McGarry?

21 MR. MCGARRY: No sir.

22 JUDGE KELLEY: Okay. Now, we break it out that  
23 way because we want to ask this question to move the  
24 discussion along. In the affidavit stack, Mr. McGarry,  
25 you heard the other day, and Mr. Carr urged you again



1 in his letter that a formal protective order be entered  
2 to protect further dissemination of the names of these  
3 people, correct?

4 MR. MCGARRY: That's correct.

5 JUDGE KELLEY: Okay. Now, and that is in,  
6 that's the affidavit stack, the 222.

7 MR. MCGARRY: Yes sir.

8 JUDGE KELLEY: Okay, are you seeking  
9 priveleged treatment or protective order with respect  
10 to anything in the review board report stack or stack  
11 two?

12 MR. MCGARRY: Yes sir. In each one of those  
13 latter two documents there were review package, and in  
14 fact two packages.

15 JUDGE KELLEY: Yeag.

16 MR. MCGARRY: There were names mentioned  
17 therein.

18 JUDGE KELLEY: Now, are these, I know that.  
19 Fine, let's follow that up a minute. Okay, there are  
20 names in those two stacks. Are those names different  
21 from the names in the affidavit stack?

22 MR. MCGARRY: No sir.

23 JUDGE KELLEY: Same people?

24 MR. MCGARRY: Correct.

25 JUDGE KELLEY: Yes?



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MR. MCGARRY: Yes sir.

JUDGE KELLEY: So, you are, I don't mean to belabor the obvious, but there is an affidavit signed by Joe Smith, someplace in either or one of those other two stacks. If I look long enough, I might find Joe Smith once more?

MR. MCGARRY: That's correct.

JUDGE KELLEY: Same guy?

MR. MCGARRY: Yes sir.

JUDGE KELLEY: Are there any in the review board report, or in stack two, that are not in the affidavit stack?

MR. MCGARRY: No sir.

JUDGE KELLEY: So, for purposes of the claim of privilege for identities, we need only focus on the affidavit stack?

MR. MCGARRY: That is correct.

JUDGE KELLEY: Okay, with the understanding, if I understand you correctly, that when you find, if and when you find one of the affiant's names either in the review report or stack two, his name is still protected?

MR. MCGARRY: Yes sir.

JUDGE KELLEY: If you get the relief that you want?

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MR. MCGARRY: That's correct.

JUDGE KELLEY: Okay, now, Mr. Guild did that all fall into place for you?

MR. GUILD: I'm trying Judge.

JUDGE KELLEY: Okay, so I think...maybe I am repeating myself again. The only claim or privelege now that we have to address from the applicants is the further disclosure of those names, correct?

MR. MCGARRY: That is correct.

JUDGE KELLEY: So there is nothing to talk about in the review report or stack two, today anyway, as far as privileged claims are concerns?

MR. MCGARRY: That's right. If we focus on the affidavit package, whatever ruling comes out of that package will pertain to the other two.

JUDGE KELLEY: Thank you, I think we have got that now pretty well narrowed down. Now, from your discussion the other day, Mr. McGarry, I heard you, I understood you to say you were only seeking protection of further disclosure of names. Mr. Guild has those names now, right?

MR. MCGARRY: Under the NR protective order.

JUDGE KELLEY: Right, but you didn't ink out anything or x it out. You just sent it as it was.

MR. MCGARRY: Absolutely, that is correct.

1 JUDGE KELLEY: Okay, now, and just to clarify  
2 this, or make it clear to one further step. When you  
3 say you want to protect names, I understand that that  
4 is really all you mean, and that you are not seeking  
5 protection of facts in the affidavit that might tend to  
6 disclose identity, is that right?

7 MR. MCGARRY: That is correct.

8 JUDGE KELLEY: Okay. So that if you got the  
9 order that you seek, Mr. Guild could take an affidavit  
10 along with the persons addressed, contact the person,  
11 and talk to him about anything. But, let me put it to  
12 you differently. He could take an affidavit in which  
13 somebody else's name, and he could go to that other  
14 person and ask the person if he knew about a certain  
15 incident and relate to facts as long as he referred to  
16 using the name of the first person.

17 MR. MCGARRY: That's correct. There is two  
18 points that I would like to make. First, that in a  
19 situation where there was... one comment, that is  
20 precisely how we conducted our investigation. If Joe,  
21 John Doe came to us in confidence, made a statement,  
22 gave us an affidavit, and in that affidavit he said  
23 that Billy Jones had done an improper weld, that would  
24 be a ... what we did was we went out and we may have  
25 talked to Billy Jones, and we may have talked to

1 somebody that Billy Jones worked with and it would be  
2 said that it has been alleged that you did an improper  
3 weld so we would ask one of his crew members. It has  
4 been alleged that Billy Jones did an improper weld. Do  
5 you know anything about that, but we would have never  
6 mentioned John Doe's name.

7 JUDGE KELLEY: Okay, thank you. Now, Mr.  
8 Guild, we heard really from Mr. McGarry and to extent  
9 from you also the other day in this general area. As I  
10 understood your position the other day, you object to  
11 the relief that Mr. McGarry seeks as further disclosure  
12 of names that he has just described is that right?

13 MR. GUILD: Yes sir.

14 JUDGE KELLEY: Okay. Could you say again how  
15 in your view you are injured by that kind of relief?

16 MR. GUILD: We me see if I can focus in on  
17 that point. It is precisely for the reason that Duke  
18 did not use names when it inquired to this matter among  
19 others. It we believe that the result of their  
20 investigations do not fairly and fully reflect a true  
21 statement to the extent of a foreman override  
22 practices at Catawba. To put it simply, our view is  
23 that as a litigant, the Applicants had every interest  
24 in minimizing the extent of this problem, and every  
25 interest in producing affidavits as they ultimately



1 extract it, saying that either concerns were limited or  
2 individuals were satisfied to the extent of whatever,  
3 or that they had no knowledge of problems at the plant.  
4 Simply asking the open ended question are you aware of  
5 foremen pressuring you to violate, or anyone on your  
6 crew to violate a quality procedure or in performing  
7 proper work is calculated to the list that the  
8 appropriate answer, and that is no. It did so, in many  
9 many cases which we would submit that on the fact, are  
10 not credible given the fact that they are asked a  
11 foreman, with overwhelming evidence indicates was  
12 guilty of the foreman override practice. If the foreman  
13 in question, here, many foreman in question. These  
14 foreman, of course, denied any wrongdoing. He said no,  
15 he had never done that. The people on his crew said no  
16 he had never done that, and despite overwhelming  
17 evidence from others, the witness presumably the same  
18 incident that said they had seen it. Further, the  
19 device the litigation posture of the party determines  
20 the, if you will, usefulness of the tool of the  
21 identities of witnesses in performing investigations, and  
22 utilizing that tool of the disclosure of identities to  
23 the maximum extent possible in order to conduct the  
24 investigation. The second point...

25 JUDGE KELLEY: Could you, now just before you



1 go to the second point.

2 MR. GUILD: Yeah.

3 JUDGE KELLEY: Could you give us maybe an  
4 example. We all keep talking about Joe Smith and Harry  
5 Jones. If you could disclose names, investigating in  
6 the field so to speak, what do you think you could get  
7 that you can't get without disclosing it?

8 MR. GUILD: Well, I think that a reflection  
9 on good investigation practices, and I am not an expert  
10 in this. I am trying to learn about it as best that I  
11 can. If you take for example what you would think of as  
12 an investigation interview conducted by law enforcement  
13 people might consist of. It is going to ask the  
14 question in general, as Mr. McGarry claimed that are  
15 you aware of these things happening, and the individual  
16 is going to say, perhaps no. They are going to be  
17 reluctant to implicate themselves in wrongdoing, to get  
18 themselves in hot water, to open themselves to  
19 reprisal, for a variety of reasons they are going to be  
20 reluctant to acknowledge their information regarding  
21 wrongdoing. Okay, so you get the initial denial, and  
22 then you turn to that individual and you say I have, if  
23 I showed you a sworn statement by your fellow  
24 crewmember X stated that you were present, and that in  
25 addition to he, he observed pressure by Foreman Y to

1 violate interpass temperature requirements. Don't you  
2 acknowledge that that happened, or does that refresh  
3 your recollection? I submit to you it is that commonly  
4 used device in conducting investigations of his sort of  
5 wrongdoing of things that are unpleasant to admit to,  
6 produces that kind of results, and that why it is  
7 employed on a regular basis that it is a fundamental  
8 handicap to not be able to take what is cooperating  
9 evidence to the extent that it exists, and to be able  
10 to freely employ that cooperating evidence in the  
11 course of conducting investigation.

12 JUDGE KELLEY: Well, but why can't you do that  
13 as long as you don't use the name?

14 MR. GUILD: Because it is of considerably  
15 limited value to be able to make the ascertainment that I  
16 think you pose as a hypothetical, it might be your  
17 posed as a hypothetical. That is, you know, someone  
18 alleges that this happened. That certainly is a  
19 question, and that is a statement that you would make  
20 in a series of investigative questions, but the bottom  
21 line is an individual who has knowledge of facts that  
22 may be damning either to themselves or may expose them  
23 to fear or retaliation is only going to fess up to the  
24 knowledge of those facts when they are confronted with  
25 evidence that essentially, pins them down to having to

1 either lie or having to acknowledge the truthfulness of  
2 facts that are otherwise cooberated. Judge, that can  
3 only be done in some circumstances, at least, by being  
4 able to use the device that I am suggesting. Taking an  
5 affidavit, if you will, or information so to identify  
6 as another source of evidence with the same wrongdoing  
7 and confronting the person who is being questioned or  
8 interviewed, or you're talking with that evidence. That  
9 is employed, I would submit, regularly in the course of  
10 investigating circumstances of this sort. It would be  
11 employed by the...by law enforcement people. If you had  
12 a statement from a co-defendant, or a co-conspirator or  
13 witness. It should not be something that is unavailable  
14 to us.

15 JUDGE KELLEY: Well, I am still trying to nail  
16 down just how much is unavailable. You now have all of  
17 these affidavits, right?

18 MR. GUILD: I have what they sent us, Judge.

19 JUDGE KELLEY: Okay. So, what is to prevent  
20 you under the relief that has been requested from going  
21 out and interviewing somebody, and then saying to them  
22 I've got a sworn statement from X, leave it blank, I  
23 don't care what you say there exactly, but just don't  
24 give the name. I ve got a sworn statement from another  
25 Duke employee that such and such happened. Here is what

1 he said, and quote the affidavit. You can do that,  
2 can't you? Under the relief that is being sought?

3 MR. GUILD: Well, Judge, if I may raise  
4 another point. I don't think that is effective, but if  
5 it is effective...to be effective for the second best  
6 thing, shall we say, you have to use sufficient facts  
7 that make it absolutely clear who that individual is.

8 JUDGE KELLEY: Well, but that's what I tried  
9 to make clear with Mr McGarry. I said to him, you're  
10 not asking for protection of facts which would tend to  
11 disclose identity. I thought the answer was no I am  
12 not.

13 MR. GUILD: I heard him say the same thing  
14 Judge.

15 JUDGE KELLEY: Okay, well then that is what he  
16 said.

17 MR. GUILD: In which case I submit that the  
18 exercise we are going through is to no end, no  
19 substance then, because if you are disclosing  
20 identifying facts, then you are only hampered  
21 artificially to know the purpose in disclosing the  
22 actual identify.

23 JUDGE KELLEY: But, why should that be your  
24 concern, if by disclosing the identifying facts you can  
25 get your message across, as long as you don't disclose



1 the name. Then, supposing your view is a waste of time,  
2 it is kind of a silly exercise. But, even so, you are  
3 not, if you are not hampered very much, what is the  
4 problem?

5 MR. GUILD: The oposition it was our hand...we  
6 are hampered. We are hampered unduly, and that is only  
7 one...that is one point I think needs to be considered.  
8 I appreciate your effort to try to figure out a way  
9 around what is obviously a problem, a naughty problem  
10 in the way that it does it, it sort of minizes the harm  
11 done to all concerned. But, I submit to you Judge that  
12 there is an overriding interest here, and that  
13 overriding interest is in finding out what is going in  
14 here in a very limited amount of time. This overriding  
15 interest also in this proceeding regulating a nuclear  
16 power plant, it makes the decision about a matter of  
17 some public moment in a public form with information on  
18 the public record. I think that interest in having this  
19 information public serves the interests of those of the  
20 private party being able to effectively litigate these  
21 issues. I think it also serves as much a part of public  
22 interest.

I submit that there are ways out of this and  
this is not to, if you will, make the  
so artificial that they don't



1 accomplish the asserted purpose, and that is protecting  
2 these confidential sources, which is what the company  
3 is really asserting here. Or, hampering us in doing the  
4 job that we are trying to do. I submit that the  
5 Applicants allude to them. They begin the process, if  
6 you will. The Midland decision, the co-board decision  
7 that we cited earlier, and that Applicants talk about  
8 in their cover letter, in fact lacks the circumstance  
9 where individuals who were the subject of the  
10 discussion had already gone back to by the parties that  
11 had been asked, do you have a need for confidentiality.  
12 Individuals who were in question, asserted on an  
13 individual particularized basis that need. It was only  
14 upon that assertion that the board and the appeal board  
15 required the disclosure, which is what we are talking  
16 about. The above made it subject to in-camera  
17 protection, or protective order because of the  
18 specified demonstrated need for confidentiality.

19 Now, in the Applicants' cover letter, they  
20 suggest that among the affidavits, there are those who  
21 make a showing of that need. I think that is absolutely  
22 the point here. I have just looked briefly at the two  
23 examples that they cite, and I think at least one of  
24 them appears on the face of it to reflect, you know, a  
25 classic example where we would seek to honor that

1 confidentiality.

2 JUDGE KELLEY: I think you are coming at an  
3 important point. I just wonder...just let me ask you  
4 this. Looking ahead at the procedures that are to be  
5 followed here, let's suppose that you next week want to  
6 depose or interview a group of employees. Why can't you  
7 just say right up front that you are investigating  
8 this, and you want to pursue it in litigation. Do you  
9 have any objection to our using your name in that  
10 connection publicly, or to other people. If the guy  
11 says you bet I do, they promised me to be confidential.  
12 I don't want you to do that. That's one thing, he says  
13 I don't care. You can tell anybody you want. That would  
14 be another. Can't we just get a reconfirmation of  
15 whether the person wants confidentiality or not when  
16 you talk to them?

17 MR. GUILD: Yes sir. That's what I think,  
18 that's what I would propose, except I think it should  
19 be under different circumstances. I think first, the  
20 principle should not be that this is a blanket order of  
21 nondisclosure for this information. I think that to the  
22 extent, and I have tried to do that beyond that too,  
23 that Applicants like to, but to the extent that the  
24 affidavits themselves make a self-identification of the  
25 circumstances that the particularized needs of

1 for confidentiality then fine, the job is in part done.  
2 I think what really is called for here though, is  
3 instead of palmetto being in a position where we are  
4 the ones that have to ask people to go public, if you  
5 will. And that's a burden that shouldn't be placed on  
6 us in my judgement, because frankly, I think that while  
7 we've demonstrated a basis for individuals with  
8 information about safety concerns to put their trust in  
9 our advocacy, if you will. The fact of the matter is  
10 this is hardball and this is a case where there is some  
11 controversy and a degree of acromony on the site and  
12 between the parties and I submit that Palmetto Alliance  
13 is probably not a particulary popular party among some  
14 quarters on the Catawba site. We, and in fact, all the  
15 people we are talking about are employees of the power  
16 company, so to ask us to be in a position where people  
17 have to agree at our request to go public is simply  
18 asking the impossible, in a lot of instances. We can't  
19 protect them if they really need protection, and yet  
20 those that may have information that they wouldd make  
21 public, the least likely among all the parties to get  
22 it is Palmetto. Here's our suggestion, I believe that  
23 the quick and simple approach here is that the board  
24 should make a simple and concise communication to the  
25 people we are talking about and should simply state in

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1 effect as you did last fall in the notice that was  
2 posted to the work force generally that you're prepared  
3 to consider claims of confidentiality. Explain the  
4 circumstances and state that you are prepared to honor  
5 those if there is a demonstrated need. Simply state  
6 that you wish to receive some concise indication of a  
7 need for confidentiality.

8 JUDGE KELLY: I might just interject here that  
9 while we said in our notice that people should be  
10 prepared to give us some need basis for  
11 confidentiality, we did not, in fact, enforce that and  
12 in most cases, I recall, no such basis was ever given.  
13 As a practical matter, the four people who came in and  
14 said they wanted to be treated confidentially were  
15 treated confidentially without their need being probed  
16 by the board.

17 MR. GUILD: Well that may be, and I'm sure in  
18 fact those circumstances reflect the give and take the  
19 need for confidentiality. The other side of that coin  
20 is that for example with Sam Nunn. So long as he felt  
21 he needed confidentiality, we sought to protect it. All  
22 the parties respected it, the board honored it and when  
23 he was prepared to go public, we promptly communicated  
24 that on his behalf to the board and we stopped needing  
25 and requiring the in camera protection with all the

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1 administrative problems and difficulties that that  
2 imposed. I think we're all talking about trying to use  
3 devices sparingly here that only require sparing use.

4 Our point here is that we don't believe that  
5 applicants are entitled to the protection that they  
6 see. We think that there are individuals there who may  
7 have a particularized need for protection of their  
8 confidence and we would honor that. We think, however  
9 that the applicants, in reviewing the documents in the  
10 quick fashion that we have, Judge we found, for  
11 example, that apparently, according to the NRC staff's  
12 recitation of the interview process, conducted by Duke,  
13 it was the welding superintendant himself, Bill Rodgers  
14 who made the introduction to the interviewee of the  
15 need for the interview and the description of the  
16 terms of their efforts to protect confidence. I think  
17 that is substantially the expectation of the individual  
18 that their confidences meant anything. Of course, I  
19 think, limited the usefulness of the interview product  
20 itself.

21 Mr. Uryc's trip report suggests that  
22 individuals were called to the superintendant's office  
23 and the welding superintendant explained to them  
24 individually the terms of the interview, and the  
25 confidentiality. In any event, these individuals

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1 identities were all disclosed to the NRC staff.  
2 Immediately there was some disclosure of the  
3 confidentiality, there is no basis described in any of  
4 the documents for stated that that was an understood  
5 expressed limitation on the scope of the confidence of  
6 pledge of confidence extended.

7 They were also disclosed apparently among  
8 the Duke investigative...

9 JUDGE KELLY: Now, I think we are going to  
10 get, excuse me but we are getting over now into the  
11 staff's claims, right?

12 MR. GUILD: No sir, I am talking about the  
13 company. I am talking about documents that this is Mr.  
14 Uryc's trip report. It simply reflects his discussions  
15 with a Duke investigative team, and reflects his  
16 understanding of the circumstances under which Duke  
17 conducted the interviews. I was trying to describe...

18 JUDGE KELLY: Alright, I'm sorry.

19 MR. GUILD: ...how the Duke interviews were  
20 conducted, and it goes to the question of whether or  
21 not in fact there are justifiable expectations of  
22 confidence that on a blanket basis that should justify  
23 blanket withholding of names. We believe otherwise. We  
24 believe that that claim, that the privilege does exist,  
25 and we argued that the other day. We believe that the

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1 pledge was conditional, or not conditional, and has  
2 already been violated in the sense that the names have  
3 been clearly disclosed among those investigative  
4 concerns among the applicants management, and technical  
5 staff, and also disclosed to the NRC staff. So, again,  
6 we come back to what I think is the...is the remedial  
7 mechanism for honoring justifiable needs for  
8 confidence. That, I submit is an individual  
9 identification of those that have the need with the  
10 presumption of this information as information  
11 generally in discovery in a proceeding of this sort  
12 should be treated as public information.

13 Perhaps, even just a review of all of the  
14 affidavits by applicants. They picked two out, I don't  
15 know how many others, if any, reflect some identified  
16 need for confidentiality. Between the two that they  
17 have identified in their cover letter, one is a  
18 foreman, I would submit, and aside from expressing some  
19 concerns about the personality of his superior, it  
20 doesn't disclose any wrongdoing or information other  
21 than, the kind of candid that one would express about  
22 someone who has... of what you have from person  
23 animosity that would warrant the extreme remedy of  
24 confidence. By contrast, the other affidavit that they  
25 identified as a welder who has very serious factual

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1 testimony regarding foreman override and procedural  
2 and safety violations. But, one is in a category on the  
3 face of that, to argue very strongly for comment, and  
4 one is very very weakly for comment. I would assume  
5 that same analysis would apply for others. That  
6 particular analysis has not been offered by applicants,  
7 except by that example is very limited. We submit that  
8 it should. We think that the vehicle of a board  
9 communication to these individuals is the preferable  
10 way of approaching this matter, because it is the most  
11 neutral party in all of this. We think that you can  
12 honor this, since this is your decision. Ultimately,  
13 the terms of disclosure of this information, we think  
14 it is most appropriate that the communication about  
15 this claim of confidence comes from the board, and be  
16 received by the board. It strikes us that that's the  
17 soundest way of accommodating of competing.

18 JUDGE KELLY: Okay, let me ask now. We have  
19 heard a brief lead off from Mr. McGarry, and Mr. Guild  
20 has argued his points on the Duke Material. Mr.  
21 McGarry, do you have any response that you want to make  
22 on Mr. Guild's arguments, and then we can pass on to  
23 the staff after that?

24 MR. MCGARRY: Yes sir. I think that one of  
25 the touchdowns of Mr. Guild's argument was that the

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1 affidavits on their face don't reflect the desire for  
2 confidentiality for the most part. Indeed, that was  
3 correct, but as the board recognized that as set forth  
4 in our letter, there was a promise of confidentiality  
5 made before the statements were taken. Therefore,  
6 there is no need to reflect confidentiality or desire  
7 to confidentiality when it had already been extended.

8 Secondly, we agreed with a suggestion made by  
9 the board. What seems to be reasonable to us is that  
10 Palmetto, that we continue the protective order.

11 Palmetto can conduct his investigation on a factual  
12 basis as opposed to asking names, or revealing names.  
13 Then, when the twelve people are selected by Palmetto  
14 on Monday, during an interview or deposition taht might  
15 be conducted of those twelve, Palmetto can ask if any  
16 of those two motions for confidentiality apply to them.  
17 If they do, then we submit that that should be  
18 extended. If they do not wish confidentiality, then we  
19 would submit that it should not be confidential. We  
20 think that is a very reasonable way of approaching it.

21 JUDGE KELLY: Just to interject a related  
22 point. We referred from time to time, I think to the  
23 device of the in camera hearing, and I know the  
24 Applicants the other day expressed their desire, not  
25 merely for this relief we are talking about now, but

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1 for in camera treatment later. Let me just note that  
2 we are not crossing that bridge this morning in any  
3 particulars. We are aware of the device. We might use  
4 it, but we are really trying to clarify matters as to  
5 how these materials can be used in discovery in the  
6 next week or so, and we are not trying to cross the  
7 hearing bridge at this point. Did I interrupt you, Mr.  
8 McCarry, or ...

9 MR. McCARRY: No sir, I think that completed  
10 our comment.

11 JUDGE KELLY: Alright.

12 MR. JONES: Judge Kelly, this is Brad Jones.

13 JUDGE KELLY: Yeah.

14 MR. JONES: I just wanted to know if the staff  
15 does have a position on this. We are sensitive to the  
16 fact that confidentiality is a useful technique in  
17 conducting investigation, and we call for the  
18 licensee's to conduct investigations in our enforcement  
19 action all the time. For that reason, we are sensitive  
20 that it is a technique that is valid in doing an  
21 investigation. It is not the type of thing that you  
22 promise confidentiality, and then after you hear what  
23 the individual has got to say you say, gee you don't  
24 have a basis wrapped in confidentiality, so we are  
25 going to release your name. That ruins the device,

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1 that's the whole point. When you conduct it in that  
2 way, then the next time you promise confidentiality to  
3 someone else, it is rather a hollow promise, and  
4 doesn't help you in the investigation.

5 So, we are sensitive to that. I also, just  
6 one comment with respect to Mr. Guild's discussion of  
7 the need to use a name in investigation. I would note  
8 that the professionals that operate both in OI and in  
9 the technical staff conduct investigations all the time  
10 without using names. In fact, any time we have an  
11 allegor who requests confidentiality, we will conduct  
12 an entire investigation as we did with the in-camera  
13 issues without using the individual's name to conduct  
14 the investigation. So, I do think you can conduct an  
15 investigation without having the names of particular  
16 individuals. I just want to note that.

17 JUDGE KELLY: Thank you. Why don't we take  
18 about a three or four minute stretch, and then we can  
19 turn to the staff's filing, okay. Come back at about  
20 ten after twelve.

21 JUDGE FOSTER: I'm wondering if Judge Purdom  
22 has joined us yet.

23 JUDGE KELLY: Is Judge Purdom with us yet?

24 MR. JONES: Mr. Kelly, do you have his phone  
25 number. I might be able to call him here in Atlanta and

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1 get him here on my line.

2 JUDGE KELLY: Yeah. He is on, are you on code  
3 404?

4 MR. JONES: Yeah.

5 JUDGE KELLY: 377-0379.

6 MR. JONES: I will try and get him on my line  
7 during the break.

8 JUDGE KELLY: Fine.

9 MR. GUILD: Do you want us to stay on the line  
10 Judge?

11 JUDGE KELLY: Yeah. Take till ten after  
12 twelve.

13 (Brief recess.)

14 JUDGE KELLY: Okay, this is Kelly again. Mr.  
15 Guild, are you there? McGarry and Carr are there right?

16 MR. MCGARRY: Yes sir.

17 JUDGE KELLY: Foster and Purdom, and Brad  
18 Jones?

19 MR. JONES: Yes.

20 MR. MCGARRY: Mr. Guild got off the phone  
21 right at the end of the break, just before the break. I  
22 heard some clicks, he was cut off the phone then?

23 JUDGE KELLY: Yes, I heard that. It is about  
24 twelve minutes after by my clock.

25 The growing ominous feeling is that we have

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1 lost Mr. Guild somehow.

2 MR. GUILD: Judge, you just found me. I am  
3 back.

4 JUDGE KELLY: Alright, good. Well, first of  
5 all, Mr. Guild, did you receive the materials, I guess  
6 you got material from two directions. The George  
7 Johnson letter dated the 25th, did you get that?

8 MR. GUILD: I don't, yes sir, I have got it.

9 JUDGE KELLY: Okay, so you got his material  
10 then. You got some separate material from Atlanta, is  
11 that right?

12 MR. GUILD: Yes sir.

13 JUDGE KELLY: And that got there too?

14 MR. GUILD: Yes.

15 JUDGE KELLY: You have got that, okay fine. I  
16 think again, for purposes of talking about these  
17 priveleged claims that the staff advances, it's useful  
18 to write them into categories, and just talk about one  
19 category at a time. So, under category one, on the  
20 confidential sources of which there are totally five  
21 people. The papers that were sent to you, Mr. Guild,  
22 were in the form of summaries of NRC interviews with  
23 the names blanked out, and when I got up here to show,  
24 I got the NRC extragated version, which shows these  
25 names marked in red as Mr. Johnson's coverletter of the

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1 26th shows.

2 So, let's talk about that category one that  
3 just shows five people and their identities, and facts  
4 that might tend to reveal their identities. Mr. Jones, if  
5 I understand the staff, they are asserting privilege  
6 with regard to the identities of these people, and are  
7 opposed to their disclosure even under a protective  
8 order, is that correct?

9 MR. JONES: Well, that was the position of the  
10 staff in the prior conference call. I think it was the  
11 last letter that Mr. Johnson wrote indicates, I  
12 believe, a protective order that could be designed that  
13 would adequately recite sources potentially. But, any  
14 such thing they would have to go to the Commission in  
15 any event because of the new policy.

16 JUDGE KELLY: Could I just be looking at  
17 Johnson's letter again on page two. In the fourth line,  
18 the staff is hereby advising the board that  
19 unrestricted disclosure of the enclosed documents would  
20 reveal the identity of NRC confidential sources, and  
21 the information designated should be disclosed only if  
22 the board determines it is necessary to a proper  
23 decision in this case, and not reasonably available,  
24 and so on. So that, well let me ask you this, Mr.  
25 Jones. Do you have a position on whether their

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1 disclosure is necessary to the case or not, or do we  
2 have to leave it as something for the board to decide?

3 MR. JONES: I'm sorry, could you repeat the  
4 last statement that you made, the last part of it?

5 JUDGE KELLY: Well, Mr. Johnson says that the  
6 information should be disclosed "only if the board  
7 determines it to be necessary to a proper decision in  
8 this case." Do you have a position on whether or not it  
9 is necessary for a proper decision in this case,  
10 disclosure that is?

11 MR. JONES: Yes sir, I think we do. I haven't  
12 specifically discussed this with Mr. Johnson, but as I  
13 expressed a moment ago, the staff does not believe that  
14 you need conduct an investigation because we have done  
15 it all the time without the names. So, in that sense we  
16 believe that Mr. Guild should be able to conduct  
17 adequate discovery, it is discovery if not a whole sale  
18 investigation, without having to disclose those names.

19 JUDGE KELLY: Okay. I think I understand. Does  
20 the Applicant feel that they have a stake in this, or  
21 should we go right to Mr. Guild on this point? Mr.  
22 McGarry?

23 MR. MCGARRY: Yes. It would seem to us that  
24 the state that we have is relevant, but disclosure of  
25 names of Applicant's employees that are on the

1 documents of the staff, if they are not held in  
2 confidence, then they could affect the confidentiality  
3 of the employees that we have identified. That's the  
4 role. I think we would be in a position of adopting the  
5 staff's argument.

6 JUDGE KELLY: Mr. Guild, do you want to  
7 address that particular category of the five  
8 confidential NRC sources?

9 MR. GUILD: Yes sir. Our view is that as a  
10 threshold matter, the identities of these individuals,  
11 at least in part, have been disclosed. There is no  
12 confidence to be protected, except the protection of  
13 this information from effective release to the public  
14 and Palmetto Alliance. We are very disturbed by what we  
15 see as first, a failure to honor the confidences of  
16 individuals who proposit to have sought it.

17 Second, the effort by the NRC staff in  
18 particular to then hide behind the skirts, or trousers  
19 if you will, of the people that they claimed, so  
20 assiduously interested in protecting. In particular, it  
21 is our view that the meeting summary of the March 13  
22 meeting between the Applicants and the NRC staff  
23 reflects that the NRC staff clearly disclosed  
24 information which, by the terms if were identified  
25 would disclose the identities, reveal the identities of

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1 the claim's confidential sources.

2 Two, for the very people from whose these  
3 sources purportedly feared retaliation. The meeting  
4 summary of March 26, 1984 reflects that the staff,  
5 after investigating the specific welding crew and  
6 foreman in question determined that there was six  
7 issues, and they specified the issues and submission  
8 detailed to reflect enough circumstances to be able to  
9 identify that a lead man was involved. There was  
10 particular workmanship involved that is identifiable,  
11 and we think traceable to individuals on a fairly small  
12 group or crew intend. Then...

13 JUDGE KELLY: I want to make sure I am with  
14 you. I want to just...Alright, you have referred to two  
15 documents so far, right?

16 MR. GUILD: I'm talking about...there is a  
17 meeting summary Judge, that describes in the NRC's own  
18 term the March 13 meeting between a Region 2 staff, and  
19 representatives of Duke Power Company. At that  
20 meeting, according to the meeting summary, they  
21 disclosed the identity of a foreman in question to  
22 Duke. The identity of the crew, through the description  
23 of the specific issues, which it identified as having  
24 safety concerns expressed by the purported confidential  
25 sources, that it followed that meeting summary with an

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1 inspection report in April, which included documents. I  
2 will compare it to the summaries and interviews they  
3 may have had another title on them. Interview, results  
4 of interviews...In any event, a position which is  
5 clearly sufficient to identify with precision of one or  
6 more of the confidential sources. This is evident from  
7 the fact that we now can confirm, without disclosing  
8 anything that Sam Dunn was absolutely right in his  
9 belief about who the individuals involved were here, as  
10 disclosed in his affidavit. In part, from there, he  
11 only identifies the foreman and general foreman in  
12 question.

13 But, I submit he was correct in his  
14 identification of Welder B. If it is available to him,  
15 it became available at the same time, at this meeting  
16 to the Applicant. Therefore, the foreman therefore to  
17 the general foreman, the welding superintendant who  
18 participated in the introduction of the interviewees to  
19 the Duke Investigative team according to Mr. Urek's  
20 trip report. In fact, therefore, the region 2 staff  
21 disclosed the very confidences that it is now seeking  
22 to protect only from Palmetto, or not from Palmetto, as  
23 from Palmetto right now, and from the public.

24 So, we think as a threshold matter, they are  
25 unable to ascertain the protection, the applicability of

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1 the exemption under 2.7907 from before. That is, that  
2 the records were compiled for investigatory, for law  
3 enforcement purposes they are investigatory records,  
4 and that they would disclose the identity of a  
5 confidential source. The disclosure has already been  
6 accomplished we submit.

7 Now, we think that such disclosure, beyond  
8 simply the inapplicability, therefore the exemption  
9 because such information has been disclosed. The staff  
10 has waived any informant privilege, if an informant  
11 privilege is what we are really talking about here. It  
12 did so in the same meeting we spoke of. It also did so  
13 thereafter. I want to make two more specific  
14 references.

15 In what has been identified as Appendix C of  
16 Mr. Johnson's letter. This is a freedom of information  
17 act response that those documents, portions of which  
18 are withheld. All of what I have is in the public  
19 record. That's OI84-722.

20 JUDGE KELLY: Right.

21 MR. GUILD: Now. Included in that document are  
22 several memos filed by Mr. Uryc of the regency staff.  
23 First, I would reference is a March 12, 1984 memo that  
24 participant welder being Uryc, a confidentiality  
25 request is indicated in the form and it says, simple

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1 for subject I believe. Called to advise that he was  
2 better able to go through blank. New paragraph. Subject  
3 was also advised that EPC was going to be briefed on  
4 the general nature of our findings and that he could  
5 expect to be briefed by an interview by the EPC in the  
6 matter. He said he would tell EPC the same thing he  
7 told the NRC when questioned by them and subsequent to  
8 that there is a memo dated 8/23 also entitled or had a  
9 participant's alledged put in welder B and Uryc's  
10 confidentiality request. The first half or the top half  
11 of the memo is simply blanked out, I don't know what it  
12 says. The remainder of it says, I called Holland. I  
13 submit that's Mr. Holland who is Applicant  
14 investigation director or coordinator, and advise him  
15 of info from a ledger and Welder B.

16 Holland said he would check and find out why  
17 a ledger blanked and got back to me. Holland said that  
18 it appeared that such a blank would not be such a good  
19 idea at this time. Now, in addition to the meeting  
20 summary, then we have two memos to file which reflect  
21 at least to the effect that I can interpret that given  
22 the deletion. I don't know if the board has the  
23 undeleted version or not. I just don't know.

24 JUDGE KELLY: We do. Yeah, just for the record  
25 yes we do have a... I'm following you, and I have

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1 both...I have what Mr. Johnson sent you, so I know  
2 exactly what you are looking at. I also have an  
3 undeleted version.

4 MR. GUILD: Okay. I submit that it reflects a  
5 couple of things of my interpretation given the  
6 deletion that it suggests very strongly that either in  
7 the course of those conversations, there was a  
8 transmittal of identifying information facts that would  
9 tend to reveal the confidential source, or that it  
10 reflects that the identity of the confidential source  
11 is already known, which is probably at least as likely,  
12 that between Mr. Uryc and Mr. Holland, there was a  
13 shared knowledge of who they were speaking about. So,  
14 the confidence was a matter that inhibits the fact was  
15 disclosed by the region 2 staff. I submit that without  
16 stating a name on this record that we go to the  
17 affidavits that the individual who Mr. Dunn surmised  
18 would be Welder B in fact submits an affidavit to the  
19 applicant that had so many factual similarities to the  
20 NRC staff interviews with their confidential authority.  
21 It is absolutely clear that the Applicants understood  
22 who the identity, of at least that confidential source  
23 was.

24 Now, we submit that that at least removes  
25 this information from the control of a position of the

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1 NRC rules, but 2790, just has been disclosed. Now, I  
2 think that doesn't necessarily have to be inquired,  
3 because frankly I think that to the extent that there  
4 is an interest in honoring confidences on a continuing  
5 basis, that again the mechanism that we suggested  
6 should apply. That is, that those individuals should  
7 have an opportunity to seek the protection that they  
8 needed, but that the NRC staff certainly has not  
9 honored that protection in substance, and that the  
10 people that they most had to fear, and the only really  
11 legitimate basis for protecting confidentiality, and  
12 that would be a reprisal from their employer or their  
13 supervisor, or the people who are identified as  
14 wrongdoers by their evidence.

15 But, that is already largely, on the face of  
16 all of the documents that we have available to us, has  
17 been reached. Therefore, no useful purpose is served in  
18 granting the staff, in granting the staff's ascertainment  
19 of a privilege from disclosure and provided them to do  
20 it. We think this information is necessary for an  
21 effective resolution of these issues. We think it is  
22 necessary...

23 JUDGE KELLY: Excuse me, I don't mean to  
24 barfercate (phonetic) the points too much, but you have  
25 got a fairly long discussion of whether the NRC had in

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1 effect, told them who these people were. Maybe it would  
2 be easier for us to handle that, and easier for the  
3 staff to respond. If they could just respond to that  
4 point, then you could pick up again. Is that okay, Mr.  
5 Guild?

6 MR. GUILD: Yes sir.

7 JUDGE KELLY: Thank you. Mr. Jones, do you  
8 want to respond to the...to whether or not in your view  
9 you disclose these sources to the power company?

10 MR. JONES: In short, Mr. Guild's  
11 characterization of the set of circumstances is not  
12 correct in several aspects. The staff has not, never  
13 has, and are hoping with the agreement of the board,  
14 will not in the future give the name of any  
15 confidential source to any non-controlled individual  
16 without a protective order. We have not in the past  
17 given any names to Duke of a confidential source. Duke  
18 has not received any information that Mr. Guild could  
19 not have received. As a matter of fact, with respect to  
20 the foreman's name, Mr. Guild called me about when the  
21 summary of that meeting was going to come out back when  
22 we were waiting for it, and I specifically told him we  
23 were not including the name of the foreman in the  
24 summary, because we didn't think it was appropriate to  
25 be putting the foreman's name in the public record when

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1 there had been no investigation or confirmation that he  
2 had done anything wrong from a personal standpoint, but  
3 if Mr. Guild wanted I did not personally know, but I  
4 would find out the name of the foreman if they felt, if  
5 they wanted it, because they were entitled to have any  
6 information that we gave Duke.

7 I was never contacted again that there was  
8 any interest in having that foreman's name. As for the  
9 general statement as to information being released  
10 which would tend to identify an individual. In the  
11 absolute sense, that is always true by calling it  
12 welder B instead of Employee B, we have limited the  
13 individuals to a certain group of people. I have no  
14 doubt that with all of the activity that took place on  
15 the site, there is a lot of guessing going on as to who  
16 welder B is. The NRC position is that we have to go out  
17 and do these investigations, and you have to look at a  
18 certain area if that is where the problem is. If there  
19 is a limited number of people that have worked on that  
20 area, then the very fact you are looking at, it may  
21 further limit the group from which people may guess.

22 That does not mean that we have revealed the  
23 source, and we will not confirm nor deny the guesses  
24 that anyone makes. That is, in the final analysis the  
25 way we can both investigate and require corrective

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1 actions by the licensee for any kind of safety problem  
2 and yet protect confidentiality to the extent that we  
3 can.

4 JUDGE KELLY: Let me ask you a question, Mr.  
5 Jones. There were some memos in Mr. Johnson's  
6 submission, FOI submission in Appendix C of that  
7 submission. In reading through these myself there were  
8 some, including some that Mr. Guild referred to that  
9 when I first read it, raised in my mind the question  
10 whether the NRC had told Duke who the confidential  
11 sources were. Let me just ask you about one, and maybe  
12 you could comment on it. I'm looking at a memo to, memo  
13 to case file dated July 13, 1984. It is about 2/3 of  
14 the way through Appendix C.

15 MR. JONES: Okay, hang on just a second. I am  
16 going to... I have what we have got from the region,  
17 and I do not have a copy of what George Johnson sent  
18 out, but Mr. Uryc is just two offices down, so let me  
19 try.

20 JUDGE KELLY: Okay, it is item 10 in Appendix  
21 C specifically, if anybody wants to look at it.

22 MR. MCGARRY: Judge Kelly, after Mr. Jones is  
23 back, if the applicants could be heard for thirty  
24 seconds.

25 JUDGE KELLY: Okay.

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1 MR. JONES: Judge Kelly, I'm sorry, Brunc Uryc  
2 is not in his office, and it is locked up so I can't  
3 get at those documents.

4 JUDGE KELLY: Well, maybe if I just read this  
5 to you, let me just try that anyway. I am talking about  
6 item ten in Appendix C of Mr. Johnson's submission of  
7 the 25th to Mr. Guild. It is a memorandum to case file  
8 dated July 13, 1984, and it is just two or three  
9 sentences and I will read the last few sentences.

10 The letter inquired as to status of work  
11 being done, and I told them things were progressing and  
12 that we expected a report from DPC in early August of  
13 1984. He said he still, he said he has still not heard  
14 anything from DPC, and I assured him they would be in  
15 touch with him, and he thanked me for the call. I read  
16 that, and I wondered how Uryc could be sure Duke would  
17 be in touch with Welder B, unless Duke knew who he was.

18 MR. JONES: I do know the answer to that  
19 question

20 JUDGE KELLY: Thank you, go ahead.

21 MR. JONES: That was because in the theme of  
22 the 217 people that Duke had interviewed, we knew  
23 Welder B was included in that group, and they had  
24 assured us that they were going to go back to everyone  
25 of them while they had raised any kind of concern and

1 talk to them.

2 JUDGE KELLY: I see, thank you.

3 MR. JONES: That was how we, we knew that,  
4 because Mr. Urcy was talking about that.

5 JUDGE KELLY: Okay. Now, I guess the  
6 Applicants, you want to be heard on this disclosure  
7 question, Mr. McGarry?

8 MR. MCGARRY: Just two points so that the  
9 record is clear. The Applicants position is that the  
10 NRC as never revealed to us the names of any of the  
11 confidential witnesses that come to them. Second of  
12 all, that Mr. Holland does not know the name of Welder  
13 B. But that this board recognizes in the pursuit of  
14 facts, the pursuit of investigation, many facts are  
15 indeed disclosed. One can make, surmises, but Duke does  
16 not know as a fact any of the names that were revealed  
17 to the NRC.

18 JUDGE KELLY: Okay, thank you. Mr. Guild, I  
19 interrupted you. Do you want to pick up on the next  
20 point?

21 MR. GUILD: Yes sir. Just to be clear, I have  
22 no basis for stating that names were disclosed, and  
23 that was never our position.

24 JUDGE KELLY: No, I thought you were saying  
25 that so many facts were disclosed, that it amounted to

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1 disclosure, is that?

2 MR. GUILD: That's correct, Judge.

3 JUDGE KELLY: Okay, I understand.

4 MR. GUILD: Beyond that, it is our position  
5 that the release of this information is necessary in  
6 order to resolve the issues of the case. The staff not  
7 only declines so far to disclose names and practices  
8 that would reveal names to Palmetto. It also made a  
9 non-specific assertion of an exemption under 2790, the  
10 freedom of information provision, or information that  
11 would, the disclosure that would constitute another  
12 warranted invasion of personal privacy. I don't know  
13 what would come under that rubric, but it seems to sweep  
14 as broad as can be here. Presumably, anything else that  
15 even fails to meet the test that we have talked about  
16 thus far is all under that category. I can surmise and  
17 tell you that on the surface our problem is that we,  
18 although we asked in our pleading, for as the discovery  
19 rules provide the identities of persons with knowledge  
20 of the facts, and although clearly the NRC has had not  
21 only the identities of the people it has talked to, but  
22 their addresses and telephone numbers.

23 Of course, Duke has their identities, their  
24 addresses and telephone numbers. We have yet to receive  
25 any of those, and the NRC staff continues to assert

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1 some privilege claim after that. They have all been  
2 deleted from the documents that were transmitted. On  
3 the top of the documents, I think they were called  
4 summaries of interviews is a box of names.

5 JUDGE KELLY: We needed to get to that, and  
6 that was going to be category 2. Did you have anything  
7 else on the confidential sources that you wanted to  
8 make?

9 MR. GUILD: The point only is that we believe  
10 that the...that if you assume that there has not been  
11 disclosure, and that therefore 2790 is the exemption  
12 from the disclosure is applicable, then turn to a  
13 question of whether or not it should be disclosed. That  
14 disclosure, I'm talking about puppet disclosure now.  
15 Unless they qualify under that, they...it is public  
16 information. The opposition is that it is public  
17 information subject to an individual particularized  
18 claim from these people under the terms we suggested  
19 earlier. That is, a board notification of forward  
20 contact asking people to make a request which we would  
21 honor.

22 Absent that, it is our view that this  
23 information is necessary in order to resolve the issues  
24 in dispute for the reason we said earlier. We can't  
25 conduct meaningful discovery. We are now on Friday,

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1 before the Monday when McGarry suggest we are obligated  
2 to have included, by the process of investigation...

3 JUDGE KELLY: No. No. No. On Monday, you are  
4 supposed to tell him who you want to depose and  
5 interview. You don't have to stop investigating.

6 MR. GUILD: Well, I'm using the term that I  
7 understood Mike McGarry to use. That was, we do our  
8 investigation between now and then, then we tell him  
9 the twelve people we want to talk to. Then, we can ask  
10 them if they want to go public, if you will. That's  
11 what I mean. I mean I appreciate the fact that there is  
12 a process of interview and deposition next week. All we  
13 have right now are Applicants' version of the facts. We  
14 have their investigative affidavit. We have no  
15 practical means whatsoever to be able to go outside  
16 those investigative affidavits except to the extent  
17 where it is within the personal knowledge of one of the  
18 people who is working with Palmetto. For example, Mr.  
19 Dunn may be able to read an affidavit and say, oh, that  
20 helps me. I can tell you this, this, and this. I don't  
21 know if Mr. Dunn has agreed to a protective order in  
22 this case.

23 But, beyond that Judge, we are unable to  
24 proceed, and we have been unable to proceed. Therefore,  
25 I would submit that not only is the disclosure of this

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1 information needed in order for us to resolve these  
2 issues, and to have discovery to investigate these  
3 matters. But, the... including Saturday and Sunday,  
4 without the opportunity to meaningfully go beyond the  
5 documents that were given to us, which are also  
6 (inaudible). We are faced with a severe difficulty  
7 being able to meaningfully exercise the right of  
8 designating twelve people. Essentially, all we can do  
9 is designate them from among the affidavits that we  
10 have seen, and we submit that what should be available  
11 to us as an opportunity, pursuant to the discovery  
12 rule, but for the NRC staff and the company to get the  
13 identities and locations of the persons acknowledged.

14 JUDGE KELLY: You have got the identities from  
15 the Applicants, right?

16 MR. GUILD: I have got the identities from the  
17 Applicants, although no location. I was left with no  
18 means for contact, no phone numbers or addresses  
19 contained in the Applicants information. As for the  
20 staff, we have no identities, nor do we have locations.  
21 So, in short, I am trying to make a showing under the,  
22 under the provision cited by Mr. Johnson in 2.740  
23 that...the provision that talks about the section of  
24 documents from the staff. I apologize for not having  
25 the citation. But, essentially, the showing that the

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1 disclosure of this information be used for the  
2 resolution of these issues. We believe that we have  
3 made that shown.

4 JUDGE KELLY: Well, let me ask you a couple of  
5 things. Again, focusing back now on the confidential  
6 source, and their identity, and putting aside for one  
7 moment the addresses of people. I can inform you of one  
8 thing, which you may or may not consider to be helpful,  
9 but it seems to me it might be helpful to know. I  
10 assume you have asked yourself whether the people who  
11 are the five confidential sources are also among the  
12 affidants that the Applicants have sent to you?

13 MR. GUILD: Yes sir.

14 JUDGE KELLY: The answer is three of the five  
15 are. I will just tell you that. So, that included in  
16 that pile of 217 or 222 affidavits is an affidavit from  
17 three of the five confidential sources.

18 MR. GUILD: Judge, it is a puzzle and every  
19 little piece helps.

20 JUDGE KELLY: It is a piece.

21 MR. GUILD: It is a piece.

22 JUDGE KELLY: Beyond that, I think we have  
23 covered that confidential source part of it. If we  
24 could move to what I have made a second category.  
25 That's that staff's summaries of interviews other than

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1 the five confidential sources. Excuse me a minute, I  
2 will find that stack.

3 MR. GUILD: Brad Jones?

4 MR. JONES: Yes.

5 MR. GUILD: Do you know what Judge Kelly is  
6 speaking of there?

7 MR. JONES: The stack? I think...

8 JUDGE KELLY: Let me give you a little more  
9 description here. The summary of interviews were all  
10 together, and the five confidential source interviews  
11 were sort of mixed in among them. I just pulled them  
12 out so we could talk about them as one category. What I  
13 am calling the rest of the summary of interviews, and  
14 this name is not confidential. It starts with Earnest  
15 L. Anderson, and they are in alphabetical order. I go  
16 through to Danny Wallace.

17 MR. GUILD: Judge, is this the Region 2 stack?

18 JUDGE KELLY: I think it is. Is that a Region  
19 2 stack, Mr. Jones?

20 MR. JONES: Yes, I believe so.

21 JUDGE KELLY: Okay, about 3/8" thick, and it  
22 may have twenty or thirty summaries in there. I have  
23 put them all together, simply because they have one  
24 thing in common. The address and phone number has been  
25 taken out. It is blank on yours, right Mr. Guild?

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1 MR. GUILD: Yes sir.

2 JUDGE KELLY: On mine, I can see it here, but  
3 is marked in yellow. So, as I understand the staff  
4 then, they sent this information to you with the  
5 addresses and phone numbers marked out because they got  
6 the information from Duke Power, and it is being  
7 withheld. Am I correct, Mr. Jones, is this a privacy  
8 claim?

9 MR. JONES: That's correct. This is  
10 information gathered during the course of this  
11 investigation which the if public released may violate  
12 someone's personal privacy.

13 JUDGE KELLY: Could you expand on that a  
14 little bit?

15 MR. JONES: Yeah. This is a situation where I  
16 believe some of these, I don't know how public the  
17 addresses are, but I do know some of the phone numbers  
18 of the individuals were unlisted, and of course, on  
19 those circumstances when you have an unlisted number,  
20 your address isn't in the phone book, and so people do  
21 have some privacy interest not having published their  
22 location and phone number. That was the reason they  
23 were, they are taken out then. Then, generally what the  
24 region does at any Ethyl IA documents under that same  
25 concern for privacy, we take any phone numbers and

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1 addresses out.

2 JUDGE KELLY: Would you have any objection to  
3 that information being disclosed to Palmetto under a  
4 protective order which said it is not to be redisclosed  
5 to anyone else, and used only in the course of pursuing  
6 their case.

7 MR. JONES: We would not object to that.

8 JUDGE KELLY: You would not object to that.  
9 So, it is really to prevent general public  
10 dissemination, is that right?

11 MR. JONES: That's correct, for general. It is  
12 not a complicated confidentiality question, it doesn't  
13 have to go to the commission, and a simple affidavit  
14 that it will not be disclosed outside of, you know, the  
15 use that they have in the hearing, but it will not be  
16 publicly disclosed. I think it has been adequately  
17 protected. The only concern we have are those  
18 individuals' addresses and phone numbers.

19 JUDGE KELLY: Mr. Guild, would that take care  
20 of your need with respect to those particular people?

21 MR. GUILD: No sir, it just wouldn't. We all  
22 are troubled by getting unwanted, unsolicited phone  
23 calls and knocks on the door. My name is in the phone  
24 book. On my pleadings, your name is publicly available.  
25 There is a call for me, on occassion at home.

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1 JUDGE KELLY: No, but it is only a protective  
2 order.

3 MR. GUILD: There is no call for a protective  
4 order here. There is just frankly no call for it. We  
5 are now at the point where they didn't even make a  
6 specific showing of why this stuff was not transmitted  
7 in the first place. This information...the  
8 information we are talking about here is phone numbers  
9 and addresses for people who didn't even seek  
10 confidence. Those little boxes say no on  
11 confidentiality requests.

12 JUDGE KELLY: Assuming all of that, and maybe  
13 you are right. I am just trying to get an answer to  
14 this question. If you want to call Ernest L. Anderson  
15 or go and visit him, and you have got this address here  
16 and this phone number for your purposes, why do you  
17 care whether it is under a protective order or not?

18 MR. GUILD: Because the principle should be  
19 that this information is public. I don't have any  
20 interest in publicizing the guy's phone number, but let  
21 me just state this. We would oppose there being any  
22 restriction on the dissemination of this information.  
23 There is clearly no restriction on the dissemination of  
24 this information. There is clearly no showing made of  
25 need to keep in confidence, by him or anyone else. Our

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1 position is preserved Judge. We have an interest in  
2 moving forward on this, and we would agree to such a  
3 protective order so long that it is clear that our  
4 position is preserved that it is inappropriate to  
5 conceal this information, or not otherwise have it  
6 public. I think long ago the board observed  
7 appropriately that it is just is a fact of life that if  
8 you are going to be employed in building a Nuclear  
9 Power Plant, that your name may be identified publicly.  
10 Your phone number may be identified publicly. Where you  
11 live might be identified publicly, and your workplace  
12 might be identified publicly because it is necessary in  
13 public interest.

14 I just think that observation applies with  
15 full force here. It is a very small matter, but I  
16 really think it is matter of principle. The staff  
17 claims that they are vastly overbroad with respect to  
18 trying to secure information, if you will, that serves  
19 no useful purpose whatsoever. It is not entitled to any  
20 legal protection. We would like our position preserved  
21 with that regard, but if we can...if it is the board's  
22 will that that protection be identified, we would like  
23 it reflected over our objection. We would be willing to  
24 sign and honor it in order to afford that we want our  
25 position preserved.

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1 JUDGE KELLY: I understand, and I think you  
2 are correct as a matter of precedent in this case in  
3 terms of addresses. We have ordered disclosure of  
4 addresses in the past and rejected privacy claims. I am  
5 not sure if we have ever done that with regard to  
6 unlisted phone numbers. But, this is not...I think we  
7 would all agree, the largest issue that is before us  
8 today, and I think maybe we have...at least, let me ask  
9 the Applicants a related question. It raises much the  
10 same points. Your affidavits, the large stack of  
11 affidavits did not include addresses and phone numbers,  
12 is that right?

13 MR. MCGARRY: Yes sir.

14 JUDGE KELLY: Do you have any objection in  
15 principle to disclosing that information to Palmetto?

16 MR. MCGARRY: No sir, subject to the  
17 projective order, no problem.

18 JUDGE KELLY: If they wanted to just get this  
19 information for some limited number for particular  
20 people, even today or tomorrow, would there be some way  
21 that they could get it if they wanted to talk to  
22 somebody?

23 MR. MCGARRY: We're trying to get it right  
24 now.

25 JUDGE KELLY: Okay. I think that covers that

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1 pretty well. I've got two categories of information  
2 left in the staff's submission. We have referred  
3 earlier a time or two to Appendix C of Mr. Johnson's  
4 letter to Mr. Guild, and the version you got Mr. Guild  
5 has some blanks interspersed. They come out black in  
6 the xerox copy, and what got sent to the board, so we  
7 could see what it was was red and yellow marking pencil  
8 instead of a black so that we can read what is there,  
9 and tell at the same time what kind of a claim is  
10 ascertained.

11 Now, the reds and the... the red markouts...  
12 everybody with me so far, do you know what I am talking  
13 about, Appendix C. They are red markouts, and you  
14 couldn't tell that, Mr. Guild from what you have got,  
15 or from what the Duke Power people got. That's the five  
16 confidential sources. In fact, I think Mr. Johnson's  
17 cover letter may spell that out, but that's what that  
18 is. It would seem to me that the same arguments that we  
19 have already heard on whether those names should be  
20 disclosed or not were applied to these markouts. We  
21 talked earlier about, we were talking about the  
22 summaries of interviews of those five people, but this  
23 is just other documents which refer to the same people  
24 by name or in such a particular way that it would give  
25 away a person's identity.

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1           The yellow markouts are, again on the copy  
2           that I have got anyway, are largely different pieces of  
3           information that the NRC got from Duke. Let me just  
4           look at my set a minute.

5           (Brief pause.)

6           JUDGE KELLY: Maybe it would help to explain  
7           this. Do you have your copy, Mr. Guild?

8           MR. GUILD: Yes sir.

9           JUDGE KELLY: In Appendix C, like just for  
10          example the first one is a memorandum to case dated  
11          1/20/84? All those markouts are red. Those are  
12          confidential sources throughout that three-page  
13          document. The...

14          MR. GUILD: Was that a three page document?

15          JUDGE KELLY: I'm sorry, that's one page, and  
16          the next one is two pages. Alright, items 1 and items  
17          2, all of these markouts are red. Now, in item 3, dated  
18          January 24, 1984, that's a mix. There are five markouts  
19          there, correct?

20          MR. GUILD: There is like four, but the first  
21          one along the line it might involve two items.

22          JUDGE KELLY: We've got two, yeah. The top  
23          line is where... that's two. Well, two of the markouts  
24          are red, and three of them are yellow. Mr. Jones, do  
25          you follow me on this?

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1 MR. JONES: This is the stuff that is locked  
2 into an office that I can't get into right now.

3 JUDGE KELLY: Well, we'll ask...

4 MR. JONES: I know, generally, what you are  
5 talking about so go ahead.

6 JUDGE KELLY: Well, I guess one question to  
7 you, Mr. Jones would be to the extent that these things  
8 that have been marked out in yellow, and which  
9 represent information that you got from Duke Power...

10 MR. JONES: Yeah.

11 JUDGE KELLY: To the extent that that very  
12 information has now been disclosed by Duke in what they  
13 have turned over, what is your interest in continuing  
14 this secret?

15 MR. JONES: Okay, those items that fall into  
16 the category of information Duke gave us, I believe one  
17 of the things that is in there is the list... a list of  
18 people that they talked to. We are protecting that  
19 information based on what was then the current claim of  
20 Duke to the confidentiality for those.

21 JUDGE KELLY: Wait a minute, you say a list of  
22 the people that Duke talked to.

23 MR. JONES: I don't know if that is one of the  
24 things that you have got in front of you right at the  
25 moment or not. As I recall, one of the things in the

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1 package that was put under the yellow item was Duke  
2 confidential sources, and I have the names of people  
3 they talk to.

4 JUDGE KELLY: Well...

5 MR. JONES: Is that the nature of the  
6 information?

7 JUDGE KELLY: Well, that's an example. If you  
8 go over to, this is clumsy, and I don't know if you  
9 gentlemen can even follow me. But, if you flip over to  
10 the August 31st memo to the case file from Bruno Uryc,  
11 that's number 12. Have you got number 12 Mr. Guild?

12 MR. GUILD: Yes sir.

13 JUDGE KELLY: Do you know what I mean? The  
14 violation of interpass temperature. Now, you've got in  
15 the left column at the bottom a whole bunch of names  
16 blocked out, right?

17 MR. GUILD: Correct.

18 JUDGE KELLY: These are people who raised  
19 concerns in the course of the investigation, but I  
20 thought these names had been turned over to Palmetto by  
21 now, and I'm trying to understand what interest there  
22 would be in the staff's continuing.

23 MR. JONES: I'm pretty sure I know what those  
24 items are. Those are items where, I guess Duke has an  
25 interim protective order under which they released that

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1 information to Mr. Guild.

2 JUDGE KELLY: But Guild has the information.

3 MR. JONES: Right, he now has it. No, we  
4 wouldn't have any objection to him having that  
5 information.

6 JUDGE KELLY: If the protective order is  
7 retained so long as he keeps it under that protective  
8 order is that right?

9 MR. JONES: That's correct.

10 JUDGE KELLY: If there isn't any protective  
11 order, when it is moved.

12 MR. JONES: Yeah, that is nothing that is an  
13 independent claim on our part. That was just related to  
14 what Duke was claiming.

15 JUDGE KELLY: That's what I thought, so my  
16 question is whatever happens to the Duke claim, the  
17 same thing can happen to these items, correct?

18 MR. JONES: Rules that issue.

19 JUDGE KELLY: Right. So, would it be possible  
20 then at a later date... well, let's suppose for example  
21 that, let's say we do have a protective order. Well,  
22 either way, we either have a protective order or we  
23 just overrule the claim. In either case, what I am  
24 worried about Mr. Jones is distinguishing in this  
25 Appendix C between what is red and what is yellow?

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1 MR. JONES: Yeah.

2 JUDGE KELLY: Can you call up Mr. Guild and  
3 tell him what is yellow and fill in the name?

4 MR. JONES: Sure.

5 JUDGE KELLY: If that is called for. We don't  
6 have to do it now, one by one. We can't get anywhere  
7 with that anyway.

8 MR. JONES: Oh yeah, absolutely. If that is  
9 the ruling, we can give him the information.

10 JUDGE KELLY: Alright, so that would handle.  
11 There is nothing separate to talk about with regard to  
12 Appendix C, I don't believe.

13 MR. JONES: I don't think there is. I think  
14 the only three categories was confidential sources,  
15 privacy information, and then the stuff that I will  
16 call Duke claims of confidentiality, and that was it.

17 MR. MCGARRY: Your honor, this is McGarry. As  
18 I understand it, the Duke claims are in yellow, is that  
19 correct?

20 JUDGE KELLY: Right.

21 MR. MCGARRY: The theory being that if we have  
22 turned that information over to the intervenors under  
23 this general protective order, then why shouldn't the  
24 staff.

25 JUDGE KELLY: Right.

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1 MR. MCGARRY: That seems logical to us.

2 JUDGE KELLY: Okay.

3 MR. GUILD: Judge, I guess I am lost here. I  
4 noticed you were mentioning there were three claims. I  
5 thought there were two. Confidentiality on a warranted  
6 base of personal privacy, and then Duke. I thought the  
7 only basis for the Duke claim was second, the privacy  
8 exemption.

9 MR. JONES: I think that's correct, but I  
10 think Duke was claiming on an entirely, on a separate  
11 basis than the staff. I mean, we have a statutory  
12 provision, and Duke was claiming it based on a course  
13 of conduct, if you will. I guess my only point Judge in  
14 raising it is if you think you are eliminating one  
15 class of these by describing them as falling or rising  
16 under the Duke claim does that only one of three or  
17 .....

18 JUDGE KELLY: I don't think I mean it in that  
19 sense. I don't think what I was suggesting prejudices  
20 your positions.

21 MR. GUILD: I'm just, I see red and I see  
22 yellow. Rather, I hear red and I hear yellow, and I  
23 guess I don't hear a third color that seems to cover  
24 what I understood as another basis for some of these  
25 things, there are are two colors.

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1 JUDGE KELLY: Well, there's only two colors in  
2 Appendix C.

3 MR. GUILD: Right.

4 JUDGE KELLY: There is a third color  
5 applicable to something else, right, Mr. Jones?

6 MR. GUILD: I'm being fasicious. I mean, I  
7 heard Mr. Jones say...

8 MR. JONES: I am really at a loss. I don't  
9 know what color of pens George Johnson...

10 MR. GUILD: Okay. My question is this Judge.  
11 I think your approach was sound in trying to identify  
12 which of the claims by the NRC staff were really  
13 dependent on Duke.

14 JUDGE KELLY: That was really all I was after.

15 MR. GUILD: But, I hear that if you are even  
16 identify what claims are simply efforts to honor Duke's  
17 claims of privilege, I still hear Mr. Jones saying that  
18 there are independent claims of a confidential source,  
19 and for the privacy.

20 JUDGE KELLY: Not with respect to the  
21 information that they got from Duke, I don't believe  
22 so.

23 MR. GUILD: Let me focus on (inaudible). What  
24 privacy claims do they still assert aside from the Duke  
25 effort to protect it's interviewee, do you follow me?

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1 MR. JONES: Oh yeah, I'm sorry. I think know  
2 what your problem, where you are mixing up. There is a  
3 set of people that we interviewed that you have summary  
4 of interviews.

5 MR. GUILD: Right.

6 MR. JONES: And in which we blank out the  
7 addresses, and we got that information from Duke. There  
8 is also a set of information from Duke that identifies  
9 the people that they talk to, and they promised them  
10 confidentiality about the fact that they talked to the  
11 Duke investigators. That is still not clear is it?

12 MR. GUILD: That's clear, but then...

13 MR. JONES: Do you understand the distinction  
14 that I am making?

15 MR. GUILD: Yes, but would all of that then be  
16 released if the Duke claim failed, or if there is a  
17 protective order that...

18 MR. JONES: Well, as I understand it, the  
19 protective order we have would cover the addresses that  
20 we have also. So, I guess one protective order would  
21 cover it all. Yeah, I can't see any sense in signing  
22 ...

23 JUDGE KELLY: Do you think there would be one  
24 protective order?

25 MR. JONES: Yeah, one protective order should

1 cover it.

2 MR. GUILD: I guess I'm just not complete. I  
3 just want to know if there is some residual class of  
4 information that is protected by agency claim of  
5 unwarranted invasion of personal privacy, that it is  
6 not simply the Duke supplied information.

7 MR. JONES: That's the red. The yellow is the  
8 Duke supplied information.

9 JUDGE KELLY: Well, that still confuses it. I  
10 think the answer to that, to your question is no,  
11 because the separate agency claim is not a privacy  
12 claim. That's a claim based on privilege to enhance  
13 their ability to enhance wrongdoing.

14 MR. GUILD: That's what I thought Judge, but  
15 then I thought that there were two independent claims.  
16 I understand... it may be apparent in the decision how  
17 it all comes out. I just don't want to miss an  
18 opportunity to focus on a residual privacy claim if  
19 there is still one there that we have identified as  
20 being separate from what...

21 JUDGE KELLY: The board is not aware of one.

22 MR. GUILD: Alright.

23 JUDGE PURDOM: This is Purdom. Just to be  
24 clear, as I understnad it the staff is asking for the  
25 five individuals that they interviewed not to be

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1 identified.

2 JUDGE KELLY: Right.

3 JUDGE PURDOM: They are asking some other  
4 people that they interviewed not to have their  
5 telephone numbers be released to the public, but they  
6 would agree to have them released to Palmetto under a  
7 protective order. Third, they have got some information  
8 that they obtained from Duke, and Duke is asking for  
9 protection, and they were asking for it only to the  
10 extent that Duke was.

11 MR. JONES: That's exactly what the three  
12 categories are.

13 MR. GUILD: It takes an engineer to figure  
14 this out, Judge Purdom, thank you.

15 JUDGE KELLY: Okay, I hope this won't muddy  
16 the water. I just want to make one observation, because  
17 the variance was something that Mr. Jones said a few  
18 minutes ago in characterizing the Duke argument. I will  
19 be happy to stand corrected if I am wrong. The Duke  
20 argument for a protective order of the names of the  
21 people that they talked to. I do not conceive of in my  
22 own mind as a privacy argument. I hear them say that  
23 they need that kind of protection in order that they  
24 can conduct an effective investigation, that they can  
25 get people to talk about their supervisors and their

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1 foreman and the like. It isn't to keep Welder Smith  
2 from being bothered at 3:00 a.m., or finding his  
3 unlisted phone number someplace in public or things  
4 like that. It is so that Duke can go out there and find  
5 out what happened. I see that as more of an  
6 investigatory privelege, somewhat analogous to the NRC  
7 staff's and not a privacy matter.

8 That, at least, is how I tend to think of it.  
9 Well, I think that leaves one thing on my list. The  
10 staff Exhibit No. 27. You will all recall was offered  
11 at the January 31 in-camera hearing. It was included  
12 in our packages, starting with page 3, I belive. Just a  
13 minute.

14 (End of tape.)  
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1 JUDGE KELLEY: I'm a little unclear since that  
2 exhibit was accepted on a confidential basis under the old  
3 protective order, if I can call it that, is there any new  
4 privilege being considered or are we supposed to change  
5 its status and, if so, why.

6 MR. JONES: This is Brad Jones.

7 JUDGE KELLEY: Right.

8 MR. JONES: Absolutely no new privilege. We just  
9 wanted everyone to be aware that those are documents that  
10 are covered by the prior order, and, you know, they have  
11 their own set of protection.

12 JUDGE KELLEY: And they were, in fact, part of  
13 the basis for your report?

14 MR. JONES: Well, what this involves is really  
15 the fact that the question was broader and said what's  
16 the basis for your conclusions on foreman override, not  
17 just the narrow Welder B issue.

18 JUDGE KELLEY: Okay.

19 MR. JONES: And, of course, all the interviews  
20 have raised the issue of foreman override and, you know,  
21 we presented testimony at the hearing as to our initial  
22 conclusions and this was part of that background.

23 JUDGE KELLEY: Okay.

24 MR. GUILD: May I ask, Judge Kelley, were those  
25 identified as part of your Freedom of Information Act

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1 response and that they have therefore been...

2 MR. JONES: I don't think they were because the  
3 Freedom of Information Act specifically asked about the  
4 follow up on the Welder B issue, and this was part of  
5 going back really to the Welder B issue being an issue and  
6 talking about, in essence, Sam Nunn's issue of foreman  
7 override in the broad sense.

8 And we didn't, you know, we did an initial  
9 investigation and presented our conclusions to the Board  
10 that there was not an overriding problem and we said  
11 we're following up on a separate issue that has been  
12 raised by Welder B with respect to one individual, and  
13 that...

14 So I think the Freedom o. Information Act got  
15 the Welder B file. I mean, you know, they're kept in a  
16 separate file. And then looking at what the Board had  
17 dictated over the phone last week, the individuals involved  
18 said well, if they're talking about the basis for the  
19 conclusion we reached back in February as well as the  
20 conclusion we've reached in the Welder B Report issue,  
21 we have to include some of the other interviews we did.

22 MR. GUILD: I guess my point for asking is  
23 George Johnson and I had a conversation about this, at  
24 least Brad's Freedom of Information Act response, and he  
25 identified this issue to me and said that the Region 2

1 staff who were passing on FOIA requests conclude,  
2 interpreted the language of the request to not include  
3 the whole stack of information that has now just come  
4 from your office, Brad, and including the blue papers  
5 that are attached.

6 And I found that somewhat troubling at the time  
7 because the blue papers include Welder B. That would be  
8 in those documents. But is that how the, is that how  
9 the two stacks differ, Brad?

10 It would help me, it'd help me try to understand  
11 what I got.

12 MR. JONES: That one, one was specifically on  
13 the follow up to the Welder B issue, the socket welds,  
14 and that narrow area and that foremen. And then the  
15 other stack was the broader question we dealt with in  
16 the in camera proceeding.

17 And we didn't want to delay the proceeding, so  
18 when we got this discovery request, we weren't even sure  
19 if this was meant to be included, but we wanted to not  
20 delay anything, so we said let's put it in and make sure  
21 we have given all the basis for both the conclusion we  
22 reached in February as well as the one we reached recently  
23 in the report.

24 MR. GUILD: Thank you.

25 JUDGE KELLEY: Okay. Well, that goes over the

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1 categories of papers that we wanted to talk about so that  
2 we could address them and decide the disputes between you  
3 and among you. Can I just explore with you for a minute  
4 how this might work?

5 JUDGE PURDOM: Judge Kelley?

6 JUDGE KELLEY: Yeah?

7 JUDGE PURDOM: Before you leave what we've been  
8 talking about, just for the record, I believe you indicated  
9 that the Board has received a marked copy, red teller (ph),  
10 I think that possibly would be you, but not the copy  
11 received by me.

12 JUDGE KELLEY: Okay. Well, the Board's going  
13 to have to go on the phone and talk this over, but I  
14 think there's every reason to try to get these rulings  
15 done this afternoon and get them communicated to you.

16 I'm just looking at my clock. It' says 10  
17 after 1. Could you, could the parties be reached in  
18 call about 3:00?

19 MR. MCGARRY: Yes, sir.

20 JUDGE KELLEY: Guild?

21 MR. GUILD: Yes, sir. I need to give you  
22 another number, but...

23 JUDGE KELLEY: You can do it, okay. Mr. Jones?

24 MR. JONES: Yes, sir.

25 JUDGE KELLEY: Let me ask my Board members.

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1 We've got to work in a little lunch somewhere and we've  
2 got to talk a while. Does 3:00 sound realistic?

3 JUDGE PURDOM: It's all right with me.

4 MR. GUILD: Mr. Carr and I will be available,  
5 Judge.

6 JUDGE KELLEY: I might have to just have my  
7 secretary quickly check with the operators here and see  
8 if we can get on a conference call at that time. We have  
9 to reserve these slots. So if you'd just be patient for  
10 a minute while I try to find that out?

11 MR. JONES: Mr. Guild, are you there, Bob?

12 MR. GUILD: Yes.

13 MR. JONES: Let me ask you a question. This is  
14 Brad. You're still trying to decide the applicant's,  
15 Duke's people, who you might want to depose next week,  
16 but the Staff a more limited number, have you determined  
17 who you want and when yet?

18 MR. GUILD: Not at all. I'd certainly be happy  
19 to try to work around people's schedules and that sort of  
20 thought, so maybe we should talk some.

21 MR. JONES: I'm pretty clear if we can find out  
22 later today, but they've got to go through our travel and  
23 get tickets and, you know, get up to Charlotte, and that...  
24 you know, I think there's really only a very few people  
25 that were involved in the investigation here, McConomos (ph).

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1 York and Blake and then the Brookhaven people that we'll  
2 put on the stand are really four people that were involved  
3 in the vestigation.

4 And if you know which two you want and when you  
5 want them, I'll make, they are all available right now  
6 any of those dates.

7 MR. GUILD: How about the Brookhaven people?

8 MR. JONES: I didn't, I don't know about the  
9 Brookhaven people, what their availability is next week,  
10 but we can find out if that's who you want to talk to.

11 MR. GUILD: Perhaps we can talk a little later  
12 this afternoon, Brad.

13 MR. JONES: Okay, that's fine. I just wanted,  
14 if you could let me know this afternoon that would be  
15 great. You can let me know in the next call if you want.

16 (Off the record.)

17 JUDGE KELLEY: Hello, this is Kelley back again.  
18 Everybody still on?

19 ALL: Yes.

20 JUDGE KELLEY: Okay, I just checked it out. We  
21 can replace the call at 3:00, so Mr. Guild has a different  
22 number?

23 MR. GUILD: Yes, sir, 919-828-3403.

24 JUDGE KELLEY: Okay. And then the idea'll be  
25 that we'll get back to you then and give you rulings on

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1 these various points. And could the Board hold on just  
2 for a minute and I'll just say goodbye to the rest of the  
3 people. Okay, goodbye.

4 MR. JONES: I'm going to lose you for the  
5 (inaudible) if I sign off.

6 JUDGE KELLEY: Huh?

7 MR. JONES: Brad. If I hang up, you're going to  
8 lose Judge Purdom.

9 JUDGE KELLEY: Oh, well, stay on a second then.  
10 Are Purdom and Foster still there?

11 JUDGE FOSTER: Foster's here.

12 JUDGE KELLEY: Can I call you two back between  
13 quarter of 2 and 2? About ready for lunch as far as I'm  
14 concerned.

15 JUDGE FOSTER: Okay, but that, that would be...

16 JUDGE KELLEY: Half hour to 45 minutes.

17 JUDGE FOSTER: Forty-five minutes? Yeah, that's  
18 fine.

19 JUDGE KELLEY: That okay, Walt? Hello? Dick?

20 JUDGE FOSTER: Dick's here, yeah.

21 JUDGE KELLEY: You're still there. Did we lose  
22 Walt?

23 JUDGE PURDOM? No, I'm still here.

24 JUDGE KELLEY: Is it okay if I call back in a  
25 half hour to 45 minutes?

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JUDGE PURDOM? Yeah.

JUDGE KELLEY: Let's have lunch and I'll do that.  
Okay, I'll do that. See you later.

UNIDENTIFIED SPEAKER: All right, bye.

JUDGE KELLEY: Bye.

END OF MORNING CALL

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CERTIFICATE OF PROCEEDINGS

This is to certify that the attached proceedings before the  
NRC

In the matter of: DUKE POWER COMPANY, Catawba Nuclear  
Station, Units 1 and 2

Date of Proceeding: September 28, 1984

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the original  
transcript for the file of the Commission.

Georgia Pinkard  
Official Reporter - Typed

*Georgia Pinkard*  
Official Reporter - Signature

*Law Desrosier*  
Transcriber

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