

# DUKE POWER COMPANY

LEGAL DEPARTMENT

P. O. Box 33189

CHARLOTTE, N. C. 28242

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STEVE C. GRIFFITH, JR.  
GEORGE W. FERGUSON, JR.  
LEWIS F. CAMP, JR.  
RAYMOND A. JOLLY, JR.  
WILLIAM LARRY PORTER  
W. WALLACE GREGORY, JR.  
JOHN E. LANSCH  
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W. EDWARD POE, JR.  
ELLEN T. RUFF  
ALBERT V. CARR, JR.  
ROBERT M. BISANAR  
WILLIAM J. BOWMAN, JR.  
RONALD L. GIBSON  
JEFFREY M. TREPEL  
JEFFERSON D. GRIFFITH, III

OF COUNSEL:  
WILLIAM I. WARD, JR.

April 30, 1986

Mr. Victor Stello, Jr.  
Executive Director for Operations  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

APPEAL OF INITIAL FOIA DECISION  
86-A-69E (85-584)  
Rec'd 5-1-86

Re: FOIA-85-584  
Appeal From an Initial FOIA Decision  
Regarding Enforcement Action EA 84-93

Dear Mr. Stello:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(6) and the NRC's regulations, 10 C.F.R. § 9.11, Duke Power Company ("Duke") hereby appeals the "eighth partial response," dated April 1, 1986, which denied in part Duke's August 19, 1985 FOIA request for copies of all documents related to and underlying enforcement Action EA-84-93.1/

1/ This request has also been the subject of correspondence with Mr. Dircks, dated October 25, 1985 and December 9, 1985, as well as eight partial responses, dated November 4, 1985, December 10, 1985, December 26, 1985, January 7, 1986, January 8, 1986, January 24, 1986, March 26, 1986, and April 1, 1986. On January 9, 1986, January 27, 1986, February 6, 1986, February 7, 1986, February 28, 1986 and April 25, 1986, Duke filed respective appeals from the December 10, 1985, "second partial response," the December 26, 1985 "third partial response," the January 7, 1986 "fourth partial response," the January 8, 1986 "fifth partial response," the January 24, 1986 "sixth partial response," and the March 26, 1986 "seventh partial response." On April 9, 1986, the Executive Director for Operations responded to Duke's January 27, 1986 appeal of the "third partial response."

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By letter of April 1, 1986, Mr. Donnie H. Grimsley, Director, Division of Rules and Records, Office of Administration, informed Duke of the NRC's refusal to release certain "predecisional information" which constitutes "advice, opinions and recommendations of the staff." As identified in Mr. Grimsley's letter, the persons responsible for this denial are Mr. Grimsley, and Mr. James M. Taylor, Director, Office of Inspection and Enforcement. They based this denial on exemption 5 of FOIA, 5 U.S.C. §§ 552(b)(5) and the corresponding provisions in the Commission's regulations, 10 C.F.R. §§ 9.5(a)(5). Duke objects to the NRC withholding this record<sup>2/</sup> on the grounds that the cited exemption does not justify withholding this relevant information.

At the outset it should be noted that Duke's ability to object effectively to the NRC withholding this document is, of course, hampered by the fact that Duke is not aware of the exact nature and content of the document withheld.<sup>3/</sup> The description of the document withheld is not complete enough to allow Duke to make a substantive response. Simply to identify a document as "Undated Handwritten comments" without stating whose comments they are, is a legally inadequate response. See, e.g., Mead Data Central v. Department of the Air Force, 566 F.2d 242, 260-61 (D.C. Cir. 1977); Vaughn v. Rosen, 484 F.2d 820, 825-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

Duke is entitled to a usable description of the document to aid it in determining whether the document is relevant to Duke's bases for challenging the Staff's enforcement action. Id. Accordingly, if the NRC continues to withhold this document after this appeal, the agency must identify the document with greater specificity so as to allow Duke to pursue intelligently administrative reconsideration and judicial review. With this present handicap in mind, however, Duke herein provides the legal basis for this FOIA appeal.

It is fundamental FOIA law that the "basic policy" of FOIA "is in favor of disclosure"; thus "Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1978). Furthermore, it is clear that a

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<sup>2/</sup> The withheld document, Document EE-1, is described as "Undated Handwritten comments on 4 pages of the enclosure and attachment to the enclosure to the memo dated 11/5/84 from O'Reilly to DeYoung. (6 pgs)."

<sup>3/</sup> In particular, the author of the "handwritten comments" withheld in Document EE-1 is not identified.

court will carefully consider the nature of each individual document that is withheld, rather than treating documents or files of documents as a whole. Id. at 229-30. Accordingly, in responding to this appeal, the Office of the Executive Director for Operations needs to review in detail the withheld document, and release those portions that are not themselves independently exempt from disclosure.

Disclosure is particularly appropriate in this case because this document underlies at least in part the NRC Staff's determination to issue, on August 13, 1985, a Notice of Violation and Proposed Imposition of Civil Penalty, EA 84-93, against Duke. As Duke has explained, the documents sought in the FOIA request are significant to its ability to determine what actions it wishes to take with respect to EA 84-93. The complex factual and legal questions at issue in that enforcement action make it imperative that Duke be able to assess the basis for the NRC's actions.

#### Exemption 5

Exemption 5 permits an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); cf. 10 C.F.R. § 9.5(a)(5).<sup>4/</sup> Mr. Grimsley's April 1st letter withholds Document EE-1 pursuant to exemption 5, as identified on Appendix EE to that letter.

From the description given of Document EE-1,<sup>5/</sup> that document appears to be outside the confines of exemption 5 for

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<sup>4/</sup> To the extent the NRC's regulations attempt to exclude under exemption 5 more than the statute itself allows to be excluded, the regulations are void. The cases interpreting the scope of exemption 5 of FOIA focus on the function served by the document within the agency. E.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 152-53, 155-60 (1975); Schlefer v. United States, 702 F.2d 233, 237 (D.C. Cir. 1983); Taxation With Representation Fund v. IRS, 646 F.2d 666, 682-84 (D.C. Cir. 1981). The NRC's regulations, however, permit withholding a document solely because the document was prepared for internal use within the agency. See 10 C.F.R. § 9.5(a)(5)(i). Notwithstanding this regulation, a document must be disclosed if it meets the legal standards in the statute as interpreted by the courts and discussed herein.

<sup>5/</sup> See note 2, supra.

the reasons explained in NLRB v. Sears, Roebuck & Co., 421 U.S. at 155-60 (1975). In Sears, the Supreme Court held that internal NLRB memoranda that explained the General Counsel's decisions not to file complaints (which thus effectively committed the NLRB not to take further action on the matter) were final agency decisions that must be disclosed. Id. Depending on who is the author of these handwritten comments in Document EE-1, they could represent an agency decision not to take a particular action, which is a final administrative decision that must similarly be disclosed.

Additionally, Document EE-1 should at the very least be released in redacted form, with all factual information contained in these handwritten comments revealed. E.g., ITT World Communications v. FCC, 699 F.2d 1219, 1236 (D.C. Cir. 1983), rev'd on other grounds, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1936 (1984); 6/ Coastal States Gas Corp. v. DOE, 617 F.2d 854, 867 (D.C. Cir. 1980); Exxon Corp. v. FTC, 466 F. Supp. 1088, 1097-99 (D.D.C. 1978), aff'd, 663 F.2d 120 (D.C. Cir. 1980). The conclusory assertion in the April 1st letter that "[t]here are no reasonably segregable factual portions" is insufficiently precise and detailed to withstand judicial scrutiny. See, e.g., Mead Data Central v. Department of the Air Force, 566 F.2d at 260-62; Vaughn v. Rosen, 484 F.2d 820, 825-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Accordingly, on this administrative appeal, the Office of the Executive Director of Operations should correct this deficiency in the FOIA response; all segregable factual material contained in Document EE-1 must be released.

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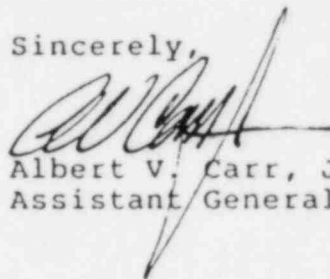
6/ In ITT World Communications, the Court of Appeals had decided consolidated appeals concerning, inter alia, the Sunshine Act, a District Court injunction against ultra vires agency actions, and the FOIA. The Supreme Court reversed the Court of Appeals on the Sunshine Act and ultra vires issues, but did not review the FOIA issue.

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April 30, 1986  
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Conclusion

As demonstrated above, the document withheld by Mr. Grimsley's April 1 response does not fall under the claimed exemption from disclosure. Duke therefore submits that production of this information is compelled by the Freedom of Information Act.

Sincerely,



Albert V. Carr, Jr.  
Assistant General Counsel

cc: Chairman Nunzio J. Palladino  
Commissioner Thomas M. Roberts  
Commissioner James K. Asselstine  
Commissioner Frederick M. Bernthal  
Commissioner Lando W. Zech, Jr.  
Mr. Samuel J. Chilk  
Mr. James M. Taylor  
Ms. Jane A. Axelrad  
Mr. Donnie H. Grimsley



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

Docket No. 50-413/50-414

Mr. Albert V. Carr, Jr.  
Duke Power Company  
Legal Department  
P.O. Box 33189  
Charlotte, NC 28242

LDL : 244

IN RESPONSE REFER  
TO FOIA-85-584

Dear Mr. Carr:

This is the eighth partial response to your letter dated August 19, 1985, in which you requested, pursuant to the Freedom of Information Act (FOIA), copies of all records related to and underlying Enforcement Action No. EA-84-93 regarding the Catawba Nuclear Station.

The records identified on the enclosed Appendix DD are being placed in the Public Document Room (PDR) in Washington, DC, and the NRC Local Public Document Room (LPDR) in South Carolina. You may obtain access to these records by referring to the folder FOIA-85-584 under your name.

The handwritten comments identified on the enclosed Appendix EE contain predecisional information consisting of advice, opinions, and recommendations of the staff given during a deliberative process. Release of these handwritten comments would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. This predecisional information is being withheld pursuant to Exemption (5) of the FOIA (5 U.S.C. 552(b)(5)) and 10 CFR 9.5(a)(5) of the Commission's regulations. There are no reasonably segregable factual portions.

Pursuant to 10 CFR 9.9 of the NRC's regulations, it has been determined that the information withheld is exempt from production or disclosure, and that its production or disclosure is contrary to the public interest. The persons responsible for this denial are the undersigned and Mr. James M. Taylor, Director, Office of Inspection and Enforcement.

This denial may be appealed to the NRC's Executive Director for Operations within 30 days from the receipt of this letter. As provided in 10 CFR 9.11, any such appeal must be in writing, addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should clearly state on the envelope and in the letter that it is an "Appeal from an Initial FOIA Decision."

~~50-413/50-414~~  
1/PP

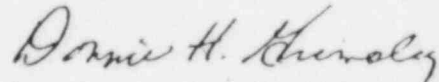


Mr. Carr

- 2 -

We will communicate with you further regarding additional records subject to your FOIA request.

Sincerely,

A handwritten signature in cursive script, reading "Donnie H. Grimsley".

Donnie H. Grimsley, Director  
Division of Rules and Records  
Office of Administration

Enclosures: As stated

Appendix DD  
Records Being Placed in PDR  
and LPDR

1. Undated Ltr to R. Guild from R. DeYoung re: June 27, 1984, request for action on behalf of the Palmetto Alliance pursuant to 10 CFR 2.206 with respect to the Catawba Nuclear Station (2 pages) w/attachment: Draft NRC Receipt of Request for Action Under 10 CFR 2.206. (2 pgs.)
2. Undated Case Summary - File No. 83-52 Catawba Nuclear Power Station - Review of NRC Handling of Allegations.



Appendix EE

Denied Record Exemption 5

1. Undated Handwritten comments on 4 pages of the enclosure and attachment to the enclosure to the memo dated 11/5/84 from O'Reilly to DeYoung. (6 pgs). The handwritten comments are denied under Exemption 5.

Note: The memorandum dated 11/5/84 and the unmarked copies of the enclosure and attachment were denied in Mr. Grimsley's letter dated January 8, 1986, Appendix U, number 3.

# DUKE POWER COMPANY

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ROBERT M. BISANAR  
WILLIAM J. BOWMAN, JR.  
RONALD L. GIBSON

0704 373- 2570

August 19, 1985

FREEDOM OF INFORMATION  
ACT REQUEST

FOIA-85-584  
Rec'd 8-20-85

J. M. Felton, Director  
Division of Rules and Records  
Office of Administration  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Re: Freedom of Information Act Request  
Regarding Enforcement Action EA 84-93

Dear Mr. Felton:

Pursuant to the Freedom of Information Act (5 USC §552) and the NRC's implementing regulations thereunder (10 CFR §9.3 et seq.) I hereby request on behalf of Duke Power Company all documents related to and underlying Enforcement Action No. EA 84-93 being taken against Duke Power Company. This enforcement action is reflected in the Notice of Violation and Proposed Imposition of Civil Penalty issued August 13, 1985.

This request extends not only to all relevant documents at NRC Headquarters relating to the enforcement action and the events surrounding Mr. Gary E. "Beau" Ross, but also to all such documents within NRC Region II including any such documents reflecting any communications between Region II and NRC Headquarters. This request includes, but is not limited to, all documents reflecting, underlying, or otherwise relevant to:

1. Any communications between NRC employees and/or representatives and members and/or representatives of Palmetto Alliance, the Government Accountability Project and/or any other outside group or individual concerning possible enforcement action based on the events surrounding Mr. Ross and/or the concerns expressed by the welding inspectors at Catawba Nuclear Station, and/or alleged harassment and/or intimidation of any quality control/quality assurance inspector at the Catawba Nuclear Station.
2. The June 4, 1985 Director's Decision (DD-85-9), including alternative drafts or proposals, and including all documents reflecting any independent fact-finding investigation conducted by NRC in connection with the enforcement action or concerning Mr. Ross.
3. Any decision to engage or not to engage in any independent fact-finding in connection with the enforcement action and Mr. Ross.
4. Deliberations regarding whether the record developed before the Atomic Safety and Licensing Board was adequate to support a finding of discrimination within the meaning of 42 USC §5851 and/or 10 CFR §50.7. This request also extends to any documents reflecting deliberations whether the

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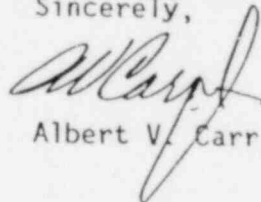
J. M. Felton, Director  
U. S. Nuclear REgulatory Commission  
August 19, 1985  
Page two

record developed before the Atomic Safety and Licensing Board was adequate to support the Board's finding of discrimination.

5. Deliberations regarding the appropriate severity level to be assigned the alleged violation.
6. Any communications between representatives of the NRC and representatives of the Department of Labor relating to this enforcement action or the events surrounding Mr. Ross.
7. The Commission's decision not to review DD-85-9, including documents underlying and reflecting the majority votes of Chairman Palladino and Commissioners Bernthal and Asselstine, and documents underlying and reflecting the dissenting views of Commissioners Roberts and Zech.
8. The August 13, 1985 Notice of Violation including alternative drafts or proposals.
9. The August 13, 1985 Proposed Imposition of Civil Penalty, including alternative drafts or proposals.

I would appreciate your prompt response to this request within the ten working day period provided in 10 CFR §9.9. Duke Power Company's deadline for responding to the Notice of Violation and Proposed Imposition of Civil Penalty is September 12, 1985. The documents I am requesting could well prove to be significant to that response. Accordingly, I hope that this request will be met as expeditiously as possible. If you cannot meet this request within the period set out in the regulations, please notify me as soon as possible, and tell me when you will be able to respond.

Sincerely,



Albert V. Carr, Jr.

c: James N. Taylor  
Jane A. Axelrad