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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket Nos. 50-413
DUKE POWER COMPANY, <u>et al.</u>)	50-414
)	
(Catawba Nuclear Station,)	
Units 1 and 2))	August 12, 1983

PALMETTO ALLIANCE ANSWER TO APPLICANTS' MOTION FOR
PARTIAL SUMMARY DISPOSITION REGARDING CONTENTION 6

Pursuant to 10CFR § 2.749, Palmetto Alliance hereby answers opposing the motion by Applicants for partial summary disposition of Palmetto Alliance Contention 6, and responds to the Staff's supporting answer of August 3, 1983. Palmetto Alliance urges this Atomic Safety and Licensing Board to deny this Motion for Summary Disposition on the ground that there exist many substantial and material issues of fact affecting the public health and safety with respect to quality assurance in the construction of the Catawba Nuclear Station that cannot be fully or adequately resolved except by live testimony and cross-examination on the record in a public hearing. In support of this answer Palmetto Alliance offers the following authority, discussion and statement; and asks this Board to consider deposition testimony, answers to interrogatories, the Applicant's Final Safety Analysis Report (FSAR), the NRC Staff's Safety Evaluation Report (SER), and such other pleadings, documents, and matters of record as appropriate. Further, Palmetto Alliance asks that these Motions For Summary

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Disposition be refused or that a continuance be ordered to permit the review of the transcripts of deposition testimony in the possession of the NRC which are the subjects of a pending Freedom of Information Act (FOIA) request. See, July 28, 1983 FOIA request, attached. Review of these transcripts particularly those of McAfee, Hoopingarner, Davison, Rogers, and Bryant is necessary to fully respond to each and every factual assertion made by Applicants and the NRC Staff in support of this Motion for Partial Summary Disposition.

MATERIAL FACTS AS TO WHICH THERE IS A GENUINE ISSUE TO BE HEARD

1. The deposition of William Ronald McAfee dated May 19, 1983, does not reflect each and every concern he has with respect to Palmetto Alliance Contention 6.

2. Mr. McAfee's deposition does not reflect that each and every concern he has with respect to Palmetto Alliance Contention 6 has either been resolved to his satisfaction or cannot be stated, as a matter of fact, to adversely impact upon the safe operation of Catawba.

3. The affidavits of J.C. Rogers and L.R. Davison do not demonstrate that the concerns raised by Mr. McAfee do not adversely impact upon the safe construction or operation of Catawba.

4. The deposition of Nolan Richard Hoopingarner, II, dated May 19-20, 1983, does not reflect each and every concern he has with respect to Palmetto Alliance Contention 6.

5. Mr. Hoopingarner's deposition does not reflect that

each and every concern he has with respect to Palmetto Alliance Contention 6 has either been resolved to his satisfaction or cannot be stated, as a matter of fact, to adverse the impact upon the safe operation of Catawba.

6. The affidavits of J.C. Rogers and L.R. Davison do not demonstrate that the concerns raised by Mr. Hoopingarner do not adversely impact upon the safe construction or operation of Catawba.

DISCUSSION

By their July 15, 1983 Motion Applicants have moved for Summary Disposition as to that aspect of Contention 6 which relies upon the allegations of Messrs. McAfee and Hoopingarner." Id. at p. 1. Applicants further characterize the relief sought as

occasioned primarily by Intervenors lack of responsiveness to Applicants and Staff discovery requests.

Id. at p. 9.

This relief, and Applicants' argument in support of such relief, is apparently endorsed by the NRC Staff. See, NRC Staff Answer Supporting Applicants' Motion for Partial Summary Disposition of Palmetto Alliance Contention 6, August 3, 1983.

Palmetto Alliance opposes Applicants' Motion fundamentally on the grounds that this subject matter is not "answerable to that procedure," Memorandum and Order, June 20, 1983, at p. 18, since it seeks to summarily dispose of evidence in the form of

the personal knowledge of two former Catawba workers (one of whom was formerly a Quality Control Inspector), rather than claims or issues in this proceeding which are appropriately subject of summary relief. Further, on the merits, resolution of "(T)hese concerns will involve credibility issues which can only be resolved in hearing," Memorandum and Order, June 13, 1983, at p. 8, where the sworn testimony of Messrs. McAfee and Hoopingarner supporting Palmetto Alliance's claims of faulty workmanship and poor quality assurance, are met only by the disputed factual claims of the Duke Power Company and NRC Staff affiants. Resolution of these disputed factual claims will require an evaluation of the credibility of respective claimants, tested appropriately after cross-examination, only possible through live testimony in a hearing. The existence of material disputed issues of fact requiring such a hearing is apparent simply from the identities of the movants' supporting witnesses: Larry R. Davison, Catawba Project Quality Assurance Manager; J.C. Rogers, Catawba Project Manager; and for the NRC Staff the former supervisor of inspection at Catawba, Jack C. Bryant.

Prior to the filing of Applicants' Motion Palmetto Alliance had taken the discovery depositions of each of these gentlemen because of their likely knowledge of Quality Assurance deficiencies at the Catawba Nuclear Station. Suffice it to say that Mr. Larry Davison (L.R.D.) is believed to be one of the primary actors in the breakdown of the Quality Assurance program at

Catawba, known particularly for his practice of verbally voiding Nonconforming Item Reports (NCI's) originated by Quality Control inspectors. See, the Welding Inspector Notes attached Palmetto Alliance's Motion to Establish Discovery Schedule on its Quality Assurance Contention 6. Mr. Davison's credibility in answering the Hoopingarner and McAfee testimony, as on the welding inspector concerns, is indeed questioned. Mr. Rogers has been Project Manager at Catawba Station since 1981, long enough to know and perhaps participate in the alleged "cover up" by Duke of the welding inspector concerns; however, not long enough to have even been present during the occurrence of events related by Messrs. McAfee and Hoopingarner. Mr. Rogers' affidavit, therefore, fails to "show affirmatively that the affiant is competent to testify to the matter as stated therein," 10 CFR § 2.749 (b), and his reliability on matters within his knowledge, as it regards Quality Assurance at Catawba, must be open to attack as to credibility only available through live testimony at hearing and cross-examination. Mr. Bryant, of the NRC Region II Staff supervised all inspection activities at the Catawba Nuclear Station from November 1972 through December 1982, Affidavit of J.C. Bryant at p. 1, which tenure included the review period which produced the "Below Average" rating of Catawba, "particularly in the areas of Quality Assurance," NUREG 0834, NRC Licensee Assessments, at p. B-1; and the period of Region II acquiescence in Duke Power Company's "cover up" of the welding inspector concerns such as falsification of inspection documents, harassment,

and a systematic breakdown of the Quality Assurance program. The credibility of Mr. Bryant's opinion evidence regarding the safety significance of Messrs. McAfee and Hoopingarner's claims and the adequacy of Quality Assurance at Catawba is to be questioned closely by Palmetto Alliance. See, Discovery Deposition by Palmetto Alliance of Bryant. All of the transcripts of the discovery depositions of these affiants are in the possession of the NRC Staff, are presently unavailable to Palmetto Alliance, and are the subject of a pending request for production pursuant to the Freedom of Information Act. See, attached FOIA Request Letter.

Palmetto Alliance stands by the truthfulness, accuracy, and significance of the deposition testimony of Messrs. Hoopingarner and McAfee. However, their testimony was only in response to discovery questions by Applicants' counsel (and to a limited extent by counsel for the NRC Staff). Palmetto Alliance had no control over the discovery questions asked or the manner of presentation of testimony by its members Ron McAfee and Rick Hoopingarner. We urge that both of these former Catawba workers have important factual evidence to provide in support of Palmetto Alliance's claim regarding inadequacies in Applicants' Quality Assurance Program in construction of the Catawba Nuclear Station. A full and fair evaluation of that evidence, as well as the evidence offered by Applicants and the NRC Staff in defense, can only fairly be evaluated for significance and credibility upon testing by cross-examination, and on the basis of face to

face evaluation as live testimony on the record at a hearing.

In its seminal decision establishing the principles for consideration of requests for summary judgement, which principles are "appropriate for use in determining motions for summary disposition under the NRC Rules of Practice, Public Service Company of New Hampshire, et. al (Seabrook Station, Units 1 and 2), LBP-74-36, 7AEC 877, 878 (1974), United States Supreme Court instructs that the burden of proving the absence of any genuine issue to be heard remains with the moving party:

Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgement must be denied even if no opposing evidentiary matter is presented.

Addickes v. S. H. Kress and Co., 398 U. S. 144, 160 (1970).

And in weighing the evidentiary matter in support of the motion

.... the inferences to be drawn from the underlying facts contained in (the moving party's) materials must be viewed in the light most favorable to the party opposing the motion.

Id., 398 U. S. at 158-159.

Palmetto Alliance urges that weighed in this scale submittals by Applicants and the NRC staff fall far short of supporting the extreme remedy of summary disposition.

In this proceeding on application for authority to operate the Catawba Nuclear Station, Units 1 and 2, Applicants Duke Power Company et al., carry the ultimate burden of proof of entitlement to such necessary licenses, 10 CFR § 2.732, as well as burden on issues in controversy raised by other parties.

Tennessee Valley Authority (Hartsville Nuclear Plant) ALAB-463, 7 NRC 341, 356, 360 (1978). That burden upon Applicants on particular issues, such as the consideration of alternatives under the National Environmental Policy Act (NEPA), may be triggered by an Intervenor showing sufficient only to require reasonable minds to inquire further. Vermont Yankee Nuclear Power Corporation v. NRDC, 435 U. S. 519, 554, 55 LEd. 2d. 460, 98 Sct. 1197 (1978).

A summary judgement is neither a method of avoiding the necessity of proving one's case nor a clever procedural gambit where a claimant can shift to his adversary his burden of proof on one or more issues (citation omitted)...the general rule in this Commission is that the 'the Applicant or the proponent of an Order has the burden of proof' (citation omitted)...in this case, the Applicants were also proponents of...summary disposition.

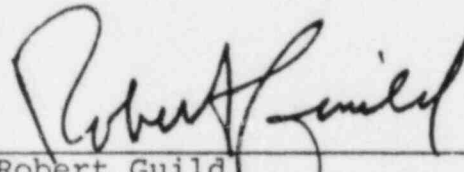
Cleveland Electric Illuminating Company et. al. (Perry Nuclear Power Plant, Units 1 and 2) ALAB-443, 6 NRC 741, 753 (1977).

As stated by the Licensing Board considering motions for summary disposition in the Big Rock Point spent fuel pool amendment proceeding,

A decision on summary disposition can be a watershed in the history of a case. If motions are too readily granted, substantial safety or environmental issues may be excluded from the serious attention they deserve, and in some cases a nuclear power plant might be permitted to operate with a defect which should have been remedied. In such a case the Commission may fail to live up to its important statutory responsibility to protect the public safety and the environment. See report of the President's Commission on the Accident at Three Mile Island, John G. Kemeny, Chairman (1979) et. 7-9, 51.

Consumers Power Company (Big Rock Point Plant) LBP-2-8, 15 NRC 299 (1982).

Palmetto Alliance urges that upon consideration of the deposition testimony of each of the contesting affiants: McAfee, Hoopingarner, Davison, Rogers and Bryant, measured by the above annunciated standards, this board will conclude that summary decision rejecting the testimony of these former workers without hearing is unjustified and inappropriate. We urge that the Applicants' Motion for Partial Summary Disposition regarding Contention 6 be denied.

A handwritten signature in black ink, appearing to read "Robert Guild", written over a horizontal line.

Robert Guild
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Counsel for Palmetto Alliance

August 12, 1983