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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANTS' RESPONSE IN OPPOSITION TO "PALMETTO MOTION TO DIRECT CERTIFICATION OF LICENSING BOARD'S DENIAL OF DISCOVERY BY PALMETTO ON ISSUES, RAISED BY IN CAMERA WITNESSES, AS TO WHICH THE BOARD IS ALLOWING FURTHER FACTUAL TESTIMONY BY APPLICANT, AND TO REVERSE THAT DENIAL; AND PALMETTO MOTION TO DIRECT THAT THE RECORD REMAIN OPEN UNTIL SUCH DISCOVERY CAN BE HAD"

Pursuant to 10 CFR §2.730(c), Applicants' hereby respond in opposition to Palmetto Alliance's motions to direct certification of the Licensing Board's rulings on discovery relating to the in camera witnesses' testimony and to require that the Licensing Board keep the record open pending such additional opportunity for discovery. For the reasons set forth below, Palmetto Alliance's motions should be denied by the Appeal Board.

## BACKGROUND

Palmetto Alliance's motions challenge the procedural framework established by the Licensing Board to hear evidence from the Board's in camera witnesses. To appreciate the propriety of the Licensing Board's action, it is necessary to provide some relevant background.

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During an August 3, 1983 conference call, Palmetto Alliance alleged that unnamed persons had brought to its attention serious deficiencies over and above those already in the case, which would compromise the public health and safety. Applicants sought an immediate identification of the persons and the alleged deficiencies. Palmetto Alliance refused to provide the information. Thereafter, the Licensing Board, in its September 14, 1983 ruling (pp. 6-8) on Applicants' written motion for the production of the names and facts concerning this matter, required that Palmetto Alliance divulge such information to Applicants. Palmetto Alliance failed to do so.

However, on October 11-12, 1983, during the evidentiary hearing phase of this proceeding, both Palmetto Alliance and the Government Accountability Project (a non party to this case) alleged that there were persons with information on the quality assurance contention who wished to come forward, but were desirous of the protections of a Licensing Board in camera proceeding.1/ On October 12, 1983, the Licensing Board

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1/ Palmetto Alliance cannot be said to dispute this fact. In its motion before the Appeal Board, it states:

> In response to representations by Palmetto and the Government Accountability Project (GAP) that there were potential witnesses among Duke Power Company (Duke) employees who would testify about unsafe conditions, equipment, and procedures at the Catawba Nuclear Power Plant except for the fact that they
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> (footnote continued)

ruled that it would issue a notice to Applicants' present and former employees which would be posted at the Catawba site and published in the media. Such notice was to inform interested persons of an opportunity to raise concerns confidentially in an in camera proceeding. The notice required that such concerns be received by the Licensing Board no later than October 21, 1983.

After publication and posting of the Licensing Board's notice, three former employees came forward. A fourth former employee, Mr. Harry Langley, was included in the in camera procedure for convenience. Mr. Langley came forward independent of the Board's notice, and raised some of his concerns in a public limited appearance session on October 17, 1983.

The Licensing Board had considerable discussions with the parties concerning the procedures for hearing the concerns of these four former employees.2/ With the input of the parties, the Board established a two step procedure for receiving the in camera testimony and the responses by the parties. Specifically, the Board determined to hear each of the four individuals on the record and under oath.

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feared retaliation against them by Duke, the Licensing Board appealed directly to the Duke workers to consider testifying under in camera procedural safeguards.

2/ The Licensing Board had advised Palmetto Alliance in its Memorandum and Order of September 30, 1983 (pp. 4-5) of the availability of the in camera process.

Such initial testimony was recognized by all to be the pre-filed testimony of these witnesses. During the November 16 in camera discussion with counsel, the Board stated:

> . . . it seems to us that once you get through this motion to strike exercise, what you have got left is in effect prefiled testimony for that witness, and then it is in the transcript. Then we presumably would be going to [the] second hearing, and we would be hearing from the Board and all parties with regard to these points. [IC Tr. 379].

In addition the Board announced that these witnesses were Board witnesses. [IC Tr. 27, 29, 434]. More importantly, in an earlier November 3 discussion of discovery as it related to these in camera witnesses, the Board stated as follows:

> I thought we mentioned something about that yesterday. We might just expand a bit. I don't know that we as a Board have given a lot of thought to it. But our thought has been that if you want to -- we would rather avoid formal discovery just for logistical, cumbersome reasons.
>
> Let us say, for example, that there is a point in one of the witness' testimony that one or the other of the parties really wants to look into more. If the witness is asked 'Do you mind if Mr. Guild or Mr. McGarry got in touch with you later on and let them look into it a bit, and may call you back?' And he says, 'That is fine, go ahead.' That might save us some problems, I would think. [IC Tr. 13].

No one objected to this procedure. Thereafter several additional discussions of procedural matters, including the subject of discovery, were held between the Board and parties. [IC Tr. 40, 42, 145, 298-99].

The Board received the initial testimony of the four former employees in camera during November 8-10, 1983. At the beginning of each in camera session, the Board advised each witness of the two-step process:

> Tonight our principal objective is to learn what your concerns are in the record and in some detail and give counsel an opportunity to ask questions so that they can begin investigating your concerns. [IC Tr. 40].
>
> * * *
>
> We do think that further down the road maybe three weeks, a month from now roughly, we would have a second session when you would come back and then having finished their review of what you have said, they would be in a better position to ask you questions, Staff too, Palmetto also, in terms of their perhaps looking further into some of the things that -- that you have expressed concerns about . . . [IC Tr. 42].

A similar statement was made to each other in camera witness. [IC Tr. 143-45, 297-98].

During later discussions of procedural matters, the Board established a schedule for the preparation of each parties response to the in camera witnesses' allegations. Specifically, on November 16, 1983, the Board set December 13 as the filing date for prefiled testimony and December 14-16, 1983 as the dates for hearing the witnesses. These dates were set without objection from Palmetto Alliance or any other party. [IC Tr. 379-81].3/

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3/ In discussing the filing dates the following coloquy took place:

> MR MCGARRY: We would endeavor to get the testimony to the Board and the parties sometimes in advance of
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> (footnote continued)

It should be emphasized Palmetto Alliance did not seek any information from Applicants regarding the in camera witnesses' allegations prior to the filing of prefiled testimony of Applicants' witnesses.4/ On December 12, 1983, Applicants filed prefiled testimony in response to the Board witnesses' allegations.5/ No other

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the date that these witnesses would come on.

JUDGE KELLEY: Yeah.

MR. GUILD: That sounds fine to me. In fact, what that would seem to do is provide us less necessity for trying to cram all of the important preliminaries into all of next week, and that means this motion to strike and the decision.

It seems to me you could defer an answer a day or so and then your decision until the following week and still have Applicants in a position where they could have several weeks' advance notice of the time to prepare their defense. [IC Tr. 380-81].

4/ Applicants are unaware of whether Palmetto Alliance sought information directly from the Board witnesses. The record is clear that the in camera witnesses were all represented by GAP. The record is further clear that a close relation exists between Palmetto Alliance and GAP. Indeed GAP has stated it is assisting Palmetto Alliance in this proceeding. Accordingly, it is not unreasonable to assume that Palmetto had access to these witnesses, each of whom could have provided Palmetto Alliance with additional information. Indeed, when GAP was unable to attend the December in camera hearings, counsel for Palmetto Alliance stated he was representing these individuals. See i.e., IC Tr. 602-603.

5/ Applicants had moved on November 28, 1983 to strike (with one exception) the entirety of the Board witnesses' testimony. The Board ruled on December 8 and 9 as to three of the individuals pre-filed testimony. Applicants' prefiled testimony in response to these three Board witnesses' allegations was filed on December 12 and 13. With respect to the fourth indivi-
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party responded on that date.6/

On December 13, 1983, the day before the established hearing date for the parties to respond to the Board witnesses allegations, Palmetto Alliance moved the Licensing Board for discovery and to keep the record open. IC Tr. 534. During the discussion of the motions between the Board and Palmetto Alliance, the following exchange occurred:

> JUDGE KELLEY: Let me ask you this. You say you want some discovery. Why didn't you ask for this three weeks ago? We have talked from the beginning about trying to avoid formal discovery, hoping we could get through in a cooperative way, and now a couple, few days before we thought we were going to hear this thing, you say you want formal discovery.
>
> Isn't that a little late?
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> MR. GUILD: I don't think so, Judge. We didn't know what the issue was. I don't think the blame is on Palmetto. I don't think the blame is on the Board. I am not trying to say, well,

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dual, the Board ruled on December 13. Applicants submitted pre-filed testimony on the fourth Board witness' allegations on December 14.

6/ The NRC Staff indicated that it was conducting an investigation of the allegations but had not yet completed its work and was thus not in a position to be heard. The Board after hearing from the parties on the matter determined that it need not hear from the NRC except as to an issue regarding [illegible]tions. Specifically, the Board felt the remaining issues were straightforward and for the most part had been the subject of previous testimony. Accordingly, the Board felt it could resolve the matter on the record independent of Staff input. The Board noted that upon the presentation of the Applicants case it would re-evaluate this decision to see if more information was necessary.

> we only found out about it this morning. Let's face the issues. The issues are joined right now.
>
> I don't know what issues are in or out. I only know what the Board rules. I am not faulting the Board on this. I don't think the Board should fault Palmetto, either. (emphasis added) [IC Tr. 538-39].7/

On December 13, 1983, the Licensing Board denied these requests. See Attachment 1.8/

ARGUMENT

The instant motion is an interoluctory appeal of a Licensing Board ruling regarding the procedural framework established to treat the allegations of Board in camera witneses. More specifically, the issue on appeal is whether Palmetto Alliance is entitled to further discovery of Board witnesses.

This Appeal Board has stressed that

> [i]nterlocutory appeals are not favored in Commission any more than in judicial practice. Whether review should be undertaken on "certification" or by referral before the end of the case turns on whether a failure to address the issue would seriously harm the public interest, result in unusual delay or expense, or affect the basic structure of the proceeding in some pervasive or unusual manner. [Duke Power Company (Catawba Nuclear Station, Units 1 and

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7/ The Board noted that Palmetto Alliance had not come to the Board with any informal discovery requests [IC Tr. 540].

8/ On December 14, 1983, the Licensing Board denied a request to stay its decision in this regard. See Attachment 2. It should be noted that the Licensing Board corrected the transcription of this Order at Tr. 11625-11629. These corrections are attached as Attachment 3.

2), ALAB-687, 16 NRC 460, 464 (1982) citing Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-634, 13 NRC 96, 99 (1981).]9/

As set forth below, Applicants submit that Palmetto Alliance has failed to satisfy the Catawba interlocutory review standard.

First, the public interest would not be seriously harmed if this Appeal Board refused to review the instant motion. The matter in question can be properly reviewed in the normal appellate process. If the Licensing Board is found to be in error (which we do not think is the case) this Appeal Board can take appropriate action to rectify any harm, i.e., it can reopen discovery and order further hearings, if necessary.

In any event, public interest requires that the administrative process be conducted in an efficient and expeditious manner. Recognition of this fact is set forth in the Commission's Statement of Policy on Conduct of

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9/ Palmetto Alliance has cited the interlocutory standard set forth in Public Service Electric & Gas Co. (Salem Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980). Such standard states that interlocutory requests

> are granted infrequently 'and then only when a licensing board's action either (a) threatens the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affects the basic structure of the proceeding in a pervasive or unusual manner.'

Applicants will address the motion pursuant to the Catawba test. However, the first part of the Salem test is embraced by the first two parts of the Catawba standard; the second part of the Salem test is identical to the third part of the Catawba test.

Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). The Licensing Board's ruling, upon which interlocutory review is sought, took this public interest into consideration. Specifically, the allegations of the Board witnesses arose during the course of the hearing. In response thereto, the Licensing Board established an innovative procedure for dealing with the newly arisen matters. All parties were aware in early November that the Board witnesses testimony would be given under oath; that thereafter over one month would be available to conduct informal discovery; and that responsive testimony could be filed by any party up to one day prior to the actual receipt of such testimony. These facts, coupled with the additional fact that the issues raised by the Board witnesses essentially involve matters which have consumed the bulk of the 43 hearing days already spent on this case, i.e., quality assurance allegations, serve as support for the Licensing Board's action and as evidence that the interest of the public was taken into account. Accordingly, it cannot be said that the public interest has been harmed, and thus, interlocutory review is unwarranted.

The grounds advance by Palmetto Alliance with regard to the public interest are not persuasive. First, Palmetto Alliance alleges that absent this Board's immediate review the record will be one-sided. Again, if Palmetto Alliance is correct, such can be rectified during the normal

appellate process. Applicants would note that Palmetto Alliance's characterization of the record as being onesided is in error. Palmetto Alliance could have sought discovery from Applicant during the in camera process established by the Licensing Board but it chose not to; Palmetto Alliance could have sought to put on a case, but it chose not to; Palmetto Alliance did cross-examine the in camera Board witneses. Second, Palmetto Alliance argues that the Appeal Board will defer to the Licensing Board's findings and that any error the Appeal Board finds as a result of the subject Licensing Board's ruling will be determined to be harmless error. Palmetto Alliance Motion at p. 10. Such an assertion is simply unfounded.

Turning to the second standard, Applicants maintain that the Appeal Board's failure to address the motion will not result in unusual delay or expense. Delay and expense are not involved in this motion. The Licensing Board has already ruled that there will not be any delay which could be occasioned by providing Palmetto Alliance yet a further opportunity to take discovery. Absent delay, there can be no corresponding expense. Rather, Palmetto Alliance's argument in this regard is similar to arguments which have been rejected by the Appeal Board on numerous occasions, viz., if the Licensing Board's ruling is overturned on appeal time and money will have been wasted. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant,

Units 1 and 2), ALAB-675, 15 NRC 1105, 1113-14 (1982)(allegations of both delay and expense); Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981)(allegations of both delay and expense); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310-11 (1981)(allegations of delay).10/

With regard to the third standard, Applicants maintain that Appeal Board review at this time will not affect the basic structure of the proceeding in a pervasive or unusual manner.11/ The issue at hand does

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10/ See Perry supra at 1113-14 wherein the Appeal Board stated:

> Applicants' second argument -- that litigation of Sunflower's hydrogen control contention will lead to delay and increased expense -- is likewise unpersuasive. See Applicants' Motion, p. 12. We have noted, in similar circumstances, the obvious fact that 'once the hearing is held[,] the time and money expended in the trial of an issue cannot be recouped by any appellate action.' Susuqehanna, supra, 13 NRC at 552. The Same is true, however, any time a contention is admitted over a party's objections and the hearing proceeds. The added delay and expense occasioned by the admission of Sunflower's contention -- even if erroneous -- thus does not alone distinguish this case so as to warrant interlocutory review. See ibid.

11/ Applicants assert that it is Palmetto Alliance which seeks to affect the basic structure of the proceeding in a pervasive manner. In numerous instances it has sought to delay the proceeding by raising at the last moment matters which it should have raised months previous. We can only say that such tactics cause us

(footnote continued)

not affect the basic structure of the proceeding, rather it is focused on the special limited procedures which the Licensing Board has imaginatively devised to treat late-filed concerns. As noted in the Background section all parties have been on notice of the procedures to be followed in the treatment of the subject issues. Specifically, the Licensing Board's ruling of November 3, 1983 provided all parties with an opportunity to conduct informal discovery, such period running for over one month prior to the presentation of oral testimony. Palmetto Alliance is not only wrong on page 7 of its motion when it states "The Board has forbidden this, [to wit, discovery]"12/ it is guilty of a serious misrepresentation of the record. See IC Tr. 13, 40, 42, 145, 298-99.

Further, the Board provided an opportunity for any party to present an affirmative case responding to the Board's witnesses allegations. See IC Tr. 385. Also all

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to view such actions as being directed to the delay and disruption of the proceeding.

12/ Palmetto Alliance is also wrong when it states "this problem is compound because Duke and the Staff refused to cooperate with Palmetto Alliance even in any informal discovery." Motion, p. 7. The fact is that Palmetto Alliance never sought informal discovery from Aplicants on these matters. Rather, ir an effort to make an appellate point it sought such informal discovery on December 13, 1983, several hours before the commencement of the hearing on these matters. At such time both Applicants and Staff refused Plametto Alliance's request, Applicants view being that the time for discovery was over. Tr. 11, 457.

parties were aware of the filing dates and the hearing dates and the tightness of the schedule. See IC Tr. 385. Importantly, Palmetto Alliance did not oppose any of the referenced procedures adopted by the Licensing Board.

The Board ruling concerning the denial of further discovery has taken the above facts into consideration and is entirely consistent therewith.

The simple fact with respect to the third Catawba standard is that Palmetto Alliance's inaction is fatal to its position. Palmetto Alliance could have developed a case; it could have contacted the in camera witnesses; it could have determined the identity of documents and names of individuals; it could have sought such information from the Applicants. However, to the best of our knowledge Palmetto Alliance did none of the above. Such inaction must be taken into account when weighing whether interlocutory appellate review is warranted, and, when weighed, must be found to be so significant as to deny such review at this time.

Palmetto Alliance's arguments in support of its position regarding the pervasive impact of the Licensing Board's ruling are again ill-founded. Palmetto Alliance relies upon Midland as authority.13/ Applicants maintain that such case is inapposite. Midland involved a situation of immediate harm, i.e., if an unsequestered

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13/ Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-379, 5 NRC 565 (1977).

witness heard the testimony of a prior witness, such unsequestered witness' testimony could be affected. Here, however, as stated above, there is no immediate harm. With limited exception, the allegations of the Board witnesses have been heard. If Palmetto Alliance is subsequently viewed as having a right to discovery such can be cured on appeal. Secondly, Palmetto Alliance reliance on Eli Lily14/ case is unhelpful to its position. The Eli Lily court held that:

> Every litigant has a duty to his client and to the court to proceed with discovery with reasonable promptitude. Reversible error arising from curtailment of discovery procedures must be premised on a demonstration that the court's action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery was impossible. (emphasis in original) [460 F2d at 1105].

As stated above, Palmetto Alliance cannot meet this test. To the best of Applicants knowledge Palmetto Alliance took no discovery on this matter. More particularly, it sought no information whatsoever from Applicants with regard thereto.

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14/ Eli Lilly and Company v. Generix Drug Sales, Inc., 460 F2d 1096 (5th Cir. 1972).

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As stated above, Palmetto Alliance cannot meet this test. To the best of Applicants knowledge Palmetto Alliance took no discovery on this matter. More particularly, it sought no information whatsoever from Applicants with regard thereto.

In sum, Palmetto Alliance has failed to satisfy the three-part test established by this Appeal Board with regard to interlocutory review. Accordingly, Palmetto Alliance's motions should be denied.15/

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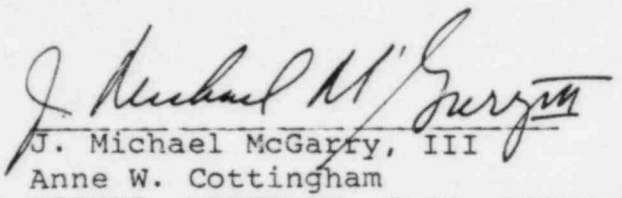
14/ Eli Lilly and Company v. Generix Drug Sales, Inc., 460 F2d 1096 (5th Cir. 1972).

15/ Inasmuch as Palmetto Alliance is not entitled to interlocutory review of the Licensing Board's ruling (footnote continued)

In sum, Palmetto Alliance has failed to satisfy the three-part test established by this Appeal Board with regard to interlocutory review. Accordingly, Palmetto Alliance's motions should be denied.15/

Respectfully submitted,



J. Michael McGarry, III
Anne W. Cottingham
BISHOP, LIBERMAN, COOK, PURCELL & REYNOLDS
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9833

Albert V. Carr, Jr., Esq.
Ronald L. Gibson
DUKE POWER COMPANY
P.O. Box 33189
Charlotte, North Carolina 28242
(704) 373-2570

Attorneys for Duke Power Company, et al.

January 3, 1984

15/ Inasmuch as Palmetto Alliance is not entitled to interlocutory review of the Licensing Board's ruling on further discovery of Board witnesses, it is not entitled to interlocutory review of the question of whether the record should remain open while it conducts such discovery.

AFTERNOON SESSION

(1:45 p.m.)

JUDGE KELLEY: Back on the record.

The Board has a ruling. Following that we will go to Mr. Johnson and his panel.

We have heard a motion this morning from Palmetto Alliance seeking formal discovery in relation to the concerns of the in camera witnesses. We heard argument from other counsel.

The Board considered the argument. The Board denies the motion for the reasons to be stated.

The relevant circumstances are these: The testimony of the in camera witnesses were taken on the 8th, 9th, 10th of November. A motion is being made now on December 12, more than a month later, one day before the merits are scheduled to begin.

The Board repeatedly stated its objectives and discussion of procedures for these in camera witnesses to avoid, if we possibly could, formal discovery procedures, largely because they would take too much time.

This is reflected in the early procedural discussions. In furtherance of that objective, we asked the witnesses to cooperate in informal discovery. They indicated generally that they would.

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In various scheduling discussions over the past several weeks it has always been assumed that the merits of the in camera concerns would be addressed around this time.

Palmetto said nothing to indicate that it wanted formal discovery until today, again on the eve of the hearing on the merits.

To grant formal discovery now would work a drastic change in the procedures that the Board and the other parties have been assuming and working under all along. It would prejudice the applicants who have been working to meet the Board's assumed schedule.

It would certainly delay the compiling and closing of the record in contention 6.

It would relate substantially, perhaps very substantially -- we can't tell how long -- it might very well, however, prejudice the Board's ability to decide the safety issue prior to the fuel load, anticipated fuel load date, and is contrary to the Commission's policy on the conduct of licensing proceedings.

In all these circumstances, we would require a strong showing of good cause before we grant formal discovery among these in camera issues, except a showing has not been made.

To begin with, as we have said before, it is a

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belated request. It should have been made, if at all, several weeks ago.

Secondly, we have had informal voluntary discovery available, presumably available all along. We don't know whether it has been used extensively or at all. In any event, there haven't been any complaints brought to us about the inadequacy of formal discovery and cooperation until now.

We don't think there is any persuasive showing in the need for discovery.

Some of the items that the Board has left in -- by left in I mean those where we have denied motions to strike -- have already been the subject of extensive testimony.

For example, Mr. Hoopingarner's concerns. All other matters were left in, at least were in the broad parameters of contention 6.

A few, I think, a very few are truly technical, but taken, for example, the lamination matter that the Board singled out, thought might be most serious, there has been no showing by Palmetto that they can make any technical contribution to the resolution of that issue.

Indeed, as stated yesterday by Mr. Riley, Palmetto then litigating the contention number 44 tried and failed to obtain the services of a metallurgist.

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Finally, these are, after all, Board witnesses. Our primary concern is whether the concerns of these, our witnesses, have been addressed.

It is not a matter of the Board depriving a party of discovery in an adversary context with respect to a party, or that party's adversary. That has been accorded.

So our bottom line in denying the motion for discovery, we are going to go ahead with the hearing starting presumably tomorrow afternoon on the merits of the in camera concerns. We expect all parties to participate.

Concern was expressed by us, among others, I think by everybody, whether we are in a position now to address these concerns fully.

We asked Mr. Johnson, for example, whether the staff thought it could. He was going to get back to us on that.

We are concerned that we address these issues adequately and if we are satisfied that they are resolved one way or the other, we think as far as that is concerned the proper thing for us to do is to go ahead and hear what is to be presented.

The staff, for example, at the close of the whole thing says that there is some issue that they would want to look at, they don't think we have enough information,

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we will take that into consideration.

Perhaps we will have to hold the record open on that.

It is simply that Palmetto could say that particular things were not adequately addressed, and we will consider that.

We don't think it is warranted to stop everything in its tracks and take us much longer to get into a deposition and interrogatories, document requests. We think that is not justified at all.

So that is our ruling on that point. Our intent is to proceed.

MR. GUILD: Mr. Chairman --

JUDGE KELLEY: Yes?

MR. GUILD: A couple matters in this regard.

First, I have a motion for reconsideration. It has been brought to my attention since the earlier motion was heard after the Board's hearing it this morning, admitting a number of new in camera concerns, that the precedent that the Board proposes to follow is inconsistent with both the precedent and pending precedent in previous licensing proceedings with respect to consideration, if you will, of whistleblower witnesses who have technical testimony.

It is also inconsistent with the recent statement of policy by the Commission of August 10, 1983,

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JUDGE KELLEY: Okay. We are back on the record.

We have pending a motion from Palmetto Alliance to stay the evidentiary hearings on the in camera concerns which we had scheduled to begin later today and go through Thursday and Friday, essentially.

We have considered that motion and the responses, and frankly found it a difficult issue to decide.

Our decision is that we are going to grant the motion in part and we are going to deny the motion in part.

First, I will spell out just what it is we are going to do, then I will explain why.

As to the grant, we are going to stay the evidentiary hearing on one technical issue to which two of the witnesses spoke, including Mr. Langley as a public witness.

We are going to stay that hearing until the staff's technical position on it is ready.

I will tell counsel off the record what the issue is. I will tell you later off the record.

Now, as to the remainder of the motion, we are denying that stay as to the remaining concerns other than the single one I referred to, and including the Board questions, we propose to go ahead with the evidentiary hearings through the rest of this week.

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Now, as to why we took this approach, we had indicated earlier we intended to hold these hearings, and indeed we would have denied the motion for a stay but for the staff's inability to proceed, as explained to us this morning by Mr. Johnson.

We were under the impression that staff was prepared to join the issue on these concerns. Now, we don't blame Mr. Johnson. He has flagged us on this before, and we are fully aware of the difficulties of working in a governmental agency and getting positions developed. It is not at all reflecting on Mr. Johnson.

We really thought we were ready to go. Then we heardfrom him in more detail this morning. It concerns us this morning.

In any event, it doesn't seem sensible for us to proceed now, and we are going to have to hear from the staff later on a particular technical issue, and in effect, quite likely, have to retry the matter.

The staff was not prepared to say, and we understand why it was not prepared to say, which of the in camera issues it would be developing a position on and which it would view as not sufficiently significant or for some other reason would not pursue.

We think in these circumstances it involves the Board to review the issues in question, and we have done

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that.

As we view the safety significance of these in camera concerns, other than the single one that we are granting the stay on, and in view of putting it in, in view of their prior development in this litigation, we think we probably can resolve them now without a staff position.

We can reconsider that in light of developments, if it becomes apparent that we have to hear from the staff, we will have to wait and hear from the staff. But we are making a probability call at this point.

Now, this means that it won't necessarily have to affect the receipt of the staff position later on in these positions, which will be presumably later on after the record is closed.

We are going to ask the staff if they develop inspection reports, for example, or something comparable on these issues, that they serve copies on the parties and that will put any party in the position to seek to reopen the record on the matter if they believe that should be done.

As to the single issue I mentioned, we view it as a complicated technical issue with an apparent, quite possible safety significance. We haven't made any judgment on that.

In any event, we think we need a staff position

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merits, and our skepticism about Palmetto's likelihood of success, as it is now applied to this ruling we have granted -- granted and denied.

As to comparative injury, we have spoken to that yesterday. It is in the record, our view, on who is injured most by going ahead or staying the proceeding. I won't repeat that.

There is a potential injury to the applicant if we delayed all these matters in terms of the availability of the Board to comply with the Commission's goal of trying these cases inside the fuel load date.

Palmetto was not prepared to cross-examine on the matters. We can only say that voluntary discovery has been open for some time, and their injury is, at least to some extent, self-inflicted.

end4b

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We think ultimately the public interest that is weighing here speaks in favor of timely completion of this hearing consistent with the Board getting what it needs on the issue in contest, and that we think our approaches, again, are within a reasonable balance.

So that is our ruling on the stay motion.

I understand there is, I believe, a tentative arrangement for an Appeal Board conference.

MR. GUILD: Yes, sir.

Mr. Chairman, let me just raise one point. I

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Now, it is just a shade after 3:00. We would like to move to the staff, but we have a couple of minutes' work here to do.

We have been given a copy of the ruling entitled "Excerpt of Proceedings." Everyone has one. It is not great English prose. I don't intend to try to make it perfect. I would like to scratch some of the mud off of some areas, and just take a couple of minutes to make some corrections, and I think some transcriptions or additions or subtractions of a word here.

We are not changing the ruling at all but in the interest of clarity I will do this.

There is nothing on page 1.

Page 2, line 3, after the word "stay" add the word "altogether," "altogether" on the next line, and add the phrase -- it will read this way. I will take it slow. "But for the staff's inability to" -- strike the word "proceed" and substitute "present its technical positions now."

Again, the phrase is "present its technical positions now.

So that that phrase reads: "But for the staff's inability to present its technical positions now as explained to us this morning by Mr. Johnson."

On line 7, strike the word "the".

Line 11, make it read, "not at all a reflection on Mr. Johnson."

At line 13, 14, just strike out "it concerns us this morning" because it comes through as gibberish. You don't need it.

Line 16, strike "and" and put in "if" instead.

Line 24, the last word, change "involves" to "devolves". One word. And add the word "to" so that it reads "We think in these circumstances it devolves to the Board" and so on.

On the next page, line 4, strike the last five words, "putting it in, in view". Strike that.

The next line, strike "of", the first word.

Line 7, change it to "We can reconsider that in light of the" and insert "developing" for developments and put a period there so it reads: "We can reconsider that in light of the developing record." Capitalize the T for a new sentence.

On the following line, after the word "staff" insert the following four words: "before resolving the issue."

At line 11, strike "it" and put in "we".

Mr. GUILD: Judge, that line about the staff resolving the issue and then a new sentence is "we" --

JUDGE KELLEY: That "we are".

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MR. GUILD: But we are. Thank you.

JUDGE KELLEY: Yes. And on the next line, change the "it" to "we".

Line 12, strike "effect". The second, third word is changed to "receive". Strike the next two words, "of the".

Change the position "positions".

Strike "in" at the end.

In the next line add the word "available" between "be" and "presumably".

I will read that whole sentence.

"Now, this means that we won't necessarily have to receive staff positions later on these positions" -- make it "concerns".

Line 13, strike "positions" and make it "concerns".

I will start again.

"Now, this means that we won't necessarily have to receive staff's positions later on these concerns, which will be available presumably later on after the record is closed."

Line 22, strike the last two words, "and apparent".

Line 23, strike "quite" so that the sentence ends "complicated technical issue with possible safety

significance."

The next page, line 1, after the second word, "that" add "technical issue" so it reads: "on that technical issue in order to resolve it."

Line 9, strike that -- line 9 is all right.

Line 13, change "is" to "was".

Line 16, strike "with" at the end of the line.

Line 22, strike "referred" and substitute "considered."

Line 23, after "parties" insert the words "positions on" so that the sentence reads, "We have considered the parties' positions on that."

Page 5, line 2, strike out "it". Substitute "that standard".

The next line, strike "granted". Put in the word "made".

MR. GUILD: Judge, again, we have granted, and then --

JUDGE KELLEY: The first "granted", strike, and substitute the word "made". Put in a period. Strike out the rest. Strike out the "-- granted and denied." You don't need it. Take it out.

Line 10, change "availability" to "ability".

Line 16, strike "that" at the end of the line.

Line 17, strike "is" at the beginning of the

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line.

Strike out "favor" to "favors".

Strike the "of" after "favors".

Line 19, change "issue" to "issues".

Line 20, strike out "within".

I will read the whole sentence.

"We think ultimately the public interest weighing here favors timely completion of this hearing consistent with the Board getting what it needs on the issues in contest and that we think our approaches generally are a reasonable balance."

Those are the changes that we have.

Again, I think that is fully consistent with what we intended.

MR. GUILD: If I can make a statement for the record.

JUDGE KELLEY: Yes.

MR. GUILD: I communicated with the witness in question and in light of that discussion we have cancelled the 3:30 conference call.

We intend to file papers either late this afternoon or tomorrow morning, but we have withdrawn our initial request, if you will, for the oral or extraordinary stay. We intend to proceed over our objection.

JUDGE KELLEY: I am not -- I think I understand.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response In Opposition To 'Palmetto Motion To Direct Certification Of Licensing Board's Denial Of Discovery By Palmetto On Issues, Raised By In Camera Witnesses, As To Which The Board Is Allowing Further Factual Testimony By Applicant, And To Reverse That Denial; And Palmetto Motion To Direct That The Record Remain Open Until Such Discovery Can Be Had'" in the above captioned matter has been served upon the following by deposit in the United States mail this 3rd day of January, 1984.

Alan S. Rosenthal
Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Paul W. Purdom
235 Columbia Drive
Decatur, Georgia 30030

Dr. Richard F. Foster
P.O. Box 4263
Sunriver, Oregon 97702

Thomas S. Moore
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Chairman
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Howard A. Wilber
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

James L. Kelley
Chairman
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Albert V. Carr, Jr., Esq.
Duke Power Company
P.O. Box 33189
Charlotte, North Carolina 28242

Richard P. Wilson, Esq.
Assistant Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Robert Guild, Esq.
Attorney-at-Law
P.O. Box 12097
Charleston, South Carolina 29412

Palmetto Alliance
2135 1/2 Devine Street
Columbia, South Carolina 29205

Jesse L. Riley
854 Henley Place
Charlotte, North Carolina 28207

George E. Johnson, Esq.
Office of the Executive Legal
Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Karen E. Long, Esq.
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

Don R. Willard
Mecklenburg County
Department of Environmental
Health
1200 Blythe Boulevard
Charlotte, North Carolina 28203

*Scott Stucky
Docketing and Service Section
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

John Clewett, Esq.
236 Tenth Street, S.E.
Washington, D.C. 20003

J. Michael McGarry, III

*Designates those hand delivered.