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Docket No. 50-220

Niagara Mohawk Power Corporation
ATTN: Mr. Thomas E. Lempges
Vice President
Nuclear Generation
300 Erie Boulevard West
Syracuse, New York 13202

Dear Mr. Lempges:

Subject: INVESTIGATION REPORT NO. 50-220/81-22 AND ENFORCEMENT CONFERENCE
REPORT NO. 50-220/81-26

On January 31, 1983, we sent to Niagara Mohawk Corporation (NMPC) a letter and accompanying enclosures in regard to Investigation No. 50-220/81-22 and Enforcement Conference Report No. 50-220/81-26. The letter advised NMPC that the NRC had determined that certain portions of the enclosures, containing details of NMPC's security program, were exempt from public disclosure in accordance with 10 CFR § 73.21 or 10 CFR § 9.5(a)(4). On February 8, 1983, NMPC advised the NRC by telephone that they intended to propose that additional portions of the enclosures be withheld from public disclosure pursuant to 10 CFR § 2.790(b)(1). On February 28, 1983, a meeting was held between NMPC and the NRC wherein the company's reasons for wanting additional portions of the subject documents withheld from public disclosure were further explained.

On March 8, 1983, you, on behalf of NMPC, filed an affidavit in accordance with 10 CFR § 2.790(b)(1) setting forth the reasons why additional portions of the subject documents should be withheld. For purposes of clarity, those portions of the documents which NMPC felt should be withheld from disclosure were underlined and marked with item numbers corresponding to item numbers listed in your affidavit. Your submittal is enclosed with this response for ease in reference.

For the reasons which follow, NMPC's request is granted, in part, and denied in part.

Item 1:

NMPC requests by authority of 10 CFR § 2.790(a)(7)(iv) that the names and positions of all persons interviewed or who declined to be interviewed, the names of individuals appearing in the SSS log, and the names of the investigating officers from the State Police be withheld from public disclosure as confidential sources. It is maintained by NMPC that the information provided by the individuals interviewed was given under either an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred. NMPC also asserts that to disclose the names of any person interviewed would constitute an unwarranted invasion of personal privacy.

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The request of NMPC is granted. However, the basis for granting this request is not your claim that the disclosure of person's identities would be an unwarranted invasion of their privacy or would compromise confidential sources. Rather, the basis for withholding the names of persons contained in the report is to assure continued cooperation by these individuals during any future investigation.

Item 2:

NMPC next requests that all information which would tend to establish the mechanism utilized to disable the emergency diesel generators be exempt from public disclosure. It is maintained that this information discloses a vulnerability to potential sabotage and therefore should not be disclosed by reason of 10 CFR § 2.790(a)(2) and § 73.21(b)(3)(i). The vulnerability NMPC would have withheld from public disclosure is the fact that the diesel generators can still be disabled by the simple expedient of opening the fuel filter petcocks.

It is further maintained by NMPC that dissemination of this material to the general public by the NRC violates the mandate of § 147 of the Atomic Energy Act of 1954, as amended, to prevent unauthorized disclosure of information which could reasonably be expected to have an adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of sabotage of a nuclear reactor. 42 USC § 2167 (a)(3)(A).

In its affidavit, however, NMPC fails to address the fact that "vulnerability", as used in 10 CFR § 73.21(b)(3)(i), refers to an uncorrected vulnerability in the physical security system and not to the vulnerability of a particular piece of safety equipment which may be the subject of sabotage. Information regarding the diesel generator fuel lines and fuel line petcocks are not covered by any of the subparagraphs of 10 CFR § 73.21. In general, details of plant safety related equipment, including design, operation, maintenance, system interaction, and any other data produced in response to the safety and environmental requirements of 10 CFR Parts 50 and 51, are not protectable as safeguards information.

The authority in § 73.21 for non-security related matters extends only to lists or locations of vital safety-related equipment explicitly identified in physical security plans or plant specific safeguards analyses.

NMPC has misinterpreted both the applicable NRC rules and § 147 of the Atomic Energy Act, as amended. While the entire security plan is designated "safeguards information", information extracted from that plan must be judged on its ability to meet the "significant adverse effect" test set forth in § 147 in order to be withheld from public disclosure. There is not basis to conclude there would be a significant adverse effect on the facility's security system if this information is disclosed.

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Finally in this regard, we wish to point out that information regarding this event is already in the public domain as an entry in the Safeguards Summary Event List, NUREG-0525, as follows:

"During a routine diesel generator operability surveillance test, a diesel generator failed to start because a pet cock (sic) drain on the fuel oil final filter housing had been tampered with. The pet cock (sic) was aligned correctly and the generator was subsequently started. Licensee personnel immediately checked the diesel generators supplying the other power train for the unit in question and found the analogous petcock misaligned. Subsequent investigation confirmed that the generators petcocks (sic) were intentionally tampered with, but failed to identify the responsible party or parties. Fuel present at site."

NMPC next makes the argument that even assuming that 10 CFR § 2.790(d)(1) and 10 CFR § 73.21 are not applicable, the information is still exempt from disclosure under the provisions of 10 CFR § 2.790(a)(4) in that the mechanism whereby the diesel generator was rendered inoperable constitutes commercial information in that it is the type of information which relates to the operation of the facility and which is customarily not released to the public by NMPC. Citing, Continental Stock Transfer and Trust Company v. Securities and Exchange Commission 566 F. 2d 363, 375 (2d Cir., 1977), National Western Life Ins. Co. v. U.S. 512 F. Supp. 454, 462 (D.C. Texas, 1980).

Again, the arguments set forth by NMPC do not go far enough. In order to protect information as confidential commercial information under exemption four, it must be shown that disclosure of the information is likely to cause substantial harm to the competitive position of NMPC. National Parks and Conservation Association v. Morton 498 F. 2d 765, 770 (D.C. Cir., 1974). No effort has been made by NMPC to show such a harm. Moreover, it should be pointed out that certain of the assertions made by NMPC are factually incorrect. Specifically, the information relative to the method of disabling the generators has not been held in confidence prior to the Commission's letter of January 31, 1983. This very information has been released to the public through NUREG-0525 as set forth above. In addition, this is not the type of information customarily held in confidence as evidenced by NUREG-0525.

Accordingly, NMPC has not met its burden to show why this information should be withheld from public disclosure as confidential commercial information.

Item 3:

NMPC next lists a series of specific passages from Investigation Report 81-22 and requests the information be withheld as matter relating to plant security and safeguards. Each specific request will next be addressed, in turn.



Item 3a:

Although the information requested to be withheld is not safeguards information under either 10 CFR § 53.21 or § 147 of the Atomic Energy Act, as amended, to the extent indicated, disclosure is withheld by reason of 10 CFR § 2.790 (d)(1).

Item 3b:

The request to withhold the fact that the State Police and FBI investigated the disabling of the diesel generators is denied in light of the fact neither organization has requested such information be withheld. Moreover, neither the FBI nor the State Police are designated in NMPC's security plan as the primary offsite response force and therefore this information is not safeguards material. In contrast to what is stated by NMPC, nowhere in the report are investigative techniques of either organization discussed, and accordingly the information sought to be withheld is not exempt by reason of 10 CFR § 2.790(a)(7)(v).

Item 3c:

The withholding from disclosure of this item is denied for the reasons set forth in response to Items 2 and 3b.

Item 3d:

For the reasons set forth in response to Item 3a, to the extent indicated, disclosure is withheld by reason of 10 CFR § 1.790(d)(1).

Item 3e:

For the reasons set forth in response to Item 3a, to the extent indicated, disclosure is withheld by reason of 10 CFR § 2.790(d)(1).

Item 3f:

This material will be withheld as safeguards information.

Item 3g:

For the reason set forth in response in Item 3a, to the extent indicated, disclosure is withheld by reason of 10 CFR § 2.790(d)(1).

Item 3h:

For the reasons set forth in response to Item 3a, to the extent indicated, disclosure is withheld by reason of 10 CFR § 2.790(d)(1).



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Item 4

For the reasons set forth in response to Item 2, withholding of this information is denied.

Item 5:

For the reasons set forth in response to Item 2, withholding of this information is denied.

Item 6:

For the reasons set forth in response to Item 3a, to the extent indicated disclosure is withheld by reason of 10 CFR § 2.790(d)(1).

Finally, NMPC requests in the alternative, that the entire enclosure be exempt from public disclosure since even the expurgated version suggested by NMPC leaves information which would prove useful to a would be saboteur. For the reasons set forth above, this request is denied and the document will be placed in the Public Document Room 30 days from the date of this letter.

Sincerely,

ORIGINAL SIGNED BY:

JAMES M. ALLAN

James M. Allan

Acting Regional Administrator

Enclosure: As stated

cc w/encl:

G. K. Rhode, Senior Vice President, System Project Management

T. Perkins, General Superintendent, Nuclear Generation

T. Roman, Station Superintendent

J. Aldrich, Supervisor, Operations

W. Drews, Technical Superintendent

Troy B. Conner, Jr., Esquire

John W. Keib, Esquire

Director, Power Division

Public Document Room (PDR)

Local Public Document Room (LPDR)

Nuclear Safety Information Center (NSIC)

NRC Resident Inspector

State of New York

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bcc w/encl:
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