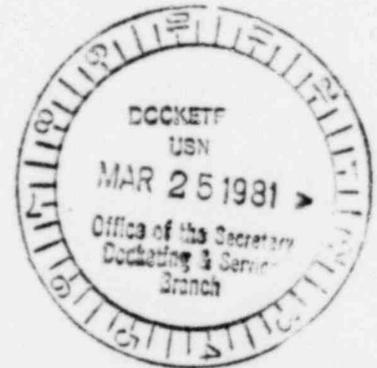




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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Charles Bechhoefer, Chairman
Dr. James C. Lamb
Mr. Ernest E. Hill



In the Matter of

HOUSTON LIGHTING AND
POWER COMPANY, ET AL.

(South Texas Project
Units 1 and 2)

Docket Nos. STN 50-498 OL
STN 50-499 OL

March 24, 1981

MEMORANDUM AND ORDER
(Granting CCANP Motion to Compel
NRC Staff to Provide Information)

On March 16, 1981, Citizens Concerned About Nuclear Power (CCANP) filed a motion pursuant to 10 CFR §2.744(c) to compel the NRC Staff to produce the identities and sworn statements of those QA/QC inspectors who supplied the information which formed the basis of the Staff's Order to Show Cause, dated April 30, 1980.^{1/} Through oral argument at the prehearing conference on March 18, 1981, the NRC Staff and the Applicants (Houston Lighting and Power Co., et. al.) opposed the motion, both on grounds of timeliness and on

^{1/} The representative of Citizens for Equitable Utilities (CEU) joined the representative of CCANP in signing the motion, although the motion by its terms is sponsored solely by CCANP.

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the merits (Tr. 666-691). For reasons set forth below, and as announced at the conference (Tr. 685), we grant CCANP's motion (as well as its companion motion to file out of time the foregoing motion to compel answers). Our grant of the motion to compel is limited to the names of QA/QC inspectors who supplied information to the NRC about harassment at the South Texas Project, and the names of employees who are said to have harassed or intimidated the QA/QC inspectors, and does not extend to the requested sworn statements. (In accord with the scope of CCANP's contentions, the names of employees are limited to those who are said to have harassed inspectors and do not encompass harassment of other than QA/QC inspectors.) The foregoing information need be made available only if subject to a protective order comparable to that under which CCANP and CEU have been directed to identify the names of certain of their informants.

1. Intervenors' motion to compel--filed on the eve of the prehearing conference at which it was considered--was admittedly untimely. The Staff had refused to furnish the information requested of it in its filing dated December 8, 1980. Under normal rules, a motion to compel should have been filed within 10 days of the Staff's response. 10 CFR §2.740(f). But at our prehearing conference in November, 1980, we set February 2, 1981 as the last date for intervenors to file motions to compel. We also had noted that schedule modifications would not be granted "absent a strong showing of good cause". Second Prehearing Conference Order, dated December 2, 1980, at pp. 5-7.

In support of its motion for leave to file out of time its motion to compel, CCANP states that, from November, 1980 through February, 1981, it

was represented by attorneys, and that CCANP assumed that all necessary discovery motions had been filed within the prescribed time periods by those attorneys. CCANP went on to state that in March, 1981, its attorneys informed it that "unfortunate circumstances beyond their control" prevented their continuing to represent CCANP and that these same circumstances prevented certain discovery motions (including a motion to compel against the Staff) from being timely filed. At the prehearing conference the CCANP representative explained that he first learned of the attorneys' impending withdrawal during the last week in February, that he asked them to draw up motions to file discovery out of time, that they did not do so, and that he had received the case files only shortly before the prehearing conference (Tr. 674-675). As a further reason to permit the untimely filing, CCANP mentions the importance of the information to the proceeding and the circumstance that the information is not reasonably obtainable from another source.

Neither the Staff nor the Applicants regarded CCANP's explanation as an adequate showing of good cause. And both of them asserted that the delay would cause them some prejudice in the preparation of their cases. Tr. 671-676. Nonetheless, as announced at the conference, we regard the importance of CCANP's participation and its potential contribution to creation of an adequate record as outweighing the timeliness factors relied on by the Staff and Applicants. In particular, we do not perceive that our granting the motion will necessarily delay the hearing. In the circumstances of this proceeding, we deem the excuse tendered by CCANP to be a strong showing of good cause.

2. Turning to the substance of the motion to compel, CCANP asserts that it needs the names of the QA/QC inspectors who supplied information to the Staff concerning harassment, as well as the names of employees who harassed and intimidated them, in order to support its contentions relating to such harassment. CCANP adds that it sought a hearing on the Order to Show Cause in part to obtain access to this type of information; and that, when that request was denied and we were directed to litigate the underlying show-cause issues in the context of this operating license proceeding, the Commission expressly permitted access to such information. CCANP cites the following passage from the Commission's opinion, CLI-80-32, 12 NRC 281, 289:

Citizens [CCANP] has offered a number of reasons why a hearing should be granted as a matter of discretion. It claims that a hearing would require the NRC staff to call as witnesses several persons who have not yet been identified, but whose interviews support the Director's order. This, in turn, would allow Citizens to learn the identities of those persons and to further question them. However, as Houston [Applicants] suggests, Citizens can file either interrogatories with the staff or a Freedom of Information request with the Commission in order to learn the identities of persons with knowledge about the incidents covered by the Director's order. These possibilities are a far cry from Citizens' fears that failure to have a hearing on the enforcement order would be tantamount to denying to it the "evidentiary basis for the NRC actions in the Order to Show Cause."

The Staff objects to providing the sought names on the ground that they are exempted from disclosure by 10 CFR §2.790(a)(7)(iii) and (iv) as constituting "an unwarranted invasion of personal privacy" and as disclosing "the identity of a confidential source". The Staff states that NRC's investigation of harassment was conducted by the Office of Inspection and

Enforcement (OIE) during the early stages of an investigation into alleged construction deficiencies at the South Texas site, under a blanket pledge of confidentiality given to both those who were alleged to have been harassed and those who were alleged to do the harassing.

The Staff also disagrees with CCANP's claim that the Commission's order in CLI-80-32 (p. 4, supra) automatically grants access to the names sought. The Staff asserts that the normal requirements of the NRC rules govern, and that CCANP has not satisfied the disclosure requirements of such rules.

We begin by agreeing with the Staff both that the information sought is exempt from automatic disclosure under 10 CFR §2.790(a)(7) and that the Commission's Order did not supersede the normal requirements of the Rules of Practice. But we also find that CCANP has satisfied the requirements of those rules and (to the extent hereinafter set forth) is entitled to the sought information, subject to a protective order.

Documents exempt from full disclosure under 10 CFR §2.790 may nevertheless be produced under the provisions of 10 CFR §2.744(c) and (d), which read as follows:

- (c) If the Executive Director for Operations objects to producing a record or document, the requesting party may apply to the presiding officer, in writing, to compel production of that record or document. The application shall set forth the relevancy of the record or document to the issues in the proceeding.
* * * The record or document covered by the application shall be produced for the "in camera" inspection of the presiding officer, exclusively, if requested by the presiding officer and only to the extent necessary to determine--

- (1) The relevancy of that record or document;
 - (2) Whether the document is exempt from disclosure under §2.790;
 - (3) Whether the disclosure is necessary to a proper decision in the proceeding;
 - (4) Whether the document or the information therein is reasonably obtainable from another source.
- (d) Upon a determination by the presiding officer that the requesting party has demonstrated the relevancy of the record or document and that its production is not exempt from disclosure under §2.790 or that, if exempt, its disclosure is necessary to a proper decision in the proceeding, and the document or the information therein is not reasonably obtainable from another source, he shall order the Executive Director for Operations to produce the document.

Furthermore, interrogatories of the Staff such as have been propounded here may be required to be answered under the terms of 10 CFR §2.720(h)(2)(ii):

* * * a party may file with the presiding officer written interrogatories to be answered by NRC personnel with knowledge of the facts designated by the Executive Director for Operations. Upon a finding by the presiding officer that answers to the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source, the presiding officer may require that the staff answer the interrogatories.

Where information covered by 10 CFR §2.790 is required to be revealed in response to interrogatories or document requests, the Board is authorized--indeed encouraged--to subject such information or documents to a protective order and, if the information is offered into evidence, to hold in camera sessions of the hearing. 10 CFR §2.790(b)(6).

As announced at the prehearing conference, we find that the names of the particular QA/QC inspectors who supplied information to the Staff

concerning harassment, and the names of the employees who allegedly harassed and intimidated those inspectors, are not only directly relevant to CCANP's contentions but are also necessary to a proper decision in this proceeding. Specifically, it is important to know whether the individuals who allegedly reported harassment to the intervenors are the same as those who allegedly reported it to the Staff. If they are different, the scope of the harassment questions which we must adjudicate may be far broader and widespread than if the individuals reporting to the intervenors and to the Staff are identical. Moreover, proper development of the record in this proceeding in an expeditious manner suggests that the names of individuals should be made available on discovery rather than waiting for the evidentiary hearing. Finally, by its very nature, the information can only be obtainable from the Staff.

For these reasons, we are granting CCANP's motion to the extent it seeks the names of individuals identified above. The information furnished shall be subject to a protective order along the lines of that approved with respect to the intervenors' informants. We note that, as in the case of CCANP's informants, the order to produce is limited to the names of QA/QC inspectors who provided affirmative information about harassment and to employees who provided information about the harassment or intimidation of QA/QC inspectors.^{2/}

^{2/} At the prehearing conference CCANP also sought to have revealed the names of individuals who were interviewed by members of the Commission's Office of Inspector and Auditor (OIA). The Board denied the request for those names on the ground that the inspection undertaken by OIA was performed directly for the Commission and not for use in proceedings bearing upon the operating license or the show cause order. Tr. 707-713. (Inspections relating to those proceedings were undertaken by OIE and the information required to be produced is limited to that gathered through the OIE investigation.)

We are not granting the portion of CCANP's motion seeking the sworn statements of informants. The Staff advises the substance of that information has already been revealed in the investigative report, which has been furnished to the intervenors. Absent some affirmative information to the contrary--which has not been provided us--, we will assume that the Staff has incorporated all relevant portions of those statements into its investigative reports. Moreover, the intervenors will be provided the names of the individuals who had furnished the sworn statements and can thus ascertain the completeness of the Staff summaries. For these reasons, the intervenors have not demonstrated that this information is not reasonably available from any other source. See 10 CFR §2.744(c) and (d), supra.

3. Because the dates for identification of witnesses and service of prepared testimony depend in part on the date when CCANP receives the names in question, we urge the Staff to furnish this information as soon as possible--hopefully, within 10 days of this Order. (The Staff is being hand-served today and thus should furnish the information no later than April 3, 1981.) Because the Staff may seek appellate review of this Order (Tr. 688), we are imposing no definite date by which the names must be furnished; the Staff will thus not have to utilize needed preparation time in order to obtain a stay order if it should choose to seek appellate review. We reiterate, however, that at the hearing we will require that the Staff reveal the names of the inspectors and informants and possibly have some of them produced as witnesses. Thus, appellate review of this Order will likely result in delay of at least some aspects of the evidentiary hearing.

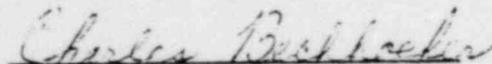
4. For the foregoing reasons, and confirming the action taken at the prehearing conference on March 18, 1981, it is, this 24th day of March, 1981,

ORDERED

a. That CCANP's "Motion for Leave to File Motion Out of Time to Compel NRC Staff to Provide Information" is hereby granted.

b. That CCANP's "Motion to Compel NRC Staff to Provide Information" is granted to the extent that the Staff must reveal the names of the QA/QC inspectors who supplied information to OIE about harassment at the South Texas Nuclear Project and the names of those employees who allegedly harassed and intimidated those inspectors, and is denied in all other respects. The Staff is urged to provide these names within 10 days of the date of this Order.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Charles Bechoefer, Chairman
ADMINISTRATIVE JUDGE