

July 2, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
UNION ELECTRIC COMPANY)	Docket No. STN 50-483 OL
)	
(Callaway Plant, Unit 1)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF APPLICANT'S MOTION TO
COMPEL DISCOVERY FROM JOINT INTERVENORS

Applicant UNION ELECTRIC COMPANY ("UNION ELECTRIC") has filed a motion to compel discovery from Joint Intervenor COALITION FOR THE ENVIRONMENT, ST. LOUIS REGION; MISSOURIANS FOR SAFE ENERGY; and the CRAWDAD ALLIANCE. This memorandum is submitted in support of UNION ELECTRIC's motion.

INTRODUCTION

Pursuant to the Special Pre-Hearing Conference Order of April 22, 1981, UNION ELECTRIC has served on Joint Intervenor a first set of interrogatories and requests for document production pertaining to Joint Intervenor's Contention Nos. 1 and 2. On June 22, 1981, Joint Intervenor served a document entitled "Joint Intervenor's Objections to Interrogatories and Requests For Production" (copy attached as "Exhibit A"), which purported to raise two general objections to certain unspecified interrogatories and document requests

served on Joint Intervenors by UNION ELECTRIC and by the NRC Staff.

In Objection No. 1, to which this motion is addressed, Joint Intervenors object

to identifying persons known to us
[Joint Intervenors] to have first hand
knowledge of the basis for our conten-
tions and persons who participate in
providing answers to interrogatories.

Joint Intervenors do not, however, specify the particular interroga-
tories to which this general objection is addressed, but rather list
only four of UNION ELECTRIC's interrogatories by way of example.

(Contention 1, Interrogatory Nos. 1A-1, 1A-6(c) and General Inter-
rogatory A; Contention 2, Interrogatory No. A-1(c)).^{1/} Joint Inter-
venors apparently object to identifying persons with first-hand
knowledge of the factual bases for Joint Intervenors' allegations
and contentions; to identifying persons who provided information used
in preparing Joint Intervenors' responses to UNION ELECTRIC's inter-
rogatories; and to identifying experts who have been informally con-
sulted by Joint Intervenors. Joint Intervenors claim such informa-
tion is not relevant and that identifying such persons will "expose
them to possible reprisals."

^{1/}By objecting in this manner, Joint Intervenors have failed to com-
ply with Section 2.740b(b) of the NRC's Rules of Practice which
requires that each interrogatory be responded to separately. Such a
procedure fails to disclose either to the Board or to UNION ELECTRIC
the full scope and import of Joint Intervenors' objection and makes
a full and complete response to the objection by UNION ELECTRIC diffi-
cult, if not impossible. Accordingly, it is submitted that Joint
Intervenors' objections should be limited to those interrogatories
specifically identified in the objections.

ARGUMENT

Section 2.740(b)(1) of the NRC Rules of Practice provides that discovery may be obtained

regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including... the identity and location of persons having knowledge of any discoverable matter. (emphasis added).

There can be little question that the identities of persons with first-hand knowledge of the facts upon which Joint Intervenors base their contentions and allegations fall within this scope of permissible discovery. Indeed, it is hard to conceive of information more relevant or more discoverable than the names of potential factual witnesses.

The discoverability of such information under Section 2.740(b)(1) has been recognized in the relevant case law. In General Electric Company (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 NRC 461 (1978), the intervenors sought to preclude disclosure of the names of persons providing information on which the intervenors had based their contentions. The Licensing Board overruled the intervenors' objection finding that such identification is "expressly discoverable" under the Section 2.740(b)(1). 8 NRC at 466. The Licensing Board also recognized that the language of Section 2.740(b)(1) is nearly identical to Rule 26(b)(1) of the Federal Rules of Civil Procedure. The Federal Rule similarly requires disclosure

of the names of persons with facts pertaining to a party's contentions. This has been repeatedly recognized by the Federal courts. In Edgar v. Finley, 312 F.2d 533 (8th Cir. 1963) the court held that it was reversible error to sustain objections to interrogatories seeking the identity and location of persons having knowledge of relevant facts relating to the accident upon which the action was founded. See also, Wycoff v. Nichols, 32 F.R.D. 370 (W.D. Mo. 1963).

Joint Intervenor's contend, however, that they need disclose the names of only those persons with first-hand knowledge whom they choose to call as witnesses. The names of other knowledgeable persons, Joint Intervenor's argue, is not relevant. It is not for Joint Intervenor's, however, unilaterally to make such a determination of relevancy. The fact that these persons, by definition, have first-hand knowledge of facts pertaining to Joint Intervenor's contentions presumptively establishes the relevancy of their identification. It is apparent that the knowledgeable persons whom Joint Intervenor's choose not to call as witnesses and not to identify may well be the persons with information most detrimental to Joint Intervenor's position in this proceeding. They cannot be allowed to select the most favorable persons as their witnesses and hide the rest. Moreover, because in NRC proceedings intervenors may choose to make their case solely through cross-examination of the witnesses of other parties, without presenting direct testimony of their own, it is clear that Joint Intervenor's must permit the other parties to learn, through discovery, the identity of persons who may provide informa-

tion to be used in the cross-examination of Applicant's witnesses.

Furthermore, Joint Intervenors' assertion that disclosure of the names of such persons will "expose them to possible reprisals" is not a legitimate foundation for their objection. It was such generalized claims of possible reprisals that were rejected in the case of General Electric Company, supra, 8 NRC at 463. This matter does not concern disclosure of the names of persons who provided information to the NRC after receiving a pledge of confidentiality. See, e.g., Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC _____ (May 8, 1981). In this case, persons have apparently chosen to provide information to the Joint Intervenors. There is no indication that these persons were promised confidentiality, that Joint Intervenors had any right to make such assurances, if they did, or that these persons even desire to have their identities withheld.

UNION ELECTRIC also strongly rejects any suggestion that any of its employees or those of its contractors would be subject to "adverse employment actions" if their names were among those disclosed. Even were this a possibility, there are protections and remedies available to such persons. Nor is there any indication that those persons whose identities Joint Intervenors refuse to disclose would even be susceptible to such reprisals. Indeed, many may not be employees of UNION ELECTRIC or its contractors.

Given the readily apparent relevancy of this information and the importance of full disclosure of the facts in a proceeding of

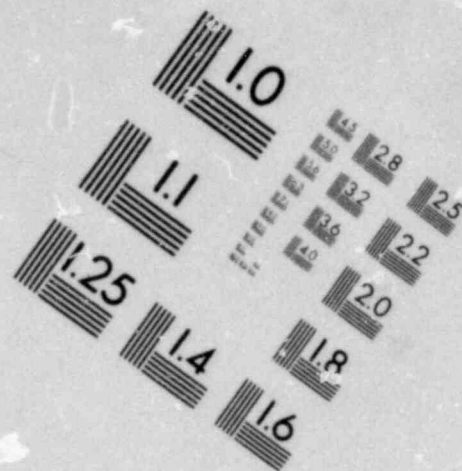
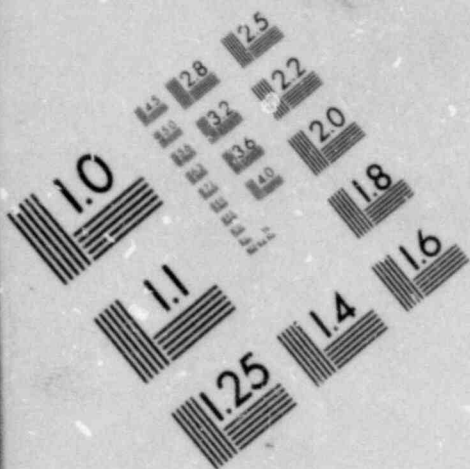
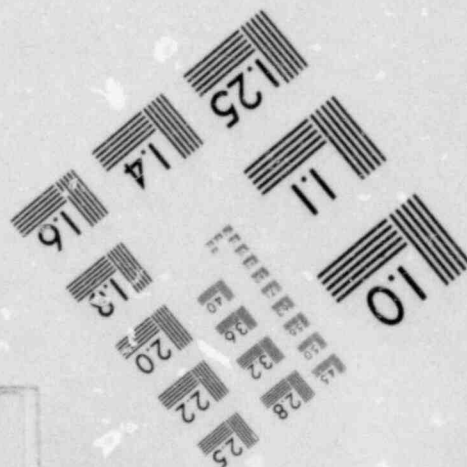
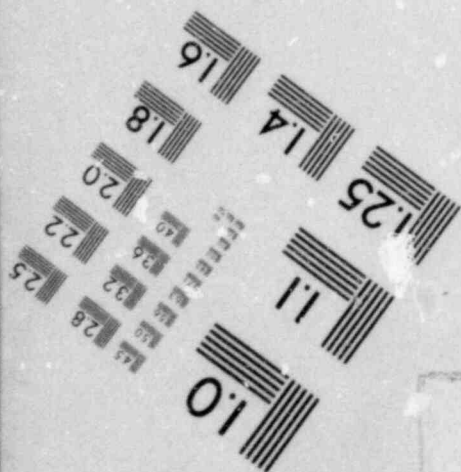
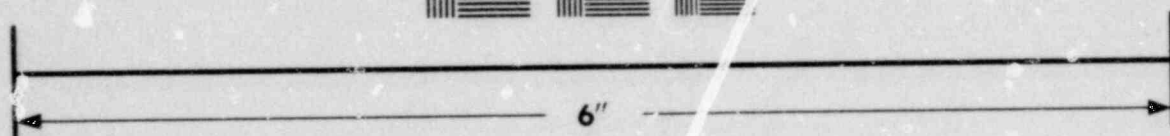
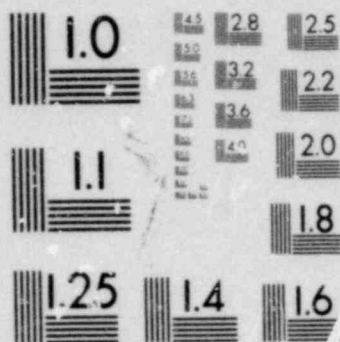


IMAGE EVALUATION
TEST TARGET (MT-3)



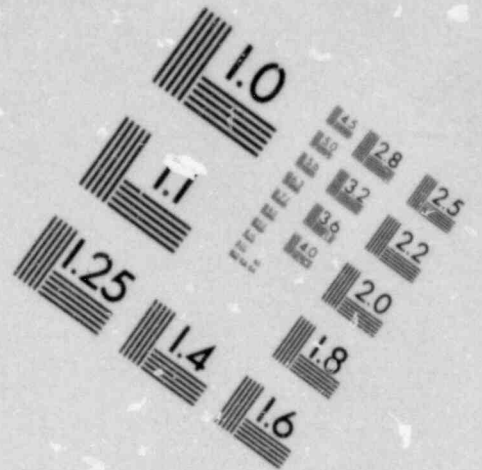
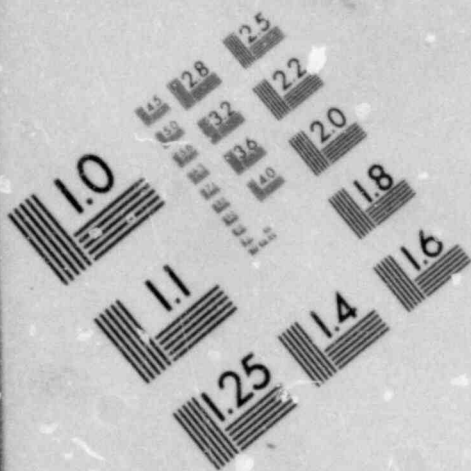
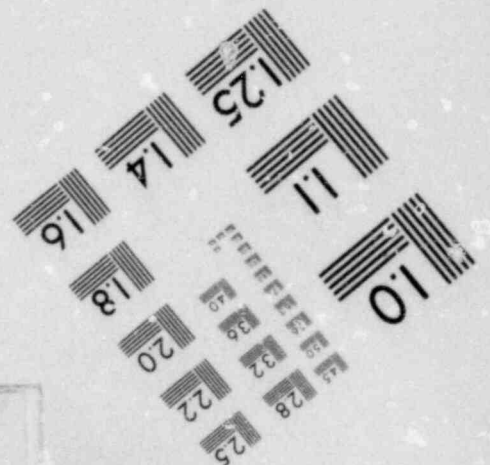
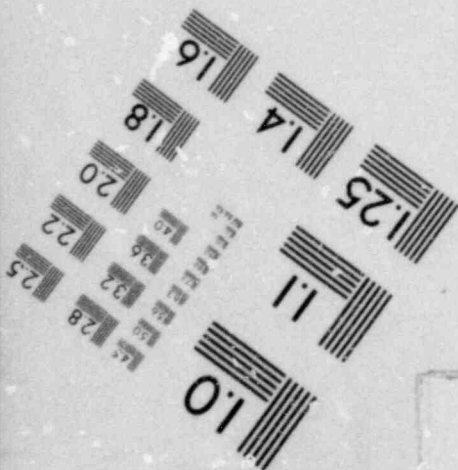
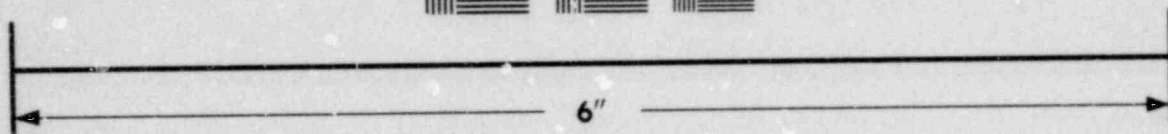
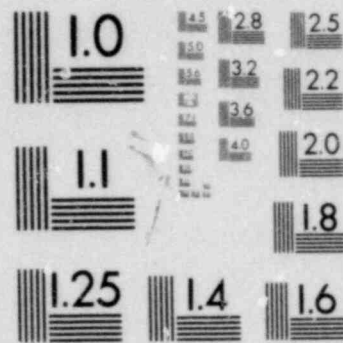


IMAGE EVALUATION TEST TARGET (MT-3)



this nature, Joint Intervenor's certainly should not be permitted to close the door on UNION ELECTRIC's legitimate avenues of discovery by raising the specter of possible "reprisals." Accordingly, it is submitted that the identity of all persons with first-hand knowledge of the basis of Joint Intervenor's' allegations and contentions should be disclosed.

Joint Intervenor's should also be compelled to respond to those interrogatories seeking the names of persons providing information used in preparing each of Joint Intervenor's' answers to UNION ELECTRIC's interrogatories. This is the same information requested in Joint Intervenor's' Interrogatory No. 159 addressed to UNION ELECTRIC. Joint Intervenor's certainly cannot object to providing that which they have requested from UNION ELECTRIC.

Finally, UNION ELECTRIC does not dispute Joint Intervenor's' contention that the identities of "experts" informally consulted in anticipation of trial (as opposed to those expected to testify or specially retained or employed) are not discoverable. If, however, such "experts" are also persons with first-hand knowledge of the factual basis for Joint Intervenor's' contentions or are otherwise persons who have supplied information which has formed the basis for Joint Intervenor's' contention, Joint Intervenor's should not be allowed to insulate such persons and the information they have from discovery by placing the label "expert" upon them. See, e.g., Sochanchak v. Marine Transport Lines, Inc., 28 F.R.Serv.2d 362, 364 (E.D. Pa. 1979); Advisory Committee Notes to 1970 Amendments to Federal Rules of Civil Procedure, 48 F.R.D. 487, 503 (1970).

CONCLUSION

If the requested disclosure is not made at this time. Applicant may be confronted at the time of hearing with Joint Intervenors' testimony or hypothetical cross-examination based upon and referring to information obtained from these undisclosed sources. Not only will Applicant be unable to prepare for and refute such testimony or questioning but also the Board will be unable properly to test and judge the credibility and reliability of such hearsay testimony. Disclosure of the requested information is essential at this juncture so that the facts in this proceeding can be fully developed and a complete record compiled. Accordingly, Joint Intervenors' Objection No. 1 should be overruled and Joint Intervenors should be compelled to respond fully to those interrogatories to which Joint Intervenors have interposed such objection.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: Thomas A. Baxter
Thomas A. Baxter
Richard E. Galen
Deborah B. Bauser

Counsel for Applicant

1800 M Street, N.W.
Washington, D.C. 20036
Telephone: (202) 822-1000

July 2, 1981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

UNION ELECTRIC COMPANY)

(Callaway Plant, Unit 1))

) Docket No. STN 50-483-OL
)
)

JOINT INTERVENORS' OBJECTIONS TO
INTERROGATORIES AND REQUESTS FOR PRODUCTION

Joint Intervenors make the following objections to Applicant's Interrogatories and Requests for Document Production (Set No. 1) on both Contentions 1 and 2, and NRC Staff Interrogatories and Request for Production of Documents.

1. Joint Intervenors object to identifying persons known to us to have first hand knowledge of the basis for our contentions and persons who participate in providing answers to interrogatories. Applicant and the NRC Staff seek not only to know who our witnesses will be at the hearings in this matter, but also the names of all persons with whom Joint Intervenors have consulted in framing our contentions and answering interrogatories. See, e.g., Applicant's Interrogatories on Contention No. 1, 1A-1, 1A-6(c), General Interrogatory A; Applicant's Interrogatories on Contention No. 2, p. 2 (first paragraph), A-1(c); NRC Staff Interrogatories 1(h)(a) and (b), 13. Joint Intervenors recognize the need of the Applicant and Staff to know who our witnesses will be and we fully intend to supply that information in due course when that has been determined. However, the Applicant and Staff can have no legitimate need to know the identity of other persons, not witnesses, who have assisted and are assisting Joint Intervenors in this matter. That information is not relevant, and to identify such persons will only expose them to possible reprisals for their activities in support of Joint Intervenors. Joint Intervenors must, therefore, object to identifying such persons in order to protect them from adverse employment actions in their present and prospective positions, and other possible reprisals.

EXHIBIT A

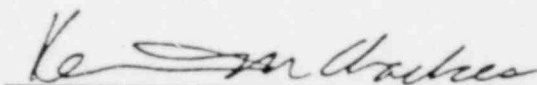
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Under the Federal Rules of Civil Procedure, upon which the NRC's discovery rules are modelled, only the names of experts who are expected to testify at trial and those who have been retained or specially employed are discoverable. The identity of experts who have been consulted informally in anticipation of trial is not discoverable.

2. Joint Intervenors object to Applicant's request for identification and production of correspondence and written records of telephone conversations or meetings between Kay Drey and any employee of the NRC. See, e.g., Applicant's Interrogatories on Contention No. 1, 1A-16. The grounds for this objection are simply that Kay Drey is not a party to this proceeding and her correspondence and records are not in the custody and control of Joint Intervenors.

Respectfully submitted,

CHACKES AND HOARE



Kenneth M. Chackes
Attorneys for Joint Intervenors
314 North Broadway
St. Louis, MO 63102
314/241-7961

EXHIBIT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

UNION ELECTRIC COMPANY

(Callaway Plant, Unit 1)

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Docket No. STN 50-483-OL

CERTIFICATE OF SERVICE

I hereby certify that copies of Joint Intervenor's Objections to Interrogatories and Requests for Production have been served on the following by deposit in the United States mail this 22 day of June, 1981.

James P. Gleason, Esq., Chairman
Atomic Safety and Licensing Board
513 Gilmoure Drive
Silver Spring, MD 20901

Mr. Glenn O. Bright
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry R. Kline
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas A. Baxter, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Roy P. Lessy, Jr., Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

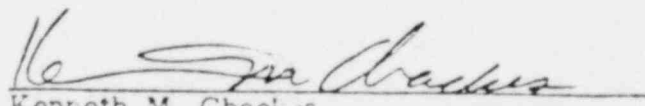

Kenneth M. Chackes
CHACKES AND HOARE

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ORDER

Upon consideration of Applicant's Motion to Compel Discovery from Joint Intervenors, the memoranda submitted in support thereof and in opposition thereto, and good cause for such motion having been shown, it is by the Board, this _____ day of July, 1981,

ORDERED that Joint Intervenors' Objection No. 1, served on June 22, 1981, be and it hereby is overruled and Joint Intervenors shall respond fully to those interrogatories to which such objection had been interposed within ten (10) days of the date of this ORDER.

Chairman

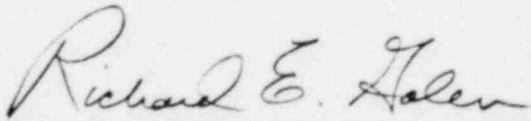
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(Callaway Plant, Unit 1))	

CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Motion to Compel Discovery from Joint Intervenors, Memorandum of Points and Authorities in Support thereof, and proposed Order were served this 2nd day of July, 1981 by deposit in the United States mail, first class, postage prepaid, to the parties identified on the attached Service List.



Richard E. Galen

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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SERVICE LIST

James P. Gleason, Esquire
Chairman
Atomic Safety and Licensing Board
513 Gilmoure Drive
Silver Spring, Maryland 20901

Mr. Glenn O. Bright
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry R. Kline
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Roy P. Lessy, Jr., Esquire
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Joseph E. Birk, Esquire
Assistant to the General Counsel
Union Electric Company
P.O. Box 149
St. Louis, Missouri 63166

Treva J. Hearne, Esquire
Deputy General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

Kenneth M. Chackes, Esquire
Chackes and Hoare
314 N. Broadway
St. Louis, Missouri 63102

Mr. John G. Reed
Route 1
Kingdom City, Missouri 65262

Mr. Howard Steffen
Chamais, Missouri 65024

Mr. Harold Lottmann
Route 1
Owensville, Missouri 65066

Mr. Earl Brown
P.O. Box 146
Auxvasse, Missouri 65231

Mr. Fred Luekey
Rural Route
Rhineland, Missouri 65069

Mr. Samuel J. Birk
P.O. Box 243
Morrison, Missouri 65061

Mr. Robert G. Wright
Route 1
Fulton, Missouri 65251

Eric A. Eisen, Esquire
Birch, Horton, Bittner & Monroe
1140 Connecticut Avenue, N.W., #1100
Washington, D.C. 20036