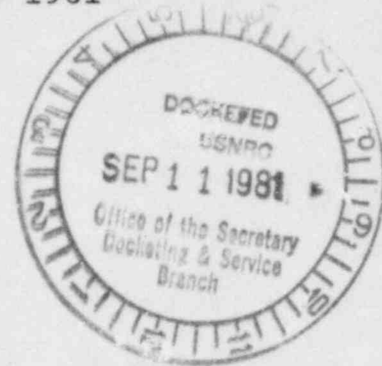
September 9, 1981



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)	)	

APPLICANT'S ANSWER TO MOTION BY
JOINT INTERVENORS AND KAY DREY FOR A
PROTECTIVE ORDER AND TO MODIFY SUBPOENA

By motion dated August 24, 1981, Joint Intervenors[1/] and Kay Drey (Movants) seek "to prevent the discovery" of certain specified information, requested by Union Electric Company (Applicant) and the NRC Staff, through issuance of a protective order and an order modifying the subpoena issued by the Board to Kay Drey. Applicant believes that on the merits, Movants' August 24 motion should be denied; however, Applicant is withdrawing its July 2, 1981 Motion to Compel on the basis of the representation of the Joint Intervenors, through counsel, that the Joint Intervenors will not call any witnesses during the litigation of their contentions 1 and 2.[2/] Consequently, a ruling from the Board is no longer necessary.

1/ The Joint Intervenors consist of the Coalition for the Environment (St. Louis Region), Missourians for Safe Energy, and the Crawdad Alliance. Special Prehearing Conference Order (April 22, 1981).

2/ Applicant also understands that the Staff no longer seeks a ruling on its Motion to Compel, nor does the Staff intend to depose Kay Drey.

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Pursuant to the Special Prehearing Conference Order of April 22, 1981, Applicant served on the Joint Intervenors a first set of interrogatories and requests for document production pertaining to Joint Intervenors' Contentions 1 and 2, dated May 26, 1981. The Staff also filed interrogatories and a request for the production of documents on May 26, 1981. Among other things, Applicant and the Staff asked the Joint Intervenors to identify both persons with first hand knowledge of the basis for Joint Intervenors' Contentions 1 and 2, and individuals who provided information used in answering the proffered interrogatories. Joint Intervenors posed similar interrogatories to Applicant and the Staff which were answered without objection.

Joint Intervenors objected to certain (unspecified) interrogatories and document requests filed by the Applicant and the Staff. See Joint Intervenors' Objections to Interrogatories and Requests for Production, June 22, 1981. In objecting 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," Joint Intervenors argued that:

> the Applicant and the 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.

Id.

The Applicant and the Staff each filed a motion to compel answers to the interrogatories to which the Joint

Intervenors had objected. See Applicant's Motion to Compel Discovery from Joint Intervenors and Memorandum of Points and Authorities in Support of Applicant's Motion to Compel Discovery from Joint Intervenors, July 2, 1981; NRC Staff Response to Joint Intervenors' Objections to Staff Interrogatories and Motion to Compel Joint Intervenors to Respond to Staff Interrogatories 1(h)(a) and (b) and 13, July 6, 1981. In general, both parties argued that the information in question fell squarely within the scope of permissible discovery.

The Joint Intervenors' answers to the Applicant and Staff's interrogatories were signed by counsel. See Response to Applicant's Interrogatories and Requests for Document Production (Set No. 1) to Joint Intervenors on their Contention No. 1, July 10, 1981; Response to NRC Staff Interrogatories and Request for Production of Documents to Coalition for the Environment, St. Louis Region, Missourians for Safe Energy, and Crawdad Alliance, July 16, 1981.

On July 16, 1981, the Joint Intervenors served on the parties a Memorandum in Opposition to the Motions to Compel filed by the Applicant and the Staff. In effect recognizing that the interrogatories in question were discoverable pursuant to the Commission's regulations, 10 C.F.R. § 2.740(b)(1), the Joint Intervenors argued that nevertheless, "sufficient reasons exist to sustain their objection and deny the subject motions to compel." The reasons set forth by the Joint Intervenors in their Memorandum in Opposition were (i) the greater access

of the Applicant and the Staff than the Joint Intervenors to persons with knowledge of facts regarding the bases of Joint Intervenors' contentions; and, (ii) the possibility of reprisals against individuals the Joint Intervenors would be required to identify.

On August 7, 1981, the Board issued a Memorandum and Order which addressed Applicant's and the Staff's motions to compel and the Joint Intervenors' response thereto. In summary, the Board did not consider the Joint Intervenors' argument regarding relevance as substantive; however, with regard to the reprisal argument, it concluded that

> the proper course is to suspend action on the motions to compel to provide the intervenor an opportunity to move for a protective order. In connection with each specific interrogatory that the intervenor believes requires protection, the motion should set forth factual summaries to demonstrate the good cause showing required. It is also suggested that the motion delineate the degree of protection the intervenor believes necessary to accomplish the result intended.

Board Memorandum and Order, August 7, 1981, at 4.

On August 10, 1981, Applicant filed a second set of interrogatories on Joint Intervenors in which Applicant asked Joint Intervenors to generically identify both individuals with first-hand knowledge of facts they alleged and individuals who provided information in response to Applicant's interrogatories. Joint Intervenors objected to these interrogatories as well on the grounds of relevancy and the unlikelihood of the information leading to the discovery of admissible evidence. See Joint

Intervenors' Objections to Applicant's Interrogatories (Set No. 2), August 28, 1981.

On August 11, 1981, the Board issued a subpoena to Kay Drey on behalf of the Staff.

On August 24, 1981, a motion was filed on behalf of the Joint Intervenors and Kay Drey seeking a protective order and an order modifying the subpoena issued to Kay Drey which would prevent discovery by the Applicant and Staff of the identities of persons known to movants to have first-hand knowledge of the basis for Joint Intervenors' contentions and persons who participated with Joint Intervenors in answering interrogatories. The grounds asserted in support of the Motion are (i) the information sought is either totally irrelevant or minimally relevant; (ii) there is a possibility of reprisals against individuals identified in response to the subject interrogatories; and (iii) in cases where confidentiality was promised, required disclosure would run afoul of the First Amendment to the United States Constitution. Based upon these arguments, Movants assert that in balance, all interests would be better served by an order preventing disclosure.

Applicant believes the arguments advanced by Movants in support of the relief sought lack merit. The substance of Movants' motion is not aimed at explaining to the Board the nature of the material sought to be protected, or the reasons why such material ought to be protected. In support of their relevancy and reprisal arguments, Movants rely solely on Joint

Intervenors' Memorandum in Opposition to Motions to Compel, dated July 16, 1981. But the Board has already rejected the relevancy argument previously advanced, and Movants identify no facts in support of reconsideration of the argument at this juncture. See Board Memorandum and Order, August 7, 1981, at 2-3. Similarly, Movants offer no additional information in support of the reprisal argument which was previously advanced by Joint Intervenors by which the Board could discern whether the requested relief is appropriate, viz., "[i]n connection with each specific interrogatory that the intervenor believes requires protection, factual summaries to demonstrate the good cause showing required." Id. at 4. Applicant considers such lack of substantiation particularly repugnant here, where Applicant's employment practices are being severely impugned.

Thus, at least with respect to the two first arguments advanced by Movants, there is a total failure to meet the burden which of necessity must be placed upon Movants to show why a protective order is appropriate in the precise circumstances at issue here when they seek to prevent disclosure of information which is otherwise discoverable. Moreover, Movants have totally ignored the specific directive of the Board that "good cause" for the requested relief be explicitly demonstrated in a motion for a protective order.

Movants next argue that there is a constitutional protection afforded Kay Drey and/or Joint Intervenors to not reveal the names of individuals which would otherwise be subject

to discovery because these individuals were promised confidentiality. Again, no factual details are provided by Movants to demonstrate the circumstances under which such pledges were given, or the degree to which the affected individuals in fact may have relied on such assurances. Moreover, Movants do not identify and it is otherwise impossible to determine to which interrogatories the argument applies. (It is clear that such promises of confidentiality were not always given. See Motion of Joint Intervenors and Kay Drey for a Protective Order and to Modify Subpoena, at 2.) For each of these reasons, Movants have failed to meet their burden of proof of establishing "good cause" for granting the relief sought.

Furthermore, the first amendment privilege Movants assert is inapplicable to the present situation. In Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977), the case upon which Movants first rely, at issue was the applicability of the specific qualified privilege afforded news reporters to protect from disclosure confidential information. In Silkwood, the Court of Appeals held that this qualified privilege, based on the First Amendment's guarantee of freedom of the press, applied to a documentary film-maker, since "the press comprehends different kinds of publications which communicate to the public information and opinion." 563 F.2d at 437. Neither Joint Intervenors nor Kay Drey do or can allege that they are "genuine reporter[s] entitled to the privilege."

Id.[4/] The two other cases upon which Movants rely are also inapposite.[5/]

4/ Ironically, the Silkwood case refers to an earlier decision by the Court of Appeals for the District of Columbia Circuit in which a newman's qualified privilege was deemed of insufficient import to protect him from disclosing the names of eye witnesses in a libel case. See Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1973). Many of the interrogatories at issue in the present controversy similarly seek the names of individuals with first hand knowledge.

5/ In International Union v. National Right to Work Legal Defense and Education Foundation, Inc., 590 F.2d 1139, 1152-53 (D.C. Cir. 1978), plaintiffs, a group of national and local labor organizations, sought disclosure of the names of the contributors to a nonprofit organization dedicated to opposing compulsory unionism. The information sought by the unions through the discovery process was information which they hoped would substantiate their claim of violation of the Labor-Management and Disclosure Act of 1959. In the instant case, Applicant seeks to discover the facts underlying the claims of Joint Intervenors, not information to substantiate Applicant's own position on the issues. Moreover, it is the Joint Intervenors, not Applicant, who have placed these issues in controversy.

Moreover, at issue in International Union was the right of individuals to freely associate and the restraint imposed on that freedom by compelling disclosure of a group affiliation. No such restraint on freedom of association is averred by Movants here.

In the third case cited by Movants, Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388 (N.D. Cal. 1976), it was also the plaintiff, in pursuit of his claims for breach of contract and defamation, who sought to depose a third party concerning confidential interviews he conducted with defendant's employees. The individual who protested disclosure was a university professor whose interviews were conducted as part of a research project; they were not conducted, nor was the research project initiated, with an eye to litigation. 71 F.R.D. at 390. These factors do not exist in the present case. In addition, the interrogatories of the Staff and Applicant in this case seek the names of individuals who have first-hand knowledge or information about Joint Intervenors' claims. As such, virtually by definition, they "go to the heart" of the issues in controversy. Id.

In summary, none of the cases upon which Movants rely substantiate their assertion of provilege to protect their rights "of free speech and to petition the government." Moreover, in the absence of any factual showing, Movants' claim to a constitutional privilege has a hollow ring. Since Joint Intervenors' counsel signed the interrogatory answers provided, the only source of which Applicant is aware of the information which forms the basis for Joint Intervenors' case is Kay Drey. Nowhere do Movants address Applicant's basic entitlement to discover the nature of Joint Intervenors' case, including the individuals whose expert advice or first-hand knowledge form the basis for Joint Intervenors' contentions. See 10 C.F.R. § 2.740. If Applicant were denied this opportunity and Movants subsequently called the unnamed individuals as witnesses during the hearing, Applicant's ability to effectively cross-examine would be unjustifiably and unfairly hampered by Movants' refusal to disclose this relevant information. See 5 U.S.C. § 556(d).

In conclusion, Applicant does not believe Movants' arguments in support of a protective order are persuasive. However, Applicant recognizes Joint Intervenors' representation that they will call no witnesses during the Callaway operating license proceeding but will rely solely on cross-examination of witnesses for Applicant and the Staff. See Motion of Joint Intervenors and Kay Drey for a Protective Order and to Modify Subpoena, at 8, and attached Affidavit of Kenneth M. Chackes, at ¶ 4. While Applicant is entitled to discover the information

in question in order to prepare for Joint Intervenors' case on cross-examination, in the interest of expediting the proceeding, and solely on the basis of Joint Intervenors' statements that they will call no witnesses, Applicant withdraws its July 2, 1981 Motion to Compel. Consequently, the Board need not rule on Movants' Motion for a Protective Order.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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Dated: September 9, 1981

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicant's Answer to Motion by Joint Intervenors and Kay Drey for a Protective Order and to Modify Subpoena" were served this 9th day of September, 1981 by deposit in the U.S. mail, first class, postage prepaid, to the parties identified on the attached Service List.

Thomas A. Baxter
Thomas A. Baxter

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