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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBefore the Atomic Safety and Licensing Board

Public Service Electric and)	
Gas Company)	
)	Docket No. 50-354-OL
(Hope Creek Generating)	
Station))	

APPLICANTS' RESPONSE TO THE PUBLIC ADVOCATE'S
"MOTION TO VACATE PSE&G'S NOTICE OF DEPOSITION
AND FOR A PROTECTIVE ORDER IN THE
FORM OF A DECLARATORY RULING"

Preliminary Statement

At a special prehearing conference on November 22, 1983 and by order of December 21, 1983, the Atomic Safety and Licensing Board ("Licensing Board" or "Board") in this proceeding admitted four of ten contentions proposed by the Public Advocate of the State of New Jersey ("Public Advocate").^{1/} The Licensing Board next directed the parties to commence discovery and proceed with it expeditiously.^{2/} Pursuant to this order, Public Service Electric and Gas Company, et al. ("Applicants") served a notice of deposition on the Public Advocate, Joseph H. Rodriguez, Esq.,

1/ Public Service Electric and Gas Company (Hope Creek Generating Station), Docket No. 50-354-OL, "Special Prehearing Conference Order" (December 21, 1983).

2/ Id. at 19.

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indicating their intent to depose him on February 22, 1984.^{3/} In a letter to the Board, dated February 16, 1984, Mr. R. William Potter stated that he would file a motion for a protective order "forbidding the applicant from proceeding with its attempted deposition of the Honorable Joseph H. Rodriguez, the Public Advocate."^{4/} On February 27, 1984, the Public Advocate moved to vacate Applicants' notice of deposition and requested a protective order in the form of a declaratory ruling.^{5/} Because February 22, 1984 is long past and no deposition taken, that portion of the motion which deals with vacating the Notice of Deposition for February 22, 1984 is obviously moot.^{6/}

Applicants oppose the Public Advocate's motion on several grounds. First, under the NRC's rules, Applicants are entitled to discover any matter, not privileged, which is relevant to the matters in controversy in the operating

^{3/} Notice of Deposition (February 9, 1984).

^{4/} Letter to the Board from R.W. Potter at 2 (February 16, 1983). This letter was preceded by a telephone call on February 15, 1984 during which Mr. Potter indicated his intent to file a motion for a protective order.

^{5/} The Public Advocate's Motion to Vacate PSE&G's Notice of Deposition and For a Protective Order in the Form of a Declaratory Ruling (February 27, 1984) ("Motion to Vacate and for a Protective Order").

^{6/} See Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-83-3, 17 NRC 72, 74 (1983).

license proceeding.^{7/} By deposing Mr. Rodriguez, Applicants wish to discover the basis of the Public Advocate's contentions.^{8/} The basis of the Public Advocate's contentions is directly at issue in this proceeding. Moreover, the basis of the Public Advocate's contentions is not privileged. Thus, Applicants are entitled to depose Mr. Rodriguez to discover this information.

Second, as admitted by the Public Advocate, the privilege asserted by the Public Advocate is conditional; it is applicable only in the absence of a showing of necessity. This operating license proceeding would not exist but for the contentions put forth by the Public Advocate. Yet the Public Advocate has repeatedly failed to state who formulated the contentions and provided their bases. In a memorandum of law supporting his contentions, the Public Advocate stated that he was "not at liberty" to identify those experts who assisted in the preparation of his contentions.^{9/} In a response to Applicants' preliminary set of

^{7/} As noted by the Board, relevance for discovery purposes is broader than the legal principles of relevance and materiality that may govern the admissibility of evidence. Special Prehearing Conference Order (December 21, 1983) (slip op. at 19).

^{8/} Discovery has already shown that no basis existed for one of the four contentions admitted in this proceeding. Order Dismissing Contention IV (February 21, 1984).

^{9/} Memorandum of Law in Support of Intervenor's Contentions at 4 (November 7, 1983).

interrogatories which requested that the Public Advocate identify his experts, the Public Advocate stated that he would inform Applicants of this information after he had selected his consultants and negotiated contracts with them.^{10/} Thus, the necessity of deposing Mr. Rodriguez arises from the Public Advocate's failure to comply with the NRC's rules by providing the basis of his contentions and by responding to discovery. By setting forth the Public Advocate's failure to comply with the NRC's rules, Applicants have demonstrated the necessity of deposing Mr. Rodriguez.

Third, the Public Advocate's Motion to Vacate and for a Protective Order does not comply with the NRC's rules in that the Public Advocate has not shown good cause for issuance of a protective order.^{11/} In any event, there is no basis for the protective order requested by the Public Advocate unless it is shown that Mr. Rodriguez did not formulate these contentions but rather lent his name to contentions written by Mr. R. William Potter or some other member of his staff. If, in fact, someone other than Mr. Rodriguez is responsible for the contentions, then

^{10/} The Public Advocate of New Jersey's Response to the Applicants' Preliminary Set of Initial Interrogatories and Request for Production of Documents at 1 (January 18, 1984).

^{11/} 10 C.F.R. §§ 2.740 and 2.740a.

Applicants will depose him upon his identification. Until such time as that occurs, having demonstrated the necessity of deposing Mr. Rodriguez, Applicants request that the Board issue the attached subpoena.

Argument

The NRC's rules provide that parties may obtain discovery 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.^{12/} The rules further provide that, in an operating license proceeding, discovery shall relate to those matters in controversy which have been identified by the presiding officer in the prehearing conference order.^{13/} Applicants here wish to discover the basis, if any, of the Public Advocate's contentions. This is a matter wholly within the scope of the discovery right afforded parties by the NRC's rules and is not privileged. If it is shown that no basis in fact exists for the three contentions, motions to strike will be filed. Applicants are entitled to discovery on all matters relevant to the admitted contentions, including the basis of the contentions.

^{12/} 10 C.F.R. §2.740(b)(1).

^{13/} Id.

Moreover, the Commission's policy favors the availability of full discovery. In Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457 (1975), the Appeal Board held that the Commission's discovery rules must be accorded the same broad liberal interpretation given the Federal discovery rules, especially where an analogous provision is found in the Commission's rules.^{14/} Applying this case here, Applicants are entitled to discover the basis of any intervenor's contentions.

In his Motion to Vacate and for a Protective Order, the Public Advocate asserts what he admits to be a conditional privilege. The Public Advocate claims that, as a State cabinet-level officer, Mr. Rodriguez should not be deposed absent a showing of necessity.^{15/} The Public Advocate further claims that Applicants have not made such a showing. Applicants believe, however, that they have demonstrated the

^{14/} Rule 26 of the Federal Rules of Civil Procedure provides for discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action. Fed. R. Civ. P. 26(b)(1). Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 322 (1980); General Electric Company (Vallecitos Nuclear Center - General Electric Test Reactor) Docket Nos. 50-70 and 70-754, "Memorandum and Order" (October 24, 1978) (slip op. at 7-8).

^{15/} Applicants note, however, that as a party intervenor, the Public Advocate has responsibilities attendant upon this status, regardless of his position in state government. See Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317 (1980).

necessity of deposing Mr. Rodriguez by setting forth the Public Advocate's actions. The Public Advocate has failed to comply with the NRC's rules by providing the bases of his contentions and by responding fully to discovery. Moreover, the Public Advocate has not complied with the nine rules of discovery set forth in Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-31-22, 14 NRC 150, 154-57 (1981) and incorporated by reference in the Board's Special Prehearing Conference Order.^{16/} In particular, Rule 6 states that "[a] failure to furnish requested information based upon a claim of awaiting further discovery is unresponsive unless precise information is given as to the nature and status of pending discovery"^{17/} Applying this rule by analogy here, the Public Advocate has advanced only imprecise statements that responses will be provided in the future.

Under the NRC's rules, in order to be admissible in an operating license proceeding, contentions must be based on sound technical concerns.^{18/} In other words, contentions must have a basis. If bases were not required, any layman

^{16/} Special Prehearing Conference Order at 19 (December 21, 1983).

^{17/} Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-22, 14 NRC 150, 157 (1981).

^{18/} 10 C.F.R. §2.714(b).

could raise frivolous issues simply by reading the Final Safety Analysis Report and alleging, without any technical basis, deficiencies. Applicants therefore have a right to discover what technical information constitutes the basis of the Public Advocate's contentions.^{19/} If there is no basis, then the contentions should be dismissed. This result is not only required by the NRC's rules, but also is good public policy. The public should not have to bear the cost of litigating contentions presented without technical foundation.

This proceeding would not exist but for the action of the Public Advocate in alleging deficiencies in the Hope Creek facility.^{20/} So far, the Public Advocate has failed to identify any technical consultants or other persons who provided the bases for his contentions. Thus, it appears that Mr. Rodriguez himself is responsible for drafting them. As such, Mr. Rodriguez should not be heard to complain about

^{19/} 10 C.F.R. §§2.714(b) and 2.740(b)(1).

^{20/} It should be noted that the Public Advocate is authorized by statute to represent named individuals as parties in appropriate fora. N.J.S.A. 52:27E-1 et seq. The only party here is the Public Advocate himself. This is not an action on behalf of a named individual or particular member of the public. See Applicants' Answer to "Motion to Hold Public Hearing and to Admit Public Advocate as a Party-Intervenor Under 42 U.S.C. 2239, in Operating License Proceedings" at 2-13 (September 24, 1983). Applicants would further note the pendency of the appeal in Public Service Electric and Gas Company v. Rodriguez before the New Jersey Superior Court, Appellate Division.

being deposed to discover the basis of his contentions.^{21/} The necessity of deposing Mr. Rodriguez is directly attributable to his own actions.

The question of who drafted the Public Advocate's contentions has been specifically addressed by the Public Advocate on two occasions. In a memorandum of law supporting his contentions, the Public Advocate stated that he was "not at liberty" to identify those experts who assisted in the preparation of the contentions.^{22/} While the Public Advocate did refer to two employees of MHB Technical Associates, it is unclear from the Public Advocate's reference whether these individuals were consulted during earlier licensing and rate proceedings or the contention-framing phase of this proceeding.^{23/} In a response to Applicants'

^{21/} Under the law of the State of New Jersey, given his first-hand knowledge and direct involvement in the proceeding, it is clear he can be deposed. Hyland v. Smollok, 137 N.J. Super. 456 (App. Div. 1975); see also Borough of Morris Plains v. Dept. of Public Advocate, 169 N.J. Super. 403 (App. Div. 1979); N.J. Turnpike Authority v. Sisselman, 106 N.J. Super. 358 (App. Div. 69); N.J. Sports & Exposition Authority v. McCrane, 119 N.J. Super. 457 (Law Div. 1971).

^{22/} Memorandum of Law in Support of Intervenor's Contentions at 4 (November 7, 1983).

^{23/} Id. When asked if he had been hired by the Public Advocate to assist him in the drafting of contentions in this operating license proceeding, Mr. Dale Bridenbaugh of MHB Technical Associates stated that he had not been involved with nor even seen the contentions put forth by the Public Advocate in this proceeding. In the Matter of the Motion of Public
(Footnote Continued)

preliminary set of interrogatories which requested that the Public Advocate identify his experts, the Public Advocate stated that he would inform Applicants of this information after he had selected his consultants and negotiated contracts with them.^{24/} Thus, the record reflects that Mr. Rodriguez formulated the contentions himself and is now in the process of hiring technical experts to support these contentions.^{25/} It is therefore necessary for the Applicants to depose Mr. Rodriguez in order to determine the basis for the Public Advocate's contentions.

The conclusion that Mr. Rodriguez formulated the contentions is not altered by the Public Advocate's Motion to Vacate and for a Protective Order. That motion was accompanied by the affidavit of R. William Potter, Esq. and stated that, although Mr. Rodriguez does not ordinarily involve himself in the details of litigation strategy, in this proceeding he participated in meetings, consultations, and briefings with his attorneys and reviewed the

(Footnote Continued)

Service Electric & Gas Company to Reduce the Level of Levelized Energy Adjustment Clause, BPU No. 831-25 (January 20, 1984) (transcript at 265).

- ^{24/} The Public Advocate of New Jersey's Response to the Applicants' Preliminary Set of Initial Interrogatories and Request for Production of Documents at 1 (January 18, 1984).
- ^{25/} The Public Advocate's Consent to the Applicant's Motion to Dismiss Contention IV and Comments on the Applicant's Arguments in Support thereof (February 17, 1984).

contentions and approved their submission.^{26/} Contrary to the Public Advocate's assertion that Mr. Rodriguez has no discoverable information,^{27/} it would appear from Mr. Potter's affidavit that Mr. Rodriguez's direct involvement in the drafting of the contentions must have been extensive. In light of this extensive participation and of the Public Advocate's repeated failure to identify any other person who prepared the contentions, it is necessary for Applicants to depose Mr. Rodriguez in order to determine the basis for his contentions.

The Public Advocate has requested that the Licensing Board issue a protective order in the form of a declaratory ruling that the Public Advocate is not subject to compulsory testimony by any method, absent a clear showing of necessity.^{28/} Section 2.740(c) of the NRC's rules provides that a Licensing Board may make any necessary protective order upon a showing of good cause. The Public Advocate has not made such a showing. The instant motion, memorandum of law, and affidavit are replete with unsupported conclusory statements that Mr. Rodriguez has no discoverable information. Such

^{26/} Affidavit of R. William Potter, Esq. in Support of Public Advocate's Motion (February 27, 1984) at 5-6.

^{27/} It is only through discovery that the absence of such information can be determined with any degree of sufficiency.

^{28/} Public Advocate's Motion to Vacate and for a Protective Order at 2.

unsupported statements are insufficient to demonstrate good cause and thus, to satisfy the burden of a proponent for a protective order.^{29/} Furthermore, the assertion that Mr. Rodriguez has no discoverable information is contrary to the statements in Mr. Potter's affidavit that Mr. Rodriguez was directly and extensively involved in drafting the contentions.

Similarly, Mr. Potter's affidavit is clearly insufficient to support the motion. In the North Anna proceeding, the Appeal Board rejected an affidavit in similar circumstances where the basis of the affiant's personal knowledge was not established in the affidavit.^{30/} Such is the case here. Mr. Potter does not provide the basis for his statements regarding Mr. Rodriguez's involvement in the contention preparation process. Significantly, he fails to state whether he attended the referenced meetings, consultations, and briefings with Mr. Rodriguez and whether he participated in the drafting of the contentions.

^{29/} See General Dynamics Corp. v. Selb Manufacturing Company, 481 F.2d 1204 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); Zenith Radio Corp. v. Matsushita Electric Industrial Company, 529 F. Supp. 866 (D.C. Pa. 1981); Reliance Insurance Company v. Barron's, 428 F. Supp. 200 (D.C.N.Y. 1977); Isaac v. Shell Oil Company, 83 F.R.D. 428 (D.C. Mich. 1979).

^{30/} Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 26-28 (1979).

In any event, there is no basis for the protective order requested by the Public Advocate unless it is shown that Mr. Rodriguez did not draft the contentions but rather lent his name to contentions formulated by Mr. Potter or another member of the Public Advocate's staff. If the latter is shown to be the case, then Applicants will depose Mr. Potter or that other staff person upon his identification. Because the Public Advocate has not identified the person(s) who provided the basis of his contentions and drafted them, the request for a protective order is unjustified.

Finally, Applicants believe that they have demonstrated the necessity of deposing Mr. Rodriguez. From the Public Advocate's responses, it seems clear that Mr. Rodriguez drafted the contentions without technical assistance and is now in the process of hiring technical experts to support these contentions.^{31/} Applicants are entitled to know the basis of the Public Advocate's contentions and should be permitted to depose Mr. Rodriguez. Accordingly, Applicants request that the Board issue the attached subpoena.

^{31/} See notes 22-27 supra and accompanying text.

Conclusion

For the reasons stated above, the Public Advocate's Motion to Vacate and for a Protective Order should be denied and the Board should issue the attached subpoena.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

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March 13, 1984

United States of America

NUCLEAR REGULATORY COMMISSION

In the matter of:

Public Service Electric
and Gas Company

(Hope Creek Generating Station)

TO

The Honorable Joseph H. Rodriguez
Public Advocate for the State
of New Jersey
Department of the Public Advocate
Trenton, New Jersey 08625

DOCKET NO. 50-354-OL

YOU ARE HEREBY COMMANDED to appear at the office of the General
Solicitor, Public Service Electric and Gas Co., 80 Park Plaza, 5th
in the city of Newark, New Jersey 07101 floor
on the 30th day of March 19 84 at 10 o'clock A. M.
to testify on behalf of
and bring with you all documents on which you intend to rely
in this proceeding
in the above entitled action and bring with you the document(s) or object(s) described
in the attached schedule.

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

BY _____

ATTORNEY FOR Public Service
Electric and Gas Company
Troy B. Conner, Jr.

.....19.....

TELEPHONE 202/833-3500

10 C.F.R. 2.720 (f)

On motion made promptly, and in any event
at or before the time specified in the subpoena
for compliance by the person to whom the sub-
poena is directed, and on notice to the party at
whose instance the subpoena was issued, the

presiding officer or, if he is unavailable, the
Commission may (1) quash or modify the sub-
poena if it is unreasonable or requires evidence
not relevant to any matter in issue, or (2) con-
dition denial of the motion on just and reasonable
terms.