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NUCLEAR REGULATORY COMMISSION

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In the Matter of
RICHARD E. DOW

Docket Nos. 50-445, 50-446

MEMORANDUM AND ORDER

CLI-91- 09

This matter is before the Commission on a motion by Richard E. "Mickey" Dow to quash a subpoena duces tecum issued to him by the NRC Staff. The NRC Staff has filed a response as we directed. For the reasons explained below, we deny the motion to quash.

I. Background.

A. Mr. Dow's Initial Discussions With The NRC.

Mr. Dow first communicated with the NRC Staff in January 1991. During subsequent discussions with both the technical staff and the NRC's Office of Investigations ("OI"), Mr. Dow apparently presented a number of allegations regarding the status of the Comanche Peak nuclear power plant. These allegations were based upon information provided to Mr. Dow by other persons. After reviewing his allegations, both OI and the technical staff informed Mr. Dow that they had not found any evidence of regulatory violations at Comanche Peak.

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Among the items Mr. Dow discussed with the Staff and OI were 16 audio tapes created by the TU Electric switchboard monitoring system. Mr. Dow informed the Staff and OI that he had obtained these tapes from a former plant employee. At that time, Mr. Dow did not allege that the tapes themselves contained any information regarding violations of NRC regulations.

B. Mr. Dow's April 9, 1991 Petition.

On April 9, 1991, Mr. Dow filed a "Petition for Temporary Restraining Order and Preliminary Injunction" in the U.S. District Court for the Northern District of Texas. In this pleading, Mr. Dow sought to enjoin the refueling and operation of Comanche Peak, Unit 1, and the continuing construction of Unit 2. The District Court dismissed the petition for lack of jurisdiction. See Dow v. Comanche Peak Steam Electric Station et al, No. 4-91-0255-E (N.D.Tx., April 11, 1991).¹

In his petition, Mr. Dow alleged, inter alia, that he had raised various safety concerns with the NRC and that he did not believe that these concerns had been satisfactorily resolved. He also alleged -- for the first time -- that a person who had listened to the tapes had informed him that the 16 tapes contained conversations between NRC officials and TU Electric officials concerning hazardous conditions at the plant and that on at least one occasion, NRC officials had given TU Electric permission to ignore possible hazardous conditions at the facility.

¹Mr. Dow has filed an appeal from this decision. The U.S. Court of Appeals for the Fifth Circuit has denied his request for an injunction pending appeal. See Dow v. Comanche Peak Steam Electric Station, No. 91-1444 (5th Cir., May 9, 1991). The Fifth Circuit has also denied his Petition for Writ of Mandamus, directing the District Judge to grant the requested injunction. See Dow v. McBryde, No. 91-1451 (5th Cir., May 7, 1991).

On April 19, 1991, Region IV Staff members conducted a transcribed interview with Mr. Dow under oath. While he provided the names of some of his informants and some additional details, he refused to provide the names of individuals who he stated did not wish to be identified because they feared harassment. He also refused to provide the name of another individual who he said did not wish to be identified because that individual did not believe the NRC would take any action.

Mr. Dow also refused to provide the NRC with the tapes he alleged contained the information cited in his petition. He admitted that he himself had only listened to a portion of the 16 tapes and that he personally had not heard any information which he considered relevant to NRC activities. However, he alleged that three of his "sources" had informed him that the tapes contained conversations between NRC officials and plant officials and that the person who had provided him with the tapes had refused to permit him to release the tapes.

On April 29, 1991, Mr. Dow reiterated his refusal to release the tape recordings in a telephone conversation with NRC Staff members. In response, on May 8, 1991, the NRC Staff informed Mr. Dow that it could not initiate any action based upon the concerns he had expressed because his information lacked sufficient detail and because he had refused to provide the names and telephone numbers of these individuals so that the NRC could interview them directly.

11. The NRC Staff Subpoena.

On May 10, 1991, the NRC Staff issued a subpoena to Mr. Dow. The subpoena was signed by Robert D. Martin, Regional Administrator, NRC Region IV

and was returnable on May 17, 1991, at the Region IV Headquarters in Arlington, Texas, approximately a two-hour drive from Mr. Dow's residence. The subpoena sought two classes of records from Mr. Dow. First, the subpoena directed Mr. Dow to provide "for copying such reports, memoranda, letters, notes, and any other records or documents in your possession, or control, which you allege contain information concerning safety-related deficiencies at Comanche Peak"

Second, the subpoena sought "for copying at the same time any reports, memoranda, letters, notes or any other records or documents in your custody, control, or possession, which identify the telephone numbers or addresses or both the telephone numbers and addresses of persons whom you identified during your interview ... as allegedly having informed you of safety-related deficiencies at Comanche Peak"

The subpoena informed Mr. Dow that any request to quash or modify the subpoena would have to be in "the hands of the Secretary of the Commission no later than 4:00 p.m., May 17, 1991." Furthermore, the subpoena itself contained the facsimile number for the Office of the Secretary. Finally, the subpoena informed Mr. Dow that if he filed such a motion, he should provide "notice to the party at whose instance the subpoena was issued"

III. The Motion To Quash.

The Commission has received a letter from Mr. Dow which essentially constitutes a motion to quash. The letter is dated May 17, 1991, but was not provided to the Commission until sometime later. A copy of Mr. Dow's motion was provided to the Region IV Regional Counsel in Arlington, Texas, on May 20, 1991. The Office of the General Counsel provided the motion to the Secretary

on May 21, 1991, after receiving it from the Regional Counsel. The Secretary has received no other copy of the motion.

According to the Staff's response, a friend of Mr. Dow's provided a copy of the letter to the Region IV counsel and informed counsel that Mr. Dow had delivered the letter to the Commission's former address in downtown Washington, D.C. Mr. Dow did not inform the Office of the Secretary directly, either by mail, facsimile, telephone, or by leaving the motion at the Commission's Public Document Room.

IV. Arguments.

Mr. Dow claims his material will indicate a situation of "duplicity and compromise" between NRC Region IV, TU Electric, and a citizens' group. Moreover, he believes that the tapes contain conversations regarding violations of the Atomic Energy Act and that only the Office of Inspector General ["OIG"] should have jurisdiction of this matter. Mr. Dow does not otherwise challenge the scope, purpose, or service of the Staff subpoena.

The Staff responds that Mr. Dow has alleged the existence of safety concerns or violations of the Atomic Energy Act. Because it is charged with protecting public health and safety, argues the Staff, it has a right to uncover information surrounding those allegations. Furthermore, this responsibility is a proper purpose for issuing a subpoena.

Moreover, the Staff argues that the OIG is well aware of the matter because the Regional Administrator himself notified the OIG of these allegations on April 18, 1991, and formally referred the matter to the OIG on May 21, 1991. In the Staff's view, upholding the subpoena will not prevent Mr. Dow from bringing his allegations to the attention of the OIG.

Accordingly, Mr. Dow's unsupported allegations should not be allowed to defeat an otherwise valid subpoena.

V. Analysis.

A. The Timeliness of the Motion to Quash.

Before we turn to the merits of Mr. Dow's motion, we address its timeliness. Clearly, Mr. Dow did not comply with terms of the subpoena in filing his motion to quash because he did not properly notify the Office of the Secretary within the time specified, despite the fact that the subpoena itself supplied the facsimile number for filing a motion with the Commission on short notice. Nor did he inform the Region IV Office of his motion, i.e., provide "notice to the party at whose instance the subpoena was issued," as the subpoena required, until May 20, 1991, the date the subpoena was returnable. We agree with the Staff that it is inherently reasonable that notice of a motion to quash or modify a subpoena be provided to the person requesting the subpoena at the same time it is provided to the Commission.

In its response, the Staff advised us that there are some indicia that Mr. Dow made a "good faith attempt" to serve the motion on the Secretary personally, although at the incorrect address. Under all the circumstances, we decline to dismiss the motion on timeliness grounds and, instead, consider it on its merits.

B. The Merits of The Motion to Quash.

Quite simply, Mr. Dow has alleged that TU Electric has committed violations of the NRC's public health and safety regulations and of the Atomic Energy Act at Comanche Peak. It is the Staff's responsibility to review and

resolve allegations regarding public health and safety. See, e.g., United States v. Comley, 890 F.2d 539, 542 (1st Cir. 1989). "To deny [the Staff] the opportunity to gather relevant information for [this] undeniably proper purpose[] would be to thwart its effort to better execute its responsibilities." United States v. McGovern, 87 F.R.D. 590, 593 (M.D.Pa. 1980).

In sum, the NRC Staff not only has the right to investigate these allegations, it has the duty to do so. Therefore, the Staff has the right to require Mr. Dow to substantiate his allegations. Cf. Joseph J. Macktal, CLI-89-12, 30 NRC 19 (1989); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), CLI-87-8, 26 NRC 6 (1987). The Staff is entitled to review the material upon which Mr. Dow relies to support his allegations, as identified in the subpoena. This material clearly includes the tapes.

Essentially, Mr. Dow argues that because he has alleged misconduct on the part of the NRC Staff, we should quash the Staff's subpoena and transfer jurisdiction of the case to the OIG. We disagree. We cannot allow the recipient of a subpoena to be able to avoid that subpoena by simply alleging that the records sought by the subpoena contain information of staff misconduct.

As the Staff correctly notes, the OIG is well aware of this matter because the Staff itself has referred the matter to the OIG. The OIG is perfectly capable of issuing its own subpoena for the requested material if it believes such a course of action is appropriate. We have no reason to believe that enforcement of this subpoena will in any way prevent the OIG from reviewing the tapes or any other information, should the OIG decide to do so. In the interests of orderly process, however, the Staff should coordinate

receipt and review of the tapes with the OIG, in the event that the OIG exercises its discretion to do so.

C. The Confidentiality Of Mr. Dow's Sources.

We note that the second paragraph of the subpoena asks for information disclosing the identities of Mr. Dow's sources. The Staff believes that it needs to interview these individuals in order to substantiate their technical concerns. As we noted earlier, Mr. Dow states that he will not disclose the identities of some of his sources because those sources fear that disclosure of their names to the Staff would lead to the disclosure of their names to TU Electric, leaving those individuals open to harassment and intimidation by the utility.

In a recent similar situation, an individual who alleged the existence of safety violations at another nuclear plant argued that disclosure of the identities of the sources of that information to the Staff could result in those persons choosing not to bring forward information in the future. In that case, the court held that the NRC must explore any possible alternative methods of obtaining the requested information from those individuals in order to protect their confidentiality and to minimize any intrusion into the allegers' First Amendment association rights. See United States v. Garde, 673 F.Supp. 604, 607 (D.D.C. 1987). However, the Garde Court also pointed out that "it is clear that under appropriate circumstances ... [the] First Amendment rights would give way to the compelling government interest in nuclear safety." Id. at 606.

In order to avoid any possible infringement on Mr. Dow's associational rights -- and to provide the opportunity for Mr. Dow's sources to maintain


their confidentiality -- we direct the Staff to discuss with Mr. Dow various alternative means of interviewing the individuals whose allegations he has presented. For example, the Staff may offer formal protection to these individuals under the confidentiality provisions of NRC Manual Chapter 0517. We do not direct the Staff to choose any particular alternative; nor do we expect the staff necessarily to accede to all of Mr. Dow's requests. The Garde Court made clear that persons who present allegations cannot "dictate how the NRC conducts its affairs." 673 F.Supp. at 606. We only hold that the Staff must "carefully and conscientiously" explore all reasonable alternatives to obtain the identities of these individuals in order to protect their confidentiality. U.S. v. Garde, supra.

VI. Conclusion.

For the foregoing reasons, we have denied the motion to quash. The subpoena remains in force and the new return date is 10:00 am on Wednesday, July 10, 1991, at Suite 1000, 611 Ryan Plaza Drive, Region IV, Arlington, Texas.

It is so ORDERED.



For the Commission²

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 20th day of June, 1991.

²Commissioner Rogers was not present for the affirmation of this order, if he had been present he would have approved it.

In the Matter of
RICHARD E. DOW

Kris Carter
Office of the Secretary of the Commission