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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD⁸⁴ JUN 21 P4:37

In the Matter of)
PACIFIC GAS AND ELECTRIC COMPANY)
(Diablo Canyon Nuclear Power Plant)
Units 1 and 2)

Docket Nos. 50-275 OL
50-323 OL

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

NRC STAFF'S ANSWER TO
JOINT INTERVENORS' MOTION FOR PROTECTIVE ORDER

Lawrence J. Chandler
Special Litigation Counsel

June 19, 1984

DESIGNATED ORIGINAL

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I. INTRODUCTION

On June 12, 1984, Joint Intervenors filed their reply to PG&E's and the NRC Staff's answers to their separate motions (as supplemented) seeking to augment or reopen the record on design quality assurance and to reopen the record on issues of construction quality assurance and licensee character and competence, as permitted by the Appeal Board's Order of May 23, 1984. Although relying on and referencing ten attachments, the reply served on the Staff appends only six, numbers 3, 4, 7 and 10 having been provided, seemingly, only to the Appeal Board. With respect to attachments 3, 4, 7 and 10, Joint Intervenors have separately requested, by motion served on June 12, 1984, that the Appeal Board issue a protective order limiting disclosure solely to the members of the Appeal Board.

Pursuant to the Appeal Board's order of June 13, 1984, the Staff responds to Joint Intervenors' motion for a protective order. As discussed below, the Staff opposes issuance of the protective order requested by the Joint Intervenors but has no objection to issuance of a less restrictive protective order.

II. DISCUSSION

Joint Intervenors argue the need for a protective order precluding disclosure of the enumerated attachments to other parties, including the Staff, on the grounds that, in the past, disclosure of such information to the Staff has led to the deliberate or inadvertent disclosure of the identities of confidential informants to PG&E with the consequent result of the harassment or discharge of three individuals (Motion at 4-5). These assertions are in turn predicated on an appended affidavit of Thomas Devine, an attorney and the legal director of the Government Accountability Project (GAP).^{1/}

^{1/} The characterization of the communication between Staff counsel and Mr. Devine (Affidavit, paragraph no. 4.) is incomplete and misleading. First, the conversation occurred on February 15, 1984, not the 16 as stated in Mr. Devine's affidavit. Second, Mr. Devine was informed that to assure, to the maximum extent possible, that the inadvertent disclosure of information submitted in confidence did not occur, the documents in question (which were attachments to GAP's February 2.206 petition) would be reviewed by the Staff and the NRC's Office of Investigations for appropriate deletions prior to release as a Board Notification and to the licensee for response pursuant to 10 C.F.R. § 50.54(f). The practice of providing a 2.206 petition to a licensee is one of long-standing. See, LeBoeuf, Lamb, Leiby & MacRae, Denial of Petition for Rulemaking, 41 Fed. Reg. 3359, January 22, 1976). Third, during the conversation Mr. Devine noted that, while he would prefer treating all of the documents in confidence, he was agreeable to the approach outlined as long as he was informed of what information would be disclosed so that he could also use it in a public forum. Fourth, Mr. Devine was advised that while his views on what information should not be disclosed would be welcomed (a practice which has continued since then), the ultimate decision on this question would have to be made by the Commission consistent with its obligations relative to the initiation and conduct of appropriate inspections and investigations. Finally, the foregoing was confirmed to Mr. Devine in a letter to him from Stephen G. Burns, Deputy Chief Counsel, Regional Operations and Enforcement Division, dated February 17, 1984. It also warrants mention that Mr. Devine, in his affidavit, states that even as to documents given to the Staff he had "deleted the identities and identifying characteristics of all confidential witnesses at their insistence." (Affidavit paragraph no. 3.) With the precautions taken by Mr. Devine and by the Staff, the general suggestion that PG&E's subsequent identification of individuals can be laid at the Staff's doorstep is both frivolous and disingenuous. In candor, however, the Staff acknowledges that it inadvertently referred to information in SSER 22 which could have permitted the disclosure of an informant's identity, although we have no evidence to indicate that such evidence has been used to identify the anonymous informant concerned.

In its Order of June 13, 1984, the Appeal Board requested responses to the following questions:

1. What documents were served on the Applicant and the Staff as Joint Intervenors' reply?

Answer

The Staff, as part of Joint Intervenors' reply, received (in addition to the reply itself and an errata with attachments) Exhibit 1 (Affidavit of Charles C. Stokes, executed on June 1(?), 1984), Exhibit 2 (Affidavit of Charles C. Stokes, executed on June 1(?), 1984), Exhibit 5 (Affidavit of Steven Lockert, executed on June 7, 1984), Exhibit 6 (Affidavit of Mark Hudson, executed on June 5, 1984), Exhibit 8 (Affidavit of Walter B. Glary, executed on May 4, 1984), and Exhibit 9 (Affidavit of Larry (Doc) Kinney, executed on June 1, 1984). Copies of Exhibits 3, 4, 7 and 10 were not received.

2. If the same documents, in the same form, as those served on the Appeal Board were received by the Applicant and the Staff, is there any need for a protective order?

Answer

The Staff understands that Exhibits 3, 4, 7 and 10 were submitted to the Appeal Board already having "deleted from them the names of the purported affiant and certain other identifying information." (Order at 1). In these circumstances, it is difficult to perceive of any need for a protective order. However, to assure a reasoned judgment on this question, Joint Intervenors should submit to the Appeal Board unexpurgated versions of the documents with a suitable justification for each deletion made. See Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19 (1983).

3. Is the Commission's policy statement of August 5, 1983, 48 Fed. Reg. 36,358, applicable to Joint Intervenors' request for a protective order? If so, with what results?

Answer

The Commission's policy statement is not applicable to Joint Intervenors' request for a protective order, and we do not understand Joint Intervenors to be relying on that statement. By its very terms, the statement pertains only to information in the possession of the Commission Staff and Office of Investigations which they determine should be brought to the attention of the Commission or its adjudicatory boards.

4. If the Commission's policy statement is not applicable, is the protective order sought by Joint Intervenors appropriate in the circumstances presented?

Answer

Irrespective of the applicability of the Commission's policy statement, issuance of a protective order may, in appropriate circumstances, be warranted to prevent the public disclosure of certain information. Cf. Houston Lighting and Power Company et al. (South Texas Project, Units 1 and 2, LBP-80-11, 11 NRC 477, 480 (1980); Byron, supra. But the present circumstances do not warrant a protective order, most particularly of the scope sought by the Joint Intervenors. Having provided already edited versions of the affidavits to the Appeal Board, the Joint Intervenors nonetheless have proposed a protective order which would effectively prevent not only the release of the identities and/or identifying characteristics of certain individuals but also of the substantive information they have provided. The net result of such order would be to deny other parties knowledge of the basis upon which the Appeal Board might resolve the pending motions and, should the documents ultimately prove to present information

of such significance to warrant reopening, it is unclear how the other parties could respond at an evidentiary hearing to matters of which they have no knowledge. Such approach has explicitly been viewed with disfavor by the Appeal Board in this very proceeding. See e.g., Order of February 23, 1984, regarding transcript of meeting with Charles Stokes. Even beyond the foregoing, however, Joint Intervenors have failed to demonstrate any need to withhold the substantive information (presumably of safety significance if it is to lend support to their motion to reopen the record and be responsive to the Appeal Board's Order of May 23), particularly from the Staff which has a principal role in assuring the protection of the public health and safety, independent of its participation as a party in this licensing proceeding. The discharge of this responsibility would be effectively foreclosed by Joint Intervenors' proposed protective order.

5. If the protective order sought by Joint Intervenors is not appropriate, is a less encompassing order suitable?

Answer

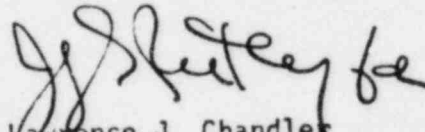
As discussed above, the protective order of the breadth sought by the Joint Intervenors is not appropriate. Nevertheless, once the Joint Intervenors justify the need for the deletion of certain identifying information, the Staff would not object to issuance of a protective order providing for the disclosure to the other parties of the documents in the form provided to the Appeal Board, i.e. with deletion of names and other identifying information. Presumably, Joint Intervenors, in making such deletions, have satisfied themselves and their informants that with such deletions, the information remaining would not result in disclosure of the informants' identities. In this way, the Joint Intervenors will be able to best assure

the anonymity of its informants, a goal it wishes to achieve, while the Staff and the licensee will be able to pursue investigation of the allegations.

III. CONCLUSION

For the foregoing reasons, the Staff opposes Joint Intervenors' motion but does not object to issuance of a limited protective order.

Respectfully submitted,



Lawrence J. Chandler
Special Litigation Counsel

Dated at Bethesda, Maryland
this 19th day of June, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO JOINT INTERVENORS' MOTION FOR PROTECTIVE ORDER" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk by hand-delivery, this 19th day of June, 1984:

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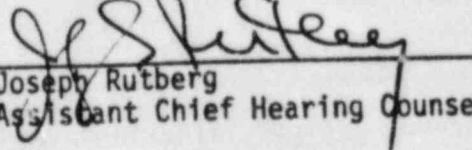
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