

671

RELATED CORRESPONDENCE

DOCKETED
USNRC

JUL 31

P2:55

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

APPLICANTS' MOTION TO COMPEL DESIGNATION OF WITNESSES AND THEIR AVAILABILITY FOR DEPOSITIONS AND/OR TO DISMISS THE PROCEEDING

Preliminary Statement

On December 21, 1983, the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") issued a Special Prehearing Conference Order,^{1/} which admitted three contentions proposed by the Public Advocate relating to intergranular stress corrosion cracking of recirculation piping installed at Hope Creek, management competence, and environmental qualification of safety-related electrical and mechanical equipment.^{2/} With regard to the conduct of discovery, the Board ruled:

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

2/ A fourth contention relating to salt deposition from the Hope Creek cooling towers was subsequently withdrawn by the Public Advocate following Applicants' motion to dismiss that contention.

D503

The parties are directed to commence discovery immediately and to proceed with expedition. They are encouraged to make voluntary disclosure, both formally and informally, of all information, data, documents and the like which could reasonably be relevant to the admitted issues.^{3/}

As directed by the Licensing Board, Applicants have pursued discovery diligently and have sought, in particular, to learn the identities of the witnesses who will be proffered by the Public Advocate to testify on any of the issues. As explained below, however, the requested information has not been furnished by the Public Advocate. His responses to discovery requests thus far have largely been to repeat information provided in the Applicants' answers to discovery requests and to cite generic documents without explaining any particular application to the Hope Creek proceeding.

Accordingly, the only means by which Applicants can adequately prepare for a hearing on the technical issues is to depose the Public Advocate's expert witnesses on each contention. Despite repeated requests that such individuals be identified so that they may be deposed, the Public Advocate has at this very late date still declined to identify its expert witnesses. In these circumstances, the Board should compel the Public Advocate to identify its

^{3/} Hope Creek, supra, Special Prehearing Conference Order at 19.

experts and produce them for depositions or dismiss the contentions and the proceeding.

Argument

On January 3, 1984, Applicants served upon the Public Advocate a preliminary set of initial interrogatories, specifically intended "to ascertain the identity of those deponents who will be examined by Applicants in accordance with the Licensing Board's Special Prehearing Conference Order."^{4/} On January 18, 1984, the Public Advocate responded to this request for identification of its witnesses, stating that Applicants would be informed of the identities "of all experts to be called to testify on Contentions one through three as soon as we complete the consultant selection and contract negotiation process. The Public Advocate anticipates that this will be accomplished in the near future."^{5/}

Applicants' First Set of Interrogatories, served January 20, 1984, then requested specific information as to the bases for the contentions. In his responses to these interrogatories, the Public Advocate cited the testimony of

^{4/} Applicants' Preliminary Set of Initial Interrogatories and Request for Production of Documents to the Public Advocate and the State of Delaware at 1-2 (January 3, 1984).

^{5/} 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).

a Dr. Stephen H. Hanauer before the New Jersey Board of Public Utilities, but did not indicate whether Dr. Hanauer would appear as a witness in the Hope Creek proceeding. Nor were any other individuals identified as possible witnesses.

Several months elapsed during which the Public Advocate had more than sufficient time to consult with experts concerning their possible retention and testimony and to conclude arrangements for their appearance. With no response yet listing witnesses, Applicants sent a letter dated July 3, 1984 to the Public Advocate again requesting their identification. In this letter, Applicants reminded the Public Advocate that the NRC rules provide in 10 C.F.R. §2.740(e)(1)(ii) that each party must provide, as a supplement to its original response to a discovery request, "the identity of each person expecting to be called as an expert witness at the hearing, the subject matter on which he is expected to testify, and the substance of his testimony." Applicants noted that, notwithstanding the provisions of this rule and repeated requests, the Public Advocate had not yet furnished Applicants with a list of expert witnesses, professional qualifications, subject matter of testimony, etc., as requested. Finally, Applicants stated in their letter that in order to "commence depositions promptly in preparation for the hearing, it is essential that this

information be furnished without further delay and certainly no later than July 13, 1984."^{6/}

In response to Applicants' letter of July 3, 1984, counsel for the Public Advocate, Miss Susan Remis, sent a letter dated July 11, 1984 noting Mr. Potter's withdrawal from the case and stating: "As soon as lead counsel is assigned and expert witnesses are selected, I will promptly inform you of this information."^{7/} The Public Advocate has yet to designate any witness on his three contentions.

To put the matter in perspective, it has been eight months since the prehearing conference at which time the Licensing Board conditionally admitted the Public Advocate's contentions. Applicants have been attempting since that time to determine the basis for those contentions, which apparently were submitted on the basis of theories developed by the Public Advocate's attorneys rather than any technical experts. After eight months of inaction, the undersigned counsel for Applicants called Miss Remis on July 26, 1984, in a further effort to determine whether any firm commitment could be made regarding identification of witnesses. Miss Remis advised that she was unaware of any witnesses, unless Mr. Potter might have made some arrangements for witnesses.

⁶ A copy of the July 3, 1984 letter from Applicants' counsel to the Public Advocate is attached.

^{7/} A copy of this letter is also attached.

Miss Remis stated that she would check with Mr. Potter and inform counsel of any witnesses.^{8/} She then stated that nothing would be done until a new lead counsel had been appointed by the Public Advocate and time had been provided for him to familiarize himself with the case.

This inaction is indefensible. The Public Advocate states he has a staff of some 335 attorneys.^{9/} Mr. Potter formally submitted his notice of withdrawal a month ago on June 29, 1984, which was certainly known to the Public Advocate in advance of that submittal. Under these circumstances, it is inexplicable that no other lead attorney could assume responsibilities for this active litigation in the face of Applicant's ongoing discovery request. It is also unclear why Miss Remis, who has participated in the proceeding from the outset, did not in response to Applicants' letter of July 3 contact Mr. Potter for witnesses or otherwise pursue the matter personally.

As the Board is aware, Hope Creek will load fuel on January 15, 1986. Inaction by the Public Advocate in obtaining expert witnesses, which could potentially delay

^{8/} As of this filing, no further information has been received from Miss Remis.

^{9/} Affidavit of Joseph H. Rodriguez, Esq., the Public Advocate of the State of New Jersey at ¶ 4 (March 26, 1984). Mr. Rodriguez's affidavit was submitted in connection with the Public Advocate's Motion to Quash the Applicants' Subpoena (March 26, 1984).

the hearing, should not be allowed to prejudice Applicants' rights. Unless the Public Advocate is required to identify its witnesses promptly, this schedule will be jeopardized. Accordingly, the Public Advocate's lack of due diligence in responding to discovery requests and its failure to prosecute its case warrant immediate relief from the Board.

It is noteworthy that, in the interim, Applicants had sought the dismissal of the proceeding on the basis of the admission by I. Rodriguez in an affidavit that he has "no personal knowledge or specialized technical information beyond the information presented to the Board in support of these contentions."^{10/} In an order issued June 18, 1984, the Board denied Applicants' motion, holding that the admission of the contentions could be supported by information provided by others. The Board nonetheless stated:

However, a different rule obviously obtains when the bases of pleadings or contentions is probed by discovery, or becomes the subject of motions for summary disposition. But a motion to dismiss the proceedings is premature at this time, and it will be denied.^{11/}

Thus, the Board recognized that dismissal of the proceedings would be appropriate if, when probed by discovery, it were established that the contentions lacked any technical basis.

^{10/} Affidavit of Joseph H. Rodriguez at 6 (March 26, 1984).

^{11/} Hope Creek, supra, "Order Denying Applicants' Motion to Dismiss Proceeding" at 2-3 (June 18, 1984).

Applicants are therefore at the point envisioned by the Licensing Board. It is fairly evident that the Public Advocate has not yet even begun to consult experts to determine his potential witnesses. In view of the Board's requirement that discovery proceed promptly and expeditiously, such delay is inexcusable and in violation of the Commission's general policy that discovery be utilized "to expedite hearings by the disclosure of information in the possession of the parties which is relevant to the subject matter involved in the proceeding so that issues may be narrowed, stipulated, or eliminated and so that evidence to be presented at hearing can be stipulated or otherwise limited to that which is relevant."^{12/}

In this regard, it is noted that no apparent dispute on the technical issues exist. As noted, the Public Advocate has to date merely cited general references with no particular applicability to Hope Creek. At a meeting on July 24, 1984 between the Applicants and the Staff on pipe cracking, the Staff stated that there would be no unresolved items regarding Contention 1 in the Safety Evaluation Report. As

^{12/} Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 455 (1981). The Commissioners also emphasized the importance of establishing and meeting "time frames for the completion of both voluntary and involuntary discovery." Id. at 456. See generally Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 321-23 (1980).

to Contention 2 on management competence, the Public Advocate has principally cited documents relating to the Salem facility, including testimony before the New Jersey PUC, contrary to the Licensing Board's order that this contention would not entail a retrial of the Salem ATWS event. It is noted that the Public Advocate sought in a petition under 10 C.F.R. §2.206, which was denied and appealed, to raise the same issues relating to Applicants' management. The petition for review in the United States Court of Appeals for the District of Columbia,^{13/} filed by the Public Advocate after the denial of Section 2.206 relief by the NRC, resulted in a voluntary dismissal by stipulation. That stipulation, a copy of which is attached,^{14/} demonstrates that management issues were resolved to the satisfaction of the Public Advocate in the Court of Appeals proceeding. As to Contention 3 on environmental qualification, Applicants are likewise unaware of any outstanding problem or any particular issue which the Public Advocate has identified by the discovery responses to date.

Finally, Applicants point out that the process of deposing the Public Advocate's witnesses has already proved successful in eliminating the one contention for which his

^{13/} Joseph H. Rodriguez v. U.S. Nuclear Regulatory Commission, No. 83-1805 (D.C. Cir., filed July 29, 1983).

^{14/} See Joint Motion to Dismiss at ¶4.

technical experts were proffered. Shortly after the special prehearing conference on November 22, 1983, the Public Advocate designated his two experts on Contention 4, relating to salt deposition from the Hope Creek cooling towers. As the result of deposing these technical consultants, Applicant filed a motion to strike Contention 4 on February 3, 1984. Subsequently, on February 17, 1984, the Public Advocate consented to the motion to dismiss, thereby eliminating Contention 4. It is Applicants' intention to pursue the same approach with regard to the remaining contentions for which no expert witnesses have yet been designated.

Relief Requested

Taking into consideration these circumstances of dilatory conduct, the Licensing Board should compel answers to Applicants' repeated requests for the identities of the Public Advocate's expert witnesses on the contentions and require that such individuals be made available for depositions no later than the week of August 13, 1984. If the Public Advocate fails to do so, the Licensing Board should dismiss the proceeding. The Commission has expressly stated that dismissal of a party's contentions or dismissal of the party from the proceeding is an appropriate sanction for failure to meet its obligations under the rules.^{15/} Other

^{15/} Statement of Policy on Conduct of Licensing Proceedings, supra, at 454.

boards have issued orders requiring dismissal of the contentions and/or parties if requested discovery is not provided.^{16/}

Conclusion

For the reasons discussed more fully above, the Board should set a date certain, preferably within the next ten days, for the Public Advocate to furnish Applicants with the information requested regarding its expert witnesses and to make such individuals available for depositions shortly thereafter. Absent such compliance, the Board should dismiss the Public Advocate's contentions and this proceeding.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

Troy B. Conner, Jr. / Rader

Troy B. Conner, Jr.

Robert M. Rader

Counsel for the Applicants

July 30, 1984

^{16/} See, e.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586 (1983); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 & 2), Docket Nos. 50-440-OL and 50-441-OL, "Memorandum and Order (Concerning Motion to Compel)" (February 18, 1982); Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-22, 14 NRC 150, 154 n.12 (1981).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion to Compel Designation of Witnesses and Their Availability for Depositions and/or to Dismiss the Proceeding," dated July 30, 1984 in the captioned matter have been served upon the following by deposit in the United States mail on this 30th day of July, 1984:

Marshall E. Miller, Esq.
Chairman
Atomic Safety and
Licensing Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Peter A. Morris
Atomic Safety and
Licensing Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. David R. Schink
Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and
Licensing Appeal Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

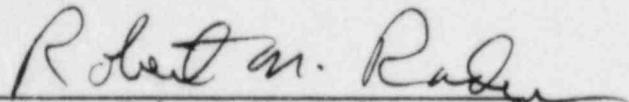
Docketing and Service
Section
Office of the Secretary
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Lee Scott Dewey, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Richard Fryling, Jr., Esq.
Associate General Counsel
Public Service Electric &
Gas Company
P.O. Box 570 (T5E)
Newark, NJ 07101

R. William Potter, Esq.
* Susan C. Remis, Esq.
State of New Jersey
Department of the Public
Advocate
CN 850
Hughes Justice Complex
Trenton, New Jersey 08625

Carol Delaney, Esq.
Deputy Attorney General
Department of Justice
State Office Building
8th Floor
820 N. French Street
Wilmington, DE 19810


Robert M. Rader

* Federal Express

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH H. RODRIGUEZ,)
 The Public Advocate of the)
 State of New Jersey,)
)
 Petitioner,)
)
 v.)
)
 UNITED STATES NUCLEAR REGULATORY)
 COMMISSION, and the)
 UNITED STATES OF AMERICA,)
)
 Respondents,)
)
 PUBLIC SERVICE ELECTRIC AND)
 GAS COMPANY,)
)
 Intervenor.)

No. 83-1805

JOINT MOTION TO DISMISS

The parties, by their undersigned respective attorneys, hereby jointly move this Court to dismiss this action pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure. This motion is based on the following agreement between the parties.

1. Respondent Nuclear Regulatory Commission (NRC) agrees to provide the Public Advocate of the State of New Jersey with advance notice of all meetings, as opposed to normal informal contact or contact resulting from inspections, between the NRC and Public Service Electric & Gas Company (the "licensee")

on the licensee's Corrective Action Plan, as set forth in licensee's letter to the NRC of April 28, 1983, and as confirmed in the NRC's Immediately Effective Order of May 6, 1983. This includes meetings on licensee's August 26, 1983 Action Plan for Improvement of Nuclear Department Operations. The Public Advocate or his representative(s) may attend any such meetings as an observer. The NRC will provide the Public Advocate with copies of the portions of all inspection reports dealing with the Corrective Action Plan or licensee's 1983 Action Plan for Improvement of Nuclear Department Operations, subject to the qualifications of the second paragraph of this agreement.

2. The NRC agrees to provide the Public Advocate promptly with a copy of all documents regarding the Corrective Action Plan or licensee's 1983 Action Plan for Improvement of Nuclear Department Operations, occurring after the date of this agreement, including documents made publicly available under 10 CFR 2.790. The preceding sentence does not apply to those portions of documents withholdable under the Freedom of Information Act, the Privacy Act, and other NRC regulations, nor does it apply to nonpublic internal working documents of the NRC. The NRC agrees to notify the Public Advocate of the existence of withholdable documents, except for nonpublic internal working papers, and will provide those documents which would be normally withheld to protect the licensee's interest to the Public Advocate under a protective agreement if the licensee consents.

3. The NRC agrees to designate an NRC contact knowledgeable in the Corrective Action Plan and licensee's 1983 Action Plan for Improvement of Nuclear Operations solely for the purpose of discussing the plans with the Public Advocate or his representative(s) until NRC involvement in the Corrective Action Plan and licensee's 1983 Action Plan for Improvement of Nuclear Department Operations ends.

4. The Public Advocate or his representative(s) may contact the NRC designee in paragraph 3 above (1) to seek clarification of the Corrective Action Plan or licensee's 1983 Action

Plan for Improvement of Nuclear Department Operations, and their status, (2) to seek an explanation of intended modifications to the plan, and (3) to express concerns regarding any modifications. The Public Advocate agrees that any discussions under this paragraph will not be unduly long, and that inquiries on subjects other than the Corrective Action Plan or licensee's 1983 Action Plan for Improvement of Nuclear Department Operations, will be made through the NRC's Regional State Liaison Officer.

Accordingly, the parties move this Court to dismiss this action without prejudice, and respectfully request the Court to approve and enter an order to that effect.

Date: 5/17/84

Respectfully submitted,
Theodore C. Granger
THEODORE C. GRANGER
Deputy Public Advocate
Department of the Public Advocate
744 Broad Street, 30th Floor
Newark, New Jersey 07102
(201 648-3741

Date: 5/18/84

Robert M. Rader by RPL
ROBERT M. RADER
Attorney for Intervenor
Public Service Electric & Gas Company
Conner & Wetterhahn, P.C.
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 833-3500

Date: 5/18/84

Richard P. Levi
RICHARD P. LEVI
Attorney for Respondent
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20006
(202) 634-1465

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 1984,
a copy of the foregoing "Joint Motion to Dismiss" was served
on counsel of record by first-class mail, postage prepaid,
addressed as follows:

Joseph H. Rodriguez, Esq.
Public Advocate, State of New Jersey
R. William Potter, Esq.
Assistant Public Advocate
Department of the Public Advocate
Hughes Justice Complex
CN 850
Trenton, New Jersey 08625

Theodore C. Granger, Esq.
Deputy Public Advocate
State of New Jersey
Department of the Public Advocate
Rate Counsel Division
744 Broad Street, 30th Floor
Newark, New Jersey 07102

Troy E. Conner, Jr., Esq.
Mark J. Wetterhahn, Esq.
Conner & Wetterhahn
Suite 1050
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Richard Fryling, Jr., Esq.
Associate General Solicitor
Public Service Electric & Gas Co.
P.O. Box 570, T5E
Newark, New Jersey 07101

Richard P. Levi

RICHARD P. LEVI
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

LAW OFFICES
GONNER & WETTERHAHN, P.C.
1747 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006

H/C

TROY B. GONNER, JR.
MARK J. WETTERHAHN
ROBERT M. RADER
INGRID M. OLSON
ARCH A. MOORE, JR.*
ROBERT H. PURL
OF COUNSEL
*NOT ADMITTED IN D.C.

July 3, 1984

(202) 533-3500

CABLE ADDRESS: ATOMLAW

Susan C. Remis, Esq.
State of New Jersey
Department of the
Public Advocate
CN850
Hughes Justice Complex
Trenton, New Jersey 08625

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

Dear Miss Remis:

On January 18, 1984, you served the Public Advocate's "Response to the Applicants' Preliminary Set of Initial Interrogatories and Request for Production of Documents," which requested identification of all witnesses, including experts and factual witnesses, in order that they could be deposed by Applicants. In response, you stated that you would inform us of the identities "of all experts to be called to testify on Contentions 1 through 3 as soon as we complete the consultation selection and contract negotiation process. The Public Advocate anticipates that this will be accomplished in the near future." You also stated that the Public Advocate had "no present intention to submit any fact witnesses."

In the Public Advocate's "First Responses to the Applicants' First Set of Interrogatories," you cite the testimony of Dr. Stephen H. Hanauer before the New Jersey Board of Public Utilities, but do not indicate whether he will appear as a witness in the Hope Creek proceeding. Nor were any other individuals identified as possible witnesses.

As you are aware, the NRC rules provide in 10 C.F.R. §2.740(e)(1)(ii), as a supplement to its original response to a discovery request, "the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify, and the

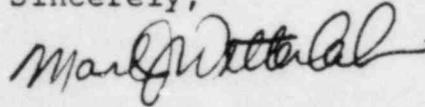
Susan C. Remi Esq.
July 3, 1984
Page 2

substance of his testimony." Further, Applicants stated in their Preliminary Set of Initial Interrogatories that the requests are "preliminary in nature in order to ascertain the identity of those deponents who will be examined by Applicants." Notwithstanding the provisions of the rules and our specific request, we have not been furnished with a list of expert witnesses, professional qualifications, subject matter of testimony, etc., as requested.

In order that we may commence depositions promptly in preparation for the hearing, it is essential that this information be furnished without further delay and certainly no later than July 13, 1984.

Thank you for your attention to this matter.

Sincerely,



Mark J. Wetterhahn
Counsel for the Applicants



JUL 13 1984

State of New Jersey
DEPARTMENT OF THE PUBLIC ADVOCATE
DIVISION OF PUBLIC INTEREST ADVOCACY

JOSEPH H. RODRIGUEZ
PUBLIC ADVOCATE

CN 850
TRENTON, NEW JERSEY 08625

RICHARD E. SHAPIRO
DIRECTOR
TEL: 609-292-1693

July 11, 1984

Mark Wetterhahn, Esquire
Conner & Wetterhahn
1747 Pennsylvania Avenue, N.W.
Washington, DC 20006

Re: In the Matter of PSE&G
(Hope Creek Generating
Station)
Docket No. 50-354=OL

Dear Mr. Wetterhahn:

I am writing in response to your letter of July 3, 1984. As you may be aware, William Potter, the lead counsel in the above-captioned matter, is no longer with the Department of the Public Advocate. Commissioner Joseph H. Rodriguez is out of town this week and has not yet assigned another attorney to assume primary responsibility in representing the public interest in the Hope Creek operating license proceeding.

When Commissioner Rodriguez returns, I will bring your letter to his immediate attention. As soon as lead counsel is assigned and expert witnesses are selected, I will promptly inform you of this information.

Thank you for your cooperation in this matter.

Sincerely,

Susan C. Remis
Assistant Deputy Public Advocate

SCR:NH