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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

SECRETARY
DOCKETING & SERVICE

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

APPLICANTS' OBJECTIONS TO "INTERVENOR'S SECOND
SET OF INTERROGATORIES AND REQUEST FOR
PRODUCTION OF DOCUMENTS TO APPLICANTS"
AND MOTION FOR PROTECTIVE ORDER

Background

On December 13, 1984, the Public Advocate served its "Second Set of Interrogatories and Request for Production of Documents to Applicants." Question IV.25 of this document requests that Applicants "[p]rovide copies of all written reports, memos, letters, analyses or other writings relating to the evaluation or assessment of the job performance of the following employees or categories of employees:

- (a) vice-president - nuclear
- (b) assistant vice-present - nuclear operations support
- (c) general manager - nuclear engineering
- (d) manager - nuclear licensing and reliability
- (e) personnel affairs manager - nuclear
- (f) assistant vice-president - nuclear operations
- (g) general manager - Hope Creek operations
- (h) general manager - Salem 182 operations
- (i) general manager - nuclear services
- (j) manager - outage services
- (k) general manager - nuclear safety review
- (l) general manager - nuclear quality assurance
- (m) Hope Creek Station general manager
- (n) Hope Creek assistant general manager
- (o) Hope Creek station operations manager

- (p) all Hope Creek senior nuclear shift supervisors
- (q) all Hope Creek nuclear shift supervisors
- (r) all Hope Creek nuclear control operators
- (s) all Hope Creek equipment operators
- (t) Hope Creek technical manager
- (u) Hope Creek maintenance manager
- (v) Hope Creek radiation protection engineer
- (w) Hope Creek startup manager."

Intervenor's Second Set of Interrogatories, Section IV at 5-6.

Pursuant to Section 2.741(d) of the Commission's Rules of Practice, Applicants object to this request for production of documents on the grounds that the request is unreasonably burdensome and that the information relevant to Contention 2 which the Public Advocate seeks through this request has already been or will be provided pursuant to the Public Advocate's other discovery requests. Additionally, the material should not be subjected to discovery as it is contained in the confidential personnel files of the individual employees. Disclosure will interfere with legitimate business interests of the Applicants and constitute an unwarranted invasion of the privacy of the individuals involved.

Section 2.740(c) provides that "[u]pon motion by a party or the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that the discovery not be had" At the Prehearing Conference of December 17, 1984,

the Atomic Safety and Licensing Board ("Licensing Board" or "Board") directed the Applicants to file such a motion, if necessary, within five days of receipt of the Public Advocate's Second Set of Interrogatories, excluding Saturday and Sunday (Tr. 405). Thus, in compliance with Section 2.740(c) and the Board's order and in view of the fact that Applicants satisfy the test for entitlement to a protective order of confidential documents as stated in Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 416-17 (1976), Applicants move the Licensing Board to issue a protective order specifying that Applicants need not respond to this discovery request.

Argument

I. The Request for Production of Documents is Unduly Broad and Burdensome

First, Applicants object to this discovery request on the ground that it is unreasonably burdensome in that it is overly broad and the information which is relevant to Contention 2 has already been or will be supplied pursuant to the Public Advocate's other discovery requests. With regard to the breadth of the request for documents, the request asks for the provision of all writings related to the evaluation or assessment of the job performance of 23 categories of PSE&G employees. Compliance with this request would indeed be onerous.

Furthermore, it is clear that all writings relating to the evaluation or assessment of job performance of 23

categories of PSE&G employees are not relevant to the admitted contention. Contention 2 is limited to a specific time period and to a specific event. This limitation was the underlying premise of the Staff's position that the contention was admissible and this limitation was reiterated by the Board in its Special Prehearing Conference Order. Special Prehearing Conference Order (December 21, 1983) at 11.

Moreover, personnel evaluations are not confined to specific events. PSE&G employees are evaluated on the basis of their overall performance. It is not possible to make any reasonable correlation with specific events or to segregate records so that they refer solely to the Salem event. Furthermore, the Board has made it clear that it will not retry the Salem event. Special Prehearing Conference Order at 11. Thus, to the extent that the personnel records deal with the Salem event, the request is outside the scope of the contention. The focus of Contention 2 is prospective; it deals with the application at Hope Creek of the lessons of the Salem event.

This discovery request is also unreasonably burdensome in light of the fact that the information which is relevant to Contention 2, such as the training records of Hope Creek's management and the Hope Creek organizational changes that have been made since February 1983, has been or will be made available pursuant to the Public Advocate's other discovery requests related to Contention 2.

In "Public Advocate's First Set of Interrogatories and Request for Production of Documents to the Applicants," dated January 30, 1984, the Public Advocate requested a table of the organization, showing the chain of communication and command, which Applicants employ to manage the operation of its nuclear plants; the identification of all persons who reviewed or participated in the Applicants' response to the ATWS incidents at the Salem Nuclear Generating Station in February 1983; copies of all reports which analyzed or made recommendations regarding the Salem ATWS event; a description of the Applicants' program for management of the operation and maintenance of the Hope Creek Station; the names and qualifications of all personnel in a management capacity to operate or oversee the operation of the Hope Creek Station; a description of all operational or management changes instituted by Applicants following the Salem ATWS event; and a description of all ways in which these changes had been applied to Hope Creek station. Public Advocate's First Set of Interrogatories at 5-6. All of this information has been provided.

In "Intervenor's Second Set of Interrogatories and Request for Production of Documents to Applicants," dated December 13, 1984, the Public Advocate requested Applicants to identify and describe all steps PSE&G has taken or plans to take to ensure its technical qualifications (III.2); to provide all writings by the NRC referring to or identifying the actions or inactions of management that caused,

contributed to, or aggravated the ATWS event (IV.2); to provide all writings by the NRC relating to the management aspects of the Corrective Action Program proposed by PSE&G in response to the ATWS event (IV.3); to provide all writings by any consultants relating to PSE&G management of the Salem or Hope Creek stations (IV.4); to provide all writings relating to the implementation of the Corrective Action Plan (IV.5); to provide all writings relating to management training for any and all personnel involved in either the Salem or Hope Creek stations (IV.8); to provide all writings relating to the proposed management organization for the operation of Hope Creek (IV.9); to provide all writings relating to the establishment, operation, and recent reorganization of PSE&G's nuclear department (IV.10); to provide all writings related to the organizational structure of Applicants provided to the NRC Staff during meetings with the Applicants on July 23, 24 and 25, 1984 (IV.26); to provide all writings related to PSE&G's Technical Supervisory Skills Program (IV.28); to provide all writings prepared for or submitted to the NRC in anticipation of or for discussion at the November 20, 1984 meeting between PSE&G and the NRC on the Hope Creek training program (IV.42); to provide all writings relating to the requalification training program; to provide all writings related to the training program for replacement personnel; to provide all writings related to site-specific training for licensed personnel at Hope Creek (IV.46); and to provide all writings related to

the analysis of the role(s) of the Vice President -- Nuclear referred to in the Management Overview Report (IV.47). This information is being provided.^{1/}

The Board has already ruled that requests of this type are too broad. At the Prehearing Conference of December 17, 1984, the Board ruled that Question IV.8 which requested the provision of all writings related to management training was too broad (Tr. 375). The Board stated that the Public Advocate must "think about what [it] want[s]" and narrow its interrogatories and requests for documents appropriately (Tr. 375). Despite the Board's ruling and the fact that Applicants have agreed to provide the information requested in Question IV.8 on management training, the Public Advocate has stated that it will not reconsider or modify its request and insists on receiving all writings related to the job evaluations of 23 categories of PSE&G employees. This request is clearly unreasonable.

II. The Requested Documents are Confidential Documents Which Should Not Be Disclosed

Second, Applicants object to Question IV.25 on the ground that the performance evaluations requested by the Public Advocate are confidential documents which are of the type protected against disclosure and that Applicants satisfy the test for entitlement to a protective order of

^{1/} See attached letter from Jessica H. Lavery to Richard E. Shapiro, December 20, 1984.

confidential documents set forth in Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC 408, 416-17 (1976). See attached Affidavit of Roger M. Nelson. In Wolf Creek, the Appeal Board, while noting that there is no regulation which establishes standards for the issuance of a protective order concerning non-agency records, held that the test for entitlement to a protective order of confidential documents is that "(1) the information in question [is] 'of a type customarily held in confidence by its originator'; (2) there is 'a rational basis for having customarily held [it] in confidence'; (3) 'it has, in fact, been kept in confidence'; and (4) 'it is not found in public sources.'"

Personnel evaluations, such as those requested here, are customarily held in confidence by the companies who generate them. In Trenton Times Corp. v. Board of Education, 138 N.J. Super. 357, 351 A.2d 30 (1976), the Court found that personnel records and evaluations of a school superintendent were private matters not subject to the public's right to know. The Court stated:

Personnel records . . . include employees' performance ratings. The policy to keep performance ratings confidential has been adopted: first, to protect the right of privacy of the government employee; second, because the evaluations are subjective opinions of the performance of the employee that vary with the person giving the rating; third, public disclosure would impede receiving candid evaluations; and fourth, a supervisor could use the public nature of these ratings as a

vindictive mechanism against employees he disliked. The lack of objective criteria, the potential for vindictiveness, the lack of an opportunity for the employee to rebut statements made in the rating, and a substantial potential for abuse leads to the conclusion that these ratings should be kept confidential.

351 A.2d at 33. Finally, the United States Supreme Court has recognized that "[t]he sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice." Detroit Edison Co. v. National Labor Relations Board, 440 U.S. 301 (1979).

There is a rational basis for protection of this type of information. Protection of performance evaluations against disclosure is based not only on the individual's need for privacy, but on the company's use of these evaluations as a management tool.^{2/} In Missouliau v. Board of Regents, ___ Mont. ___, 675 P.2d 962 (1984), the Court recognized the value of using confidential personnel evaluations as an aid in improving performance and as allowing employer and employee to openly express opinions, offer suggestions, and communicate.

^{2/} See also, Wylie v. Mills, 195 N.J. Super. 332, 478 A.2d 1273 (Law Div. 1984) holding that there is a qualified privilege protecting self-evaluation of corporate actions from discovery as a matter of public policy.

PSE&G does, in fact, maintain personnel evaluations in confidence. PSE&G's policy with regard to personnel files is set forth in the attached Affidavit of Roger M. Nelson which states that "personnel records will not be made available to third persons absent the express written authorization of the employee whose records are requested. The employee's written authorization must include all of the employee's personnel records and may not be limited to only a part of those records." Affidavit at ¶2. Similarly, "[w]hile employees may review their completed Performance Appraisal Forms at their request, they are not given copies of their appraisals nor are they allowed to make copies of the completed form. Information in personnel files concerning matters such as grievances, arbitration hearings, governmental hearings, legal actions, investigations, customer complaints, or individual matters critical of an employee may not be reviewed by employees." Affidavit at ¶3. Thus, much of the information requested by the Public Advocate is not even available to PSE&G employees themselves. Inquiries made by PSE&G employees about the contents of the personnel files of other employees are "permitted only when that information is pertinent to the effective conduct of business." Affidavit at ¶4. In effect, the information is provided to persons within PSE&G only on a "need to know" basis.

Finally, the information requested is not found in public sources. PSE&G has, in fact, kept the documents

referred to in Question IV.25 in confidence. Affidavit at ¶¶2-4.

III. The Release of Personnel Records
Is Not Otherwise Warranted

The Public Advocate has not established that the disclosure of the requested information is necessary to the establishment of a full and accurate evidentiary record on Contention 2 nor that it is necessary to a proper decision in the matter. Use of the requested material at hearing could lead to the consideration of extraneous matters and lengthen the hearing process all out of proportion to whatever marginal relevance to Contention 2 the personnel evaluations may have. Any disclosure of personnel material would have a chilling effect on relations between PSF-G employees and their supervisors and would inhibit candor in future job evaluations.^{3/} Provision of this information amounts to an unwarranted invasion of privacy, particularly in view of Applicants' production of vast quantities of documents.

Conclusion

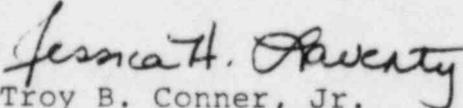
In summary, Applicants object to Question IV.25 in its entirety as overly broad and unreasonably burdensome. Applicants also object to Question IV.25 on the grounds that production of the documents, in light of their confidential

^{3/} See Trenton Times, supra, at 33.

nature, will result in annoyance and embarrassment and will adversely affect Applicants' legitimate business interests, contrary to Section 2.740(c).

In light of the short time now available for discovery, the fact that this request is made more than a year after initiation of the discovery period, and the fact that Applicants have already or will produce vast quantities of information relevant to the admitted contention, Applicants have established good cause for the issuance of a protective order. Applicants have also established that they satisfy the test for entitlement to a protective order of confidential documents. Therefore, Applicants move the Board to issue an order protecting Applicants from producing the documents requested in Question IV.25.

Respectfully submitted,
CONNER & WETTERHAHN, P.C.


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