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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Ivan W. Smith, Chairman
Gustave A. Linenberger, Jr.
Dr. Jerry Harbour

In the Matter of	)	Docket Nos. 50-443-OL
	)	50-444-OL
PUBLIC SERVICE COMPANY	)	(ASLBP No. 82-471-02-OL)
OF NEW HAMPSHIRE, et al.	)	(Offsite Emergency Planning)
	)	
(Seabrook Station,	)	
Units 1 and 2)	)	March 23, 1988

MEMORANDUM AND ORDER
(Protecting Information From Public Disclosure)

I. BACKGROUND

On September 18, 1987 Applicants filed in this proceeding its Seabrook Plan for Massachusetts Communities (SPMC). Asserting personal privacy considerations, Applicants deleted or "redacted" certain information concerning the identity of individuals and organizations needed to implement the plan.

In its memorandum and order lifting the stay of low power operations, the Commission required that the Applicants must provide to the NRC Staff and to FEMA any of the redacted information that the Staff and FEMA deem necessary for their review of the plan. The Commission

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directed further that, prior to low power operation, Applicants must indicate their willingness to provide "the detailed information [deemed necessary by the Staff and FEMA] to the other parties to the proceeding, if necessary under appropriate protective orders from the Licensing Board." The Commission expected that the Licensing Board would fashion orders that would ". . . allow full litigation of contested issues without unnecessarily violating personal privacy." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-87-13, 26 NRC 400, 404-05 (1987).

On December 30, 1987, Applicants provided to the Staff information requested by the Staff and requested that the information be withheld from public disclosure pursuant to 10 C.F.R. 2.790 on the grounds that it contained commercial proprietary information. The Staff granted the request on February 5, 1988. During the evidentiary hearings the Massachusetts Attorney General (Mass AG) requested the information. The Applicants agreed to provide it, but only under a protective order withholding the information from the general public. The Attorney General objected to a protective order as a matter of policy. Tr. 8398-8425, 8987-9004. The matter stood at an impasse until February 10, when the Massachusetts Attorney General, who is the lead intervenor on this issue, agreed to a temporary protective order until the matter could be resolved on the

merits. Tr.9724-29. On February 17 the Licensing Board issued a temporary protective order. Active parties have executed affidavits of non-disclosure where required and we understand that most of the information has been provided in accordance with the terms of the temporary protective order.

In the meantime, Rockingham County Newspapers requested the information under the Freedom of Information Act (FOIA) (5 U.S.C. 552), which request was denied by the Staff on February 25 on the grounds that the information was proprietary, apparently under FOIA Exemption 4 as restated under Part 9 of the NRC regulations. 10 C.F.R. 9.5(4).

The Massachusetts Attorney General filed his motion and memorandum opposing the entry of a permanent protective order on February 19, to which Applicants replied on February 25, with the Staff responding on March 3.

II. DISCUSSION

A. Introduction

The Massachusetts Attorney General opposes a continuation of the protective order on the general grounds that one is not needed, that the Massachusetts public has a right to know who will be the responders in an emergency, and that a protective order will foreclose a full litigation of the plan by current and potential intervenors.

In response, Applicants argue that an extended protective order is needed to protect the privacy of the suppliers of services and facilities in the plan for Massachusetts communities, and that Applicants would be harmed in their commercial interests in the plan if the suppliers were publicly identified and subject to intimidation by persons not under the control of the Licensing Board.

For its part, the NRC Staff emphasizes the Applicants' commercial right to have the information withheld from public disclosure, and would have the Board recognize the privacy rights of the suppliers.

In our rulings below, we extend the protective order through discovery to the beginning of the hearing on the plan for the Massachusetts communities. We will then reassess the need for protection. We agree with the Applicants and Staff that there is a significant probability that the suppliers' rights to privacy might be invaded absent a protective order. The Applicants have made at least a threshold showing that they have a protectible commercial or proprietary interest in the withheld information. Their initial request to the Staff for confidential treatment should not be mooted by compulsory discovery in this proceeding. Our major focus, however, is on preserving the integrity of this proceeding. Unrestricted disclosure of the identity of the suppliers

prior to the evidentiary hearing will have the dangerous probability of allowing potential witnesses to be intimidated. In fact the very factual foundation of the litigation could be distorted if uncontrolled disclosure of the relevant information is authorized.

B. Authority to Issue Protective Order

The Commission itself recognized that a protective order might be required to avoid violating personal privacy. Seabrook, supra, 26 NRC at 405. The Commission's general discovery rule authorizes its presiding officers to make orders required to protect ". . . a party or person from annoyance, embarrassment, oppression . . . ." 10 C.F.R. 2.740(c). The exemptions to the FOIA have been incorporated into the NRC discovery rules. Thus trade secrets and commercial financial information may be withheld from disclosure after balancing the interest of the public in disclosure and the interests of the persons urging non-disclosure. 10 C.F.R. 2.790(a)(4); 2.740(c).

Judicial officers have the inherent authority and responsibility to assure a fair hearing to the parties before it. Toward this end the NRC rules and the Administrative Procedure Act empower presiding officers to regulate the course of those hearings. 5 U.S.C. 556(c)(5); 10 C.F.R. 2.718(e).

Further, the Commission's Licensing Boards must predicate their decisions upon a record supported by reliable, probative and substantial evidence. 10 C.F.R. 2.760(2)(c). See also 5 U.S.C. 556(d). Our authority to regulate the course of the proceeding therefore necessarily authorizes us to protect the foundation of the evidentiary record from deliberate distortion through annoyance, intimidation or embarrassment of potential witnesses or persons involved in the subject matter of the proceeding, as we explain below.

No party seriously disputes our general authority to impose orders restricting the disclosure of information. The dispute centers on whether the intervenors' litigative needs will be compromised, whether a protective order is needed in this case, and whether any such need outweighs the strong public interest in conducting the proceeding ". . . as open as possible to full public scrutiny." Kansas Gas and Electric Company, et al. (Wolf Creek, Unit 1), ALAB-327, 3 NRC 408, 417 (1976).

A corollary to our finding that the Board is authorized to restrict the public dissemination of the protected information, in face of the strong public policy favoring disclosure, is that the restriction should be no greater than needed to protect the interests entitled to protection. Wolf Creek, Id., and at 418. Seattle Times Co. v. Rinehart, 467 U.S. 20, 32; 81 L. Ed. 2d 17, 26 (1984), citing

Procunier v. Martinez, 416 U.S. 396, 413; 40 L. Ed. 2d 224 (1974) and other cases. We have followed this principle in considering the need for and the terms for extending the protective order.

C. Need for Protective Order

As the Massachusetts Attorney General recognizes, "[t]his is to be sure an unusual situation." Memorandum at 5. The emergency planning aspects of the Seabrook application have captured the public's attention as much as any proceeding. Even the candidates for the office of President of the United States found it appropriate to address the issue during the recent campaign in New Hampshire. The Commission itself commented that the Seabrook plant is surrounded by an "emotionally charged atmosphere" -- a fact to which the Board can attest from its own experiences during the hearings.

The Board has had an opportunity over many weeks to hear from and observe many who live near the Seabrook Station, including many who live in the Emergency Planning Zone. Most of those we have heard strongly oppose the licensing of Seabrook, yet are civil and decorous. The Seabrook opponents by and large are as dedicated to civil order and to a disciplined society as any people anywhere.

There is, however, a proportionally small but aggressive minority of Seabrook opponents, including some

members of the Clamshell Alliance, who have demonstrated by civil disobedience their willingness to frustrate the licensing process by extra-legal means. They are not parties to the proceeding and are, therefore, beyond the control of the Licensing Board. If, as we fear, this group would seek to influence the licensing process by interfering with the agreements and expectations between Applicants and the suppliers in the plan for Massachusetts, there is little the Board can do except to deny them the opportunity.

There is another aspect of the emergency planning phase of the proceeding that sets it off from other administrative proceedings. In this case the Board is required to make predictive findings, i.e., there is, or there is not, reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency at Seabrook. 10 C.F.R. 50.47. This fact gives rise to a rare opportunity to influence the outcome of the adjudication by changing the facts upon which the prediction must be made. Our concern therefore is that some undisciplined opponents to the Seabrook Station will improperly interfere with the arrangements between Applicants and the suppliers for the purpose of influencing the hearing. This finding is unprecedented, required by the novel circumstances of this proceeding. Our reasoning should be well understood.

Stated another way, if the arrangements between the Applicants and the suppliers were made solely for the purpose of providing emergency services and facilities in the Massachusetts communities, without regard to the licensing process, we would have no concern that the arrangements would be tampered with -- nor any authority over the matter. It is only because the arrangements have a separate and special use in support of the license application that our cognizance over them and the need for protection arises.

The intervenors argue the matter from a slightly different direction. They state that, if in fact the community influences suppliers to abbrogate their arrangements with Applicants, that is simply a fact of life which must be accounted for when considering whether adequate protective measures can and will be taken. And, in any event, the argument goes, sooner or later the information must be produced. The Board, however, does not accept this concept of a self-fulfilling, circular chain of events. No one seriously suggests that a rational community would oppress the potential suppliers of emergency services solely because they would serve in an actual radiological emergency. The only reason for pressuring the potential suppliers would be to prevent their arrangements with the Applicants from being used in the licensing proceeding. If

the Board can interrupt the cycle by an appropriate protective order, it is our responsibility to do so.

D. Personal Privacy Considerations

The Massachusetts Attorney General points to the decision in Houston Power and Lighting Company (Allens Creek, Unit 1), ALAB-535, 9 NRC 377, 400 (1979), for the proposition that privacy protection to be afforded the suppliers in this proceeding was not granted in the similar Allens Creek case. There, the National Lawyers Guild sought to protect the identity of its intervening members to spare them harassment because of their asserted anti-nuclear views. The Appeal Board, drawing a distinction between the emotional climate surrounding the civil rights movement (where privacy needed protection) and the controversy attendant to issues of nuclear power, held that the identity of the Guild members had not been shown to require protection solely because of their views. Id. at 399, 400. The case before us is quite different. As noted above, the Board through its own observations has determined that there are those who might harass the suppliers if it would suit their purposes, and that they might perceive a rational incentive for such harassment.

As argued by the Mass AG, there may be some doubt whether the privacy rights to which the suppliers might be entitled has a foundation in the exemptions to the Freedom

of Information Act. The respective provision of the NRC rules, Section 2.790(a)(6), pertains to medical, personnel, and similar files relating to the individual personal life. But, as noted above, our discovery rules do not end with Section 2.790. The general NRC discovery rule on protective orders, Section 2.740(c), and Federal Rule of Civil Procedure 26(c), upon which the NRC rule was modeled, clearly permit protection from annoyance and oppression independently of FOIA exemptions.

The Attorney General asserts his right to communicate the protected information to the general public. Both the Attorney General and Applicants have directed the Board's attention to Seattle Times Co. v. Rinehart, supra, 467 U.S. 20, which is, indeed, instructive on that point. There the Court upheld a Rule 26(c) privacy-type State protective order designed to prevent harassment of members of a controversial religious organization. The Court found that pre-trial discovery limitations on the dissemination of such information does not offend the First Amendment. Thus the Attorney General, gathering the information about the suppliers solely through the discovery authority given for this proceeding, is reasonably restrained from disseminating that information. He would not have the information but for the needs of this litigation and he has no First Amendment rights to information gathered only through that means. Id. at 32.

It should be noted that the protective order does not restrain the dissemination of identical information obtained through independent means. Id. at 34.

The Board therefore concludes that the suppliers of services and facilities in the plan for Massachusetts communities have an independent right to have their arrangements with the Applicants held private. This right of privacy is a separate and adequate basis in itself to extend the protective order. We also hold that the Applicants have sufficient privity with the suppliers to assert their privacy rights for them. As a practical matter the suppliers cannot raise privacy claims on their own. Only Applicants can do this effectively. United States v. Lasco Industries, Div. of Phillips Indus., 531 F. Supp. 256, 263 (N.D. Tex. 1981). (Employer may assert right of employee to privacy in medical records against Federal subpoena.)

E. Applicants' Commercial Interests

It is obvious that the Applicants have a substantial commercial interest in the arrangements with the suppliers. Not only has money been expended in developing the arrangements, as the Staff points out, but the secondary damages attendant to any disruption of the arrangements through tortious interference would be very great in terms

of delay, extra litigative costs, or perhaps the outright denial of a commercially valuable license to which Applicants might be entitled.

The Commission's rules authorize the non-disclosure of "[t]rade secrets and commercial or financial information obtained from a person and privileged or confidential." 10 C.F.R. 2.790(a)(4). This protection, as we have noted, has its genesis in the Freedom of Information Act, Exemption 4. 552 U.S.C. (b)4. Traditionally the type of information protected by Exemption 4 has been confidential commercial or financial information the disclosure of which would "cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks and Conservation Association v. Morton, 498 F.2d 765, 769-70 (D.C. Cir. 1974) ("National Parks I"). Although the Applicants do not allege a specific competitive injury from the disclosure of the identity of the suppliers, and there is no direct competitive significance to the information, any serious economic damage would weaken a utility's competitive position vis-a-vis other fuels. Furthermore, the economic trend is for increased competition among central-station electricity generators. The Board believes that Applicants have a real competitive interest in the commercial information. In addition, as the NRC Staff argues, substantial economic harm to the information's owner may be protected under Exemption 4 even where no

competitive position is at risk. Staff response at 7, citing generally, 9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System, 721 F.2d 1 (First Cir. 1983). Finally, Exemption 4 is not by its terms limited to considerations of competitive harm.

F. Intervenors' Due Process Rights

The Attorney General argues that he will be denied a "full litigation" of the plan for Massachusetts communities under a protective order because he would be denied access to hundreds of third party sources of information about the suppliers. Memorandum at 14-15. There is no need to dwell on this point. We are simply not moved by the argument and can find no need for any party to consult in the community at large in its discovery efforts.

The protective order is very narrow. It permits access to the information by the attorneys, secretaries, and investigators of the office of Attorney General. It is similarly flexible with respect to other intervenors. The intervenors are permitted to conduct normal discovery-type interviews with the suppliers. In the case of business firms, they are permitted to contact the cognizant employees. If any intervenor, in a particular situation comes to a dead-end because it may not contact, say, a former employee without violating the protective order, it

can first seek an exception from the Applicants, then from the Licensing Board.

The Attorney General also makes a due-process argument on behalf of unnamed potential intervenors. This argument is even less convincing than the argument on the AG's own behalf, even assuming that he has standing to raise the matter. Potential intervenors have no discovery rights. Discovery is available only to parties to a proceeding. 10 C.F.R. 2.740(a), (b). Memorandum at 12-13.

F. Other Withheld Information

Also redacted from the plan for the Massachusetts communities was a category of information in Appendix H, said to be the names and phone numbers of hundreds of members of the New Hampshire Yankee offsite response organization. The Staff did not request this information. Therefore the Applicants have not provided it to the intervenors under the temporary protective order. The Attorney General demands the Appendix H information. He argues that the Commission, in CLI-87-13, intended for the intervenors to have the entire plan for the Massachusetts communities. Applicants, looking at the plain language of CLI-87-13 note, that under that order they need only indicate their willingness to give to the other parties the detailed information requested by the Staff and FEMA. Id., 26 NRC at 405.

Neither the Applicants nor the Massachusetts Attorney General has interpreted the Commission's order correctly. The Attorney General has no basis for his opinion that the Commission intended that the entire plan be provided to the intervenors. The language is clear enough on that point. Id.

On the other hand, Applicants misread CLI-87-13 as stating that they are obliged to provide the intervenors with only the information requested by the Staff. That construction would imply that intervenors' discovery rights are controlled by the requests of the Staff or perhaps FEMA.

The Commission was simply explaining to the Applicants that, at a minimum and without undue delay, the intervenors should have whatever information the Staff and FEMA use to perform their evaluations. The Commission had no intention of restructuring the discovery rules in that respect. The standard for discovery remains as always: "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding . . . ." 10 C.F.R. 2.740(b)(1). The information contained in Appendix H is relevant to the proceeding. The question to be decided is whether the information is privileged or should otherwise be protected in accordance with general discovery principles. This matter was discussed during the telephone conference call of March 21. Tr. 9831-40. The foregoing interpretation of CLI-87-13 was explained to the

parties. While counsel for Applicants points out that none of the Appendix H information would be discoverable until the contentions are filed, to move the matter along, Applicants are willing to produce the information forthwith under suitable protection. E.g., Tr. 9838 (Dignan).

Accordingly, the Board directs that the Appendix H information be provided under the protective order extended today. However we authorize the Applicants to redact home phone numbers because they are irrelevant to the issues, private, and would serve no discovery purpose. We also authorize the Applicants to redact the emergency phone numbers because there is no apparent discovery purpose for them and because the potential damage in the inadvertent release of the emergency numbers would outweigh any benefit from producing them.

II. ORDER

The protective order approved on February 17, 1987 is extended until the beginning of the evidentiary hearing on the Seabrook Plan for the Massachusetts Communities, or until further order of the Board. Prior to the beginning of the evidentiary hearing, Applicants may petition for further relief. Prefiled testimony containing protected information shall be withheld from public disclosure in accordance with

the terms of the order. To the extent possible, protected information shall be separated from other portions of prefiled testimony.

THE ATOMIC SAFETY AND LICENSING BOARD

Gustave A Linenberger, Jr.
ADMINISTRATIVE JUDGE

Jerry Harbour
ADMINISTRATIVE JUDGE

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

March 23, 1988