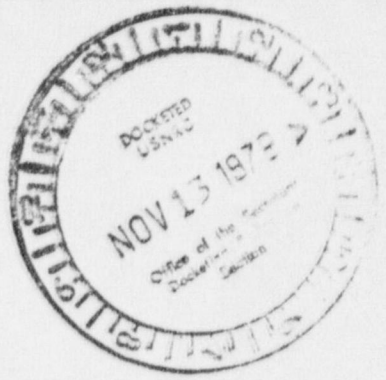

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PUBLIC SERVICE COMPANY OF OKLAHOMA, ASSOCIATED ELECTRIC COOPERATIVE, INC. AND WESTERN FARMERS ELECTRIC COOPERATIVE, INC.	)	Docket Nos. STN 50-556 STN 50-557
	)	
(Black Fox Station, Units 1 and 2)	)	

NRC STAFF RESPONSE TO GENERAL ELECTRIC MOTION TO QUASH INTERVENOR'S SUBPOENA

I. Introduction

On October 18, 1978, this Licensing Board issued a subpoena to General Electric Company (G.E.) requiring it to produce a copy of a document commonly referred to as the "Reed Report." G.E. filed a motion to quash the subpoena on October 30, 1978. The NRC Staff suggests certain modifications in the subpoena and associated procedures but otherwise opposes the motion to quash.

II. Background

In a letter dated April 18, 1978, Counsel for the Intervenors informally requested that NRC Staff Counsel furnish a copy of what has become known as the Reed Report. In a letter dated May 5, 1978, Staff Counsel informed Intervenors that the Reed Report had been found to contain proprietary information and consequently could be released only in accordance with the provisions of 10 C.F.R. §2.790. Enclosures to that letter in the form of the February 9, 1978 letter from NRC Chairman

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Joseph M. Hendrie to Congressman John D. Dingell explained that the NRC Staff had examined the Reed Report and ascertained that the NRC was aware of all of the 27 items in that Report which might be construed as having any safety significance.

In a motion dated May 19, 1978, Intervenors requested that the presiding Atomic Safety and Licensing Board admit the following additional[1/] contention:

> Intervenors contend that the Applicant and Regulatory Staff have not adequately assessed the impact of numerous unresolved safety items, both singularly and collectively, in evaluating and reviewing the Black Fox nuclear plant in conjunction with the application. As a result of this inadequate assessment, the Black Fox systems, structures and components may have to be backfitted to current regulatory requirements or redesigned. The list of unresolved BWR safety items [is] discussed by General Electric in the proprietary General Electric Report, "Reed Task Force Report."

As grounds for the admission of this new contention, Intervenors alleged generally that what they termed the "27 unreviewed items" contained in the Reed Report were of possible safety significance and that the information in the report should be made available to them so as to permit a complete and thorough review. No explanation for the late submission of that contention was given by the Intervenors. See Intervenors' Motion to Add New Contentions dated May 19, 1978.

In an oral ruling at the June 29, 1978 prehearing conference,[2/] the Licensing Board denied the motion on the grounds that:

1/ The Licensing Board had ruled on the admissibility the original contentions in this case in its August 4, 1976 Special Prehearing Conference Order.

2/ Later incorporated by reference in the July 7, 1978 Board Order in the Section 2.752 prehearing conference.

(1) Mr. Hubbard, one of the Intervenors' consultants, had noted the existence of the Reed Report in testimony before the Joint Committee on Atomic Energy on February 18, 1976 and thus had been aware of the existence of the report since that time;[1/] and (2) Mrs. Ilene Younghein, an Intervenor had, on April 1, 1976 filed a copy of the Hubbard testimony as a part of her amended petition to intervene. Tr. 4170-73. The Licensing Board specifically found that at this late date, an argument about the production of the Reed Report would almost certainly broaden the issues of the case and most certainly delay the proceeding. Tr. 4172-73.

On October 11, 1978, Intervenors' new counsel,[2/] during cross-examination of a General Electric expert on the subject of intergranular stress corrosion cracking, asked questions about that witness's knowledge of the Reed Report and orally moved for production of that Report insofar as it was concerned with all of the Intervenors' currently admitted contentions, including IGSCC. Tr. 4700-09. Following arguments on the motion, the Licensing Board ordered the parties to negotiate a protective agreement and the Applicant to produce the Reed Report for inspection by counsel for the parties under protective order, only insofar as it related to the broad area of the "27 safety issues." Tr. 4721.

1/ Subsequent information revealed that Intervenors' consultants were working at General Electric during the time of the preparation of the 1974 report, had furnished inputs to that report but never saw the contents of the finished report. Tr. 4704.

2/ On August 15, 1978, former Counsel, Andrew T. Dalton, Esq. withdrew as Counsel for Intervenors and Robert A. Franden, Joseph Ferris, Esq. entered an appearance on August 17, 1978. Later, Robert Woodard, Esq. also entered an appearance for Intervenors.

After being informed that Applicant did not have a copy of the Reed Report, Tr. 4721, 4725-26, and advising that it would issue a subpoena for the subject documents, Tr. 4961-2, the Board deferred further ruling on the production of the Report until October 16, 1978 in order that Counsel for the Applicant might reach some accommodation with the General Electric Company regarding production of the Report. Tr. 4962. At a meeting with Counsel for the Applicant, Staff and Intervenors, on October 15, 1978, General Electric offered to settle the subpoena dispute by (1) preparing and furnishing all parties with a Reed Report Summary (Summary) which would consist of a discussion, on an issue-by-issue basis, of all matters addressed in the Reed Report having to do with safety, including a status report on those issues from a current NRC licensing standpoint; and (2) a copy of the full Reed Report for in-camera inspection by the Licensing Board so that it could determine whether the Summary was a faithful rendition of the contents of the Reed Report.[1/]

On October 17, 1978, after hearing further argument on the subject, the Licensing Board ruled that the Applicant and/or General Electric Company must produce the entire Reed Report for inspection by both Intervenors' Counsel and their experts, MHB Associates,[2/] for the purpose of cross-examination.[3/]

1/ General Electric, October 30, 1978 Brief Accompanying Motion to Quash at 19; Tr. 5547-53.

2/ Messrs. Minor, Hubbard and Bridenbaugh.

3/ Tr. 5727.

III. Argument

A. Subpoenas

Once a subpoena has issued, a party seeking relief from production of the evidence sought has the burden of proving that it should not provide that evidence.[1/] 10 C.F.R. §2.720(f) provides that upon a timely motion by the person to whom the subpoena is directed on adequate notice to the party at whose instance the subpoena was issued, a Licensing Board can:

1. Quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or
2. Condition denial of the motion on just and reasonable terms.

B. Reasonableness

The Staff believes that the record as a whole[2/] demonstrates that with respect to at least one, and perhaps more, specific contentions in issue in this proceeding, that the Reed Report contains information of relevance.

While timeliness may bear on the question of reasonableness, it is not dispositive of the matter. The actual circumstances must be assessed to determine whether a request is unreasonably out of time. The Appeal Board has indicated that the failure of a party to take advantage of discovery cannot preclude the exercise of other rights it may possess.[3/] In the Clinton

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1/ Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 463 (April 26, 1974).

2/ This includes the discussions contained in the pleading filed in connection with Intervenors' May 19, 1978 motion to add contentions.

3/ Illinois Power Company, (Clinton Power Station Units 1 and 2), ALAB-340, 4 NRC 27, 33 (1976)).

decision, however, the Appeal Board indicated that in a particular case a Licensing Board must balance the effects of delay of the proceedings against such countervailing factors as the alacrity with which the information was requested when its materiality became apparent, the relationship of the information requested to unresolved questions in the proceeding, and the overall importance of the information sought to a sound decision. A showing on these factors obviously would satisfy the good cause exception to the requirement to complete discovery by the second prehearing conference.

In this situation, the Board must also consider the balance between a company's need to protect its proprietary information (10 C.F.R. §2.790) and the public interest in developing a full and complete record. The Appeal Board has set forth the criteria to be applied when determining whether to allow discovery of §2.790 information in Commission adjudicatory proceedings.[1/] Discovery may be permitted in the Licensing Board's discretion when: (1) the party seeking the information demonstrates that it is relevant to its contentions; (2) release of the information is made pursuant to a protective order; and (3) the requesting party demonstrates that it possesses the necessary technical competence to evaluate the information.

The above considerations form the matrix within which this Licensing Board must consider G.E.'s motion to quash pursuant to 10 C.F.R. §2.720(f).

1/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977).

The two essential issues raised are whether the subpoena was unreasonable and whether denial of G.E.'s motion should be conditioned on just and reasonable terms. As developed in this response, the NRC Staff does not believe the subpoena was unreasonable but it does urge that denial of G.E.'s motion be conditioned in the manner required by Diablo Canyon.

General Electric's objections as to the reasonableness of the order directing production of the Reed Report pursuant to subpoena raise three considerations bearing on the issue of reasonableness:

1. Scope of the subpoena.
2. Timing of the subpoena.
3. Necessity of the information for a sound decision.

C. Scope of the Subpoena

Although there was some confusion as to the amount of material constituting the requested "Reed Report", the material sought to be produced consists of a 21-page summary and a 140-page main report, and not the five-foot shelf of supporting information.[1/] This being the extent of the documents, the NRC Staff does not believe that physical size or difficulty in reproduction is a valid ground for objection.

1/ The Staff understands that the five-foot shelf of background data for the Reed Report has since been destroyed. Tr. 5555-58.

As to the breadth of the subpoena in terms of subject matter, the NRC Staff believes that the subpoena, as now worded, is at this point overly broad in scope in that it requires the production of the whole Reed Report and not merely those portions of the Report which deal with matters which the Intervenors have placed in issue by virtue of their contentions.[1/] While it is clear that the information sought must bear upon the issues to be litigated in the proceeding, the material sought is not yet in the hands of the Intervenors, and thus the Licensing Board may still limit the material to be released to those portions of the Report which are germane to the admitted contentions.

G.E.'s statement that the Report was originally compiled for essentially commercial purposes (plant reliability and availability), G.E. Brief at 3, in no way rebuts Intervenors' claim of relevance. On page 5 of the G.E. Brief, Dr. Reed admits that "although in the course of the Study Group's review, nuclear safety aspects were considered, this study was not a safety review." (Emphasis added.) This quote and others tend to demonstrate that while a study can be compiled primarily for commercial purposes, it still can contain safety-related information and thus be producible under a subpoena.

D. Timeliness and Prejudice

As to the timeliness of the Intervenors' request, it is clear that the subpoena is probably untimely if it is considered a request for a new

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1/ Clinton, supra, Diablo Canyon, supra; Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 460-61 (1974).

contention,[1] or as a request is for additional discovery,[2] or even if the request is simply to subpoena material for evidentiary purposes.[3] As discussed earlier, even though discovery is completed, material may be subpoenaed.[4] In the instant case, there is little information on the record as to the delay which might be expected in the safety hearings themselves by furnishing the information sought. However, due to the limited nature of the material (160 pages, maximum), the fact that the material will be used only for cross-examination of expert witnesses on relevant contentions, Intervenors' Brief at 4, the fact that the Licensing Board must make a determination as to relevancy of certain sections and the fact that the radiological health and safety hearings will not be completed in December of 1978, thus forcing the continuation of the hearings until January, 1979 or beyond, the Staff believes the potential for long periods of hearing delay is minimal. (See November 9, 1978 NRC Staff Response to Applicant's Motion to Set a Hearing Schedule).

1/ Tr. 4172-73; 10 C.F.R. §2.714; Louisiana Power and Light Co. (Waterford Steam Electric System, Unit 3), LBP-73-31, 6 AEC 717 (September 13, 1978); dismissed as interlocutory, ALAB-168, 6 AEC 1155 (December 20, 1973); Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975).

2/ 10 C.F.R. §2.752; 10 C.F.R. §2.740(b)(1). The Section 2.752 hearing was held on June 29, 1978, thus theoretically cutting off discovery at that point.

3/ See Para. IV(b) of App. A to 10 C.F.R. Part 2.

4/ Clinton, supra.

E. Necessity of Information for Resolution of the Issues (materiality).

Clinton requires the Licensing Board to consider whether there is a need for the material in question to decide the issues in dispute. The Licensing Board should examine the material in question and make a judgment as to whether this material is necessary to make the findings in this case.

The NRC Staff has examined the Report in question and found that there was no information contained therein which was not known to the NRC in 1976. However, Intervenors' point is well taken that it is not required to accept statements by Counsel and experts of the Staff, General Electric and the Applicant as to the existance or non-existance of safety issues.[1/] Accordingly, absent any showing that the Intervenors' consultants are unreliable or likely to divulge the contents of the Report, Counsel for the Intervenors, with the aid of their consultants, are entitled to review those portions of the Report this Board may deem relevant to their contentions.

[1/] An analogous situation occurred in the case of Murphy v. New York and Porto Rico S.S. Co., 27 F. Supp. 878 (S.D. Ny 1939). In that case, in response to an order to produce for reproduction and inspection any reports made in the course of business with reference to the Plaintiff seaman's injuries, Defendant's Counsel produced a letter stating that Defendant's authorized representatives informed the writer that the official log book of the ship made no mention of Plaintiff's injury. The Court held that its order had not been complied with and that Plaintiff need not rely upon the representations of Defendant's Counsel.

Of course, this requires the Board to review the Reed Report in the first instance prior to a release of the material to Intervenors to make the necessary record finding of relevance of contentions.

F. Adequacy of Protection of Proprietary Material

If the Licensing Board decides that the Reed Report information is necessary for a valid decision in this case, it is under a duty to ascertain that that sensitive proprietary information is revealed to only reliable persons who are not likely to divulge that information to others and thus unfairly weaken General Electric's competitive poisition in the industry. The burden of demonstrating that a protective order is insufficient protection for G.E.'s competitive position rests with G.E. In this regard, Counsel for the Staff notes that nowhere in the General Electric brief is there any indication of what interests it wishes to protect nor does it argue that MHB associates are unreliable.

It has been difficult to identify the specific harm perceived in the production to Intervenors. If the matter is primarily about the material's commercial nature and the harm perceived is disclosure to competitors and/or disclosure as public commercial information, the portions related to safety, if culled out from other matters, may have little effect.

The Staff notes that G.E.'s perception of risk associated with disclosure of the Reed Report to the Intervenors' consultants is a subjective test, not necessarily congruent with the amount of actual risk undertaken with

MHB under a protective agreement. The Staff believes that the actual risk test, not the subjective risk test espoused by G.E., is the correct test to apply in the instant case.

In regard to General Electric's view that a protective order would be lacking in sanctions and enforcement authority, the Staff notes that whether the sanctions are adequate or not, the Appeal Board in Diablo Canyon, supra. found that even sensitive security plans could be released under protective order if the amount of information disseminated were limited to relevant issues raised by the Intervenors. As has been urged by the Staff above, limiting the Intervenors to only that information relevant to their contentions should further reasonably limit and minimize the danger to General Electric's competitive position.

IV. Recommendation

Initially, the Licensing Board must determine whether any part of the Reed Report satisfies the Clinton standard. The Staff believes that adequate argument on this issue can be made in-camera with access provided only to counsel. This initial threshhold test of relevance and materiality would determine whether in fact the subpoena should be quashed. If the Licensing Board determines that it should not quash, then it should adopt the procedures outlined in Diablo Canyon. Those procedures suggest that:

1. Only those portions of the report which are both relevant to and necessary for the litigation of Intervenors' contentions need to be released to Intervenors' representatives.

2. Whatever information is released is pursuant to an adequate protective order.

3. The relevant portions of the report shall be released solely to individuals qualified to review it, i.e., Intervenors' attorney and its qualified expert.

In implementing the Diablo Canyon procedures, the Licensing Board should:

1. Order that a copy of the Reed Report and the Summary thereof referred to by General Electric in its October 30, 1978 Motion to Quash, be produced for the purpose of the Board's determination of the relevancy of portions of all of that report to the contentions in issue in this proceeding.

2. Order that a copy of the Summary be provided to all Counsel to aid in preparation of arguments on relevancy under a proper protective order.

3. Rule as to which portions of the Reed Report and/or Summary are relevant to the approved contentions in this case.

4. Balance the necessity of having the Reed Report material available to make a decision in this case against any probable delay in the hearing due to the production of this material.

5. Upon the Licensing Board's finding that the material is relevant and necessary to a decision in this case, and absent any substantial showing of the unreliability of Intervenors' consultants, MHB Associates, under the protection of a proprietary agreement drawn up by the parties,

the Board should order that those portions of the Reed Report/and or Summary which are relevant to the contentions in this case and which are material to the resolution of the safety issues in this case be provided to the NRC Staff, the Intervenors and their consultants, MHB Associates. A copy of the full Report should be retained by the Licensing Board for reference and to settle any later evidentiary or legal disputes as to relevancy and materiality of the Report.

6. Review the remainder of the Full Report and Summary and satisfy itself that no serious safety, environmental or common defense and security matters are contained therein in regard to non-contested issues. If any items of significant environmental or safety import are discovered by the Board, they should be readdressed to the parties as Board questions.

V. Conclusion

For the foregoing reasons, the NRC Staff urges the Licensing Board to deny G.E.'s motion to quash conditioned on the adoption of the procedures suggested herein.

Respectfully submitted,

L. Dow Davis

L. Dow Davis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 9th day of November, 1978.