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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

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JUL 31 1987

The Honorable J. J. Pickle
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Pickle:

This responds to your July 10, 1987 letter inquiring about the status of motions that the Government Accountability Project (GAP) and Citizens Concerned About Nuclear Power (CCANP) filed regarding the South Texas Nuclear Project and requesting an indication as to when low-power testing at the plant is scheduled to commence.

On July 15, 1987, the Commission denied a GAP/Billie P. Garde motion to quash an NRC subpoena requesting information about allegations regarding the South Texas facility. The Commission ordered Ms. Garde to appear before the agency pursuant to the subpoena. (See attachment)

The same day, the Commission addressed GAP's request for a task force independent of NRC Region IV and the Executive Director for Operations to handle the South Texas allegations. The Commission informed GAP that the agency could determine more appropriately whether the appointment of an independent task force is warranted, after careful review of the allegations in detail. (See attachment) Thus, the Commission encouraged GAP to provide the allegations to the agency. Ms. Garde appeared pursuant to the subpoena, but thereafter, refused to furnish either the allegations or the identities of the alleged to the agency. If GAP complies with this request, the agency will be in a position to make the appropriate determination regarding allegations management. Further delay by GAP in turning over the information will only result in further delay in the agency looking into the matters to which GAP has alluded in its communications with the NRC and others.

The Commission recently denied CCANP's motion to reopen and referred it to the NRC Staff for consideration under 10 C.F.R. §2.206.

Finally, low-power testing at the South Texas plant is scheduled to begin either the latter part of July or early August, 1987.

Sincerely,

Harold R. Denton
Director
Office of Governmental and
Public Affairs

FOIA-88-107

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PDR FOIA
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Attachments:

- 1. July 15, 1987 Memorandum and Order
- 2. NRC Letter to GAP, July 15, 1987

G/10

Attachment 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'87 JUL 15 12:15

COMMISSIONERS:

Lando W. Zech, Jr., Chairman
Thomas M. Roberts
Frederick M. Bernthal
Kenneth M. Carr

SERVED JUL 15 1987

In the matter of:
Houston Lighting and Power Company
(South Texas Project)

Docket Nos. 50-498 OL
50-499 OL

MEMORANDUM AND ORDER

On May 20, 1987, the NRC Executive Director for Operations (EDO) subpoenaed Billie P. Garde, Esq. of the Government Accountability Project (GAP) to testify before NRC personnel concerning safety allegations of current and former employees of the South Texas Project and any other safety allegations regarding the South Texas Project. The subpoena further requested Ms. Garde to provide any records or documents regarding the allegations.

Ms. Garde now moves to quash the subpoena, arguing that compliance with the subpoena would compromise the public health and safety, the EDO has no authority to issue the subpoena; and the attorney-client privilege and work product doctrine preclude divulgement of the information requested. Movant also requests oral argument on the motion.

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Houston Lighting and Power Company* and the NRC Staff filed responses to the motion on June 11, 1987. Ms. Garde also filed a reply to the NRC staff's response on June 25, 1987.

I. Background

Beginning in January 1987 Ms. Garde informed the NRC that GAP had commenced an investigation into allegations concerning the safety of the South Texas nuclear project. According to Ms. Garde, GAP received these safety allegations from approximately 36 current and former employees of the South Texas Project. GAP informed the NRC that upon completion of the investigation it would issue a public report, but in the interim it would not advise its clients to provide the allegations to the NRC Region IV office because of its lack of confidence in the office's ability to comply with regulatory requirements. Thus GAP advised the NRC that unless it was willing to provide independent inspectors to process the allegations, GAP would turn over the allegations to the State Attorney General's office, congressional committees, and other regulatory and municipal bodies interested in ensuring the public safety at the South Texas plant.

*The subpoena was issued in support of the staff's responsibility to pursue and resolve allegations bearing on NRC licensed activities, but was not issued in connection with a pending licensing or enforcement adjudication on the South Texas Project. Thus, the Houston Lighting & Power Company is not, strictly speaking, a party to the dispute over the subpoena and has no legally cognizable interest in its enforcement. Nonetheless, the Commission has considered the utility's views insofar as they may aid the Commission's resolution of the issues.

Correspondence followed between the NRC Executive Director of Operations (EDO) and GAP regarding allegations management. Essentially GAP desires an investigation of the allegations by an NRC employee or task force independent of Region IV. The EDO is of the position that the South Texas Project is located in Region IV, and the personnel in that region can adequately investigate the allegations; and in any event, GAP should turn over the allegations to the agency so that the agency can determine the proper handling of them. After repeated requests for the information, the EDO issued a subpoena requesting Ms. Garde to testify and produce documents regarding the South Texas allegations on May 26, 1987 at 9:00 a.m. at the NRC, Room 6507, 7735 Old Georgetown Road, Bethesda, Maryland. On May 22, 1987, attorneys for Ms. Garde and the NRC entered into an agreement. Ms. Garde agreed to move to quash the subpoena by Friday, May 29, 1987, and the NRC agreed to continue the appearance date for the subpoena from May 26, 1987 until fourteen days after the decision on the motion to quash, unless the parties agreed on an earlier date.

II. Analysis

A. Compliance With the Subpoena Would Compromise the Public Health and Safety.

Ms. Garde cites no authority for her first argument which is based on her belief that Region IV and the EDO could not competently investigate the allegations. Compliance with the subpoena would not compromise the public health and safety. In fact, the converse is true. Failure of the NRC to obtain the allegations would more likely compromise the public health and safety, particularly if the allegations are substantiated. Moreover, the

agency has demonstrated its commitment to protect health and safety through the rigorous and repeated efforts of the EDO to obtain the allegations, which culminated in issuance of the subpoena.

B: EDO's Authority to Issue the Subpoena

Contrary to Garde's assertions, the EDO clearly had the authority to issue the subpoena. The Commission is authorized to issue subpoenas pursuant to 42 U.S.C. 2201(c) (section 161c of the Atomic Energy Act). It further has the power to delegate this authority consistent with 42 U.S.C. 5849 (section 209(b) of the Energy Reorganization Act) and 10 C.F.R. 1.40, which provide that the EDO shall perform such functions as the Commission may direct. See also Atomic Energy Act § 161n, 42 U.S.C. 2201(n). The Commission delegated the authority to issue subpoenas to the EDO in 1982. This delegated responsibility has been incorporated in the NRC Manual Chapter 103-0214 which provides: "The [EDO], ... is specifically responsible for: ... issuing subpoenas under Section 161c of the Atomic Energy Act of 1954, as amended, where necessary or appropriate for the conduct of inspections or investigations." Thus, Garde's argument that the EDO lacked authority to issue the subpoena is without merit.

C. Attorney-Client Privilege and Work Product Doctrine

Ms. Garde claims that she can not comply with the subpoena, because the withheld information is protected by the attorney-client privilege and the work product doctrine. The Commission does not reach these issues, because

Ms. Garde has not provided sufficient factual information in her affidavit, retainer agreement, or other supplemental documents upon which the Commission can make the determination that all the relevant information that the subpoena requests is protected by the attorney-client privilege or work product doctrine. See N.L.R.B. v. Harvey, 349 F.2d 900 (4th Cir. 1965).

The Commission notes however, that based on a review of the information that Ms. Garde has provided, on its face, it appears that she possesses at least some information that is not withholdable under the attorney-client privilege or shielded by the work product doctrine. The attorney-client privilege applies if:

- (1) the asserted holder of the privilege is a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Eagle-Picher Industries, Inc. v. United States, 11 Cl. Ct. 452 (1987). The work product doctrine is a qualified privilege which protects documents and tangible items prepared in anticipation of litigation or trial. Id.; Fed. R. Civ. P. 26(b)(3); 10 C.F.R. 2.740(b)(2). Fact work product is discoverable upon showings of substantial need and inability without undue hardship to obtain the substantial equivalent of the materials by other means. Id.; see Hickman v. Taylor, 329 U.S. 495, 510-12 (1947); In re Murphy, 560 F.2d 326, 334 (8th Cir. 1977). Opinion work product (mental impressions, conclusions, opinions, or legal theories) may be discoverable upon extraordinary justification. See Hickman, 329 U.S. at 513; In re Murphy, 560 F.2d at 336.

As the utility points out, Ms. Garde indicated in her January 20, 1987 letter to the EDO and the Attorney General for the State of Texas that GAP

either represents or "is working with" approximately 36 current or former employees of the South Texas plant. Attachment 2 to Garde's Motion to Quash. Obviously, the attorney-client privilege cannot attach if there is no client. Thus, the presumption is that communications with the employees that GAP "is working with" as opposed to representing, are not a part of or protected by the attorney-client privilege.

Furthermore, it is unclear from the facts before the Commission whether Ms. Garde was acting in a legal capacity when she gathered allegations from employees for the purpose of having them reviewed by the NRC. If she was not acting in such a capacity, it would be questionable as to whether the communications made at that juncture would be protected by the attorney-client privilege. Also, Ms. Garde seeks to withhold the identities of her clients. Assuming arguendo that the attorney-client privilege applies, generally the identity of an attorney's client is not considered privileged. N.L.R.B., 349 F.2d at 904. Moreover, it is difficult to determine from the information thus far provided whether the privileged nature of the information, if any, has been waived, thereby terminating the privilege. See Artesian Industries, Inc. v. Department of Health and Human Services, 646 F.Supp. 1004, 1008 (D.D.C. 1986), citing In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672, 675 (D.C. Cir. 1979), cert. denied sub nom. Sea-Land Service, Inc. v. United States, 444 U.S. 915 (1979). It appears that GAP intends to reveal at least some of the information when it releases its public report.

The Commission also lacks sufficient data to determine whether the work product doctrine applies to all documents requested under the subpoena. The Commission would need more information regarding the circumstances surrounding the creation of each document in order to make that determination. Also, since it is unclear whether the attorney-client privilege is applicable, it is

equally unclear whether logically any of the documents could be attorney work product. Other questions include whether Ms. Garde prepared the documents in anticipation of litigation and whether work product documents, if any, are discoverable under the substantial need exception. See 10 C.F.R. 2.740(b)(2); Fed. R. Civ. P. 26(b)(3).

The Commission's view is that the more appropriate time for Ms. Garde to assert the attorney-client privilege and work product doctrine is when Ms. Garde testifies regarding specific questions posed, in response to the subpoena. At that time she may invoke privileges which she believes are applicable and explain their relationship to the information sought by the Commission. Her assertion of them at this time is premature.

Therefore, the motion to quash the subpoena and the request for oral argument are denied. Unless the parties agree otherwise, Ms. Garde shall appear 14 days after the date of this decision at Room 6507, 7735 Old Georgetown Road, Bethesda, Maryland at 9:00 a.m. to testify and produce documents concerning allegations bearing on safety at the South Texas plant, pursuant to the May 22, 1987 agreement between Ms. Garde and the NRC.

It is so ORDERED.



For the Commission*

Samuel J. Chilk
 SAMUEL J. CHILK
 Secretary of the Commission

* Commissioner Carr was not present for the affirmation of this Order. If he had been present he would have approved it.

Dated at Washington, DC this
15th day of July, 1987

Attachment 2



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
SECRETARY

July 15, 1987

'87 JUL 17 09:52

Billie P. Garde, Esq.
Director, Midwest Office
Richard E. Condit, Esq.
Staff Attorney
Government Accountability Project
1555 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036

SERVED JUL 17 1987

Dear Ms. Garde and Mr. Condit:

This letter responds to your May 29, 1987 petition under 10 CFR 2.206 for the establishment of an investigative unit independent of NRC Region IV and the Executive Director for Operations (EDO), to review allegations concerning the South Texas nuclear power plant.

You specifically state in your petition that "[i]t would be inappropriate to have [the EDO] or anyone connected with Region IV decide the merits of this petition since they are the individuals we are seeking relief from." GAP 2.206 Petition at 15. A 2.206 petition is addressed to the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards. 10 CFR 2.206(a). These directors report to the EDO who by virtue of his position is involved in the 2.206 deliberative process. Taking into consideration the plain language of your request, the Commission decided to treat the document that you characterize as a 2.206 petition as a request for Commission consideration. The Commission notes, however, that the determination of the most appropriate means of evaluating allegations is essentially within the Commission's discretion and is not within the scope of actions contemplated by 10 C.F.R. 2.206.

The agency can best determine whether the allegations should be handled by Region IV personnel or by an independent task force only after detailed review of the nature of the allegations. The Commission encourages GAP to provide the allegations to the agency promptly pursuant to the May 20, 1987 subpoena issued to Ms. Garde. Additional delay in turning over the information to the agency will only result in further delay in looking into matters which you claim are relevant to public health and safety. After the agency has reviewed the substance of the allegations, it will be in a better position to determine whether Region IV is the appropriate entity to review the allegations or whether the appointment of an independent task force is necessary. The Commission assures GAP that the agency will handle the investigation of the allegations properly, both with regard to technical review and confidentiality.

Sincerely,

Samuel J. Chilk
Secretary of the Commission

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