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RELATED CORRESPONDENCE

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)	
)	
HOUSTON LIGHTING & POWER)	Docket Nos. 50-498 OL
COMPANY, <u>ET AL.</u>)	50-499 OL
)	
(South Texas Project, Units 1)	
and 2))	

Applicants' Response To CCANP's Second
Request For Production Of Documents

Pursuant to 10 C.F.R. §§ 2.740 and 2.741(d), Applicants hereby respond to CCANP's Second Request for Production of Documents to Applicants dated February 4, 1986.

I. General Objections

A. Applicants object to CCANP's entire Second Request for Production of Documents on the grounds that the documents requested relate solely to alleged illegal drug use at STP and the programs in place to detect such use. Such documents are neither relevant to, nor reasonably calculated to lead to, the discovery of admissible evidence regarding the only issue in Phase III upon which discovery has been authorized (Issue F). As discussed in more detail in Applicants' Motion for Protective Order (February 17, 1986) ("Motion"), Issue F relates to whether HL&P's QA program for operation of STP will meet the requirements of 10 C.F.R. Part 50, Appendix B. Appendix B does not require,

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nor provide criteria for, licensee programs to detect and control the use of drugs by nuclear plant personnel. Even if the wording of Issue F was less clear as to its lack of applicability to matters relating to drug use, consideration of such matters under Issue F would be impermissible since this area of inquiry is currently the subject of generic action by the Commission and is, therefore, barred from litigation in individual licensing proceedings. As discussed in more detail in Applicants' Motion at 5-6, the Commission has under consideration two proposed rules and a Statement of Policy which address the subject matter of CCANP's discovery requests.

B. Applicants object to Instruction 1, which states that "[e]ach production response should include all pertinent information known to Applicants, their officers, directors, or employees, their agents, advisors, or counsel." CCANP Production Request at 1. The term "employees" is defined to include HL&P, "Bechtel, Ebasco, any consultants, sub-contractors, and anyone else performing work or services on behalf of the Applicants or their agents or sub-contractors." Id. Instruction 1 is unduly broad, would require Applicants to engage in extensive and burdensome investigation and represents an inappropriate effort to discover documents from third parties.

Since the inception of STP (and even since January 1, 1984, the date CCANP references in its Request for Production 1) there have been hundreds of contractors, consultants and sub-contractors performing work or services for STP. Many, if not

all, of these contractors and consultants have programs or policies governing the use of drugs by their employees and the terms of those programs and policies may widely vary. Moreover, information about the programs of such organizations is generally not relevant to the drug control programs that will apply to STP during plant operation. Accordingly, Applicants should not be required to provide documents beyond those in their possession. While Applicants may properly be required to produce documents in their possession (to the extent relevant to the issues to be litigated within the meaning of 10 C.F.R. § 2.740) instruction 1 is unduly broad and burdensome and would require Applicants to engage in a lengthy investigation of the programs and policies of numerous past and present contractors that are beyond their control and from which full and complete cooperation cannot be assured.

Furthermore, such discovery represents an impermissible effort to obtain discovery from third parties in a manner not sanctioned by the Commission's rules. Those rules permit discovery from non-parties to be taken by deposition (10 C.F.R. § 2.740a) but not through requests for production of documents (10 C.F.R. § 2.741). CCANP's Request for Production of Documents seeks documents that are not in Applicants' possession, thus impermissibly seeking to discover information from third parties, through requests for production of documents directed to Applicants. Accordingly, Applicants object to this instruction.

In its motion to compel dated February 28, 1986 CCANP responded to a similar objection regarding CCANP interrogatories by stating that CCANP is willing to limit its interrogatories to information in the possession of "HL&P, Bechtel, & Ebasco and any contractors or subcontractors who performed any element of the drug control program for these three companies or whose personnel were included in investigations conducted by these three companies." Motion to Compel at 1. Such a limitation is not adequate because it is not reasonable to require HL&P to produce documents that are not in its possession or readily available to it. While many records maintained by Bechtel, Ebasco and their subcontractors are readily available to HL&P (such as those maintained in the Project Records Management System), there may very well be records which are not so available. Bechtel and Ebasco are independent contractors and there are limits to their respective contractual responsibility to HL&P.

C. Applicants object to Instruction 3, which states

3. As to each document provided, Applicants shall consider that providing the document constitutes an admission of its authenticity or provide, pursuant to Section 2.742(b), the basis for refusing to admit.

Such an instruction is not authorized by the Commission's rules, is unduly vague because the word "authenticity" is not meaningful in the abstract sense used by CCANP, attempts to improperly shorten the time permitted by the rules to reply to requests for admissions by requiring a response at the time the documents are

identified (or in the alternative to extend discovery beyond its current March 6, 1986 deadline), seeks to shift to Applicants CCANP's burden under 10 C.F.R. 2.742(a) of supplying copies of documents that are the subject of requests for admissions, and is unduly burdensome because it seeks to impose on Applicants the duty to review and address in a response to a broad-brush and defective request for admissions, a potentially large volume of documents, many of which, under anyone's theory of the case, are not relevant.

D. Applicants object to Instruction 4, which states that "[t]hese requests for production of documents shall be continuing in nature and subject to supplementing should additional information become available." CCANP Interrogatories at 2. 10 C.F.R. § 2.740(e) states that "[a] party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired except as [provided in Sections 2.740(e)(1)-(3)]." Applicants will supplement their answers only in accordance with Section 2.740(e)(1)-(3).

E. CCANP's Request for Production of Documents seeks information which is neither relevant nor likely to lead to the discovery of admissible evidence in that the requests relate to investigations of alleged use or sale of illegal drugs by Project employees, without regard to whether such employees will be involved in the operation of STP. Since Issue F, the only issue upon which the Board has authorized discovery at this time,

relates solely to the QA program for Plant operation, CCANP's requests are unduly broad, and should be limited to allegations regarding Plant operations personnel.

F. Applicants object to Instruction 5, which seeks to require Applicants to express a judgment about the extent to which any documents produced are covered by individual CCANP documents requests. It would impose an undue burden on Applicants to require that documents be removed from Applicants' files and segregated in the manner suggested by CCANP. Under the rules in Federal courts, such segregation was made an option of the party producing documents by the 1980 revisions to F.R.C.P. 34. HL&P should also have the option of producing files in the order in which they are maintained on the Project, which is the other option authorized by current F.R.C.P. 34. Moreover, NRC's rule (10 C.F.R. § 2.741) is modeled after the prior version of F.R.C.P. 34, which did not even go so far as to limit the party producing documents to the two alternatives currently provided by F.R.C.P. 34. Thus under 10 C.F.R. § 2.741 there is no requirement that Applicants produce files in any particular order. However, Applicants recognize that it would be inappropriate to produce documents in a deliberately disorganized manner.

II. Objections to Individual CCANP Requests

In addition to the foregoing general objections to CCANP's second request for production of documents, Applicants object to the individual requests on the following grounds.

Request for Production 1

1. All documents relevant to the programs described in answer to Interrogatory 1 of CCANP's Second Set of Interrogatories to Applicants dated February 4, 1986.

Objections

In addition to the general grounds stated in Section I, above, Applicants object to this request on the following bases:

A. The request is unduly vague and does not comply with the requirement of 10 C.F.R. § 2.741 that requests for production of documents describe each item and category with reasonable particularity, because it is unclear what documents CCANP considers relevant to the various programs. In view of requests 2-6 of CCANP's Request for Production, which would otherwise be duplicated by request 1, it appears that CCANP may be seeking by this request only those documents which contain the basic descriptions of the various programs for detection of the use and sale of illegal drugs by Project employees. Such an interpretation would provide sufficient particularity to enable Applicants to identify the requested documents.

B. Even if the request is interpreted in accordance with the limitation stated in objection (A), certain documents covered by this request contain confidential information, the disclosure of which would be detrimental to Applicants and contrary to public policy. Specifically, some such documents detail confidential investigative techniques used at STP, the disclosure of which would tend to make it easier for individuals who violate

Project policies and procedures to escape detection. Applicants should not be required to reveal such confidential information unless its disclosure is shown to be essential to proper resolution of the issues in this proceeding. Moreover, if such disclosure were found to be necessary, it should be subject to an appropriate protective order that limits the disclosure to specifically identified individuals who have a need for such information to perform their responsibilities in this proceeding.

Request for Production 2

2. Documents containing the results of all lie detector tests performed on STNP personnel since January 1, 1985 in connection with inquiries related to use and/or sale of illegal drugs.

Objections

In addition to the general grounds for objection stated in Section I, above, Applicants object to this request on the following bases:

A. The documents requested contain confidential information, the disclosure of which would be detrimental to Applicants and contrary to public policy and would constitute an unwarranted invasion of the privacy of various present and former Project employees.

It appears that this request seeks the "strip charts" and similar raw data produced in polygraph tests, since the interpretations of such data are covered by Request 3. General objection I.B is particularly relevant to this request because

most of the polygraph tests of which Applicants are aware were performed by the contractor that provides site security services (not Bechtel or Ebasco). This contractor tested all of its employees, and advised HL&P of the actions it was taking as a result of such screening, but has not provided the test data or the analyses of individual tests. Of the remaining six tests, four were performed by independent companies under contracts directly with the employees tested or their union as part of an effort to substantiate their positions in employee grievance procedures. Only two such tests were performed under contracts directly with HL&P, and the contracts under which these tests were performed require the contractor to provide HL&P with an evaluation, not with raw data. Since the raw data produced by such tests have been retained by the contractors and are not in HL&P's possession, HL&P should not be required to produce it.

Since these documents are not available to Applicants, we cannot be certain of their contents. However, the documents containing such raw data can generally be expected to contain the identities of individuals who took such polygraph tests, and the questions asked during such tests.

The identities of such individuals are confidential and it would constitute an invasion of privacy to reveal the fact that these individuals took polygraph tests in connection with a drug-related investigation. Revelation of such information could cause undue embarrassment to the individuals and expose them to

ostracism by the community. This would be particularly unjust because included in the questions asked during the tests are likely to be repetitions of various unsubstantiated allegations.

Another reason that public policy is against disclosure of these documents is that, because there have not been a large number of such tests (other than the employees of one contractor), the revelation of the identities of the individuals so tested may tend to identify the sources of information provided in confidence during an investigation. Moreover, if discovery in this proceeding creates the public impression that such information may be disclosed, Project employees would be discouraged from cooperating with future Project investigations.

The disclosure of the questions asked such individuals might also tend to disclose the identities of confidential sources of information and would, in addition, disclose the questioning techniques utilized in such polygraph examinations. If individuals know in advance the questions they will be asked during a polygraph examination, the results of the examination will be less reliable or inconclusive.

While the concern about jeopardizing the usefulness of future polygraph tests could be resolved by an appropriate protective order, the revelation (or appearance of possible revelation) of identities of individuals would jeopardize future investigations regardless of the terms of any protective order.

B. The raw data collected in a polygraph test is not meaningful to a "layman". Since no basis has been shown for concluding that CCANP has the resources to obtain a qualified expert to evaluate such data, there would be no benefit to the adjudicatory process in revealing such data to CCANP, and therefore no justification for imposing on Applicants the burden of such production.

Request for Production 3

3. All documentation relevant to each test produced in response to Request for Production 2, including but not limited to all interpretations, analyses, and other evaluations of the results of the lie detector test.

Objections

In addition to the general grounds stated in Section 1, above, Applicants object to this request on the following bases:

A. The request for "all documents relevant to each test" is unduly vague and does not comply with the requirement of 10 C.F.R. § 2.741(c) that the requested documents or categories of documents be identified with reasonable particularity. Applicants can identify the documents in their possession which contain the "interpretations, analyses and other evaluations of the results of the lie detector test," but cannot determine what other documents CCANP may consider "relevant to each test."

B. Regardless of what clearer identification of requested documents CCANP may provide, it is apparent that the documents requested generally contain confidential information of the type

discussed in Applicants' objection (A) to request for production (2), and should not be produced for the reasons stated in that objection (pages 8-10, above).

Request for Production 4

4. All documentation of any investigation or inquiry conducted or being conducted on use and/or sale of illegal drugs as a result of any answers received in response to the lie detector tests produced in response to Request for Production 2.

Objections

In addition to the general grounds stated in Section I, above, Applicants object to this request on the following bases:

A. The documents requested generally contain confidential information of the type discussed in Applicant's objection (A) to request for production (2), and should not be produced for the reasons stated in that objection (pages 8-10, above).

B. As described in Applicants' objection (A) to request for production (2), most such documentation is not in Applicants' possession. However, it is likely that such documentation in the possession of various contractors would contain confidential information that should not be produced. For example, the association of the requested documentation of investigations with allegations received during "lie detector tests" would tend to reveal the sources of the allegations which led to the initiation of such follow-up investigations. Revelation of such confidential sources would discourage cooperation with future investigations.

C. The request for documentation of investigations "being conducted" seeks confidential information regarding any drug investigations which may be in progress. Not only is there no showing of the relevance of any such investigations to Issue F, but disclosure of the records of investigations in progress may jeopardize the success of such investigations. There is no apparent need for CCANP to obtain such information. However, if such information were to be disclosed to CCANP, it should be only under a protective order limiting access to this information to specified individuals with a need to know such information.

Request for Production 5

5. All documentation on any investigation or inquiry conducted since January 1, 1985 on use and/or sale of illegal drugs by STNP personnel not produced in response to Request for Production 4.

Objections

In addition to the general grounds stated in Section I, above, Applicants object to this request on the basis that the documents requested generally contain confidential information of the type discussed in Applicants' objection (A) to request for production (2), and should not be produced for the reasons stated in that objection (pages 8-10, above). Of particular concern with respect to this request is that at least one such investigation was initiated as a result of an allegation made to Safeteam under a promise of confidentiality. Disclosure of the source of that allegation would be damaging to the Safeteam program.

Request for Production 6

6. The exit interviews of all employees identified in answer to Interrogatory 9a of CCANP's Second Set of Interrogatories to Applicants dated February 4, 1986.

Objections

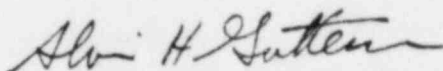
In addition to the general grounds stated in Section I, above, Applicants object to this request on the following bases:

A. The information requested is confidential and should not be disclosed. Exit interviews are conducted by Safeteam under a general promise of confidentiality. Disclosure of the contents of Safeteam files such as exit interviews, even if under a protective order, would cause Project employees to distrust the Safeteam promise of confidentiality and to be less forthcoming in disclosing their concerns to Safeteam in the future. Since the Safeteam, by identifying and investigating employee safety concerns, serves an important function, it would be contrary to the public interest to jeopardize the success of Safeteam.

B. The information sought is unduly broad, since exit interviews of such employees may not include any information relevant to plant operations or to allegations of drug use by Project employees, and may include other confidential information not relevant to the drug use question CCANP seeks to raise.

C. The documents requested generally contain confidential information of the type discussed in Applicants' objection (A) to request for production (2), and should not be produced for the reasons stated in that objection (pages 8-10, above).

Respectfully submitted,



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RELATED CORRESPONDENCE

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response To CCANP's Second Request For Production Of Documents" have been served on the following individuals and entities by deposit in the United States mail, first class, postage prepaid on this 6th day of March 1986.

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