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January 27, 1986

Mr. Victor Stello, Jr.
Acting Executive Director
for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

APPEAL OF INITIAL FOIA DECISION

86-A-5E (85-584)
Rec'd 1-30-86

Re: FOIA-85-584
Appeal From an Initial FOIA Decision
Regarding Enforcement Action EA 84-93

Dear Mr. Stello:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(6) and the NRC's regulations, 10 C.F.R. § 9.11, Duke Power Company ("Duke") hereby appeals from the "third partial response," dated December 26, 1985, which denied in part Duke's August 19, 1985 FOIA request for copies of all documents related to and underlying Enforcement Action EA-84-93.^{1/} By letter of December 26, 1985, Mr. Donnie H. Grimsley, Director, Division of Rules and Records, Office of Administration, informed Duke of the NRC's refusal to release certain "predecisional information" which constitutes "advice, opinions and recommendations of the staff," and "an investigatory record compiled for law enforcement purposes."

As identified in Mr. Grimsley's letter, the persons responsible for this denial are Mr. Grimsley, Mr. James M. Taylor, Director, Office of Inspection and Enforcement, and Dr. J. Nelson Grace, Regional Administrator, Region II. They based this denial on Exemptions 5 and 7 (A) of FOIA, 5 U.S.C. §§ 9.5(a)(5) and (a)(7)(i). Duke objects to the NRC withholding these records on the grounds that neither of the cited exemptions justifies withholding this relevant information.

At the outset it should be noted that Duke's ability to object effectively to the NRC withholding these documents is, of course, hampered by the fact that Duke is not aware of the exact nature and content of each document withheld 2/. In most instances the description of many of the documents withheld is so perfunctory as to prevent Duke from making a

1/ This request has also been the subject of correspondence with Mr. Dircks, dated October 25, 1985 and December 9, 1985, as well as five partial responses, dated November 4, 1985, December 10, 1985, December 26, 1985, January 7, 1986, and January 8, 1986. Duke on January 9, 1986, filed an appeal from the December 9, 1986, "second partial response."

2/ For example, Document J-14 is apparently a three-page long routing and transmittal slip.

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substantive response.^{3/} Simply to identify a document as an "Undated Draft," letter, memo, or decision, and to indicate the planned sender and recipient, with not even a hint concerning the subject matter, is a legally inadequate response. See, e.g., Mead Data Central v. Department of the Air Force, 566 F.2d 242, 260-61 (D.C. Cir. 1977). Vaughn v. Rosen, 484 F.2d 820, 825-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

Duke is entitled to a usable description of each document to aid it in determining whether the document is relevant to Duke's bases for challenging the Staff's enforcement action. Id. Accordingly, Duke requests that if the NRC continues to withhold any of these documents after this appeal, then the agency must identify those documents with greater specificity so as to allow Duke to pursue intelligently administrative reconsideration and/or judicial review. With this present handicap in mind, however, Duke herein provides the legal basis for this FOIA appeal.

It is fundamental FOIA law that the "basic policy" of FOIA "is in favor of disclosure"; thus "Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 220 (1978). Furthermore, it is clear that a court will carefully consider the nature of each individual document that is withheld, rather than treating documents or files of documents as a whole. Id. at 229-30. Accordingly, in responding to this appeal, the Office of the Executive Director for Operations needs to review the entirety of each document that is withheld, and release those portions that are not themselves independently exempt from disclosure.

Disclosure is particularly appropriate in this case because these documents underlie at least in part the NRC Staff's determination to issue, on August 13, 1985, a Notice of Violation and Proposed Imposition of Civil Penalty, EA 84-93, against Duke. As Duke has explained, the requested documents are significant to its ability to determine what actions it wishes to take with respect to EA 84-93. The complex factual and legal questions at issue in that enforcement action make it imperative that Duke be able to assess the basis for the NRC's actions.

Exemption 5

Exemption 5 permits an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §§ 552(b)(5); cf. 10 C.F.R. §§ 9.5(a)(5).^{4/} Mr. Grimsley's December 26th letter withholds

^{3/} It should be noted that the description "Undated Draft Letter from Taylor to Garde" is the description of at least five separate documents. J-6 through J-10. See also documents J-1 through J-5, J-13, K-1a, K-2, K-3a, L-3, and M-1 through M-11.

^{4/} To the extent the NRC's regulations attempt to exclude more under Exemption 5 than the statute itself allows to be excluded, the regulations are void. As discussed in the text, infra, the cases interpreting the scope of Exemption 5 of FOIA focus on the function

thirty-five separate documents pursuant to Exemption 5, as identified on Appendices J, K, L, and M to that letter.^{5/} One judicially recognized limitation on the scope of Exemption 5 requires that at least six of these withheld documents ^{6/} be released pursuant to FOIA because these documents represent the NRC's "working law" (i.e. they are interpretations or guidelines with precedential weight that the agency follows, thereby affecting the public), and thus the documents must be disclosed. E.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 152-53 (1975); Schlefer v. United States, 702 F.2d 233, 237 (D.C. Cir. 1983); Taxation With Representation Fund v. IRS, 646 F.2d 666, 682-84 (D.C. Cir. 1981); Exxon Corp. v. FTC, 466 F. Supp. 1088, 1097-98 (D.D.C. 1978), aff'd, 663 F.2d 120 (D.C. Cir. 1980). These documents, withheld pursuant to Exemption 5, appear to be memoranda which set forth the agency's view on whistleblower protection in general or as applied to the Director's Decision in the matter of Duke Power Company. As such, these documents must be viewed as setting forth the standard which was followed by the agency and therefore should be disclosed.

Additionally, all thirty-five of the documents in Appendices J, K, L, and M that are being withheld pursuant to Exemption 5 should at the very least be released in redacted form, with all factual information contained therein revealed.^{7/} E.g., ITT World Communications v. FCC, 699 F.2d 1219, 1236 (D.C. Cir. 1983), rev'd on other grounds, U.S., 104 S. Ct. 1936 (1984);^{8/} Coastal States Gas Corp. v. DOE, 617 F.2d 854, 867 (D.C. Cir. 1980); Exxon Corp. v. FTC, 466 F. Supp. at 1097-99 (D.D.C. 1978). The conclusory assertion in the December 26th letter that "there are no reasonably segregable factual portions" is insufficiently precise and detailed to withstand judicial scrutiny. See, e.g., Mead Data Central v. Department of the Air Force, 566 F.2d at 260-62; Vaughn v. Rosen, 484 F.2d

served by the document and the use to which it is put by the agency. The NRC's regulations, however, permit withholding a document solely because the document was prepared for internal use within the agency. See 9 C.F.R. § 9.5(a)(5)(i). Notwithstanding this regulation, a document must be disclosed if it meets the legal standards in the statute as interpreted by the courts, and discussed herein.

^{5/} Documents J-1 through J-14, K-1a, K-1b, K-2 through K-4, L-1 through L-4, and M-1 through M-12.

^{6/} Documents J-11, J-12, L-1 through L-3, and M-12.

^{7/} For example, Document L-2A, entitled "Parties [sic] Positions and Boards [sic] Remarks on Discrimination and Harassment Incidents (6 pages)" would appear to consist primarily, if not exclusively, of factual information that must be disclosed.

^{8/} In ITT World Communications, the Court of Appeals had decided consolidated appeals concerning, inter alia, the Sunshine Act, a District Court injunction against ultra vires agency actions, and the FOIA. The Supreme Court reversed the Court of Appeals on the Sunshine Act and ultra vires issues, but did not review the FOIA issue.

820, 825-28 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Accordingly, on this administrative appeal, the Office of the Executive Director for Operations should correct this deficiency in the FOIA response; all segregable factual material contained in the thirty-five documents withheld pursuant to Exemption 5 must be released.

Finally, at least one of the documents identified in this third partial response, which the NRC has withheld in reliance on Exemption 5, also appears (from the description in Appendix J)^{9/} to be outside the confines of Exemption 5 for the reasons explained in NLRB v. Sears, Roebuck & Co., 421 U.S. at 155-60 (1975). In Sears, the Supreme Court held that internal NLRB memoranda that explained the General Counsel's decisions not to file complaints (which thus effectively committed the NLRB not to take further action on the matter) were final agency decisions that must be disclosed. Id. Because the Commissioners' vote sheets represent the Commission's decision not to review a staff decision,^{10/} they are final administrative decisions that must similarly be disclosed.

Exemption 7(A)

Exemption 7(A) allows an agency to withhold "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . ." 5 U.S.C. § 552(b)(7)(A); see 10 C.F.R. § 9.5(a)(7)(i); cf. FBI v. Abramson, 456 U.S. 615 (1982). Additionally, the information contained in the withheld memorandum must be information that, if disclosed, would "harm . . . the government's case in court" due to premature disclosure of the facts discovered during the investigation. E.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. at 227.^{11/} "[M]aterial cannot be and ought not be

^{9/} Document J-11, "11/26/84 Facsimile Transmittal Sheet from Axelrad to O'Reilly with Notation Vote Response Sheet (3 pages)." It is puzzling, if not arbitrary, that Duke was provided with Vote Sheets of Commissioner Asselstine, but not with any vote sheets of the other Commissioners. See Document A-19, "07/24/85 Notation Vote Response Sheet of Commissioner Asselstine," identified in Appendix A to Mr. Felton's November 4, 1985 partial response to FOIA-85-584. Also see Document I-3, "Notation Vote Response Sheet from Commissioner Asselstine" identified in Appendix I to Mr. Grimsley's December 26, 1985, partial response.

^{10/} The identity of the decision on which the Commission was voting is unclear from the terse description of Document J-11. See note 8, supra. The date of the vote response sheet suggests that DD-84-16 was under consideration.

^{11/} In Robbins, the Supreme Court upheld the NLRB's refusal to produce witness statements prior to the witnesses testifying. That case, however, was decided in the unique setting of unfair labor practice proceedings where "[h]istorically, the NLRB has provided little prehearing discovery." Id. at 236. The Court was unwilling to change the discovery practice before the NLRB "[i]n the absence of clear

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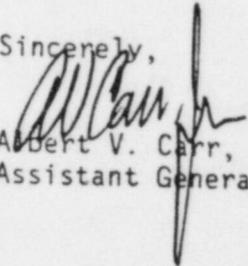
exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes." Id.

It is certainly not obvious that the four documents withheld pursuant to this exemption -- all contained in Appendix L 12/ -- satisfy the definition of an "investigatory record[]." Indeed, it is Duke's understanding that no investigation now is ongoing (or has been ongoing for some time), because the enforcement action is based solely on the record developed in 1983 before the Catawba Atomic Safety and Licensing Board. Therefore it is difficult to conceive how release of these four documents could harm the enforcement proceeding through premature disclosure of facts uncovered during the investigation. Accordingly, Documents L-1 through L-4 should be released.

Conclusion

As demonstrated above, none of the documents withheld by Mr. Grimsley's December 26 response fall under any of the claimed exemptions from disclosure. Duke therefore submits that production of this information is compelled by the Freedom of Information Act.

Sincerely,


Albert V. Carr, Jr.
Assistant General Counsel

AVC/clr

cc: Chairman Nunzio J. Palladino
Commissioner Thomas M. Roberts
Commissioner James K. Asselstine
Commissioner Frederick M. Bernthal
Commissioner Lando W. Zech, Jr.
Mr. Samuel J. Chilk
Mr. James M. Taylor
Ms. Jane A. Axelrad
Mr. Donnie H. Grimsley

congressional direction to the contrary." Id. at 238.

12/ Documents L-1 through L-4.