

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'89 JUN 22 A11:51

COMMISSIONERS:

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SERVED JUN 22 1989

In re JOSEPH J. MACKTAL

OI-4-89-008

RE SERVED JUL 25 1989

ORDER

CLI-89-12

I. Introduction.

This matter is before the Commission on a motion filed by Mr. Joseph J. Macktal styled "Motion for Protective Order" in response to a subpoena issued to him by the NRC's Office of Investigations ("OI"). The motion before us constitutes a "Motion to Quash or Modify" the subpoena. 10 C.F.R. § 2.720(f). After due consideration, we deny the motion for the reasons stated herein.

II. Factual Background.

A. Prior Contacts With Mr. Macktal.

The NRC staff had its first dealings with Mr. Macktal in January, 1986. At that time, Region IV opened an allegation file in response to a newspaper article about certain of Mr. Macktal's alleged concerns regarding construction deficiencies at the

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Comanche Peak nuclear power plant. See Fort Worth Star Telegram (January 23, 1986). After negotiations between his counsel and NRC staff, Mr. Macktal presented his concerns both to OI (March 5, 1986) and to the Region IV staff (March 11, 1986). On each occasion, Mr. Macktal signed an agreement conferring upon him a limited form of "confidentiality" in regard to the nature of his concerns. At no time did Mr. Macktal seek confidentiality with regard to his identity. See Texas Utilities Electric Company (Comanche Peak Steam Electric Station), CLI-89-06, 29 NRC 308, 355 n.7. (1989). The NRC later revoked Mr. Macktal's confidentiality because he no longer met the criteria set forth in NRC Manual Chapter 0517. See Letter from Victor Stello, Jr., to Michael D. Kohn, Esq. (January 23, 1989).

The NRC issued an inspection report covering the technical aspects of Mr. Macktal's allegations on December 22, 1986. See Inspection Report 50-445/86-15; 50-446/86-12. This report is a public document and the NRC provided copies of it to the attorneys who represented Mr. Macktal at that time. Later, on August 12, 1987, the NRC's Office of Special Projects, which had been established to oversee construction at Comanche Peak, attempted to provide Mr. Macktal himself with a copy of the inspection report and to obtain his comments on the NRC's resolution of his concerns. The August 12th letter was returned on August 24, 1987, stamped "Not deliverable - Not at address - no forwarding address." The NRC did not have any other contact with Mr. Macktal until the matter now before us arose.

B. Mr. Macktal's Current Concerns.

The matter now before the Commission first arose in the fall of 1988 when the Citizens for Fair Utility Regulation ("CFUR") filed a petition for late intervention in the NRC's administrative hearings involving the Comanche Peak nuclear power plant, located near Glen Rose, Texas. Ultimately, the Commission denied the petition. See Texas Utilities Electric Company (Comanche Peak Steam Electric Station), CLI-88-12, 28 NRC 605 (1988).

In the course of those proceedings, CFUR submitted an affidavit executed by Mr. Macktal which alleged certain deficiencies and safety concerns at the Comanche Peak facility. See Affidavit of Joseph J. Macktal (August 31, 1988), attached to "CFUR's First Supplement to Its August 11, 1988 Request for Hearing and Petition for Leave to Intervene" (Sept. 12, 1988). Because Mr. Macktal was still covered by the "confidentiality" agreements signed in March, 1986, the NRC took pains not to identify him during its decision on the petition. See, e.g., CLI-88-12, 28 NRC at 612, n.8., (identified only as "the specific individual" or "the individual involved").

As we noted above, Mr. Macktal had also filed an action with the Department of Labor ("DOL") against his former employer, the Brown & Root Corporation, under Section 210 of the Energy Reorganization Act, alleging that he had been wrongfully terminated from his position as an electrician in the construction force at Comanche Peak because of his actions in voicing safety concerns. Subsequently, Mr. Macktal entered into a settlement



agreement with Brown & Root, terminating that litigation. He has since repudiated that settlement agreement and attempted to reinstate the DOL proceeding, a matter addressed at length in both CLI-88-12 and CLI-89-06.

In pleadings filed with the Secretary of Labor and provided to the Commission during the proceedings which culminated in CLI-89-06, Mr. Macktal stated that he had withheld information regarding certain safety issues from the NRC staff during the interviews conducted during March of 1986. Additionally, he alleged that he had been offered what might be termed a "bribe" to withdraw his Section 210 action against his former employer and not to provide testimony to the NPC's Licensing Board or to the Citizens Association for Sound Energy ("CASE"), the intervenor in the Comanche Peak proceedings. See generally Second Affidavit of Joseph J. Macktal (December 27, 1988). See also Affidavit of Joseph J. Macktal (August 31, 1988), supra. Mr. Macktal also testified about his alleged safety concerns and the alleged "bribes" during a recent Congressional hearing. See Transcript of Hearings before the Committee on Environment and Public Works, Subcommittee on Nuclear Regulation, at 91-106 (May 4, 1989). Furthermore, Mr. Macktal has discussed his concerns with various news organizations. See, e.g., Fort Worth Star Telegram (Sept. 13, 1988); Dallas Times Herald (Sept. 13, 1988); Dallas Morning News (Sept. 13, 1988); Fort Worth Star Telegram (Sept. 14, 1988).

C. The Subpoena Issued To Mr. Macktal.

In CLI-89-06 the Commission specifically invited Mr. Macktal to detail his alleged concerns. See CLI-89-06, 29 NRC at 355. Subsequently, both OI and the Comanche Peak Project Division of the Office of Nuclear Reactor Regulation ("NRR/CPDP," the successor to the the Office of Special Projects) requested Mr. Macktal to provide them with information which he claimed to possess regarding (1) his allegations concerning safety concerns at Comanche Peak and (2) one of the specific allegations of "bribery."

Both offices attempted to arrange an interview date which was convenient for both Mr. Macktal, who resides in Texas, and his counsel, who reside in Washington, D.C. Altogether, counting both letters and telephone calls, the OI and NRR/CPDP offices have made over ten separate requests to either Mr. Macktal or his attorneys between March 1, 1989 and the present time in an attempt to schedule an interview. These requests included attempts to arrange an interview with Mr. Macktal during his trip to Washington, D.C., to testify before a Congressional subcommittee investigating issues at Comanche Peak. Mr. Macktal has rebuffed all advances and has repeatedly refused to be interviewed by representatives of either office absent the conditions he seeks to impose by this motion.

Accordingly, OI issued Mr. Macktal a subpoena which was signed on June 2, 1989 and served upon Mr. Macktal on June 5, 1989. The subpoena directed Mr. Macktal to appear at the NRC's

Region IV OI Office in Arlington, Texas, on June 15, 1989, to testify on the matters contained in his allegations and to bring any relevant documents. Mr. Macktal indicated at the time of service that he did not plan to comply with the subpoena. Subsequently, on June 13, 1989, Mr. Macktal filed the motion which is the subject of this Order.<sup>1</sup>

### III. The Motion for Protective Order.

The Motion for Protective Order does not challenge the subpoena on jurisdictional grounds. Instead, Mr. Macktal essentially argues that the subpoena is "burdensome" because (1)

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<sup>1</sup>On June 20, 1989, the Commission received a letter dated June 16, 1989, from Mr. Macktal's counsel seeking additional time "to respond to any request filed for enforcement of said subpoena." Letter of June 16 at 1. The letter contained additional arguments in support of the motion now before us. The letter also requests leave to present oral argument to the Commission on these issues.

Any arguments in support of the Motion for Protective Order should have been submitted with that motion. However, in order to avoid any prejudice to Mr. Macktal we have reviewed the letter of June 16 as if it were a Memorandum in Support of the Motion for Protective Order.

Second, oral argument before the Commission is discretionary. 10 C.F.R. § 2.763. We find nothing in the pleadings before us to indicate how it would assist us in reaching a decision. Therefore, we also deny the motion for oral argument.

"Enforcement" of the subpoena does not take place before the Commission. Instead, if Mr. Macktal refuses to comply with the subpoena as modified herein, the Office of the General Counsel will ask the Department of Justice to seek enforcement of the subpoena in the appropriate United States District Court. 10 C.F.R. § 2.720(g).



it does not give him adequate time to review and prepare his documents and (2) it requires him to appear in the NRC's Region IV OI Office, burdening him with the expenses for his attorney's travel to Texas and lodging for the time necessary to prepare for and complete the interview.<sup>2</sup> Mr. Macktal also objects to the subpoena on the grounds that it does not guarantee him "confidentiality."

In his motion, Mr. Macktal seeks relief on each count. First, he seeks an NRC guarantee of "confidentiality;" second, he seeks to have the deposition in Washington, D.C.; and third, he seeks thirty days prior notice of the interview. We deal with each of those requests in turn.

#### IV. Analysis.

Mr. Macktal clearly does not meet the guidelines required for a grant of confidentiality as that term is normally defined, i.e., confidentiality with regard to his name. Although Mr. Macktal has not disclosed the substance of his new safety allegations, he has, as discussed above, publicly stated that he has safety concerns which he has not previously disclosed. In view of this, a grant of confidentiality with regard to the identity of Mr. Macktal would not be appropriate.

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<sup>2</sup>The staff and OI estimate that the interview should be completed in less than one full day.

Instead, Mr. Macktal apparently is requesting "confidentiality" regarding the nature of his allegations, i.e., that the NRC "disguise" his allegations so that in subsequent investigations or inspections, other persons or entities such as the licensee, Texas Utilities, will not know if the items being investigated or inspected are the result of Mr. Macktal's allegations.

To this point, Mr. Macktal has failed to demonstrate that he meets the criteria for granting confidentiality set forth in NRC Manual Chapter 0517. The purpose underlying a grant of confidentiality is to preserve the alleged's identity from public disclosure where such disclosure could cause harm to the alleged. Mr. Macktal has repeatedly failed to demonstrate what harm might befall him if his name were linked to any specific new allegation which he may bring before the staff at this time -- in spite of numerous requests by the NRC staff to provide such an explanation. See, e.g., letter from P. McKee, NRR/CPPD, to Michael D. Kohn, Esq., (May 12, 1989). Absent some effort by Mr. Macktal to provide the NRC staff with some reason why the NRC should grant him "confidential" status, i.e., evidence of some harm which could result to Mr. Macktal because of the disclosure of the nature of the new information he provides to the NRC, we see no reason to accede to his request. In view of Mr. Macktal's numerous public statements regarding the nature of his previous alleged safety violations at Comanche Peak, we fail to see any "harm" which Mr.



Macktal might suffer if the nature of his alleged additional concerns are made public.<sup>3</sup>

Finally, the NRC has not entirely closed the door on the question of confidentiality. During recent conversations, OI representatives informed Mr. Macktal that the issue of confidentiality would be reviewed upon completion of the interview and that if Mr. Macktal could demonstrate that he met the applicable criteria, the NRC would reconsider its position. Mr. Macktal rejected this offer. In any event, both OI and the NRR/CPPD will evaluate the nature of the allegations upon completion of the interview and determine whether a basis for a grant of confidentiality exists under the applicable NRC criteria.

Second, the subpoena reasonably seeks Mr. Macktal's presence in Arlington, Texas. Arlington is less than two hours drive from Mr. Macktal's residence. The Region IV office is the location of the OI investigators who are assigned to this case. Naturally, this is also the location of any investigative documents compiled by OI. Furthermore, the subject of Mr. Macktal's technical concerns is a nuclear power plant also located less than two hours from the Region IV Office. The NRC technical staff at the plant would be readily available for consultation if the necessity

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<sup>3</sup>For example, during the process of revoking the previous grant of confidentiality, the NRC staff repeatedly requested Mr. Macktal to provide them with some reason why that status should be retained under Manual Chapter 0517. Mr. Macktal never addressed that criteria. See Letters from Victor Stello, Jr., to Michael D. Kohn, Esq. (October 3, 1988); (October 31, 1988); and (January 23, 1989). See also Letter from William H. Briggs, Jr., Esq. to Michael D. Kohn, Esq. (February 10, 1989).

arose, and similarly documents and records at the plant would also be readily available. Additionally, the NRC could arrange for Mr. Macktal to point out his concerns during a tour of the plant, if necessary. Moving this interview to Washington D.C. would require transporting those individuals and documents to Washington, at no small expense. Moreover, it would eliminate the ready access to the plant and its personnel. On balance, we find that the Government's interests would not be served by such action.

Mr. Macktal's main concern appears to be the travel expenses of his attorney if the interview is held in Texas. While Mr. Macktal may have counsel present at the interview, should he so choose, there is no duty on the part of the agency to provide him with counsel of his choice or to incur an additional burden or expense to facilitate Mr. Macktal's access to any particular counsel of his choice. Mr. Macktal has not pointed to any reason why he cannot obtain local counsel in Arlington.

Finally, as we noted earlier, the NRC requested an interview with Mr. Macktal when he was in Washington (with his counsel) for the Congressional hearings on May 4, 1989. Mr. Macktal declined to meet with the NRC staff at that time and made no apparent effort to take advantage of the situation to conduct the interviews at that time. Therefore, we find his protests on this occasion without merit.

Third, Mr. Macktal requests thirty (30) days notice of the proposed interview based only upon the blanket assertion that he "and his counsel need a reasonable period of time to review said documents and make a determination as to whether said documents

are privileged." Motion for Protective Order at 2. We find this argument completely unpersuasive. Mr. Macktal has known for several months that the NRC sought information from him. Thus, any claim that he has not had sufficient time to review and prepare his documents is completely lacking in credibility. However, in view of our resolution of this issue, we find that it may be moot. Discussions between NRC counsel and Mr. Macktal's counsel have indicated that the first available date for an interview is July 6, 1989, a date which we have incorporated into the modified subpoena. Mr. Macktal received his subpoena on June 5th. Accordingly, Mr. Macktal will in fact have had thirty days notice by the revised return date of the subpoena.

V. Conclusion.

Based upon the above analysis, we hereby deny the relief sought by Mr. Macktal. Because negotiations have at least identified a date upon which both Mr. Macktal and his counsel are available, we hereby modify the subpoena to be returned on July 6, 1989, at 9:00 am, C.D.T., at the NRC Region IV OI Office, 611 Ryan Plaza Drive, Suite 1000, Arlington, Texas. Upon completion of the interview, OI and the NRR/CPPD staff will separately review the



substance of the interview in their respective areas of concern and consider Mr. Macktal's request for confidentiality under the relevant criteria of NRC Manual Chapter 0517.

It is so ORDERED.



Dated at Rockville, Maryland  
this 22 day of June, 1989.

For the Commission,

A handwritten signature in dark ink, appearing to read "Samuel J. Chilk". The signature is written over a horizontal line.

SAMUEL J. CHILK  
Secretary of the Commission

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In re Joseph J. Mactal  
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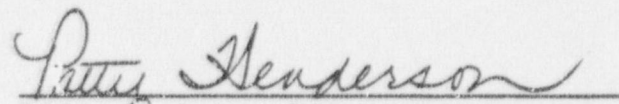
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Certificate of Service

I hereby certify that a copy of the foregoing Commission Order has been served upon the following person by certified mail (receipt requested), postage prepaid and in accordance with the requirement of 10 CFR Sec. 2.712.

Stephen M. Kohn, Esquire  
Counsel for Joseph J. Mactal  
526 U Street, NW  
Washington, DC 20001

Dated at Rockville, Maryland  
this 22 day of June, 1989

  
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Office of the Secretary  
of the Commission

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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In re Joseph J. Mactal  
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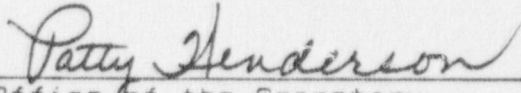
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Certificate of Service

I hereby certify that a copy of the foregoing Commission Order has been served upon the following person by first class mail, postage prepaid and in accordance with the requirement of 10 CFR Sec. 2.712.

Steven M. Kohn, Esquire  
Counsel for Joseph J. Mactal  
Kohn, Kohn & Colapinto, P.C.  
526 U Street, NW  
Washington, DC 20001

Dated at Rockville, Maryland  
this 25 day of July, 1989

  
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Office of the Secretary  
of the Commission