

REGULATOR INFORMATION DISTRIBUTION SYSTEM (RIDS)

ACCESSION NBR:8107150211 DOC.DATE: 81/07/06 NOTARIZED: NO DOCKET #
 FACIL:STN-50-528 Palo Verde Nuclear Station, Unit 1, Arizona Publi 05000528
 STN-50-529 Palo Verde Nuclear Station, Unit 2, Arizona Publi 05000529
 STN-50-530 Palo Verde Nuclear Station, Unit 3, Arizona Publi 05000530

AUTH.NAME AUTHOR AFFILIATION
 BISCHOFF,C.A. Arizona Public Service Co.
 BISCHOFF,C.A. Bischoff, C.A.
 RECIP.NAME: RECIPIENT AFFILIATION
 Atomic Safety and Licensing Board Panel

SUBJECT: Motion by Joint applicants to compel intervenor PL Hourihan
 response to Interrogatories 63-65.Certificate of Svc encl.

DISTRIBUTION CODE: DS03S COPIES RECEIVED:LTR 0 ENCL 1 SIZE: 9
 TITLE: Filings (Not Orig by NRC)

NOTES:Standardized Plant.1 cy:C Grimes 05000528
 Standardized Plant.1 cy:C Grimes 05000529
 Standardized Plant.1 cy:C Grimes 05000530

	RECIPIENT ID CODE/NAME	COPIES LTTR ENCL	RECIPIENT ID CODE/NAME	COPIES LTTR ENCL
ACTION:	LIC BR #3 BC KERRIGAN,J.	1 1 1 1	LIC BR #3 LA	1 1
INTERNAL:	ASLAP I&EI OELD,BLANTON PUBLIC AFFAIRS	5 5 2 2 1 1 1 1	ASLB NRC PDR OGC REG. FILE	1 1 1 1 1 1 1 1
EXTERNAL:	LPDR NTIS	1 1 1 1	NSIC	1 1

JUL 20 1981

TOTAL NUMBER OF COPIES REQUIRED: LTTR

0
19

ENCL

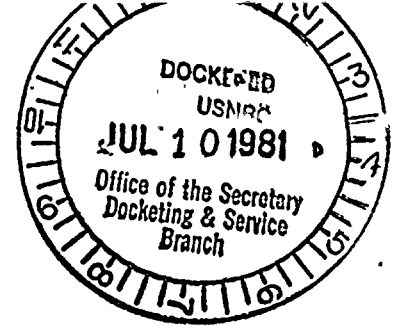
20
19



1

[Faint, illegible text scattered across the page, possibly bleed-through from the reverse side.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)

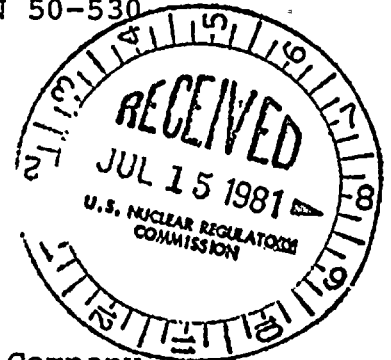
ARIZONA PUBLIC SERVICE)
COMPANY, et al.)

(Palo Verde Nuclear Generating)
Station, Units 1, 2 and 3))

DOCKET NOS. STN 50-528
STN 50-529
STN 50-530

7/6/81

JOINT APPLICANTS' MOTION TO COMPEL
INTERVENOR TO ANSWER INTERROGATORIES



Joint Applicants Arizona Public Service Company,
Salt River Project Agricultural Improvement and Power District,
Southern California Edison Company, El Paso Electric Company,
and Public Service Company of New Mexico ("Joint Applicants")
hereby move the Atomic Safety and Licensing Board ("Board") for
an order compelling Intervenor Patricia Lee Hourihan ("Intervenor")
to respond to certain interrogatories served upon her by Joint
Applicants on May 22, 1981. Specifically, Joint Applicants seek
responsive answers to the following interrogatories:

"63. Describe in detail how you came to learn
that some of the concrete slump tests performed by
Engineering Testing Labs for PVNGS Units 1 and 2
were falsified. Did you acquire such knowledge
based upon conversations, consultations, corres-
pondence or any other type of communications with
one or more individuals? If so,

(a) Identify by name and address each
such individual.

D903
50/1



(b) Describe the nature of each communication with each such individual, when it occurred, and identify all other individuals involved.

(c) Describe the information received from each such individual.

(d) Identify each letter, memorandum, tape, note or other record related to each conversation, correspondence, or other communication with such individual.

64. Identify by name and address each and every individual who you know or have reason to believe participated in the falsification of the concrete slump tests. For each individual so identified, explain in detail how you came to learn that such individual participated or may have participated in the falsification of the concrete slump tests.

65. For each and every concrete slump test which you claim was falsified, explain what aspect or aspects of the test were falsified. If information was falsified, describe such information, and state what the false values of such information are. As to such information, state what the true value should be."

Each of the above-quoted interrogatories relates to Intervenor's Contention No. 8, which reads:

"The base mats for Units 1 and 2 are not structurally able to support the systems and equipment inside containment, because some of the concrete slump tests performed by Engineering Testing Labs for Units 1 and 2 were falsified."

Intervenor provided no factual basis for alleging that the concrete slump tests were falsified. Accordingly, it fell upon Joint Applicants to uncover the basis for the contention through discovery. The above-quoted interrogatories constitute the heart of Joint Applicants' discovery efforts made thus far.

In Intervenor's Answers to Joint Applicants' First Set of Interrogatories, dated June 26, 1981, Intervenor refused to respond, relying instead upon the following objection to all three of the interrogatories:

"Object on the ground that the interrogatory calls for information which is irrelevant, immaterial, and not designed to lead to the discovery of admissible evidence."

This objection is deficient for several reasons. First, the Commission's Rules of Practice provide:

"Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section."
10 CFR § 2.740(f)(1); see Pennsylvania Power and Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-31, 10 NRC 597, 601-02 (1979).

No application for a protective order has been filed by Intervenor. Accordingly, her failure to respond cannot be excused, and an order by the Board compelling proper responses is warranted.

Second, the basis for objection stated by Intervenor provides no legal justification for her failure to answer. The information sought by Joint Applicants goes to the very essence of Contention No. 8. To say, as Intervenor does, that Intervenor's source of information (Interrogatory No. 63), identification of the individuals who falsified the tests (Interrogatory No. 64), and a description of the information which was falsified (Inter-



2

rogatory No. 65) are irrelevant, immaterial and not designed to lead to admissible evidence is the height of absurdity. Tests cannot falsify themselves; only people can falsify tests. Therefore, any person who has knowledge respecting the alleged falsification of the concrete slump tests would possess relevant and material evidence. It thus becomes necessary to identify such people and to talk to them, in order to learn whether the contention has any merit. Likewise, it is relevant and material to identify the specific aspect of the test and the specific information that was falsified. If Intervenor truly believes that such matters are irrelevant and immaterial, Joint Applicants find it impossible to conceive of evidence which Intervenor would acknowledge to be relevant and material to her contention.

A recent licensing board decision clearly supports Joint Applicants' position and the appropriateness of their interrogatories. In Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), LBP-80-11, 11 NRC 477 (1980), CEU, one of the intervenors in the case, co-sponsored contentions involving alleged construction deficiencies and falsification of certain construction records. In responding to interrogatories on these contentions, some of which apparently requested the identity of CEU's informant, see id. at 479-80, the intervenor declined to provide any substantive answers. Both the Applicants and the NRC filed motions to compel CEU to respond further to their interrogatories. In directing

CEU to answer the interrogatories, the licensing board reasoned as follows:

"As the Applicants and Staff each point out, this response is unsatisfactory. '[T]he purpose of discovery is to enable each party prior to hearing to become aware of the positions of each adversary party on the various issues in controversy, and the information available to adversary parties to support those positions.' Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-31, 10 NRC 597, 600 (October 30, 1979) (quoting from unpublished Memorandum and Order in that proceeding, dated August 24, 1979). To fulfill this purpose, it is not necessary for a party such as CEU to perform extended research or data gathering in order to respond. Where, as here, interrogatories are merely seeking to uncover the basis for and rationale of a contention, a party must delineate the information, if any, currently in its possession (and the source of that information where applicable) on the particular subject. Presumably, it must have relied on information of some sort to formulate a contention; such information must be revealed. A party may, of course, indicate areas of its case which are still under development and where incomplete substantive answers are all that can be furnished. The identity of prospective witnesses may be such an area. (Responses such as this must be supplemented, as provided in 10 CFR 2.740(e).) But, we stress again that a party must, in response to discovery requests, identify the information, if any, which it possesses and on which it is basing its contentions." Id. at 478-79 (emphasis added in part).^{1/}

^{1/} In dealing with a separate contention relating to the adequacy of the protection of the facility against hurricanes, the licensing board stated:

"We note that certain of the interrogatories seek identification of persons upon whom CEU relies or has relied (as distinguished from those whom CEU intends to call as witnesses). This is a proper subject on inquiry." 11 NRC at 481 (emphasis added).

(Continued)

The licensing board in Houston Lighting and Power Company made a further point respecting the interrogatories on falsified construction records. It noted that CEU had stated that workers at the South Texas Nuclear Power Plant were fearful of harassment and had insisted (apparently to CEU) that their names not be divulged until a later time. Id. at 479.

In resolving this matter, the licensing board stated:

"[W]here revealing the name of an informant or proposed witness or member, in response to discovery or other NRC requirements, would occasion harm to or reprisal against such person, a licensing board can and should take steps to protect that person, consistent with achieving to the extent possible the purposes of NRC's discovery rules or other requirements. For that reason, even though some revelation of names may be required, the Board may well limit disclosure to an extent necessary to avoid the anticipated harm or reprisal. Therefore, if CEU believes that, in answering interrogatories on Contentions 1 and 2 (as we have directed) or any other contentions, it will subject its informants or witnesses to harassment, it should request a protective order." Id. at 480 (footnote omitted).^{2/}

1/ (Continued) From the context of the licensing board's discussion, it is evident that the "persons upon whom CEU relies or has relied" referred to CEU's informants. See id.

2/ Joint Applicants are aware of the recent decision by the Appeal Board in the South Texas proceeding which vacated the licensing board's order directing the NRC Staff to disclose the names of confidential informants to the intervenors, including CEU. Houston Lighting and Power Company, et al. (South Texas Project, Units 1 and 2), 2 CCH Nuclear Regulation Reporter ¶30, 586, ALAB-639 (May 8, 1981). The Appeal Board based its decision on "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law." Id., quoting Roviaro v. United States, 353 U.S. 53, 59 (1957).

(Continued)

Joint Applicants are aware that Intervenor did not object to Interrogatories Nos. 63-65 on the ground that revealing the name(s) of her informant(s) would result in harm to or reprisal against such person(s). However, if such concern contributed to Intervenor's decision to object to such interrogatories, the licensing board's decision in LBP-80-11 makes clear that such concern is not grounds for objection, although anticipated harm or reprisal may justify a limitation on disclosure.

Because Intervenor's objection is without merit, Intervenor should be compelled to answer the three interrogatories to which she objected.

2/ (Continued) The Appeal Board added:

"This 'informant's privilege' obtains not only in criminal cases but exists (perhaps even more strongly) in civil cases

That the privilege applies in [NRC] proceedings is not disputed; long-standing decisions and express Commission regulations eliminate any debate. 10 CFR §§2.744(d), 2.790(a)(7) 10 CFR §21.2." ALAB-639 (footnotes omitted).

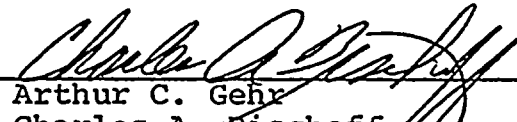
It was expressly noted in a separate opinion that CEU could not claim even a qualified privilege against disclosure of its informant. Id., opinion of Ms. Kohn, dissenting in part, at n.13. Thus, the decision by the Appeal Board in no way undermines the licensing board's holding in LBP-80-11.

WHEREFORE, Joint Applicants move this Board for an immediate order compelling Intervenor to respond to Interrogatories Nos. 63-65 quoted herein.

Dated: July 6, 1981.

Respectfully submitted,

By


Arthur C. Gehr
Charles A. Bischoff
3100 Valley Bank Center
Phoenix, Arizona 85073

Attorneys for Joint
Applicants

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

ARIZONA PUBLIC SERVICE)
COMPANY, et al.)

(Palo Verde Nuclear Generating)
Station, Units 1, 2 and 3))

DOCKET NOS. STN 50-528
STN 50-529
STN 50-530

CERTIFICATE OF SERVICE

I hereby certify that copies of "Joint Applicants' Motion to Compel Intervenor to Answer Interrogatories" have been served upon the following listed persons by deposit in the United States mail, properly addressed and with postage prepaid, this 6th day of July, 1981.

Docketing and Service Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Chairman, Maricopa County
Board of Supervisors
111 South Third Avenue
Phoenix, Arizona 85004

Dr. Richard F. Cole
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Bruce Meyerson, Esq.
Arizona Center for Law in
the Public Interest
112 North Fifth Avenue
Phoenix, Arizona 85003

Robert M. Lazo, Esq.
Chairman, Atomic Safety and
Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Dixon Callahan
Union Carbide Corporation
P.O. Box Y
Oak Ridge, Tennessee 37830

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Henry J. McGurren, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555


Charles A. Bischoff

1-1