Applicant 3/31/83

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY
AND LICENSING BOARD

In the Matter of	)	
	)	
WASHINGTON PUBLIC POWER	)	
SUPPLY SYSTEM	)	Docket No. 50-460-OL
	)	
(WPPSS Nuclear Project No. 1)	)	

APPLICANT'S MOTION FOR RECONSIDERATION AND/OR FOR CERTIFICATION TO THE ATOMIC SAFETY AND LICENSING APPEAL BOARD OF MARCH 15, 1983 MEMORANDUM AND ORDER

I. INTRODUCTION

On March 15, 1983, the Licensing Board in the captioned proceeding issued a Memorandum and Order in which it addressed a number of issues discussed in the Special Prehearing Conference held in Richland, Washington on January 26 and 27, 1983.[1] One of these issues concerned the propriety of issuing a protective order pursuant to which the Coalition for Safe Power ("petitioner") would disclose to the other participants in this proceeding the names and addresses of those individuals upon which petitioner's standing to intervene in this proceeding purportedly is based. The Protective Order proscribed the further dissemination of such information.

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[1] Washington Public Power Supply System (WPPSS Nuclear Project No. 1), ASLBP No. 82-479-OL, March 15, 1983 slip opinion ("March 15, 1983 Memorandum and Order").

The Washington Public Power Supply System ("Applicant") hereby seeks reconsideration of that portion of the March 15, 1983 Memorandum and Order granting the Protective Order sought by petitioner. Applicant submits that the issuance of such Order was without any factual or legal basis. Accordingly, Applicant urges the Board (1) to reconsider its March 15, 1983 Memorandum and Order granting petitioner's request for a Protective Order and, (2) to require that petitioner disclose on the public record the names and addresses of those individuals upon whom its standing to participate in this proceeding is purportedly based. Alternatively, pursuant to 10 C.F.R. Section 2.718(i), Applicant urges that the Board certify its decision to issue the Protective Order in this proceeding to the Atomic Safety and Licensing Appeal Board for immediate review.

II. ISSUANCE OF THE PROTECTIVE ORDER WAS WAS WITHOUT ANY FACTUAL OR LEGAL BASIS

Applicant submits that the March 15, 1983 Memorandum and Order of the Licensing Board issuing the Protective Order sought by petitioner was without any factual or legal basis. First, it improperly relies on unsubstantiated allegations made in another proceeding. Second, the Memorandum and Order draws a number of factual inferences which are simply not supported on the record and in any event do not justify issuance of the Protective

Order. Third, the Memorandum and Order erroneously distinguishes Houston Lighting & Power (Allens Creek Nuclear Generating Station, Unit 1).[2] Therefore, Applicant believes that the Protective Order should be withdrawn and that petitioner should be required to identify on the public record the names of those individuals sponsoring its participation in this proceeding.

A. The March 15, 1983 Memorandum and Order Improperly Relies on Unsubstantiated Allegations Made in Another Proceeding

Earlier decisions of both the Appeal Board[3] and licensing boards[4] consistently demonstrate the need for a factual basis on the record to exist before a protective order is issued. The courts also have emphasized that there must be a "reasonable probability," if not "convincing proof," that disclosure of information during

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2 ALAB-535, 9 NRC 377 (1979).

3 Virginia Electric & Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 27-28 (1979); Allens Creek, ALAB 535, supra, 9 NRC 399-400.

4 Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), LBP-80-11, 11 NRC 477, 479-80 (1980).

judicial proceedings would deter first amendment activities such that a protective order or other procedural safeguards should be employed.[5]

Applicant submits that the March 15, 1983 Memorandum and Order clearly fails to satisfy this requirement. A linchpin of that Memorandum and Order -- the finding that members of petitioner could fear that they would be subject to "compulsory legal process"[6] to defend contentions proposed by petitioner -- rests not on facts established on the record in this proceeding. Instead, it rests in the first instance upon unsubstantiated allegations made by petitioner in another proceeding. As explained below, such allegations may not constitute a basis for issuance of a protective order.

The Licensing Board asserted that "[i]t is sufficient that a demonstration has been made that the rights of association of a member of an intervenor group in this area have been threatened in the form of a threat of compulsory legal process to defend contentions."[7] According to the Licensing Board, petitioner made this demonstration by showing that another applicant (Puget Sound Power & Light Co., et al.) in another proceeding (Hanford/Skagit)

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[5] See In re Possible Violations of 18 U.S.C. §§201 and 371, 491 F.Supp. 211, 214 n. 3 (D.C.D.C. 1980)

[6] March 15, 1983 Memorandum and Order at 11.

[7] Id.

questioned a member of petitioner (not the individual upon which standing is purportedly based in this case) about his interests in that proceeding and about the contentions raised on his behalf by petitioner.[8]

If allowed to stand, this holding would have broad ramifications. The Board will have concluded that a petitioner merely needs to recite claims of harassment in an earlier proceeding (not even involving the applicant in that case) as a basis for a licensing board in a subsequent proceeding to issue a protective order. An applicant in one proceeding would be expected to respond to allegations concerning the conduct of others, over which they had no control, in an earlier proceeding to rebut a claim by an opposing party that it was in fact the subject of harassment during such earlier proceeding.

Thus, under the reasoning of the March 15, 1983 Memorandum and Order, if a regional or national intervenor group sought to participate in an operating license proceeding concerning a power reactor located outside of Philadelphia, an allegation of harassment in that proceeding would be probative of the existence vel non of harassment in a subsequent proceeding concerning another power reactor located in southern New Jersey, provided the same organization representing individuals with standing

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[8] Id. at 10-11.

to intervene is involved in both proceedings. As a result, the licensee in the New Jersey proceeding would, in essence, have to defend against an allegation of harassment made in the prior Pennsylvania proceeding. At a minimum, this would completely emasculate all concepts of fairness and administrative due process because it is virtually impossible for an applicant in one NRC proceeding to defend against allegations of harassment based upon events that occurred in another NRC proceeding.

As the March 15, 1983 Memorandum and Order demonstrates, that is precisely what has occurred in this case. Petitioner sought to intervene in the construction permit proceeding involving Puget Sound Power & Light's Skagit/Hanford plant. The individual upon which petitioner sought to rely to establish standing, M. Terry Dana, was questioned by counsel for the applicant in that proceeding concerning his interest in the proceeding as well as the contentions purportedly raised on his behalf.[9] Although this individual claimed to believe that such contact constituted harassment,[10] it is apparent that during the Skagit/Hanford proceeding no findings were made to that

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9 March 15, 1983, Memorandum and Order at 10-11.

10 Washington Public Power Supply System Nuclear Projects Nos. 1 and 2, Transcript of January 26-27 Special Prehearing Conference ("Tr.") at 44.

effect.[11] Nevertheless, his subjective perception as to that questioning is now being used here as a factual basis to warrant issuance of a Protective Order. Clearly, an unsubstantiated allegation in another proceeding may not comprise the factual showing required of a participant in an NRC licensing proceeding seeking the issuance of a protective order. On these grounds alone, the Board should reconsider its Memorandum and Order.

B. The Memorandum and Order Draws a Number of Inferences Which Are Not Supported In the Record and Which In Any Event Do Not Support Issuance of a Protective Order

Assuming arguendo that the Memorandum and Order could properly rely on the unsubstantiated allegations made by petitioner in connection with the Skagit/Hanford proceeding, Applicant submits that the March 15, 1983 Memorandum and Order draws a number of inferences which simply are not supported in the record and which in any event do not support issuance of a protective order. First, the Memorandum and Order states that, "[w]hether intended or not, Mr. Dana (and perhaps other current or prospective members) was put on notice (unwarranted in our opinion) that a sponsorship of this intervention could result in his being compelled to attend the hearing and support his

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[11] See Applicant's Motion for Leave to Supplement Memorandum, February 17, 1983 attaching pages 36-39 of the May 5, 1982 transcript from the Skagit/Hanford proceeding.

concerns (i.e., CSP's contentions) about the issues raised."[12] As a factual basis for this conclusion, the Board referred to the "questioning" of Mr. Dana in Skagit/Hanford and to a telephone conversation Mr. Dana had with a representative from the Applicant.

Neither of these events support the inference drawn in the Memorandum and Order that Mr. Dana or others feared that they would be compelled to defend contentions proposed by petitioner. Petitioner did not claim and apparently has not claimed that Mr. Dana feared such compulsory process.[13] Indeed, it is difficult to understand how such a claim could be made in light of his actual experience in Skagit/Hanford. Mr. Dana apparently never was deposed regarding contentions proposed by petitioner in that proceeding,[14] and there is no indication that any obligations were imposed on him by virtue of his sponsorship of petitioner's intervention.

Nor does the single telephone conversation by a representative of the Applicant suggest that Mr. Dana had reason to fear and did in fact fear that he would be called upon to defend the contentions proposed by petitioner in the construction permit amendment proceedings

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12 March 15, 1983 Memorandum and Order at 12.

13 See petitioner's "Position on Protective Order -- February 7, 1983."

14 Tr. at 40.

involving WNP-1 or WNP-2, where he sponsored petitioner's intervention. During this telephone conversation, Mr. Dana stated from the outset that he was aware of his rights (presumably including that he would not be compelled to testify or otherwise directly participate in evidentiary hearings). Further, the Supply System representative stated that he did not intend to harass Mr. Dana or to force Mr. Dana to speak with him. In addition, the focus of the inquiry was not to secure the withdrawal of Mr. Dana's affidavit authorizing petitioner to represent his interests in those proceedings but rather to learn of his concerns.[15] Applicant submits that under these circumstances no factual inference can be reasonably drawn that this telephone call suggested to Mr. Dana that he would be compelled to defend petitioner's proposed contentions.

Importantly, however, the critical question before the Board does not concern Mr. Dana alone. Rather, it concerns as well the other undisclosed members of petitioner (specifically those who petitioner alleges are sponsoring its participation in this proceeding) and whether they reasonably can fear compulsory legal process should their activity in this proceeding become known.

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15 Affidavit at Gerald C. Sorensen Regarding Contact with Member of Petitioner Organization at 2, appended to Applicant's February 17, 1983 Motion for Leave to Supplement Memorandum.

Nothing in the March 15, 1983 Memorandum and Order indicates a finding on this critical question. To the contrary, that Memorandum and Order equivocates by stating that "[w]hether intended or not, Mr. Dana (and perhaps other current or prospective members) was put on notice (unwarranted in our opinion) that a sponsorship of this intervention could result in his being compelled to attend the hearing and support his concerns (i.e., CSP's contentions) about the issues raised."[16] Applicant submits that there was no basis to infer that Mr. Dana believed he would be forced to defend petitioner's proposed contentions in those NRC proceedings in which he sponsored petitioner's participation. Nor did the Memorandum and Order reflect any finding that the other members of petitioner sponsoring its participation feared such compulsory participation. Therefore, the March 15, 1983 Memorandum and Order was erroneous when it cited "compulsory legal process" as a basis for issuance of the Protective Order in this case.

Applicant also submits that the March 15, 1983 Memorandum and Order erroneously inferred that members of petitioner other than Mr. Dana could reasonably fear loss of employment, or other reprisals, as a result of the sponsorship of petitioner's participation in this

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16 March 15, 1983 Memorandum and Order at 12 (emphasis added).

proceeding. Accordingly, it was error to issue the Protective Order on the basis of such an inference. Based on nothing more than an unsubstantiated assertion of petitioner, the March 15, 1983 Memorandum and Order states that Mr. Dana indicated to petitioner that his sponsorship of its intervention in Skagit/Hanford "threatened his very employment."[17] Taking official notice that the nuclear industry is a major source of employment around WNP-1, the Memorandum and Order then seems to leap to the conclusion that the undisclosed individuals upon whom petitioner's standing to intervene is purportedly based could face similar reprisals.[18]

Simply stated, the Memorandum and Order transfers Mr. Dana's unsubstantiated claim of employment discrimination to the undisclosed individuals upon which petitioner's standing to intervene is purportedly based and assumes that reprisals against them are reasonably likely. However, nothing in the record documents who their employers are or whether in fact those employers would take disciplinary action against these individuals for sponsoring petitioner's attempted intervention. Moreover, Applicant submits that while the Memorandum and Order could properly take official notice pursuant to 10 C.F.R

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17 March 15, 1983 Memorandum and Order at 12.

18 Id. at 13.

Section 2.743(i) that the nuclear industry is a major source of employment in the vicinity of WNP-1, it does not follow that the individuals upon whom petitioner's standing is purportedly based necessarily work for employers which would take disciplinary action for their sponsorship of petitioner's intervention. Clearly, such fact is not "generally known within [the territory] or ... capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[19]

Accordingly, the March 15, 1983 Memorandum and Order inferred erroneously that members of petitioner who are sponsoring its participation in this proceeding could face economic reprisals from their employers. As a result, a Protective Order could not be issued on the basis of these inferences.

C. The March 15, 1983 Memorandum and Order Erroneously Distinguishes Allens Creek

The March 15, 1983 Memorandum and Order distinguishes Allens Creek on the grounds that the "general situation officially noted by the Appeal Board [in that proceeding], an absence of retaliation against critics of a nuclear plant construction, is no longer valid."[20] As support for

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19 Fed. R. Evid. 201(b). 10 C.F.R. §2.743(i) allows licensing boards to take official notice of all matters of which a court may take judicial notice.

20 March 15, 1983 Memorandum and Order at 9.

this proposition, the March 15, 1983 Memorandum and Order references allegations made in three other proceedings involving what was characterized there to be harassment.

However, as even the Memorandum and Order recognizes, each of these cases concerns the allegedly unlawful discharge of those employed by either a construction permit holder or its contractors or subcontractors as a result of an employee making charges to NRC regarding what he believed were defects in plant construction.[21] The claims of harassment in those cases did not involve alleged firings by employers not involved in the nuclear industry.

In the instant case the record does not indicate by whom the undisclosed sponsors of petitioner's participation in this proceeding are employed. Nor can it be assumed that those employees are NRC construction permit holders or their contractors or subcontactors. Therefore, such claims hardly provide any reason to conclude that any member of any anti-nuclear group, regardless of his employer, will necessarily face harassment by virtue of his anti-nuclear activities or that overall attitudes towards intervenors have changed since the issuance of Allens Creek.[22]

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21 Id. at 10.

22 ALAB-535, supra.

That the March 15, 1983 Memorandum and Order improperly distinguishes Allens Creek is also demonstrated by Houston Lighting & Power Company (South Texas Project, Units 1 and 2),[23] one of the proceedings involving a claim of unlawful discharge referenced in the Memorandum and Order as a basis for distinguishing Allens Creek.[24] In that proceeding, the Licensing Board held that the procedures established in Allens Creek, viz., issuance of a protective order upon an adequate factual showing, applied to "whistler-blowers," who are protected by Section 210 of the Energy Reorganization Act, 42 U.S.C. §5851. Therefore, whether and to what extent allegations of harassment against such employees have been made is no basis to distinguish that Appeal Board decision from the instant proceeding.

D. Conclusion

In light of the foregoing, Applicant respectfully urges the Licensing Board to reconsider its March 15, 1983 Memorandum and Order. As set forth above, the record does not support issuance of the Protective Order granted petitioners in this proceeding. Rather, the Board should

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23 LBP-80-11, 11 NRC 477 (1980).

24 ALAB-535, supra; March 15, 1983 Memorandum and Order at 10.

require the petitioner to disclose on the public record the identity of the individuals upon whom its representative standing is purportedly based.

III. THE LICENSING BOARD SHOULD CERTIFY TO THE ATOMIC SAFETY AND LICENSING APPEAL BOARD THE QUESTION OF WHETHER A PROTECTIVE ORDER WAS PROPERLY ISSUED IN THIS PROCEEDING

Pursuant to 10 C.F.R. Section 2.718(i), Applicants request that the Licensing Board certify to the Atomic Safety and Licensing Appeal Board the question of whether the March 15, 1983 Protective Order was properly issued in the event that it declines to reconsider its March 15, 1983 Memorandum and Order. Applicant submits that prompt review of this question is necessary to prevent "detriment to the public interest. . . ."[25]

The current approach to ruling on claims of harassment such as in the case at bar has been prescribed by the Appeal Board in Allens Creek. In that proceeding, the

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25 10 C.F.R. §2.730(f). Under the NRC Rules of Practice, a party seeking certification pursuant to 10 C.F.R. §2.718(i) must establish that a referral under 10 C.F.R. §2.730(f) is proper. See, e.g., Puerto Rico Water Resource Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 615 (1976). Section 2.730(f) provides that the presiding officer in an NRC proceeding may refer a ruling to the Commission (and, therefore to the Appeal Board (10 C.F.R. §2.785) when a prompt decision is necessary "to prevent detriment to the public interest . . . ."

Appeal Board established that the proponent of a protective order must establish a factual basis sufficient to justify the issuance of such an order.

The Licensing Board has eviscerated the Appeal Board's teaching in this regard by imposing an unfair and inappropriate burden on the Applicant to rebut a claim of harassment in a proceeding involving other parties and another nuclear plant. This ruling by the Licensing Board is capable of repetition but will evade review[26] because it is unlikely as a practical matter that such a ruling will ever be reviewed, if and when the decision in this proceeding is appealed on the merits. This, of course, presumes that a direct appeal from the Board's Memorandum and Order is proscribed as interlocutory (10 C.F.R. §2.730(f)), a matter that Applicant does not concede. Therefore, because of the importance of this matter to the public interest, Applicant urges that the ruling in the March 15, 1983 Memorandum and Order be certified to the Appeal Board should the Licensing Board decline to reconsider such Memorandum and Order.

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26 Sholly v. U. S. Nuclear Regulatory Commission, 651 F.2d, 780, 784, (D. C. Cir. 1980), rehearing denied, 651 F.2d 792.

IV. CONCLUSION

In light of the foregoing, Applicant urges that the Board reconsider its issuance of the March 15, 1983 Memorandum and Order granting petitioner's request for a Protective Order. Alternatively, Applicant requests that the Board certify this matter to the Appeal Board pursuant to 10 C.F.R. Section 2.718(i).

Respectfully submitted,

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March 31, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
WASHINGTON PUBLIC POWER SUPPLY SYSTEM	)	Docket No. 50-460-OL
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(WPPSS Nuclear Project No. 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicant's Motion for Reconsideration and/or for Certification to the Atomic Safety and Licensing Appeal Board of March 15, 1983 Memorandum and Order," in the captioned matter were served upon the following persons by deposit in the United States mail, first class, postage prepaid this 31st day of March, 1983:

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