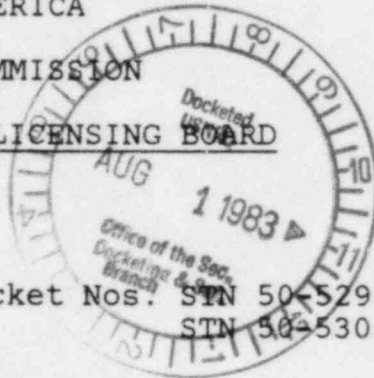


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ARIZONA PUBLIC SERVICE)
COMPANY, et al.)
)
(Palo Verde Nuclear)
Generating Station,)
Units 2 and 3)
_____)

Docket Nos. STN 50-529
STN 50-530



JOINT APPLICANTS' RESPONSE TO WEST VALLEY'S MOTION
TO COMPEL RESPONSES TO INTERROGATORIES

By motion dated July 15, 1983, West Valley Agricultural Protection Council, Inc. ("West Valley") seeks an order from the Board compelling Joint Applicants to identify documents requested by Interrogatories Nos. 2, 3, 4, 7, 8 and 9 from West Valley's Second Set of Interrogatories. Joint Applicants objected to each of the above-numbered interrogatories, except for No. 8, on the grounds that such interrogatories require the identification of documents and correspondence subject to the work product doctrine and/or the attorney client privilege. With respect to Interrogatory No. 8, Joint Applicants objected on the grounds that the documents sought by West Valley are proprietary and irrelevant to the subject matter of the proceeding. In addition, Joint Applicants stated that the identification of such documents would be oppressive and unduly burdensome and

expensive. As explained more fully below, the objections raised by Joint Applicants are entirely appropriate. West Valley's motion is not supported by the Commission's discovery rules and thus should be denied.

General provisions governing discovery in NRC proceedings are set forth in the Commission's rules, which provide in relevant part as follows: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding." 10 CFR §2.740(b)(1). There is no inherent or statutory right in NRC proceedings granting parties discovery. Rather, discovery is allowed only to the extent permitted by the Commission's rules. Detroit Edison Company, et al. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-37, 3 NRC 575, 580 (1978). Section 2.740(b)(1) exempts from discovery matter which is either privileged or irrelevant. Such exemptions provide the basis for Joint Applicants' objections to the interrogatories which are the subject of West Valley's Motion to Compel.

Interrogatories Nos. 2, 3, 4, 7 and 9

Interrogatories Nos. 2, 3, 4, 7 and 9 seek the identification of documents relating to cooling tower salt emissions, spray pond salt emissions, evaporation pond salt emissions, salt drift deposition patterns and effects of salt drift on crops, respectively. Each interrogatory is

divided into two parts, with the first part seeking documents prepared prior to the filing by West Valley of its Petition to Intervene and the second part seeking documents prepared subsequent thereto. West Valley conveniently fails to mention in its motion that Joint Applicants did identify documents responsive to the first part of such interrogatories. With respect to the second part, Joint Applicants objected on the grounds identified above. Joint Applicants stated, however, that they were in the process of identifying documents described in such interrogatories and would identify such documents, to the extent not privileged, when their review was completed. Several such documents were in fact identified in Joint Applicants' Supplemental Response to West Valley's First and Second Sets of Interrogatories, dated July 1, 1983 -- another fact conveniently omitted from West Valley's motion and supporting memorandum. In view of the fact that Joint Applicants did identify several documents responsive to West Valley's interrogatories, West Valley's argument that Joint Applicants' objection is overbroad and that under such objection, Joint Applicants would not have to produce the crop study now being prepared by the University of Arizona, is simply without merit. See Memorandum in Support of Motion to Compel at 2.

Documents which were not identified by Joint Applicants are those which are entitled to protection from disclosure under the work product doctrine. The work prod-

uct doctrine is the only privilege which has been expressly set out in the Commission's rules. Section 2.740(b)(2) provides:

(2) Trial preparation materials. A party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (1) of this paragraph and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

West Valley, without citation of authority, urges the Board to order Joint Applicants to identify documents subject to the privilege by author and date and to summarize the subject matter of each document. Motion to Compel at 2; Memorandum in Support of Motion to Compel at 2. The serious problem with West Valley's request is that, if granted, the purpose of the work product doctrine would be destroyed. The goals of this doctrine are two-fold: First, it protects "the mental impressions and theories developed by a lawyer or any other representative of a party in anticipation of litigation," and second, it prevents "an attorney from waiting while opposing counsel does investigative work and

then simply requesting the fruits of such efforts via discovery." Eirhart v. Libbey-Owens-Ford Company, 93 F.R.D. 370, 372 (N.D. Ill. 1981). If Joint Applicants were to be required to identify each document and summarize its subject matter, such information would in and of itself reveal not only the general type of communication involved, but also its content. Discovery of the contents of documents through interrogatories is equivalent to the discovery of the documents themselves. Peterson v. United States, 52 F.R.D. 317, 320 (S.D. Ill. 1971). Ordering such disclosure would work an injustice on Joint Applicants and totally undermine the work product doctrine. West Valley's request, therefore, should be denied.

It appears from West Valley's motion and supporting memorandum that the validity of the work product doctrine is not disputed. Rather, the concern apparently is that documents not identified by Joint Applicants may not fall under the work product doctrine. To allay any concerns that West Valley has in this connection, Joint Applicants are willing to provide the documents to the Board for an in camera inspection. The Board would then be in a position to decide for itself whether or not the work product doctrine is applicable to such documents. Such procedure would avoid the necessity for Joint Applicants to disclose the contents of the documents and would at the same time offer an independent determination concerning the applicability of the privilege claimed by Joint Applicants.

Interrogatory No. 8

The second part of Interrogatory No. 8 seeks the identification of all documents concerning application of the "FOG" model to power plants other than PVNGS. The FOG model was used by NUS, an independent consultant to Joint Applicants, to analyze and describe salt drift deposition patterns for PVNGS. Joint Applicants objected to the interrogatory on the grounds that the documents sought to be identified were proprietary and irrelevant to the subject matter of this proceeding. In addition, Joint Applicants stated that such identification would be oppressive and unduly burdensome and expensive.

The fact is that the application of the FOG model at other plants is irrelevant to its use at Palo Verde. West Valley's own consultant, Edward Davis, argued in his report submitted with the West Valley Petition to Intervene that in order to be confidently used to make accurate predictions, it is necessary to calibrate the FOG model against data taken under circumstances closely resembling those where it is to be used. Memorandum Report to Mr. Steven Pavich from Edward A. Davis, dated September 28, 1982, at 10. As West Valley is aware, Joint Applicants will be monitoring levels of salt deposition as part of the Salt Deposition and Impact Monitoring Plan for Palo Verde. In addition, and as West Valley is also aware, Dr. William E. Dunn has been retained to evaluate the FOG predictions of salt

drift deposition. These undertakings are much more relevant to the Palo Verde proceeding than the use of FOG by NUS at other plants which in some instances involved a different version of the FOG model and in all instances involved different meteorological and topographical conditions. West Valley's interrogatory is nothing more than a fishing expedition.

Apart from the relevancy objection, and as stated by Joint Applicants in their response to this interrogatory, NUS has employed different versions of the FOG model at several fossil and nuclear plants, some of which have not been built. Obviously, a large number of documents would be involved in responding to the interrogatory. The efforts required to identify all such documents would clearly be oppressive and burdensome. As to those plants which have not been built, the interrogatory would require the disclosure of information, including the identity of proposed power plants, which in some instances has not previously been made part of or even referenced in any public record. Such matters are considered to be proprietary to NUS and its clients.

Finally, it should also be pointed out that the documents sought are not in the possession of Joint Applicants and that responding to the interrogatory would require Joint Applicants to secure information from an independent consultant who is not a party to this proceeding. The

Federal Courts have stated that if documents sought for production are not within a party's custody, control or possession, such party cannot be compelled to produce them. La Chemise Lacoste v. Alligator Company, 60 F.R.D. 164, 171 (D. Del. 1973); United States v. Dempster Brothers, 31 F.R.D. 207, 208 (E.D. Tenn. 1962). A party should also not be compelled to identify such documents.

Conclusion

Based on the foregoing reasons, West Valley's motion should be denied.

RESPECTFULLY SUBMITTED this 29th day of July,
1983.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Joint Applicants' Response to West Valley's Motion to Compel Responses to Interrogatories" have been served upon the following listed persons by deposit in the United States mail, properly addressed and with postage prepaid, this 29th day of July, 1983.

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