January 13, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CAROLINA POWER & LIGHT COMPANY	)	Docket Nos. 50-400 OL
and NORTH CAROLINA EASTERN	)	50-401 OL
MUNICIPAL POWER AGENCY	)	
	)	
(Shearon Harris Nuclear Power	)	
Plant, Units 1 and 2)	)	

APPLICANTS' MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

Applicants Carolina Power & Light Company and North Carolina Eastern Municipal Power Agency, pursuant to 10 C.F.R. § 2.740(c), hereby move the Atomic Safety and Licensing Board for the issuance of a protective order, in the form attached hereto as a proposed order, to prevent public disclosure of certain information sought from Applicants by the discovery requests of intervenor Wells Eddleman. The information sought includes personnel data on employees and former employees of Daniel International Corporation, constructor of the Harris Plant, which is proprietary and of commercial value to Daniel

and CP&L, and which is encompassed by the employees' rights of personal privacy.

II. BACKGROUND

Eddleman Contention 41 states that "Applicants' QA/QC program fails to assure that safety-related equipment is properly inspected (e.g. the 'OK' tagging of defective pipe hanger welds at SHNPP)." Board Memorandum and Order (Addressing Applicants' Motion for Codification) at 4 (Jan. 17, 1983). The Board ruled explicitly that the contention was limited to the allegation that there exist defective hanger welds that have been improperly inspected and approved. Id.; LBP-82-119A, 16 N.R.C. 2069, 2097 (1982).

On August 4, 1983, Mr. Eddleman filed a motion to compel discovery of Applicants, seeking additional answers to interrogatories and access to documents beyond those provided by Applicants in discovery responses dated May 12, 1983. In the case of several interrogatories on Eddleman 41 which sought information on both the welding of pipe hangers and their inspection, Applicants had answered the discovery requests as they applied to inspections, and had objected to them as they related to the actual welding of pipe hangers as irrelevant to the contention.

In telephone conferences held on September 22 and 23, 1983, and in the Board's Memorandum and Order (Ruling on Discovery Disputes), October 6, 1983, the Board granted in part

and denied in part Mr. Eddleman's August 4 motion to compel discovery of Applicants. In conformance with these rulings, on November 11, 1983, Applicants filed supplemental responses to the Eddleman discovery requests as to which the Eddleman motion to compel had been granted, except for certain interrogatories which required the receipt of information from Daniel. Additional responses were filed on January 13, 1984.

The interrogatories not yet answered, and which are the subject of this motion, are as follows:

41-1(l): Provide a list of the names and last-known addresses of those structural welders in Craft 66, the pipe fitter craft. (Tr. 722; Oct. 6, 1983 Memorandum and Order at 3.)

41-1(m): For each welder identified above, state the date hired and, if applicable, the date discharged, laid off or resigned. For a random sample (to be worked out between the parties), provide information on qualifications when hired, including a general description of any welding training courses and the dated failed, if applicable. (Tr. 665.)1/

On November 14, 1983, Applicants transmitted to Mr. Eddleman a draft consent protective order which would protect from public disclosure the information to be provided in response to the above interrogatories. For the next several weeks, Applicants and Mr. Eddleman discussed the provisions of the draft protective order in an attempt to reach an agreement.

1/ Applicants and Mr. Eddleman have discussed and agreed upon the sample.

When that effort failed, Applicants undertook the preparation of this motion. At the outset it should be clearly understood that the issue raised by this motion is not compliance with the Board's order directing discovery (i.e., Applicants are prepared to provide the information sought), but rather the protection of that information from public disclosure.

III. ARGUMENT

A. Governing Standards

The Commission's Rules of Practice, at 10 C.F.R. § 2.740(c), provide that:

> Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (6) that, subject to the provisions of §§ 2.744 and 2.790, a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way. . . .2/

In Kansas Gas and Electric Company, et al. (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 N.R.C. 408

2/ Section 2.740(c) is patterned after Rule 26(c) of the Federal Rules of Civil Procedure. While the rule lists seven types of protection which may be ordered, the presiding officer is free to order whatever relief justice requires in the circumstances. See 4 Moore's Federal Practice ¶ 26.78.

(1976), the Atomic Safety and Licensing Appeal Board addressed the standards governing a motion for protective order, under 10 C.F.R. § 2.740(c)(6), aimed at preventing the public disclosure of confidential commercial information in the hands of a private party. The discovery in that case went to the nuclear fuel supply contract between the applicants and Westinghouse Electric Corporation, which included information deemed commercially confidential and proprietary to Westinghouse, which was not a party to the proceeding.

The Appeal Board held that neither 10 C.F.R. § 9.5(a)(4) (which implements the Freedom of Information Act) nor 10 C.F.R. § 2.790 (availability of official NRC records) ". . . is directly concerned with the discovery of information in the hands of a private party. Rather, both deal with the matter of access to records and documents contained in the files of the Commission itself." ALAB-327, supra, 3 N.R.C. at 415. The Appeal Board held that in order for a claim of entitlement to protective treatment to be honored, it would have to be demonstrated that: (1) the information in question was of a type customarily held in confidence by its originator; (2) there is a rational basis for having customarily held it in confidence; (3) it has, in fact, been kept in confidence; and (4) it is not found in public sources. Id. at 416-17. The Appeal Board also suggested that if the requisite showing was made by the movant, consideration also should be given to any countervailing

factors militating in favor of public disclosure which clearly outweigh the potential harm which might inure from such disclosure. See id. at 418.3/

B. Application of the Standards

The information sought in the interrogatories quoted above may be found only in the employee personnel files in the possession of Daniel. As discussed below, the attached Affidavits of John J. Schroeder, Daniel Vice President - Personnel Management, and A. R. Pannill, Daniel Personnel Manager at the Harris site, demonstrate that the information sought by these interrogatories qualifies for protective treatment under the standards established by the Appeal Board. Mr. Schroeder has personal knowledge of the policies and practices of Daniel with regard to preserving the confidentiality of this information, and Mr. Pannill has custody of the Daniel records in question. See Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 N.R.C. 23 (1979).

3/ Cf. Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 N.R.C. 1144, 1153 (1982) (adopting a different "good cause" standard for issuance of a protective order where an evidentiary privilege is the basis for the motion).

1. The information is of a type customarily held in confidence by Daniel.

Personnel files are held in confidence by employers. Illinois Power Company, et al. (Clinton Power Station, Unit 1), LBP-81-61, 14 N.R.C. 1735, 1740 (1981). As described by Mr. Schroeder, it is the clear and explicit policy of Daniel to hold in confidence the information contained in its employee personnel files, including the employee's name, address, dates of employment, training records, and entry qualifications. Schroeder Affidavit at ¶ 3.

2. There is a rational basis for having customarily held this information in confidence.

The information sought by the subject interrogatories has customarily been held in confidence by Daniel for two reasons: (1) disclosure of the information may amount to an unwarranted invasion of employee privacy; and (2) the information is of commercial value to Daniel and CP&L.

It has been recognized that information in personnel files is sensitive in that its disclosure may be regarded as an undue and actionable invasion of the right of privacy of the person involved. Clinton, supra, LBP-81-61, 14 N.R.C. at 1740 (1981).

As explained in the Affidavit of Mr. Schroeder, the information sought is of commercial value to Daniel. As a part of its craft training employment activities, Daniel has provided certain training to welders at the Harris plant. Daniel has

invested substantial sums in the creation, development and administration of its training program and thus in its qualified welders. Schroeder Affidavit at ¶¶ 4-7, 9.

The information sought identifies welders' names, their addresses, background, experience and qualifications, all of which could be used, if known, by Daniel's competitors or others to raid its welding employees. Raiding of such employees would impair Daniel's ability to maintain qualified welding personnel, would result in a significant loss of a corporate resource, and could subject Daniel and CP&L to the cost of acquiring and training new employees. See Burroughs Corporation v. Brown, 501 F. Supp. 375, 381 (E.D. Va. 1980), rev'd on other grounds sub nom. General Motors Corporation v. Marshall, 654 F.2d 294 (4th Cir. 1981).

3. The information has, in fact, been kept in confidence by Daniel.

The craft employment records of the Daniel personnel employed on the Harris project are maintained in a controlled and secure manner, with access limited to the individual employee or authorized personnel on company business. See Pannill Affidavit.

4. The information is not found in public sources.

The information contained in Daniel's personnel files is not found in public sources. Schroeder Affidavit at ¶ 8.

5. There are no countervailing considerations which militate in favor of public disclosure of the information and which clearly outweigh the potential harm of disclosure to Daniel and its employees.

Applicants discern no countervailing considerations which militate in favor of public disclosure of the information sought and which clearly outweigh the potential harm of disclosure to CP&L, Daniel and its employees. The information sought will be available to Mr. Eddleman for whatever productive use he may choose to make of it in support of his Contention 41 in this proceeding. Protecting the information from public disclosure, in the manner set forth in Applicants' proposed protective order, will not inhibit the presentation of Mr. Eddleman's case to the Board. Further, the public's interest in knowledge of the Board's resolution of Eddleman 41 should not be compromised by the protection afforded to this information.

C. Relief Sought

Applicants request that the information sought by the two interrogatories quoted above be protected from public disclosure in the manner set forth in Applicants' Proposed Protective Order, which accompanies this motion.

The proposed order defines as protected "Employee Information" the information provided in answer to the two subject interrogatories, except qualification and training information which is used without revealing other protected information (e.g., with a pseudonym instead of a name).

The proposed order provides for access to the protected Employee Information by persons assisting Mr. Eddleman in the preparation of his case and who are willing to be bound by the terms of the protective order.

Further, the proposed order provides for retention of protected Employee Information, if necessary, during the process of appellate review of the Board's decision on Eddleman Contention 41.

IV. CONCLUSION

The information sought by Eddleman Interrogatories 41-1(l) and 41-1(m), to which Applicants previously had objected as irrelevant, is proprietary and confidential, of commercial value to Daniel and CP&L, and affects the privacy interests of employees and former employees of Daniel. As demonstrated by the legal precedent discussed above and the attached affidavits, this information qualifies for protective treatment under the standards established by the Appeal Board in Wolf Creek, supra, ALAB-327, 3 N.R.C. 408 (1976). The protection from public disclosure requested by Applicants is reasonable, will not unduly

burden Mr. Eddleman in the pursuit of his case, and is the minimum necessary to avoid the potential harm to Daniel and CP&L of public disclosure of the information.

For all of the foregoing reasons, Applicants' Motion for Protective Order should be granted.

Respectfully submitted,

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