

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal BoardPublic Service Electric and)
Gas Company).(Hope Creek Generating)
Station))

Docket No. 50-354-OL

APPLICANTS' ANSWER TO THE PUBLIC ADVOCATE'S
MOTION TO QUASH SUBPOENAPreliminary Statement

In order to discover the bases of the contentions of the Public Advocate of the State of New Jersey ("Public Advocate"),^{1/} Public Service Electric & Gas Company, et al. ("Applicants") applied for issuance of a subpoena requiring the attendance and testimony of the Public Advocate, Joseph H. Rodriguez, Esq., in Newark, New Jersey on March 30, 1984.^{2/} On March 15, 1984, the requested subpoena was

1/ The Public Advocate is the sole intervenor in this operating license proceeding. He does not represent the State of New Jersey or any individual; rather he represents what he conceives to be the "public interest." Department of the Public Advocate Act of 1974, N.J.S.A. 52:27E-1 et seq. See also Letter to Office of Secretary from B. A. Curran, President, Board of Public Utilities, State of New Jersey of November 18, 1983.

2/ Applicants' Response to the Public Advocate's "Motion to Vacate PSE&G's Notice of Deposition and for a Protective Order in the Form of a Declaratory Ruling"
(Footnote Continued)

issued by the Atomic Safety and Licensing Board ("Licensing Board" or "Board") presiding over this proceeding; the subpoena was served on the Public Advocate on the following day.

In response to this subpoena, the Public Advocate, without prior notification of Applicants as is required by 10 C.F.R. §2.720(f), filed a motion with the Atomic Safety and Licensing Appeal Board ("Appeal Board") requesting that the Appeal Board (1) issue a stay, effective immediately, of the subpoena pending consideration on the merits of its motion, (2) direct certification of its motion, and (3) hear and resolve its motion pursuant to 10 C.F.R. §§2.785(b)(1) and 2.720(f).^{3/}

On March 27, 1984, the Appeal Board directed the Applicants to answer that portion of Public Advocate's motion requesting a stay by 12:00 noon, March 29, 1984.^{4/}

(Footnote Continued)

(March 13, 1984) and Application for Subpoena (March 13, 1984).

^{3/} The Public Advocate of the State of New Jersey's Motion to Quash the Applicant's Subpoena (March 26, 1984) ("Motion to Quash"). The Public Advocate indicated in his motion that he filed his motion with the Appeal Board because Chairman Miller of the Licensing Board is on vacation. Motion to Quash at 2. According to information provided by the Licensing Board's secretary, Chairman Miller will be in his office on Thursday, March 29, 1984.

^{4/} Due to the short period of time provided for an answer to the Public Advocate's motion for a stay, Applicants have informed the Public Advocate of the position taken in this answer by telephone call today.

Applicants oppose the Public Advocate's request for a stay on the ground that the Public Advocate has failed to address, much less satisfy, the stay criteria specified in 10 C.F.R. §2.788(e). It is no longer necessary to depose Mr. Rodriguez, however, in light of his sworn statement that he has no knowledge of the bases for his contentions. Applicants accept Mr. Rodriguez's Affidavit in lieu of his deposition. Accordingly, the matters raised by the Public Advocate are now moot as a result of Mr. Rodriguez's sworn statement.

Argument

In his Motion to Quash, the Public Advocate requests that the Appeal Board issue an immediately effective stay of the subpoena issued by the Licensing Board, pending consideration on the merits of his motion.^{5/} The Memorandum of Law attached to this Motion does not discuss the Public Advocate's request for a stay nor does it address the requirements of 10 C.F.R. §2.788 governing the issuance of a stay by the Appeal Board.^{6/} Most importantly, none of the stay criteria specified in Section 2.788(e) are addressed.

^{5/} Motion to Quash at 1-2.

^{6/} Section 2.788(b) requires that an application for a stay be no longer than ten pages, exclusive of affidavits, and contain, among other things, a concise statement of the grounds for a stay, with reference to the factors specified in Section 2.788(e). Despite these requirements, the Public Advocate's Motion to

(Footnote Continued)

Moreover, considering the information provided in the Memorandum of Law without regard to the Public Advocate's failure to show how this information relates to the stay criteria, the Public Advocate has failed to show that a stay is warranted. While the Public Advocate repeatedly alleges that the deposition of Mr. Rodriguez will cause irreparable injury, his Memorandum of Law contains no information pertinent to the three other criteria. Thus, Applicants conclude that the Public Advocate has not made the requisite showing for issuance of a stay by the Appeal Board.

Having addressed the stay question, however, Applicants believe that the Appeal Board need not involve itself in this discovery dispute. Although the Appeal Board does have authority to review such matters, the Appeal Board reserves this authority for exceptional and important issues.^{7/} The discovery questions here involved do not fall into that category.

Moreover, in light of Mr. Rodriguez's sworn statement that he lacks any knowledge of the bases of his contentions, it is no longer necessary to depose Mr. Rodriguez.

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Quash and Memorandum of Law total 30 pages. Similarly, neither document contains a concise statement of the grounds for a stay.

^{7/} 10 C.F.R. §§2.720(f) and 2.785(b)(1); Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 321 (1980).

Accordingly, as stated earlier, Applicants accept Mr. Rodriguez's Affidavit in lieu of his deposition.

Applicants made clear from the outset that their sole purpose in deposing Mr. Rodriguez is to determine if there were any bases for his contentions.^{8/} Under NRC case law, a party must be permitted full discovery in order to determine the bases of admitted contentions.^{9/} While the Public Advocate states in the Memorandum of Law which accompanied the Public Advocate's submission of proposed contentions that he relied on expert assistance in the preparation of the contentions, he has not stated who those experts were.^{10/} Instead, the Public Advocate stated that

^{8/} The depositions of the Public Advocate's after-acquired experts on Contention IV demonstrated that he had no basis for the contention when filed. Accordingly, pursuant to Applicants' motion and the Public Advocate's admission that the contention had no basis, the Licensing Board dismissed the contention from the proceeding. Public Service Electric and Gas Company (Hope Creek Generating Station), Docket No. 50-354, "Order Dismissing Contention IV" (February 21, 1984).

^{9/} Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445 and 50-446, "Memorandum and Order" (April 13, 1981) (slip op. at 3); Northern States Power Company (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300 (1978). During this entire discovery dispute, the Public Advocate has never acknowledged that Applicants must be able to inquire effectively as to the positions of intervenors prior to the hearings in order to afford Applicants a fair opportunity to discharge their burden of proof in this proceeding. id.

^{10/} Memorandum of Law in Support of Intervenor's Contentions at 4 (November 7, 1983). Thus, it is
(Footnote Continued)

he was "not at liberty" to identify the experts who assisted in the preparation of his contentions.^{11/} Further, in a response to Applicants' preliminary set of interrogatories which requested that the Public Advocate identify his experts, the Public Advocate stated that Applicants would be provided this information after consultants had been selected and contracts negotiated with them.^{12/} Thus, despite the right of Applicants to discover the bases of the Public Advocate's contentions, the Public Advocate has repeatedly failed to provide this information. Moreover,

(Footnote Continued)

unclear why the Public Advocate argues that deposition of Mr. Rodriguez will jeopardize the ability of any State government official from intervening in an NRC proceeding without technical staff at his side from the outset. Memorandum of Law at 22. This concern is clearly inapposite here.

^{11/} Id.

^{12/} The Public Advocate of New Jersey's Response to the Applicants' Preliminary Set of Initial Interrogatories and Request for Production of Documents at 1 (January 18, 1984). While the Public Advocate did state that his history of participation in NRC proceedings had enabled him to have access to persons such as Mr. Dale G. Bridenbaugh and Mr. Gregory C. Minor of MHB Technical Associates, it is unclear from the Public Advocate's reference whether these individuals were consulted during earlier licensing and rate proceedings or during the contention-framing phase of this proceeding. In an unrelated rate proceeding, Mr. Bridenbaugh of MHB Technical Associates said that he had not been involved with nor even seen the contentions put forth by the Public Advocate in the Hope Creek operating license proceeding. In the Matter of the Motion of Public Service Electric & Gas Company to Reduce the Level of Levelized Energy Adjustment Clause, BPU No. 831-25 (January 20, 1984) (Tr. 265).

until Applicants received the affidavit of Mr. Rodriguez, the record of this proceeding could only reflect that Mr. Rodriguez himself provided the bases for the contentions.

Now, however, Mr. Rodriguez states that he has "no personal knowledge or specialized technical information beyond the information presented to the Board in support of [the] contentions."^{13/} Mr. Rodriguez further states that his "direct participation was limited to reviewing the proposed petition to intervene, and assuring [himself] that the attorneys had researched the matter thoroughly."^{14/} Finally, he states that his participation "was limited to (1) determining after careful consideration -- and consonant with state law and regulation, that the public interest of New Jersey residents would benefit from the intervention, and (2) participating in meetings, consultations, and briefings with R. William Potter, Esq., the attorney who, along with Susan Remis, Esq., prepared the papers offered to the Board."^{15/} As Applicants' interest in deposing Mr. Rodriguez is limited to determining the bases of the Public Advocate's contentions,^{16/} and as Mr. Rodriguez has now

^{13/} Affidavit of Joseph H. Rodriguez, Esq., Public Advocate of the State of New Jersey at 6 (March 26, 1984).

^{14/} Id.

^{15/} Id. at 6-7 (citations omitted).

^{16/} Applicants' Response to the Public Advocate's "Motion
(Footnote Continued)

sworn that he did not provide the bases for the contentions but merely reviewed and approved the proposed petition to intervene on the basis of briefings by Mr. Potter and Miss Remis, it is no longer necessary to depose Mr. Rodriguez. Accordingly, Applicants accept Mr. Rodriguez's Affidavit in place of his deposition.

As the Applicants have suspected throughout, there appears that there were no bases for the contentions when filed by the Public Advocate other than attorneys' interpretations of technical matters. The record now seems clear that the contentions were only the creation of attorneys and did not have any technical foundation. The Public Advocate is only now obtaining technical support of his positions.

Finally, while Applicants do not believe that the Public Advocate's Motion to Quash and accompanying Memorandum of Law need be responded to, the Public Advocate has made the very serious charge that, in applying for a subpoena for Mr. Rodriguez, Applicants ignored and distorted the governing law.^{17/} Applicants feel that they should respond to this allegation in order to demonstrate its falsity. Under the Federal and State law cited by the

(Footnote Continued)

to Vacate PSE&G's Notice of Deposition and for a Protective Order in the Form of a Declaratory Ruling" at 3 (March 13, 1984).

^{17/} Memorandum of Law at 26.

Public Advocate, the privilege asserted is a conditional one. A high-level government official is not absolutely immune from compulsory process; rather, such an official may be deposed if there has been a showing of necessity. Applicants demonstrated to the Board's satisfaction the necessity of deposing Mr. Rodriguez by describing the Public Advocate's repeated failure to state who provided the basis for the Public Advocate's contentions. Applicants are entitled to know this information in light of the Public Advocate's statement that he relied on expert assistance in the preparation of the contentions. Thus, Applicants did precisely what is required by the law; they applied the legal principle to the facts of this proceeding and demonstrated the necessity of deposing Mr. Rodriguez.

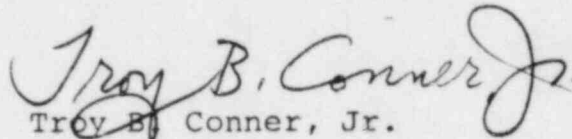
Conclusion

In sum, Applicants conclude that the Public Advocate's Motion to Quash does not satisfy the stay criteria in 10 C.F.R. §2.788(e) and thus does not justify issuance of a stay. It is no longer necessary to depose Mr. Rodriguez, however, in light of his sworn statement that he has no knowledge of the bases of his contentions. Accordingly, the

matters raised by the Public Advocate are now moot as a result of Mr. Rodriguez's Affidavit.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



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March 29, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Answer to the Public Advocate's Motion to Quash Subpoena," dated March 29, 1984 in the captioned matter have been served upon the following by deposit in the United States mail on this 29th day of March, 1984:

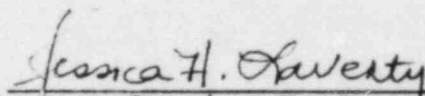
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