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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	:	
Public Service Electric and Gas Company	:	Docket No. 50-354 OL
(Hope Creek Generating Station)	:	

THE PUBLIC ADVOCATE OF THE STATE OF NEW JERSEY'S MOTION TO QUASH THE APPLICANT'S SUBPOENA

The Public Advocate of the State of New Jersey, a cabinet level officer of the executive branch of government of the State of New Jersey, N.J. Stats. Ann. 52:27E-1, et seq., and the party-intervenor in the above-captioned proceeding, hereby files this motion requesting that the Atomic Safety and Licensing Appeal Board ("Appeal Board")

1. issue a stay, effective immediately of the subpoena signed by the Honorable Marshall E. Miller, presiding officer of the Atomic Safety and Licensing Board ("Licensing Board"), on March 15, 1984,* pending considerations of the merits of this motion in order to prevent

*This subpoena directs the Honorable Joseph H. Rodriguez, Public Advocate of the State of New Jersey, to appear at PSE&G's corporate office in Newark, New Jersey on March 30, 1984 at 10:00 A.M. A copy of the subpoena is appended as Attachment 1.

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immediate, serious irreparable injury;

2. direct certification of the instant motion, and determine whether it was appropriate to grant a subpoena of a high-level government official (i.e. a cabinet official of the State of New Jersey), pursuant to the Appeal Board's authority 10 C.F.R. §2.718(i); and

3. hear and resolve the enclosed motion under the Appeal Board's delegated obligations to entertain a motion to quash a subpoena due to the unavailability of the presiding officer below, pursuant to 10 C.F.R. 2.785 (b) (1) and 2.720(f).*

The attached Memorandum of Law presents the Public Advocate's argument in support of this motion.

Dated: March 26, 1984

Respectfully submitted,

JOSEPH H. RODRIGUEZ
PUBLIC ADVOCATE

BY: R. William Potter
R. WILLIAM POTTER, ESQ.
Assistant Public Advocate

*Chairman Miller signed the subpoena on March 15 and, then reportedly, departed for a vacation.

PRELIMINARY STATEMENT

This is a motion to quash a subpoena of a cabinet official of the State of New Jersey, who is also an intervenor on behalf of New Jersey residents in the Hope Creek Operating License proceeding. It comes to the Appeal Board after an apparently unsuccessful motion to the Licensing Board to vacate an earlier notice of deposition filed by the applicant utility, Public Service Electric and Gas Company (PSE&G"), the proponent of the subpoena. (The motion was "apparently unsuccessful" because the presiding officer did not rule on it before signing the subpoena, notwithstanding responses by the NRC staff in support and by PSE&G in opposition.)

Because forcing the Public Advocate to submit to PSE&G's deposition -- especially when he willingly concedes that he has no knowledge of the underlying facts -- will cause him, the office he holds, and the State of New Jersey, immediate irreparable injury, the Public Advocate must call upon the Appeal Board to stay the subpoena immediately, and hear the matter under its direct certification authority, or as an exercise of its original jurisdiction to rule on motions to quash when the presiding officer is unavailable. 10 C.F.R. §§2.720(f) and 2.785(b)(1). Whichever basis is used, the Public Advocate is convinced that swift and decisive

action by this Appeal Board is crucial to avert a manifest injustice and a clear derogation of law. (See Attachment2, Affidavit of Joseph H. Rodriguez, Esq., Public Advocate of the State of New Jersey.)

The memorandum which follows sets forth the Public Advocate's legal argument in support of his motion -- and refutes the arguments presented by PSE&G in support of the application for a subpoena.

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PROCEDURAL HISTORY

The Licensing Board admitted the Public Advocate as an intervening party on October 5, 1983, subject to the submission of one or more viable contentions. On November 7, 1983, the Public Advocate submitted an amended petition containing various proposed contentions which were the subject of a Special Prehearing Conference on November 22, 1983 in Salem, New Jersey. After lengthy discussion, the Board orally admitted four (4) of the Public Advocate's contentions, and then issued a written order on December 21, which set forth the Board's decision and directives.

Discovery began almost immediately and continues on three of the contentions, the fourth being in the process of withdrawal.

On February 9, PSE&G served a notice of deposition on the Public Advocate, Commissioner Joseph H. Rodriguez. After unsuccessfully attempting to reach an agreement, the Advocate moved on February 27 to vacate the notice and for a protective order due to Commissioner Rodriguez' privilege as a cabinet officer and his lack of information. On March 13, PSE&G filed

an apparently untimely response[1] opposing the motion, and applying for a subpoena.

The NRC staff on March 14 filed a response to the Advocate's motion which supported "this request for a protective order." On March 15 Chairman Marshall E. Miller signed the subpoena, commanding Commissioner Rodriguez to appear at the office of PSE&G in Newark, New Jersey on March 30 at 10:00 A.M.

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*10 C.F.R. ¶2.730(c) allows ten (10) days to respond to a written motion. (Hereafter, this response will be referred to as Applicant's Response).

ARGUMENT

POINT I: The Appeal Board Has Jurisdiction To Grant A Stay And Hear And Decide The Public Advocate's Motion In Order To Protect The Important Privilege Of A High Government Official Against Compelled Examination.

The Appeal Board has both the power and the duty to act under two separate provisions of the Commission's "Rules of Practice First", 10 C.F.R. §2.718(i) authorizes this body to:

> [act where the interlocutory] ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.[2] (Emphasis added).

Plainly, forcing the cabinet head of a major department of state government to submit to depositions regarding questions already answered by the Licensing Board, and when the official admits to having no factual knowledge or expertise -- simply because he dared to intervene to help assure that the interests of New Jersey residents are represented -- serves no proper purposes whatever and will cause immediate irreparable harm

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[2] In the Matter of Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), 5 NRC 1190, 1192 (1977). In the same opinion, the appeal panel also suggested that a claim that "guidance is necessary" might also be relevant. Id., n. 5.

which "as a practical matter [can] not be alleviated by a later appeal." In re Public Service Co. of Indiana (Marble Hill), 5 NRC, supra at 1192. In the Matter of Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), 13 NRC 309, 310 (1081).

As the Appeal Board has noted in matters of interlocutory jurisdiction, "a like practice obtains in the federal system." In re Public Service Co. of Indiana (Marble Hill), 5 NRC 767, 768 (1977). Accordingly, we may look to the federal court system for guidance, including the question of the proper standard for appellate review generally of interlocutory decisions which are "final" as to a given right.[3] Here, the courts agree that a subpoena in aid of discovery, although facially interlocutory, is properly appealable to the circuit in order to protect a valid privilege. See, e.g., Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964), setting aside a subpoena duces tecum which infringed upon the attorney-client privilege, despite a claim of necessity in aid of an ongoing grand jury investigation. ("The privilege here is a valuable and an important right... We think that to [accept] the limitations on this right urged by the United States would

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[3] Since the federal rules currently do not require leave of court to subpoena a witness, R.45 of the Federal Rules of Civil Procedure (1983 Ed.), there are few recent federal circuit court decisions directly confronting the interlocutory appeal of a subpoena order. Rather, the current federal rule permits the person subpoenaed to serve a "written objection" within ten days of service of the subpoena; thereupon the "party serving the subpoena may ... move upon notice to the deponent for an order [from the district court] at any time before or during the taking of the deposition." R.45 (d)(1)(P2). Thus, it is to the federal district courts where we turn for the most recent guidance.

tend in substantial measure to destroy the privilege." Id. at 350) (emphasis added).

Accord: International Business Machines Corp. v. United States, 471 F.2d 507, 515, 516 (2d. Cir. 1972) ("If IBM is compelled [to produce certain information] the harm thus caused IBM cannot effectively be remedied by an 'appeal from the final judgment'... 'When that time comes, it will be too late effectively to review the present order and the rights conferred ... will have been lost, probably irreparably.'") (emphasis added).[4] Investment Properties International, Ltd. v. IOS, Ltd. 459 F.2d 705, (2d Cir. 1972) (finding the requisite "extraordinary significance" and "extreme need for review" to justify overturning an order vacating notice of deposition). Further cases employing similar reasoning and achieving the same result -- declaring a proper appellate role to review pre-

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[4] This case is especially instructive for its discussion of the two avenues by which the Circuit Court has jurisdiction to review and set aside the trial court's discovery order. These two routes -- mandamus or interlocutory appeal under 28 U.S.C. § 1292 -- are analogous to the options before this Appeal Board: original jurisdiction to quash under 10 C.F.R. 2.720 (f) and 2.785(b)(1), or directed certification by way of 10 C.R.F. 2.718(i). The Court reasoned that whichever is adopted "the two paths converge at a common destination, i.e., appellate review of [the] Pretrial Order," which the court reversed due to the "allegedly privileged material." Id. at 517.

trial orders with a "final" effect on a valid right -- are legion.[5]

Finally, "Developments in The Law -- Discovery," 74 Harvard L. Rev. 940 (1961), 994, 999-1000, describes the "collateral orders doctrine" and the leading case of Cohen v. Beneficial Industrial Loan Corp. 337 U.S. 541, (1949) which so ably articulates the need for appellate review. The doctrine holds that

> when the trial court order disposes of an issue which is collateral to the subject matter of the litigation and which will expose a person to potential irreparable injury if appeal is postponed until the final decision, an immediate appeal is permissible.

Id. 999 (emphasis added).

The authors conclude that an order compelling discovery over a facially valid claim of a privilege is precisely the sort of "collateral order" which meets the doctrine enunciated in Cohen v. Beneficial Industrial Loan Corp., supra.[6] That

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[5] See, e.g., cases collected in Industrial Business Machine Corp. v. United States, 471 (F.2d 507), supra, 517, n. 17.

[6] "This [issue] appears to fall in that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of [28 U.S.C. §1292] This practical rather that a technical construction . . . We hold this order appealable because it is a final dispositin of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." Cohen v. Beneficial Loan Corp., 337 U.S., supra, 546, 69 S.Ct., supra, 1225-26 (emphasis added).

is, the privilege once "lost" cannot be "returned" on appeal of the final judgment, regardless of the outcome. And since the sanctions for violating a subpoena or discovery order are potentially so harsh (e.g., contempt of court, dismissal of the action, striking a defense, etc.), few parties will choose to run such risks. Lacking a remedy, the holders of the privilege will be "chilled" into giving it up, absent some mode of timely appellate attention. Hence, immediate appellate review, though it may be sparingly invoked, is vital if socially important privileges are to have any lasting strength.

The doctrine enunciated in Cohen is decidedly like that announced by this Appeal Board in In re PSC of Ind. (Marble Hill) 5 NRC 1190, supra. Thus, in Cohen: "When that time [of final judgment] comes, it will be too late effectively to review the present order, and the rights conferred . .. will have been lost, probably irreparably." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. supra, at 546. And in Marble Hill: "[W]e have taken discretionary interlocutory review only where the ruling below . . . threatened the party with immediate and serious irreparable impact which as a practical matter, could not be alleviated by a later appeal [of a final judgment]." (emphasis added). In short, without saying so, this Appeal Board already has blazed its own path to a "collateral rights doctrine" of appellate, interlocutory review which, as in the federal

system, offers real protection of important but fragile interests that will be lost if not protected immediately.

Thus, it is clear that the Appeal Board has the power and the duty to grant the requested stay of the subpoena compelling Commissioner Rodriguez to submit to depositions, hear the present motion in its entirety, and provide the relief requested -- lest a universally recognized privilege be lost, perhaps irreversibly, for want of a forum.

POINT II: As a Cabinet Officer of the State of New Jersey, Commissioner Rodriguez is Priviledged against Compulsory Process, absent a clear showing of Extraordinary Necessity, Which is Not Present Here

In the attached Affidavit of Joseph H. Rodriguez he fully describes the cabinet-level status of his position as both the Public Advocate and Public Defender for the State of New Jersey, with the designation of "Commissioner" of the Department of the Public Advocate. New Jersey Statutes Annotated ("N.J.S.A.") 52:27E-1, et seq.[7] As such, Mr. Rodriguez is privileged against PES&G's efforts to compel him to sit for depositions or otherwise to submit to discovery. The law on this point is well-settled and beyond serious dispute. See, e.g., Halderman v. Pennhurst State School and Hosp., 96 F.R.D. 60, 64 (E.D. Pa., 1982),

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7. In the Public Advocate's January 14 response to The Applicant's Preliminary Set of Initial Interrogatories counsel stated we "will inform the applicant . . . of all experts as soon as we complete the consultant selection and contract negotiation process. The Public Advocate anticipates that this will be accomplished in the near future." Thus, PSE&G will have someone to depose soon enough.

rev'd on other grounds, __ U.S. ____, 52 L.W. 4155 (1984), where the court quashed a subpoena of Helen O'Bannon, Pennsylvania's Secretary of the Public Welfare Department. In United States Board of Parole v. Marhige, 487 F.2d 25, 29 (4th Cir. 1973), cert. denied, 417 U.S. 918 (1974), the court disallowed discovery of members of the federal parole board. Similarly, the court in United States v. Northside Realty Associates, 324 F.Supp. 287, 293,295 (N.D. Ga. 1971), rev'd on other grounds, 474 F.2d 1164 (5th Cir. 1973), granted a protective order against deposition of the Attorney General. Finally, the court in Wirtz v. Local 30, International U. of Operating Engineers, 34 F.R.D. 13, 14-15 (S.D. N.Y. 1963), protected Secretary of Labor Wirtz against the union's notice of deposition with this cogent reasoning:

> It goes without saying that ours is a government of laws and not of men and that the Secretary of Labor is subject to the lawful orders of this Court, as is any private citizen.
>
> But at the same time common sense suggests that a member of the Cabinet and the administrative head of a large executive department should not be called upon personally to give testimony by deposition, either in New York or elsewhere, unless a clear showing

> is made that such a proceeding is essential to prevent prejudice or injustice to the party who would require it. No such showing has been made here and in the nature of things it could not be made.
> 34 F.R.D., supra, 14.

The Public Advocate is precisely such "a member of the Cabinet and the administrative head of a large executive department" who must be guarded against personal legal compulsion except in the rarest of circumstances.[8] As the Affidavit confirms, Mr. Rodriguez is a State cabinet officer in command of a legal department with diverse administrative and cabinet duties. He is involved in literally tens of thousands of cases as counsel or as a named party, or both.[9] Moreover, he has no remotely relevant and discoverable information that PSE&G appropriately may discover -- whether

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8. Federal courts routinely recognize that the privilege applies to state officials with exactly the same force and effect as it applies to federal officers of comparable rank. See, e.g., Halderman v. Pennhurst State School and Hosp., supra.

9. See, also, Sneaker Circus, Inc. v. Carter, 457 F.Supp. 771, 794, n. 33 (E.D. N.Y., 1978) (forbidding deposition of a high government official "unless a clear showing is made that such a proceeding is essential to
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by deposition or through any other means.[10] Accordingly, the Appeal Board should issue the appropriate protective orders by quashing the subpoena and protecting Commissioner Rodriguez against further efforts to summon him in the future, absent a genuine showing of real necessity.

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Prevent prejudice or injustice to the party who would require it"); The Federal Rules of Civil Procedures, 28 U.S.C. §331 (1983), R. 26(c), and related "Commentary;" Peoples v. United States Dept. of Agriculture, 427 F.2d 561, 567 (D.C. Cir. 1971), suppl. opinion of C.J. Leventhal ("[S]ubjecting a cabinet officer to oral deposition is not normally countenanced."); and Schicke v. United States, 346 F.Supp. 417, 420-421 (D.Conn. 1972).

10. Affidavit, para. 9.

Point III: The Applicant Has Failed to Make the Requisite Clear Showing of Necessity Required to Infringe the Privilege

As demonstrated in Point II, Commissioner Rodriguez is entitled to a privilege against compulsory testimony -- whether by deposition or by any other method -- which customarily is due all high government leaders, such as cabinet officials. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 353, 420 (1971). The courts unanimously agree that only a clear showing of necessity to avoid manifest prejudice and injustice will obligate a high government official to submit to depositions. (See cases cited and quoted in Point II, supra.)[11] PSE&G's Application for Subpoena fails utterly to meet this strict standard.

Significantly, the applicant did not even mention, let alone distinguish any of the many federal cases which so compellingly support the Public Advocate's position.[12]

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11. The NRC Staff's Response to the Public Advocate's Motion for a Protective Order provided additional argument and citations in supportof the Public Advocate's position.

12. At the outset we note that some confusion may attend this matter due to the lack of a Board ruling on the Public Advocate's Motion to Vacate PSE&G's Notice of Deposition and for a Protective Order. The Board, however, granted the applicant's motion for a subpoena based upon matters allegedly presented in the Applicant's Response,

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(See Applicant's Response to Public Advocate's Motion to Vacate, hereafter "Applicant's Response"). Indeed, the applicant merely relied upon general statements in unrelated NRC cases -- none from a federal court -- regarding the familiar rule favoring a board scope of discovery (although the applicant acknowledges the applicability of the federal rules.)[13] These generalizations are then followed by an astonishing exercise in distortion which bares scant resemblance to the record to date. On this paltry basis it is impossible for any reviewing authority to conclude that PSE&G is entitled to the extraordinary relief demanded.

The applicants launch this voyage of misinformation by asserting the truism that "the basis of the Public Advocate's

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when it probably should have been treated as a separate motion entitling the Public Advocate and NRC staff to respond prior to the Board's approval of the subpoena. The Commission's Rules of Practice unconditionally permit all parties a chance to respond to motions. See 10 C.F.R. §2.730(c) and (h). Had such an opportunity been provided, the Public Advocate would have opposed the subpoena motion for the reasons stated above.

13. See, e.g., Applicant's Response, p. 6, n. 14.

contentions is not privileged"[14] -- as if the Advocate had ever asserted such a privilege. The privlege that is asserted is the right of a cabinet officer to be free of compulsory testimony, absent real necessity, nothing more and nothing less. Applicant's counsel seeks to divert attention from this central point by arguing against a straw man -- the typical tactic of one who lacks a legitimate basis for his claim.

Next, as for the requisite "clear showing" of necessity "to prevent prejudice or injustice" required of one who seeks to subpoena a high government official, Wirtz v. Local 30, International U. of Operating Engineers, 34 F.R.D. 13, 14-15 (S.D. N.Y. 1963), PSE&G simply restates its strongly-held complaint that "the operating license proceeding would not exist but for the contentions put forth by the Public Advocate."[15] (emphasis added)

While it may well be that "but for" the Advocate's intervention there would be no hearings, this allegation

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14. Applicant's Response, p. 3.

15. Applicant's Response, p. 3, repeated again almost verbatim at p. 8.

is both conjectural and beside the point.[16] (One might just as well lament that "but for" the Licensing Board's decision to admit the Advocate, or "but for" the staff's concurrence with at least one of the Advocate's contentions there would be no "operating license proceeding" -- yet neither entitles the applicant to subpoena the presiding officer or the staff!) The question remains whether the test of clear necessity laid down in a long line of cases has been met. Specifically, has the applicant made

(1) a clear showing that

(2) the Commissoner's deposition is essential,

(3) to prevent prejudice or injustice?

Plainly, PSE&G has shown none of the above. Significantly, the applicant has not even affixed an affidavit to support any element of its claim of necessity, but chosen instead to rely on contrived interpretations of the law and of the facts in the record to date.

16. First, the Commission or its staff could always seek hearings sua sponte or on their own motion. 42 U.S.C. 2235 and 2239(a), which show that dispensing with a hearing at the OL stage, while customary, is not required. Second, late-filed petitions might still have "triggered" the convening of a Board and the admission of parties leading to the prospect of hearings. 10 C.F.R. 2.714(a)(1) and (d).

At bottom, applicant's claim rests upon a fundamental absurdity. Stated simply, PSE&G believes that necessity is shown sufficient to overcome this important privilege simply because the company faces the prospect of hearings and no Public Advocate witnesses or experts have been identified as yet.[17] Such a view, if accepted by this Commision, could render the privilege a nullity and put any State government official in jeopardy, simply because he has intervened in an NRC proceeding without a technical staff at his side from the outset. Applicant's counsel, in short, will have his shot -- but he cannot be allowed to pick any target he wishes, when and where he wishes.

The next twist in applicant's tale is the statement that "the Public Advocate has repeatedly failed to state who formulated the contention and provided their

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17. As stated in the Public Advocate's responses to the applicant's first interrogatories, contracts have not yet been signed with consultants who will assist the Public Advocate; the applicants will be notified as soon as this has been accomplished. The applicant explicitly notes this fact in his Response, at 4, but adds: "Thus, the necessity of deposing Mr. Rodriguez arises from the Public Advocate's failure to comply with the NRC's rules by providing the basis of his contentions and responding to discovery." (emphasis added) At the time the contentions were admitted one or

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bases.[18] The applicant is well-aware of the answer: the attorneys who signed the papers of intervention, who publicly explained the contentions at the November 22, 1983 special prehearing conference, who argued for their admission, and who have responded to date to applicant's inquiries are well-known to all as the authors of the contentions. Indeed, at the conference, counsel to the Advocate redrafted many of the contentions publicly and before the very eyes of all those present.[19]

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more "bases" were explicitly identified and found to be such by the Licensing Board. See, generally, the Transcript of the Special Prehearing Conference, November 22, 1983 and the Board's Special Prehearing Conference Order, December 21, 1983. Moreover, no rule violation is identified except the assertion that the Advocate has "by analogy" violated the rule against denying information "based upon a claim of awaiting further discovery." The Advocate has made no such claim. Moreover, before a Board may sweep aside a long-settled privilege, it should consider less intrusive alternatives -- such as entertaining a motion to compel discovery. 10 C.F.R. §2.740(f).

18. Applicant's Response, p. 9.

19. See, e.g., the transcript of the November 22, Special Prehearing Conference, Tr. 132-134, where counsel to the Advocate read into the record the redrafted Contention I (which the Board accepted at Tr. 139); Tr. 170, where counsel stated: "Mr. Chairman, Mr. Dewey of the Staff and I have consulted and we have agreed to the following language for Contention V. And I will read it." and Tr. 218, where counsel to the State of Delaware observes that "Mr. Potter could rewrite [Contention X]" which was promptly done, and then read it into the record (Tr. 219: "Mr. Chairman, I would be willing to give [redrafting] a shot . . . This is the Public Advocate's rephrased Contention X.") In short, it was as obvious to Applicants on November 22 as it is today

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Finally, in what is perhaps the most curious aspect of applicant's brief, we find the puzzling assertion that "under the law of the State of New Jersey, given [Commissioner Rodriguez'] first-hand knowledge and direct involvement . . . it is clear he can be deposed." Applicant's Response, p. 9, n. 21. As stated previously and in the attached Affidavit of Commissioner Rodriguez, he does not have such "first hand knowledge and direct involvement." Moreover, even if he did,the New Jersey cases applicant cites compel the very opposite conclusions. Thus, in Hyland v. Smollock, 137 N.J. Super. 456 (App. Div. 1979), 349 A.2d 541 cert. denied, 71 N.J. 328 (1976), 364 A.2d 1060. The appellate court reversed the lower court's denial of a protective order sought by the Attorney General, noting that the Attorney General's affidavit denied active participation in the suit and concluding: "The rationale of the trial judge

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by the named Advocate attorneys that the contentions were drafted and redrafted/-- at times rapidly, at counsel's table and before their very eyes. The "mystery" they would solve by forcing Mr. Rodriguez to submit to a subpoena does not exist.

that since Hyland is the plaintiff he is subject to being deposed ignores the fact that the Attorney General is suing solely in a representative capacity." Hyland v. Smollock, 137 N.J. Super., supra, 960. (emphasis added)[20]

Similarly, in Borough of Morris Plains v. Dept. of Public Advocate, 169 N.J. Super. 403 (App. Div. 1979), 404 A.2d 1244, cert. den'd, 81 N.J. 411 (1979), the threshold issue before the Court was the borough's motion to compel discovery from the Public Advocate regarding the basis for his suit -- an issue analogous to the instant controversy. The court denied the motion, calling it "entirely inappropriate," 169 N.J., supra, 407, and relied instead entirely on an affidavit submitted by the Public Advocate.

Finally, PSE&G cites N.J. Sports & Exposition Authority v. McCrane, 119 N.J. Super. 457 (Law Div. 1971), 292 A.2d 580, aff'd, 61 N.J. 1 (1972), 292 A.2d 545, appeal dism'd, 409 U.S. 943 (1972), but nowhere in this 109-page decision can one find any mention of the questions here at issue.

In short, New Jersey case law closely parallels the

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20. The Public Advocate, of course, has intervened solely in his "representative capacity."

federal approach -- which the applicant has conspicuously failed to address. The recitation of the above cases, therefore, merely underscores the Public Advocate's contention (except for the third case which has no hearing whatever). Why PSE&G's counsel chose to cite them for the opposite rule of law is unclear, to say the least.

In sum, we find a consistent pattern to PSE&G's argument: First, applicant utterly ignores and distorts the governing law. Second, PSE&G wants to relitigate the Board's Orders of November 22 and December 21 admitting certain contentions and denying others, and, third, the applicant in its impatience absolutely must depose the Public Advocate himself, (notwithstanding his lack of technical expertise and the existence of a nearly inassailable privilege against compulsory process).

Point IV: The Subpoena is Defective on Its Face as It Commands Commissioner Rodriguez to be Deposed at PSE&G's Corporate Office -- which is far from Commissioner Rodriguez' Place of Business and Residence

The federal rules provide that a person

> may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court.

R. 45(d)(2) (1983 Ed.)

PSE&G has set the deposition for Friday, March 30, at 80 Park Place, City of Newark, Essex County, New Jersey. As noted in the Affidavit of the Public Advocate, Commissioner Rodriguez uses the headquarters office of the department -- located in the Richard J. Hughes Justice Complex, City of Trenton, Mercer County, New Jersey -- as the place where he is employed and "transacts his business in person." Trenton is about 55 miles from Newark. Moreover, Commissioner Rodriguez resides in Cherry Hill, New Jersey, which is another 35 miles southwest of Trenton. Accordingly, the site is neither within the county of business nor residence of the deponent, nor is it within close proximity to either.

Conclusion

The Appeal Board has jurisdiction of this motion to quash under two separate provisions of the Commission's Rules, 10 C.F.R. 2.718(i) and 2.785(b)(1). The Appeal Board should grant the requested stay of the subpoena and hear and decide the motion to quash in order to prevent immediate, serious irreparable harm to a cabinet officer of the State of New Jersey. The matter is ripe for the Appeal Board's decision; while it relates to discovery, the interest will be irreversibly lost if the motion is not heard immediately. The applicant has studiously avoided discussing case law on the subject, has distorted the factual record and attempted to mislead the Appeal Board on the standards of New Jersey law.

Finally, the location of the deposition lies well outside the Commissioner's place of business and residence.

For these and other reasons the subpoena signed by the Honorable Marshall E. Miller on March 15, 1984 should be stayed indefinitely and this motion heard and granted.

Respectfully submitted,

JOSEPH H. RODRIGUEZ
Public Advocate of the State
of New Jersey

By: R. William Potter

R. WILLIAM POTTER
Assistant Public Advocate/
Assistant Commissioner

Dated: March 26, 1984

ATTACHMENT 1

United States of America

NUCLEAR REGULATORY COMMISSION

In the matter of:

Public Service Electric
and Gas Company

(Hope Creek Generating Station)

} DOCKET NO. 50-354-OL

TO
The Honorable Joseph H. Rodriguez
Public Advocate for the State
of New Jersey
Department of the Public Advocate
Trenton, New Jersey 08625

YOU ARE HEREBY COMMANDED to appear at the office of the General Solicitor, Public Service Electric and Gas Co., 80 Park Plaza, 5th floor

in the city of Newark, New Jersey 07101

on the 30th day of March 1984 at 10 o'clock A. M.

to testify on behalf of

and bring with you all documents on which you intend to rely in this proceeding

~~in the above entitled action~~ and bring with you the document(s) or object(s) described in the attached schedule.

BY ORDER OF THE ATOMIC SAFETY AND LICENSING BOARD

BY Marshall E. Miller
Chairman

March 15 1984

ATTORNEY FOR Public Service Electric and Gas Company
Troy B. Conner, Jr.

TELEPHONE 202/833-3500

DR 8403200108

10 C.F.R. 2.720 (f)

On motion made promptly, and in any event at or before the time specified in the subpoena for compliance by the person to whom the subpoena is directed, the presiding officer or, if he is unavailable, the Commission may (1) quash or modify the subpoena if it is unreasonable or requires evidence not relevant to any matter in issue, or (2) con-