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July 9, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY	)	Docket No. 50-40[illegible] OL
	)	
(Shearon Harris Nuclear Power Plant)	)	

APPLICANTS' RESPONSE TO INTERVENOR WELLS EDDLEMAN'S PETITION FOR PRODUCTION OF CERTAIN DOCUMENTS BY MAKING THEM PART OF A PUBLIC RECORD OR, IN THE ALTERNATIVE, PURSUANT TO THE FREEDOM OF INFORMATION ACT

Applicants Carolina Power & Light Company ("CP&L") and North Carolina Eastern Municipal Power Agency submit this response in opposition to Intervenor Wells Eddleman's petition for production of certain documents, by letter from Robert Guild, Esquire to the Board dated June 19, 1985. Mr. Eddleman asks the Board to rule that the documents in question, provided to the Board by Applicants for in camera review to confirm a preliminary determination of irrelevancy to litigation of former Eddleman Contention 41-G, should be made "part of the record in this proceeding for possible consideration on appeal and that copies of these documents be provided to us for our review and use." In the alternative, Mr. Eddleman seeks production of the documents pursuant to the Freedom of Information Act ("FOIA").

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Applicants oppose production of the documents at issue because (1) the documents need not be made part of the Commission's record of this proceeding, in that (i) review of the documents was not required for the Board to reject Mr. Eddleman's motion to compel and (ii) the underlying contention, which led to the discovery dispute, has been dismissed as inadmissible -- thus mooting any issues raised during discovery for purposes of appellate review; (2) pursuant to 10 C.F.R. § 2.790(b)(5), Applicants have an absolute right to the return of documents found by the Commission "to be irrelevant or unnecessary to the performance of its functions"; (3) the documents are not an "agency record" subject to production pursuant to FOIA; (4) a party may not obtain production of documents pursuant to FOIA, where production has been denied pursuant to the Commission's discovery rules; and (5) in any event, the documents are exempt from production pursuant to FOIA since they contain confidential commercial information and privileged self-critical analyses.

By this pleading, pursuant to 10 C.F.R. § 2.790(b) (1), Applicants formally petition the Board to withhold disclosure of the subject documents as containing confidential and privileged commercial information. This petition is supported by the attached affidavits of Dr. Thomas S. Elleman ("Elleman Affidavit") and Mr. Harold R. Banks ("Banks Affidavit").

BACKGROUND

The documents in question were provided in camera solely to the Board by cover of letter from Applicants' counsel dated May 20, 1985. The documents are the "Final Report SHNPP QA/QC-Construction Inspector Review Panel," dated August 30, 1984 ("Review Panel Report"), and certain documents relating to a Quality Check exit interview of an employee and follow-up investigation of an allegation ("Quality Check Report"). These documents are described in more detail in the attached Elleman Affidavit at ¶¶ 3-6 and Banks Affidavit at ¶¶ 2-3.

In a conference call on May 7, 1985, the Board had denied a motion to compel discovery of inter alia the instant documents, subject to an in camera review of the Review Panel Report and Quality Check Report. Tr. 7580. In transmitting the documents to the Board, Applicants stated:

> These documents are transmitted to the Board members solely for the purpose of an in camera review to confirm the Board's preliminary determination that such documents need not be produced by Applicants. These documents are not to be considered evidentiary in any way. Since these documents will not be part of the record and will not be viewed by other parties, Applicants ask that they be returned after the Board has completed its review to avoid any concern regarding an ex parte communication.

Subsequently, the Board confirmed its ruling that the documents were not relevant to litigation of Eddleman Contention 41-G. Tr. 7712-14 (Conference Call, May 29, 1985). Upon reconsideration of its analysis of the five lateness factors in

admitting the contention, the Board dismissed Eddleman 41-G. Tr. 7755-56 (Conference Call, June 6, 1985); Memorandum and Order (Dismissing Contention Concerning Alleged Harassment of Former Employee and rejecting Emergency Planning Contention) dated June 12, 1985. Nonetheless, the Board gave Mr. Eddleman an opportunity to respond to Applicants' arguments, set forth in our letter of May 20, 1985, regarding whether the documents need be made part of the appellate record of this proceeding. Tr. 7714; 7766-67. Mr. Eddleman submitted his views by his counsel's letter of June 19, 1985, and for the first time raised the request for production of documents pursuant to FOIA. The Board Chairman gave Applicants until July 9, 1985 to respond to Mr. Eddleman's FOIA request.

ARGUMENT

A. Documents, reviewed in camera by the Board merely to confirm its preliminary determination regarding relevancy in ruling on a motion to compel relating to a contention subsequently dismissed as inadmissible for litigation, need not be made part of the record for appeal.

Mr. Eddleman's June 19, 1985 letter-petition focuses predominantly on the Board's decision to review the documents in camera without opportunity for review of the documents by Mr. Eddleman. This question has already been briefed by Applicants in our letter of May 20, 1985. Applicants understand that the instant opportunity for response applies only to the new issues raised by the June 19, 1985 letter.

Subsequent to Applicants' letter of May 20, 1985, the Board dismissed Eddleman Contention 41-G, finding it, on reconsideration, inadmissible for litigation. Any discovery disputes regarding Eddleman 41-G are moot. There is clearly no need to include in the record for appeal documents that may have been the subject of a discovery dispute that is now moot. Neither the Appeal Board nor a reviewing court would entertain an appeal of a dispute that has been mooted.

Even if Eddleman 41-G had not been dismissed as moot, the Appeal Board could well have reviewed the Board's discretionary finding of no relevancy based on the arguments of counsel in the transcript without the need to review the actual documents. Indeed, the Board only reviewed certain of the documents originally demanded by Mr. Eddleman. And even if the Board were to determine that the documents should be made part of the record for appeal, in order to preserve the determination that Mr. Eddleman has no right to the documents pursuant to the Commission's discovery rules, the documents would necessarily be retained in the record under seal.

B. Pursuant to the Commission's Rules at 10 C.F.R. § 2.790(b)(5), Applicants have an absolute right to return of documents found by the Commission "to be irrelevant or unnecessary to the performance of its function."

The Commission's Rules at 10 C.F.R. § 2.790 establish the right of public access to the Commission's records. It predates FOIA but was subsequently amended to comply with FOIA

and the Commission's regulations at 10 C.F.R. Part 9 which implement FOIA. In Westinghouse v. NRC, 555 F.2d 82 (3d Cir. 1977), the Third Circuit closely examined Section 2.790 in light of numerous statutory and constitutional challenges and concluded that Section 2.790 is a "validly enacted agency regulation" with "the 'force of law'." Id. at 94. In General Electric Co. v. NRC, 750 F.2d 1394, 1397 (7th Cir. 1984), the Seventh Circuit explained the need for both Part 9 and Section 2.790, in that "[Section 2.790] establishes a policy on disclosure, as distinct from merely implementing the Freedom of Information Act -- a statute that requires some, but . . . does not forbid any, disclosure."

Section 2.790(b)(5) establishes a balancing test for the Commission to apply where it determines that a record or document sought for disclosure contains trade secrets or privileged or confidential commercial or financial information. Such information falls into exemption category 4 for disclosure under FOIA as well. 10 C.F.R. § 9.5(4). Section 2.790(b)(5) also provides:

> If the record or document for which withholding is sought is deemed by the Commission to be irrelevant or unnecessary to the performance of its functions, it shall be returned to the applicant.

There is no balancing test to be applied here. Nor does this apply only to records or documents found to be confidential or privileged information. It simply requires that any irrelevant or unnecessary document that may have been provided to the

Commission, for whatever reason, and for which withholding is sought, "shall be returned to the applicant." Where the Board has found the instant documents to be irrelevant -- indeed, the underlying issue has been dismissed -- Applicants have an absolute right to their return.1/

While we believe that this is the most straightforward and clearly dispositive response to Intervenor Eddleman's FOIA request, we present in the succeeding sections a number of alternative arguments which produce the same result.

1/ Even if an applicant's request for withholding of documents is denied, pursuant to Section 2.790(c) an applicant may nonetheless request withdrawal of the document and the document "will be returned to the applicant." The court in Westinghouse Electric Corp. v. NRC, supra, held that: "[A]n applicant requesting confidentiality has the absolute right to demand the return of any document claimed to contain proprietary information in all NRC proceedings [except rulemaking proceedings]." 555 F.2d at 88. In dicta the Seventh Circuit suggested that such a reading would utterly defeat the application of FOIA to any document submitted by a private party. General Electric Co. v. NRC, supra, 750 F.2d at 1399. With all due respect, the dicta of the Seventh Circuit is a gross overstatement. While Section 2.790(c) does allow the submitter to withdraw a document rather than allow disclosure, the submitter then cannot rely on such information in support of a license application. With respect to a private party's information, there is no reason why the submitter should not be able to make such a decision. The Commission's Rules provide that right. This issue is before the Commission again on remand from the Seventh Circuit.

C. Documents provided to the Board for the sole purpose of in camera review to confirm the Board's ruling that the documents are irrelevant to a licensing proceeding do not constitute agency records within the meaning of the Freedom of Information Act and therefore may not be disclosed.

An agency "must first either create or obtain a record as a prerequisite to its becoming an 'agency record' within the meaning of the FOIA." Forsham v. Harris, 445 U.S. 169, 182, 100 S.Ct. 977, 985 (1980). As to what is an agency record, the Court found the only definition in the legislative history of FOIA occurred during Senate hearings leading to the enactment of FOIA: "[s]ince the word 'records' . . . is not defined, we assume that it includes all papers which an agency preserves in the performance of its functions." Administrative Procedure Act: Hearings on S. 1160 et al. before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 244 (1965)(emphasis supplied). Id., 445 U.S. at 184. In another FOIA case decided the same day, the Court held that records "have been obtained from a person" when the agency has "chosen to retain possession or control." Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 151-52, 100 S.Ct. 960, 969 (1980). The Court of Appeals for the District of Columbia Circuit has elaborated on the degree of control required before a document can be held to be an agency record subject to FOIA disclosure, in stating: "the agency to whom the FOIA request is directed must have exclusive control of the disputed documents." Paisley v.

CIA, 712 F.2d 686, 693 (D.C. Cir. 1983), modified 724 F.2d 201 (1984). Thus, the D.C. Circuit has held that the test is whether documents have passed from the control of the private party and have "become property subject to the free disposition of the agency with which the document resides." Goland v. CIA, 607 F.2d 339, 347 (D.C. Cir. 1978), vacated in part on other grounds, 445 U.S. 927 (1980).

The documents in question were provided only to the Board, at its request, for the sole purpose of in camera review to confirm the Board's determination that the documents were irrelevant to litigation of Eddleman Contention 41-G and thereby need not be produced in discovery. Applicants clearly indicated their intent not to relinquish control of the documents by stating:

> These documents are not to be considered evidentiary in any way. Since these documents will not be part of the record and will not be viewed by other parties, Applicants ask that they be returned after the Board has completed its review to avoid any concern regarding an ex parte communication.

Letter from Applicants' counsel to the Board dated May 20, 1985, at 2. It is clear that these documents are not within the "exclusive control" of the agency; they are on loan. Accordingly, they have not "become property subject to the free disposition of the agency." Nor are they documents that the agency need "preserve" or "retain" for any reason.

NRC regulations implementing FOIA state that a record is any "documentary material . . . in the possession of, or under

the control of the NRC pursuant to Federal Law or in connection with the transaction of public business as evidence of NRC organization, functions, policies, decisions, procedures, operations, programs or other activities." 10 C.F.R. § 9.3a(b). Without court interpretation, the regulation might be read to require no more than possession by an agency for a document to become an agency record. As discussed above, the Supreme Court has interpreted "control" of a document to be required before a document can be considered an agency record. In Goland v. CIA, supra, 607 F.2d at 346, the Court rejected plaintiff's argument that an agency's possession of a document per se dictates that document's status as an "agency record." There congressional transcripts were found merely to be in the possession of the CIA and not to have passed from the control of Congress. See also CIBA-GEIGY Corp. v. Mathews, 428 F. Supp. 523, 531 (S.D.N.Y., 1977) (report prepared by private researchers and relied upon by an agency, not an "agency record": "Mere access without ownership and mere reliance without control will not suffice to convert the . . . data into agency data.")

A recent decision by the Court of Appeals for the Seventh Circuit suggests in dicta a broader interpretation of what is an agency record than the position taken by Applicants here. In General Electric Co. v. NRC, supra, the court remanded to the Commission a decision to disclose a General Electric report for explication of its decision. The Commission had first decided that the General Electric report, provided to the Board

for limited in camera use of excerpted sections in the Black Fox licensing proceeding, was not an agency record, and then reversed itself and decided that it was. The court found that the documents had been "submitted to the agency for use in carrying out its duties." Id., 750 F.2d at 1400. While it is not clear whether the decision in General Electric Co. v. NRC can be squared with the cases discussed previously, even assuming it is good law (albeit dicta), the situation here regarding Applicants' documents can be readily distinguished. In the Black Fox proceeding the General Electric report was found relevant to an issue in controversy and was used by the Board itself "to frame questions that were asked at in camera hearings in the licensing proceeding." Here, of course, the documents in question have not only been found irrelevant but the underlying contention was dismissed upon reconsideration of its admission for litigation in the first place and the documents have not been used by the agency in any way. Thus, the documents in no way are "evidence of NRC organization, functions, policies, decisions, procedures, operations, programs or other activities," and do not come within the definition of a "record." 10 C.F.R. § 9.3a(b).

The Board should find that neither the Review Panel Report nor the Quality Check Report is an agency record, and thereby neither document is subject to disclosure under FOIA.

D. Where the Commission has denied an intervenor's motion to obtain documents through discovery, the intervenor may not use FOIA as an end-run around the discovery rules.

Intervenor Eddleman admits that the purpose of his attempts to obtain the instant documents from Applicants is because they "may form the basis for new contentions in this proceeding." June 19, 1985 letter-petition at 2. It is an impermissible use of discovery in the first place to obtain information which might lead to new contentions. See Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit No. 2), ALAB-31, 4 A.E.C. 689, 690-91 (1971). There is presently no admitted contention regarding which he can seek the production of the documents in question. Undaunted, Mr. Eddleman seeks to misuse FOIA as a supplement to civil discovery. The facts here present the issue in the most egregious possible light, since the only reason the documents are in the possession of the Board was for the purpose of resolving a discovery dispute -- now moot.

The Supreme Court rejected a similar ruse in United States v. Weber Aircraft, ___ U.S. ___ ,104 S.Ct. 1488 (1984). There petitioners attempted to obtain through FOIA confidential statements made to air crash investigators as part of an internal review of Air Force procedures for "the sole purpose of taking corrective action in the interest of accident prevention." Id. at 1491. The confidential statements were held by

a trial court to be privileged2/ with respect to pretrial discovery. The Court held that the statements were exempt from discovery pursuant to FOIA exemption 5. The Court also addressed the relationship between FOIA and civil discovery, in stating:

> Moreover, respondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA. See Baldridge v. Shapiro, 455 U.S. 345, 360, n. 14, 102 S.Ct. 1103, 1112, n. 14, 71 L.Ed.2d 199 (1982); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n. 10, 95 S.Ct. 1504, 1513, n. 10, 44 L.Ed.2d 29 (1975); Renegotiation Board v. Bannercraft Co., 415 U.S. 1, 24, 94 S.Ct. 1028, 1040, 39 L.Ed.2d 123 (1973). We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented.

Id. at 1494 (footnote omitted).

Thus, without entering the thicket of whether these documents are exempted from production under FOIA, this Board could find that, consistent with the Supreme Court's view of the relationship between civil discovery and FOIA, these documents should not be produced. As will be discussed infra, the Court's decision in Weber may also be interpreted to broaden the scope of the exemption categories.

2/ While the documents at question here were found irrelevant rather than privileged, it is a distinction without importance for the principle articulated by the Court. As will be discussed in the next section, Applicants claim a privilege with respect to the documents as well.

E. The documents in question are exempted from disclosure because they contain commercial information and privileged self-critical analyses held in confidence by Applicants; as such, the documents are encompassed within the exemptions to disclosure set forth in 10 C.F.R. § 2.790(a)(4) and 10 C.F.R. § 9.5(4).

Confidential or privileged commercial information in the possession of the government is protected from public disclosure under FOIA. Exemption 4 of the Act specifically exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . ." 5 U.S.C. § 552(b)(4)(1982). The legislative history of Exemption 4 indicates that it was intended to protect information "which would customarily not be released to the public by the person from whom it was obtained." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). The House of Representatives expressed similar sentiments about the purpose of Exemption 4 in language particularly appropriate to the circumstances surrounding the submission of the documents in question to the Board:

> It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

NRC regulations implementing FOIA state that the "commercial information" referred to in Exemption 4 of FOIA includes

"that which is customarily held in confidence by the originator." 10 C.F.R. § 9.5(a)(4). Such material is also described to include but not be limited to, "[i]nformation received in confidence, such as trade secrets, inventions and discoveries, and proprietary data." Id. at § 9.5(a)(4)(i).

The Elleman Affidavit and Banks Affidavit clearly establish that the Review Panel Report and Quality Check Report are customarily and have been held in confidence by CP&L. Furthermore, the information was transmitted to the Board in confidence and certainly is not available in public sources.3/ See 10 C.F.R. § 2.790(b)(4)(i)-(v). The remaining question then is whether the documents are "commercial" information.

A document need not contain "trade secrets" to be held "commercial information" eligible for protection pursuant to Exemption 4 of FOIA. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983). The term "commercial" is to be given its ordinary meaning. Id.; Washington Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982); Board of

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3/ Commercial or financial information is "confidential" for the purposes of Exemption 4 if its disclosure through FOIA "is likely to . . . impair the Government's ability to obtain such information in the future." National Parks and Conservation Ass'n v. Morton, 498 F.2d 265, 770 (1974). While the documents in question were not submitted to the NRC Staff for review, they are available for on-site review by the resident inspector and I&E inspectors. The Inspector Review Panel and Quality Check Program are self-help activities strongly encouraged by the NRC. If the reports of such programs were made publicly available through FOIA, Applicants and other utilities would be less willing to initiate such programs. When such programs were initiated, the reports would be less candid and much less useful to management and to NRC reviewers. See Elleman Affidavit at ¶ 8.

Trade v. Commodity Futures Trading Commission, 627 F.2d 392, 403 (D.C. Cir. 1980). Thus the courts have rejected the argument that the definition of commercial information should be confined to "records that actually reveal basic commercial operations . . . or relate to the income-producing aspects of a business." See Public Citizen Health Research Group v. FDA, 704 F.2d at 1290 (reports of adverse reactions in medical device testing); American Airlines v. National Mediation Board, 588 F.2d 863 (2d Cir. 1978)(record of the number of authorization cards submitted to the National Mediation Board by a union); Stone v. Export-Import Bank, 552 F.2d 132 (5th Cir. 1977) (loan agreement); Miller, Anderson, Nash, Yerke & Wiener v. Department of Energy, 499 F. Supp. 767, 770 (D.Or. 1980) (legal memorandum prepared by commercial entity's lawyer and in possession of public power authority); Brackway v. Department of the Air Force (report produced by a commercial enterprise regarding findings and opinions as to cause of accidents), rev'd on other grounds, 518 F.2d 1184 (8th Cir. 1975). The documents in question are an integral part of Applicants' program to ensure quality construction of a plant that is one of their largest financial investments and is vital to their commercial success. See Elleman Affidavit at ¶ 9 and Banks Affidavit at ¶ 7. In this regard, it meets the definition of "commercial information" in Exemption 4.

Commercial information is also exempted from disclosure pursuant to FOIA if such information is "privileged." The

Review Panel Report and to a lesser extent the Quality Check Report are entitled to the self-evaluative privilege (also known as the self-critical analysis privilege). See generally Note, The Privilege of Self-Cricital Analysis, 96 Harv. L. Rev. 1083 (1983). The privilege is acknowledged to have been formulated first by the District Court for the District of Columbia in Bredice v. Doctor's Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), aff'd mem., 479 F.2d 920 (D.C. Cir. 1973). Bredice was a medical malpractice case in which the plaintiff sought to discover the minutes and reports of the hospital staff committee dealing with the death in question. In denying the requested discovery, the District Court held that such internal reports were entitled to a qualified privilege. See id. at 250-51. The court noted that the "[c]andid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care," and that the purpose of the staff meetings was "the improvement, through self-analysis, of the efficiency of medical procedures and techniques." Id. at 251. In light of its finding that confidentiality was essential to such a procedure, the court held that there was "an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded." Id.

The principles enunciated in Bredice have been applied in both federal and state courts in a variety of factual situations. One line of cases supports recognition of the privilege

for internal reports which require confidentiality in order to promote candid and critical evaluation with a view towards self-improvement -- particularly in the area of public health and safety. See e.g. Davidson v. Light, 79 F.R.D. 137, 139 (D.Colo. 1978) (strong public interest in promoting health care improvements); Gillman v. United States, 53 F.R.D. 316, 318 (S.D.N.Y. 1971) (hospital board of inquiry's findings are privileged); Dade County Medical Assoc. v. Hlis, 372 So.2d 117, 119-120 (Fla. App. 1979) (medical association ethics committee records subject to privilege); Wylie v. Mills, 195 N.J. Supr. 332, 478 A.2d 1273 (1984) (internal investigation of an automobile accident to determine whether procedures should be changed to avoid future injuries held to be privileged); see also Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment (attached) in Washington Post Co. v. United States Department of Justice, Civil Action No. 84-3581 (D.D.C., Apr. 8, 1985) (where at pp. 19-28 the Government argues against disclosure of a report by a Special Committee of the Board of Directors of Eli Lilly and Company setting forth the analysis, conclusions and recommendations regarding the marketing of a drug based on the privilege of self-critical analysis).

Another line of cases recognizes that "a qualified privilege of 'self-examination' exists to permit free discussion looking toward compliance with law. . . ." Rosario v. New York Times Co., 84 F.R.D. 626, 631 (S.D.N.Y. 1979) ("self-evaluation

material pertaining to affirmative action . . . need not be produced"); see also Bank v. Lockheed-Georgia Co., 53 F.R.D. 283, 285 (N.D. Ga. 1971) (company reports compiled to assist in compliance with affirmative action laws are not discoverable); Roberts v. National Detroit Corp., 87 F.R.D. 30, 32-33 (E.D. Mich. 1980) (public policy supports protection of qualified self-critical analysis privilege); O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980) (privilege of nondisclosure recognized in order to encourage "candid and unconstrained self-evaluation" regarding compliance with the law); McClain v. Mack Trucks, Inc., 85 F.R.D. 53, 58 (E.D. Pa. 1979) (affirmative action plans not discoverable); Webb v. Westinghouse Electric Corp., 81 F.R.D. 431, 434 (E.D. Pa. 1978) (recognizing that discovery of self-critical analyses of employment practices would discourage voluntary compliance with the law).

While Applicants are not aware of any case where the privilege has been claimed for a self-critical analysis by a utility in the context of an NRC licensing proceeding, the principles that are the underpinning of the privilege squarely support its application here. The Review Panel Report was an attempt to evaluate all concerns relating to safety that were brought forward in confidential interviews with QA/QC and Construction Inspectors. The Review Panel efforts were initiated solely to ensure public health and safety and to comply with the NRC's regulations. Confidentiality is essential to encourage this type of self-improvement effort. See Elleman

Affidavit at ¶ 8. Thus, Applicants submit that the Review Panel Report and the Quality Check Report (as one investigative report of an ongoing self-examination program) are privileged documents and thereby exempt from FOIA disclosure.

This argument gains additional support from the recent opinion of the U.S. District Court for the District of Columbia in Washington Post Co. v. HHS, 603 F. Supp. 235 (1985). There the court, in interpreting the Supreme Court's decision in United States v. Weber Aircraft, supra, incorporated discovery privileges "not explicitly identified by the Congress" into Exemption 4 of FOIA. The court held that documents, exempt from discovery by the confidential report privilege, were, in light of the Court's opinion in Weber, exempted from disclosure pursuant to Exemption 4 of FOIA. While we believe Weber may be read as providing an independent basis for non-disclosure of documents where a party seeks to obtain through FOIA what was denied through discovery (see Section D, supra), Weber may also be read as expanding the scope of the FOIA exemption categories for documents that were subject to privilege from discovery. Under either interpretation, the Supreme Court's ruling in Weber protects the documents here from disclosure under FOIA.

APPLICATION FOR WITHHOLDING DOCUMENTS FROM DISCLOSURE

Pursuant to 10 C.F.R. § 2.790(b)(1), Applicants hereby petition the Board to withhold disclosure of the Review Panel Report and Quality Check Report as containing confidential and privileged commercial information. This petition is supported by the Elleman Affidavit and Banks Affidavit. Withholding is required for the reasons set forth in Section E of the ARGUMENT supra. This application is only operative if the Board does not find in Applicants' favor for the reasons set forth in Sections B, C or D of the ARGUMENT supra.

CONCLUSION

For all of the reasons set forth herein, the Board should find that the subject documents are not part of the record of this proceeding, should be withheld from disclosure pursuant to FOIA and should be returned to Applicants.

Respectfully submitted,

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