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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of)

CAROLINA POWER AND LIGHT COMPANY AND)
NORTH CAROLINA EASTERN MUNICIPAL)
POWER AGENCY)

Docket Nos. 50-400 OL
50-401 OL

(Shearon Harris Nuclear Power Plant,)
Units 1 and 2))

NRC STAFF RESPONSE TO THE LICENSING
BOARD'S AUGUST 5, 1985 MEMORANDUM

I. INTRODUCTION

On August 5, 1985, the Licensing Board issued a Memorandum requesting the Staff to respond to four questions propounded by the Board. This request was made in connection with a request for documents ^{1/} filed by Intervenor Wells Eddleman pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, which is currently pending before the Board. Applicant has urged the Board to deny the request, contending, inter alia, that the materials sought are exempt from disclosure pursuant to Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4), and Section 9.5(a)(4) of the Commission's regulations. 10 C.F.R. § 9.5(a)(4). According to the Applicant, the documents sought by Intervenor contain commercial information of a privileged and

^{1/} The documents in question were generated by Applicant in connection with a self-initiated effort to determine whether any of the quality control inspectors employed at the Shearon Harris facility were aware of any potential safety problems or had any unresolved safety concerns.

confidential nature. See Applicants Response at 14-20 (July 9, 1985). Regarding the alleged "confidential" nature of the documents, Applicant maintains that disclosure of the materials sought by Intervenor will impair the NRC Staff's future ability to obtain information of the type contained in those documents. Id. at 15 n.3. To assess Applicant's position the Board has asked the Staff to respond to the following questions:

1. Are the documents in question here, and those of the type it represents, an important means by which the NRC obtains or might obtain safety information about nuclear facilities?
2. Is the substance of such documents already required to be compiled and reported to NRC under an existing regulation or under quality assurance plans for particular facilities? Could compilation and disclosure of such information be required under a new regulation?
3. Is an enforceable pledge of confidentiality from the licensee to its employees, such that resulting reports are exempt from disclosure under the Freedom of Information Act, an essential element in having licensees generate useful documents of the kind in question.
4. Taking into account the answers to the foregoing questions, and any other relevant factors, would an unrestricted grant of the pending Freedom of Information Act request be likely to impair the NRC's ability to obtain safety information in the future? If so, should the request be granted under a protective order?

The Board stated that its purpose in propounding these questions was to obtain "the Staff's best judgment of whether disclosure of these documents would actually affect the availability of safety information[.]" Memorandum at 3. The Staff's views are set forth in this response and are discussed more fully in the attached affidavit of Walter P. Haass,

Senior Vendor Inspection Specialist, Vendor Program Branch, Office of Inspection and Enforcement (hereinafter "Haass Affidavit"). ^{2/}

II. DISCUSSION

A. Impairment of the NRC Staff's Future Ability To Obtain Safety Information

As noted earlier, the documents sought here by Intervenor were generated by the Applicant in connection with a self-initiated effort to determine whether any of the quality control inspectors at the Shearon Harris facility were aware of any potential safety problems or had unresolved safety or quality concerns.

The primary function of the NRC is to protect the public safety and health from the risks posed by non-military uses of nuclear power. Its effectiveness in this regard is enhanced by the timely receipt, from whatever source, of any information bearing on the safety of a nuclear power plant. See Haass Affidavit ¶6. Consequently, a survey of quality control inspectors conducted by an applicant in an effort to learn of potential safety problems or concerns could yield useful information to

^{2/} In its August 5, 1985 Memorandum, the Board stated that all of the "information in question is, we think, "commercial[.]" Id. at 2. The Board should be advised that an FOIA determination was issued the next day in an unrelated case by the Director of the Rules and Records Division of the Office of Administration. See FOIA 85-123 (August 6, 1985). In that determination, the Director of the Rules and Records Division rejected Louisiana Power & Light Company's (LP&L) argument that reports of an investigation into an employee's allegation against his supervisor which were generated by LP&L and voluntarily submitted to the Office of Investigations constituted "commercial information" within the meaning of Exemption 4 of the FOIA. Id. at 2. Those documents appear to be similar to some of the documents involved here. A copy of that determination is appended to this Response.

the NRC. Id. For this reason, it is the Staff's view that the type of documents sought here by Intervenor represents "an important means by which the NRC obtains or might obtain safety information about nuclear facilities." The Applicant's self-initiated program is the type of program which the NRC encourages and it would be detrimental to the NRC's regulatory role if that type of program is discouraged or impaired.

Regarding the Board's question whether the information reflected in the documents at issue is required to be reported to the NRC either by law or by Applicant's quality assurance plan, the Staff notes that nothing in the Commission's regulations requires Applicant to report to the NRC all of the information contained in the documents. As Mr. Haass observes, 10 C.F.R. § 50.55(e)(1) requires an applicant to notify the NRC of a significant deficiency bearing on design, quality assurance, or performance which, "were it to have remained uncorrected, could have adversely affected the safety of operations of the nuclear power plant at any time throughout the expected lifetime of the plant[.]" Haass Affidavit ¶9. While it is true that 10 C.F.R. Part 50, Appendix B requires every applicant for an operating license to include in its Final Safety Analysis Report information pertaining to safety controls to be used to ensure safety and applies specifically to all safety-related systems, structures, and components, it does not purport to prescribe minute details of a quality assurance plan or mandate the adoption of specific measures or activities which an applicant must undertake to comply with its requirements. See Haass Affidavit ¶ 7. Rather, Appendix B provides applicants considerable latitude in the design and implementation of a quality assurance program that will provide assurance that its nuclear facility can be operated safely.

In the Staff's view, the NRC could promulgate a regulation requiring the compilation and disclosure of such information. This is because section 161(o) of the Atomic Energy Act confers upon the Commission broad statutory authority "to make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of [the Atomic Energy] Act." 42 U.S.C. § 2201(o). Mr. Haass notes, however, that no rulemaking proceeding which would do so is pending. Nor is he aware of any information which would suggest that the Commission is contemplating such action in the future. Haass Affidavit ¶ 7.

With respect to the question whether an enforceable pledge of confidentiality from the licensee to its employees, such that the resulting reports are exempt from disclosure under the Freedom of Information Act, "[is] an essential element in having licensees generate useful documents of the kind in question," the Board should recognize that this proposition has not been statistically tested. Consequently, in responding to this question the Staff necessarily is required to make a subjective determination. See Haass Affidavit ¶ 8.

As Mr. Haass states, "persons employed at nuclear facilities with knowledge of potential safety problems are more likely to make those concerns known and to express them with candor if they are assured that their confidentiality will be protected. However, this concern for confidentiality is directed more toward the non-disclosure of their identities rather than the nature of the information they provide." Haass Affidavit ¶ 8. The Staff cannot state that a grant of confidentiality to such individuals is essential, however, because there have been cases where an employee elected to waive confidentiality. Haass Affidavit ¶ 8. It is Mr. Haass' opinion, however, that such

individuals "are apt to be more forthcoming regarding potential safety problems when they are secure in the knowledge that their identities will not be disclosed." Haass Affidavit ¶ 8.

It is more problematical whether an applicant will in the future undertake an effort similar to the one reflected in the documents in question if the Board grants the pending FOIA request. Corporate records are not subject to the provisions of the FOIA. Consequently, an applicant may elect to take actions designed to ascertain whether any of its employees or agents have knowledge of potential safety problems. It is also not unreasonable to assume that an applicant may forego the taking of such measures because it may conclude that it would receive no regulatory credit from the NRC for doing so. This is because to receive such credit, an applicant would first have to inform the Staff of its efforts and findings. This an applicant may be reluctant to do so because corporate records, once in the custody or under the control of the NRC, are subject to the strictures of the FOIA.

The final matter to be addressed is whether "an unrestricted grant of the pending Freedom of Information Act request [would] be likely to impair the NRC's ability to obtain safety information in the future." As Mr. Haass explains in his affidavit, unrestricted release of the documents to Intervenor would not affect the Staff's future ability to obtain safety information relating to: (i) a "significant breakdown" in any portion of an applicant's quality assurance program; (ii) a "significant deficiency" in final design; (iii) a "significant deficiency in construction or significant damage to a system, structure, or component"; or (iv) a "significant deviation from performance specifications." Haass Affidavit ¶ 9. The NRC Staff's ability to continue to receive

information bearing on these matters will not be affected by the Board's determination on the pending FOIA request because section 50.55(e)(1) of the Commission's regulations requires an applicant to notify the NRC Staff of the existence of any of the foregoing deficiencies "which, were it to have remained uncorrected, could have adversely affected the safety of operation of the nuclear power plant at any time throughout the expected lifetime of the plant." 10 C.F.R. § 50.55(e)(1). See Haass Affidavit ¶ 9.

Similarly, 10 C.F.R. Part 50, Appendix B, Criterion XV requires that "measures be established to control material, parts, or components which do not conform to requirements in order to prevent their inadvertent use or installation." Criterion XVI of Appendix B requires applicants to establish measures "to assure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, and defective material and equipment, and nonconformance are promptly identified and corrected and that records relating to nonconforming conditions be maintained. In view of these requirements, the Staff's ability to obtain information regarding safety related nonconformances would not be affected appreciably by an unrestricted grant of the pending FOIA request. Haass Affidavit ¶ 9.

The impact of acceding to Intervenor's FOIA request would be most noticeable with respect to information that may bear on safety but which is not required to be submitted under the Commission's regulations, the

Veeco doctrine, ^{3/} or by the Commission's board notification procedures. ^{4/} An unrestricted grant of the pending FOIA request may induce applicants in the future to refrain from disclosing voluntarily information of this kind to the NRC Staff. Haass Affidavit ¶ 9. If that were to happen, to obtain that information the NRC Staff would be required to: (i) expend its limited resources to obtain the information itself or (ii) resort to the potentially time-consuming subpoena process (assuming it was even aware that the information existed). Haass Affidavit ¶ 9. This state of affairs would not improve the efficiency or the effectiveness of the NRC Staff's regulatory program. As the Commission has noted:

In order to fulfill its regulatory obligations, NRC is dependent upon all of its licensees for accurate and timely information. Since licensees are directly in control of plant design, construction, operation, and maintenance, they are the first line of defense to ensure the safety of the public. NRC's role is one primarily of review and audit of licensee activities, recognizing that limited resources preclude 100 percent inspection.

Petition for Emergency and Remedial Action, CLI-78-6, 7 NRC 400, 418 (1978); see Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1208 (1984). For an agency structured to

^{3/} In Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 489 (1976), the Commission held that an applicant's withholding of information having a "material" bearing on agency decisionmaking is a violation of Section 186 of the Atomic Energy Act, 42 U.S.C. § 2236 and is punishable by civil penalty.

^{4/} In Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625-26 (1973), the Appeal Board held that a party has an affirmative obligation to "inform the presiding board and other parties of new information which is relevant and material to the matters being adjudicated."

operate in a regulatory atmosphere "of cooperation and trust," (United States Nuclear Regulatory Commission Policy and Planning Guidance, NUREG-0885 No. 4 at 3 (February 1985)), any action that has the consequence of discouraging applicants from voluntarily providing the NRC Staff with accurate and timely safety information should not be taken lightly. Haass Affidavit ¶ 9.

Finally, the Staff notes that an unrestricted grant of the pending FOIA request could appear to be at cross purposes with the Commission's stated policy of encouraging "industry initiatives to improve safety." Haass Affidavit ¶ 9, quoting NUREG-0885 No. 4, supra, at 3. See also General Statement of Policy and Procedure for NRC Enforcement Actions, 10 C.F.R. Part 2, Appendix C § V.(B) ("NRC attaches great importance to comprehensive licensee programs for detection, correction, and reporting of problems that may constitute, or lead to, violation of regulatory requirements. This is emphasized by giving credit for effective licensee audit programs when licensees find, correct, and report problems expeditiously and effectively.") Granting the pending FOIA request could be interpreted by the industry that there is little benefit in undertaking and sharing with the NRC Staff the results of a self-initiated effort to improve safety, particularly where there exists the possibility that that effort may yield information adverse to the applicant's position. Haass Affidavit ¶ 9.

B. Other Matters

It remains to be considered whether the documents should be released under a protective order. As explained in Part II(A) of this Response, the Staff is of the view that the pending FOIA request should

be denied in its entirety because the documents sought are "confidential" within the meaning of Exemption 4 of the FOIA. Under the Commission's regulations, information which is exempt from disclosure under the FOIA may be disclosed only upon a determination that "production or disclosure is not contrary to the public interest and will not adversely affect the rights of any person . . ." 10 C.F.R. § 9.9(a). Disclosure of the documents sought could, as explained in this Response, hamper the Staff's regulatory efforts because it could impair the Staff's future ability to obtain safety information of the type in question. It certainly is not in the public interest to impair the Staff's ability to obtain information that could assist it in achieving its regulatory goals.

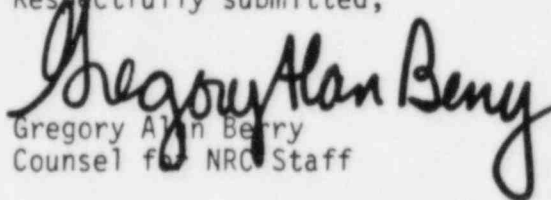
Moreover, the Commission's regulations authorize a licensing board "[u]pon motion by a party from whom discovery is sought, and for good cause shown, . . . to make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." 10 C.F.R. § 2.740(C). Discovery, however, can be had only with respect to matters "relevant to the subject matter involved in the proceeding . . ." 10 C.F.R. § 2.740(a)(1). The documents at issue sought by Intervenor purportedly relate to Eddleman Contention 41-G. That proposition was squarely rejected by the Board on May 29, 1985, when it ruled that the documents sought were not relevant to litigation of Eddleman Contention 41-G. See Tr. 7712-14 (May 29, 1983). Moreover, on June 6, 1985, the Board dismissed Eddleman Contention 41-G from this proceeding, finding it inadmissible for litigation. See Tr. 7755-56 (June 6, 1985). Consequently, there is no longer any admissible contention in this proceeding to which the documents sought are relevant. Accordingly, the Intervenor is not

entitled to the documents under the Commission's discovery rules. Therefore its request for production of the documents, under protective order or otherwise, should be denied.

III. CONCLUSION

The Licensing Board should consider the pending Freedom of Information Act request in accordance with the views expressed in this Response.

Respectfully submitted,


Gregory Alan Berry
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 23rd day of August, 1985