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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING & POWER COMPANY, ET AL.	)	Docket Nos. 50-498 OL 50-499 OL
	)	
(South Texas Project, Units 1 and 2)	)	

APPLICANTS' RESPONSE TO CCANP MOTION TO COMPEL

I. Introduction

On February 28, 1986, CCANP filed a motion to compel Applicants to provide further answers to CCANP's Second Set of Interrogatories to Applicants (Motion to Compel). Applicants had previously responded to CCANP's Second Set of Interrogatories by answering Interrogatories 12(a, b and c) and objecting to the balance of the Interrogatories on various grounds. 1/ CCANP argues that Applicants' objections can be resolved by narrowing

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1/ Applicants objected to all of CCANP's Interrogatories except Interrogatories 12(a, b and c), on the ground that the information they sought is not relevant to Issue F, which is the only issue upon which the Board has permitted discovery. Applicants also filed a Motion for Protective Order seeking an order directing that CCANP's discovery (both its Interrogatories and its Requests for Production of Documents) regarding Applicants' drug control programs not be had. CCANP has filed a separate response to Applicants' Motion for Protective Order, and that response is incorporated by reference in its Motion to Compel. Applicants' instant Response does not further argue the threshold question of whether CCANP's discovery regarding STP drug control programs is within the scope of Issue F.

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its Instruction 2, granting a protective order prohibiting CCANP from disclosing the information to others, and rejecting certain of Applicants' objections. It also argues that Applicants' answers to Interrogatories 12(a, b, and c) were incomplete. Accordingly, CCANP moves the Board to compel Applicants to answer completely all of its Interrogatories.

Applicants oppose CCANP's Motion to Compel in all respects. Instruction 2, even as narrowed by the Motion, is overly broad and improperly seeks to compel Applicants to discover information from its contractors. A protective order would not be adequate to eliminate the potential harm of disclosure of confidential information to CCANP, and there is good cause to order that the discovery CCANP seeks should not be had. 2/ Finally, as interpreted by CCANP's Motion to Compel, Interrogatory 12 was outside the scope of Issue F and no answer was required. However, Applicants did adequately answer Interrogatories 12(a, b and c).

2/ Although CCANP's Motion to Compel mentions its Request for Production of Documents, Applicants' specific objections to CCANP's document requests (filed on March 6, 1986), are not addressed in the Motion to Compel. Thus, CCANP has not sought an order to compel production of the requested documents and has chosen to limit its current request to the compelling of answers to its Interrogatories.

II. Argument

A. CCANP's Instruction 2 Improperly Seeks to Require Applicants To Discover Information From Their Contractors.

In Instruction 2 to its Interrogatories, CCANP stated that each Interrogatory response should include all pertinent information known to Applicants including their "officers, directors, or employees, their agents, advisors, or counsel." CCANP Interrogatories at 1. It defined "employees" to include HL&P, Bechtel, Ebasco, "any consultants, subcontractors, and anyone else performing work or services on behalf of the Applicants or their agents or sub-contractors." Id. Applicants objected that Instruction 2 was unduly broad, would require them to engage in extensive and burdensome investigation, and represented an inappropriate effort to discover information from third parties.

CCANP now proposes:

> to limit Instruction 2 to HL&P, Bechtel, & Ebasco and any contractors or subcontractors who performed any element of the drug control program for these three companies or whose personnel were included in investigations conducted by these three companies.

Motion to Compel at 1. This "limitation" 3/ does not resolve Applicants' objection. While Applicants may properly be required to produce information in their possession (to the extent

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3/ Applicants assume it is CCANP's intent that subcontractors who performed "any element of the drug control program for these three companies" do not include all subcontractors who had drug control programs applicable to their own employees, otherwise CCANP's limitation would be totally illusory.

relevant to the issues to be litigated within the meaning of 10 C.F.R. § 2.740) regarding their employees, officers, directors, counsel or contractors, Instruction 2, even as modified, is unduly broad and burdensome and would require Applicants to engage in a detailed investigation of the programs and internal investigations of Bechtel, Ebasco and certain contractors or subcontractors. No further investigation beyond the knowledge Applicants currently possess should be required. Information about the programs of such organizations is generally neither relevant to the drug control programs that will apply to STP during plant operation, nor to any distinctions HL&P is alleged to have made between application of its drug control program to its employees in operations as opposed to its employees in other departments. Accordingly, Applicants should not be required to provide information, beyond that in their possession, concerning contractors', consultants', or subcontractors' programs for control of the use or sale of drugs by their employees.

Furthermore, such discovery represents an impermissible effort to obtain discovery from third parties in a manner not sanctioned by the Commission's rules. Those rules permit discovery against non-parties to be taken by deposition (10 C.F.R. § 2.740a) or subpoena (10 C.F.R. § 2.720), but not through interrogatories (10 C.F.R. § 2.740b). Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 690 (1979). To the extent such information is not in Applicants' possession, CCANP's Instruction 2, even if limited to the

principal contractors on the Project (which CCANP's "limitation" does not do), impermissibly seeks to discover information from such third parties, through Interrogatories directed at Applicants. Accordingly, Instruction 2 is improper and should be rejected.

B. There Is Good Cause To Order That CCANP's Discovery Not Be Had.

1. The Board Has Discretion to Order That Certain Discovery Not Be Had if Good Cause is Shown.

CCANP contends that all of its Interrogatories seek information relevant to its allegations regarding Applicants' drug control program "and are, therefore, not objectionable, if the overall allegation is considered a matter falling within Issue F." Motion to Compel at 3. In essence, CCANP asserts that it is entitled to answers to its Interrogatories, because it has purportedly demonstrated the "relevance" of the information it seeks, and that Applicants' objections regarding the confidential nature of the information can be satisfied by a protective order prohibiting CCANP from disclosing it to third parties. Id. CCANP is wrong.

The Board has explicit authority "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, including one or more of the following: (1) that the discovery not be had; ... (4) that certain matters not be inquired into, or that the scope of discovery be limited to

certain matters; ... (6) that, subject to the provisions of § 2.744 and 2.790, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; ... "10 C.F.R. 2.740 (c) (1985). As stated by Professor Moore (citing numerous authorities),

> The concept of relevance allows a party to discover a broad range of information relating to the subject matter of an action. However, where the relevance of information sought in discovery proceedings is questionable and the request is overly broad, or compliance with such a request would be unduly burdensome, discovery of the requested information will be denied.

4 Moore's Federal Practice, ¶26.69) (2d ed. 1984) (footnotes omitted).

Confidential information should not be disclosed, even under a protective order, unless there is a need for such disclosure that outweighs the burden and potential harm of such disclosure. Id. at ¶26.75 CCANP's Interrogatories seek disclosure of information about specific present and former Project employees which those employees would find highly embarrassing or worse, the identities of confidential sources of information, and descriptions of Applicants' confidential investigatory techniques. Moreover the numerous arcane details CCANP seeks about internal Project investigations are not necessary to develop the facts CCANP seeks to put in issue, even if such facts were relevant to Issue F. Accordingly, as discussed further below, the burden upon Applicants and the

potential risk to the Project and to present and former employees of producing the requested confidential information far outweighs any possible need CCANP could have for such detailed information.

2. Confidential Sources of Information Should Not Be Disclosed.

Interrogatories 4(h), 10 and 13 require identification of persons providing confidential information in drug-related investigations. As shown by the attached Affidavit of Andrew O. Hill, III, HL&P's Manager, Nuclear Security, disclosure of that information, even under a protective order prohibiting disclosure to third parties, would be likely to cause Project employees to doubt that Project investigators will, in the future, respect the confidentiality of their communications with such investigators. If Project employees do not have a reasonable expectation that their statements will be kept in confidence they will be unlikely to cooperate in future investigations. Affidavit at ¶¶ 8, 20, 24, and 28.

Furthermore, it is in the public interest to encourage effective licensee investigatory programs. Such programs aid in the protection of the Project from improper actions of individuals, help to resolve employee concerns and constitute an important source of information not only for the Project, but also for the NRC Staff.

The Licensing Board in Carolina Power & Light Co. (Shearon Harris Nuclear Plant) Memorandum and Order (September 9, 1985) (unpublished) recently considered these issues in rejecting

a request under the Freedom of Information Act for information that had come into its possession from a confidential licensee investigation. There the licensee had interviewed its QA/QC inspectors to determine if they had technical concerns related to the facility, assuring each interviewee that the information would be held confidential. Based in part on an affidavit provided by the Staff at the Licensing Board's request, the Licensing Board found that "assurances of confidentiality are important to facilitate the free flow of information, whether or not its disclosure is required by an NRC regulation," (Id. at 11) and that "[i]f release of these documents subject to a protective order were to be NRC's standard practice, licensees could not promise effective confidentiality to those employees whose voluntary cooperation they seek" (Id. at 12).

The principle underlying the Shearon Harris decision was endorsed by the Appeal Board in Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 477 (1981). There the Appeal Board stated that disclosure of the names of confidential NRC Staff informants under a protective order would not "cure the vice in releasing their names." The Appeal Board continued:

> Clairvoyance is not needed to appreciate that word of the breach of confidentiality [resulting from the Intervenors' stated intent to interview the informants] would spread and the likelihood of informants coming forward with safety-related information in future cases be diminished.

Id.

CCANP argues that the Applicants are not a government agency and that the exemption from disclosure of such confidential information (embodied in 10 C.F.R. § 2.790 (a)(7)) is not applicable to them. Motion to Compel at 3. Applicants do not claim that Section 2.790(a)(7) applies to them. It is the policy underlying this exemption which Applicants cite as guidance to the Board on the factors it should consider in determining whether there is good cause to order that the discovery not be had. As discussed above, the Licensing Board in the Shearon Harris case found that, although a government investigation was not involved, the licensee's investigations did provide necessary support to the government.

Similarly in Ross v. Bolton, 106 F.R.D. 22, 23 (S.D.N.Y. 1985), after recognizing that the third party against whom discovery was sought was subject to government oversight and did not have a governmental privilege from discovery, the Court stated:

> [h]owever, this does not preclude the argument that the interests asserted by the Association in encouraging witness cooperation and maintaining the integrity of its investigative techniques and files are similar to those of a governmental regulatory agency.

The Court then found that there is a "strong public interest in maintaining the integrity of effective industry self-regulation" which would have been undermined by the discovery, and after

weighing these interests against the litigants' need for the information, ordered that certain information not be discovered. Id. at 24-25.

Applicants' investigations are no less in the public interest than those involved in the Ross and Shearon Harris cases, and as shown below, CCANP has not shown sufficient need for this information to outweigh the harm of disclosure.

3. Disclosure of the Requested Information About Individual Employees Would Constitute An Undue Invasion of their Privacy.

A number of the CCANP Interrogatories seek the identities of individuals who were terminated or otherwise disciplined for use or sale of illegal drugs (Interrogatories 8, 9(a) and (c), and 12(d), alleged to be involved in the use or sale of illegal drugs (Interrogatories 8, 10, 14 and 15), or given a lie detector test in connection with an investigation regarding the use or sale of illegal drugs (Interrogatory 4(h)). Other Interrogatories seek information that would tend to disclose such information (Interrogatories 4(g), 5; see e.g., Affidavit at ¶¶ 5, 15, 16, 18, and 25).

Such information would suggest that the individuals had been involved in criminal activity. Disclosure of such information would expose these individuals to embarrassment, annoyance or worse, and would clearly invade their privacy. That invasion of privacy is particularly egregious where the allegations are unsubstantiated (cf. Interrogatory 15).

Disclosure of much less embarrassing information, such as job performance evaluations, has been held an invasion of privacy. E.g., Metropolitan Life Ins. Co. v. Usery, 426 F.Supp. 150, 168 (D. D.C. 1976), aff'd. 736 F.2d 727 (D.C. Cir. 1984). The policy of not disclosing such confidential information is reflected in the Freedom of Information Act and the Commission's implementing regulations (cf. 10 C.F.R. 2.790(a)(6)) as well as the Commission's proposed "Access Authorization Program" rule 4/ (49 Fed. Reg. 30726, 30729 (August 1, 1984)):

> While the Privacy Act does not apply to private parties, the public policy it expresses leads the Commission to conclude that information of a secretive nature in personal records, resulting from the application of this rule, should be handled with discretion and disseminated to persons . . . only if they have a legitimate "need to know" in administering the access authorization program.

CCANP apparently does not contest Applicants' position that such information ought not be publicly disclosed. It argues, however, that non-disclosure can be assured through a protective order prohibiting CCANP from disclosing the information to third parties. Motion to Compel at 4-5. Limiting the distribution of such information would certainly reduce the

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4/ Furthermore, Interrogatory 5 requests information obtained during polygraph examinations, and Texas law prohibits the disclosure of information acquired from a polygraph examination except to the examiner or his designee, the entity that requested the examination, governmental agencies licensing or controlling the activities of polygraph examiners, other polygraph examiners in private consultation or others as required by due process of law. Texas Rev. Civ. Stat. art. 4413(29cc) § 19A (Vernon 1986). None of these circumstances is applicable here.

invasion of privacy caused by such disclosure, but it would not eliminate it. Before ordering disclosure pursuant to a protective order, the Board must still balance CCANP's need for the information against the harm of disclosure.

4. Applicants Should Not Be Required to Disclose Confidential Investigative Techniques.

Several of the Interrogatories inquire about investigative techniques (Interrogatories 4(e), (f), (g) 6, 11 and 16). Details of Applicants' investigative techniques are confidential and their disclosure would reduce the effectiveness of HL&P investigations. Affidavit at ¶¶ 5, and 13-14. Although the exemption for disclosure of information embodied in 10 C.F.R. 2.790(a)(7) does not apply to a private party such as Applicants (cf. Metropolitan Life Ins. Co. v. Usery, supra 426 F.Supp. at 169), the public interest in strong industry self regulation (e.g. Ross v. Bolton, supra), clearly supports protection of such confidential information. See 10 C.F.R. 2.740(c)(6); Shearon Harris, supra.

5. The Interrogatories Require Unnecessary Information And Thus The Potential Harm Of Disclosure Outweighs CCANP's Need For The Information.

CCANP contends that its Interrogatories constitute "a routine discovery pattern designed to pinpoint any examples of preferential treatment in the drug control program and when the Operations Group received such treatment, either by not being investigated when implicated, not being disciplined when found to

be involved in the use and/or sale of drugs, or otherwise receiving more lenient treatment than others on the Project alleged or discovered to be similarly involved with illegal drugs." Motion to Compel at 2-3.

Contrary to CCANP's assertion, its discovery requests are not "routine"; they seek a level of detail that goes far beyond any reasonable need to address the issue CCANP is apparently seeking to raise. 5/

5/ CCANP's Interrogatories seek extremely detailed information about "lie detector tests" used in the investigation of allegations of "use and/or sale of illegal drugs" by Project employees, including when such tests were administered (Interrogatories 4(a and b)), who administered them (Interrogatories 4(c, d and i), 9(b)), what questions were asked (Interrogatory 4(e)), who selected the people to be tested (Interrogatory 4(f)), what criteria were used to make this selection (Interrogatory 4(g)), who was tested (Interrogatory 4(h)), the results of such tests (Interrogatory 5), the procedures for further investigating such allegations after such tests (Interrogatory 6), actions taken with respect to tested individuals (Interrogatories 7 and 8), the identities of individuals terminated as result of such tests (Interrogatories 9(a and c)), the identity of the person responsible for such termination (Interrogatory 9(d)), identities of persons implicated in use or sale of illegal drugs by the persons who were so tested (Interrogatory 10), the identities of persons so tested who implicated "Operations Group" personnel in use or sale of illegal drugs (Interrogatory 13), and Operations group personnel each implicated (Interrogatory 14), the results of any investigation regarding the persons so implicated (Interrogatory 11), the identities of any member of the "Operations Group" terminated "for reasons related in any way to the use and/or sale of illegal drugs" (Interrogatory 12(d)), identities of "Operations Group" personnel "implicated" at any time in the use or sale of illegal drugs at STP (Interrogatory 15) and the actions taken with regard to the implicated "Operations Group" personnel (Interrogatory 16).

Even if the issue CCANP outlines in its Motion to Compel were within the scope of Issue F, the information that CCANP would need to determine whether there is any validity to its speculation (resulting from the anonymous phone call), would be a simple summary of the numbers of Project employees who were alleged to have used or sold illegal drugs (tabulated by Project organizations), the number (by organization) of those allegations that were investigated, the number (by organization) of those allegations which were substantiated, and the number (by organization) of terminations or other disciplinary actions.

Such a simple tabulation would provide the relevant information without the need to invade the privacy of a single individual, disclose a single confidential investigatory technique or require any disclosure that would jeopardize the confidence of Project employees in the confidentiality with which their communications with Project investigators or SAFETEAM will be treated. There may be situations in which disclosure of some of such confidential information might then be necessary under an appropriate protective order, but CCANP has not presented any need for such disclosure here.

Instead of asking for such summary information, CCANP seeks numerous extraneous details. Its rationale for this discovery is apparently explained in its Motion to Compel where it argues that "[s]ince the allegation included the charge that non-members of the Operations Group were not fired because they would implicate the Operations Group, CCANP seeks to develop

information on all individuals tested who implicated others in order to trace the path of such identifications and what was done in such instances." Motion to Compel at 3. Thus, CCANP seeks to justify its broad discovery demand by citing its own speculation that activities, which on their face are unrelated to Plant operations, were somehow motivated by a desire to conceal something in Plant operations. The entire theory is farfetched. It requires one to believe that some group of individuals was implicated in drug use and that some person in authority within Applicants was able to determine which of them, if subjected to disciplinary action, would "implicate" "Operations Group" personnel and which would not. While this hypothetical person would somehow be unable to withhold disciplinary action against the "Operations Group" personnel, if they were implicated, he (or she) was able to withhold disciplinary action against implicated non-"Operations Group" personnel. CCANP does not explain the reason why Applicants or this hypothetical person in authority would have a desire to protect "Operations Group" personnel, but not personnel involved in completing construction, one and a half years before Plant operation and while considerable construction activities are still underway. There is no obvious reason.

The Commission's Regulations state "[i]n no event should the parties be permitted to use discovery procedures to conduct a 'fishing expedition' or to delay the proceeding." 10 C.F.R. Part 2, App. A § IV(a) (1985). Applicants submit that here CCANP is fishing for some totally imaginary evil.

Accordingly, given the significant harm which might arise from the disclosure of the information requested by CCANP, even under a protective order, and the absence of any real need for the information to address either Issue F or CCANP's drug-related allegations, there is no good cause for requiring disclosure even under a protective order.

C. Applicants' Answer to Interrogatory 12(c) Was Adequate.

Interrogatory 12 states:

Regarding the Operations Group at STNP, please provide the following information:

a. The date said group was formed.

b. The functions of said group.

c. The names and employment history (date hired, positions held, date employment ended) of all personnel who were members of this group since the inception of the group.

d. The identity and last known address of any member of this group terminated for reasons related in any way to the use and/or sale of illegal drugs.

Applicants answered, without objection, parts a, b and c (although parts a and b sought information that is already in the record). CCANP contends that Applicants' answer is not adequate because it listed only the personnel who worked in the Nuclear Plant Operations Department, and not the personnel in the Nuclear Training or Security Departments.

Applicants believe that their answer is adequate. The Interrogatory asked for a list of personnel in the "Operations Group." Since the phrase "Operations Group" is not the name of

any HL&P organization, it required interpretation. Applicants reasonably interpreted the phrase as referring to the group responsible for operating the plant, (i.e., the Nuclear Plant Operations Department), and supplied a list of the personnel in that Department. CCANP's claim that the Nuclear Training and Security personnel were also requested is an attempt to change the Interrogatory, and does not identify any deficiency in Applicants' answer. 6/

In its Motion to Compel, CCANP states that "[a]ll of CCANP's Interrogatories and production requests are propounded for [the purpose of investigating Applicants' drug control programs]." Motion to Compel at 3. If CCANP had made this clear in its Interrogatories, Applicants would also have objected to Interrogatory 12 in its entirety on the grounds that it was related solely to matters outside the scope of this proceeding. Accordingly, if the Board rules that CCANP's drug control program Interrogatories are outside the scope of issue F, that ruling should dispose of the Motion to Compel with respect to all of the parts of Interrogatory 12, as well. Should some discovery be authorized regarding Applicants' drug control programs, Applicants are willing to supplement their answer to Interrogatory 12(c) by adding information about the Nuclear Training personnel. CCANP's allegations, however, provide no

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6/ If CCANP had pursued discovery diligently, it could have simply filed an additional interrogatory following up on Applicants' response. Its attempt to substitute a Motion to Compel is improper.

basis for discovery about the Security personnel because that Department was assigned to HL&P's Group Vice President - Administrative throughout 1985, 7/ and thus could not be considered part of HL&P's "Operations Group" during the timeframe of the alleged anonymous phone call to CCANP. Furthermore, disclosing the names of Security Department personnel, (particularly undercover personnel) could jeopardize the effectiveness of the department and result in embarrassment and annoyance of such persons. Accordingly, there is no reason why CCANP should receive a list of such personnel.

III. Conclusion

Applicants oppose CCANP's Motion to Compel in all respects. CCANP Instruction 2 is overly broad even as narrowed by the Motion and improperly attempts to compel Applicants to obtain discovery from third parties. Interrogatory 12 is outside the scope of Issue F and has, in any event, been fully and fairly responded to by Applicants. Most importantly, the potential harm of disclosure of the confidential information sought by CCANP,

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7/ The transfer to Mr. Dewease's organization occurred on January 27, 1986.

even under a protective order, far outweighs CCANP's need for the requested information. For the reasons stated above, CCANP's Motion to Compel should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Response To CCANP Motion To Compel" have been served on the following individuals and entities by hand delivery, as designated with an asterisk and by deposit in the United States mail, first-class, postage prepaid, on this 17th day of March 1986.

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