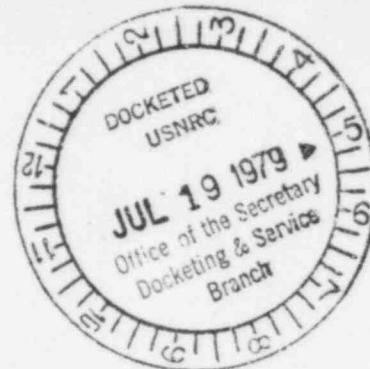


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
THE DETROIT EDISON COMPANY) Docket No. 50-341
(Enrico Fermi Atomic Power) (Operating License)
Plant, Unit 2))

APPLICANTS' CONSOLIDATED MOTION TO
COMPEL DISCOVERY AND FOR SUMMARY
DISPOSITION OF CONTENTION 11

Introduction

On March 27, 1979 Applicants^{1/} served the intervenors in this proceeding, Citizens for Employment and Energy ("CEE"), with a set of interrogatories pursuant to §2.740b of the Commission's Rules of Practice and the Order of March 21, 1979 of the Atomic Safety and Licensing Board ("Board"). On July 9, 1979, Applicants' counsel received by mail a document entitled "CEE's Responses to Interrogatories". This document was signed and notarized on July 6, 1979, seven days after the deadline imposed for responses to first-round discovery requests by the Board's Order of March 21, 1979.

1/ The Detroit Edison Company, Northern Michigan Electric Cooperative, Inc., and Wolverine Electric Cooperative, Inc. are joint applicants for an operating license for the Enrico Fermi Atomic Power Plant, Unit No. 2 ("Fermi 2") and are collectively referred to as "Applicants".

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Applicants respectfully request that the Board, pursuant to §2.740(f) of the Rules of Practice, issue an order compelling CEE to answer Interrogatories 2, 3, 4, 5, and 6 of Applicants' Interrogatories submitted to CEE on March 27, 1979.^{2/} This motion is necessary because CEE has completely failed to make meaningful responses to those interrogatories. CEE has failed, moreover, to demonstrate any recognition of its duty to make a diligent effort to respond to discovery requests in this proceeding. The evasive and incomplete nature of CEE's response to each of these five interrogatories is more fully explained below.

Applicants note that CEE's failure to respond properly within the original time period could, under the schedule imposed by the March 21, 1979 Order, effectively deny Applicants a second round of discovery. Applicants therefore request, as ancillary relief, that the

^{2/} Applicants submitted eight (8) interrogatories to CEE on March 27. The responses to the five identified above are the subject of this motion to compel. The response to Interrogatory 7 prompted the motion for summary disposition made below. The responses to the two remaining interrogatories are not contested here. Interrogatory 1 seeks the identity, and certain information relating to, witnesses CEE will present. CEE stated that it is unable to respond now but that it would answer when witnesses have been selected. Interrogatory 8 requested the identity of each person preparing the responses and CEE identified two such individuals. Applicants have no basis for disputing the sufficiency of this response.

Board's order compelling CEE to respond provide additional time, consistent with the anticipated hearing schedule, for follow-up discovery requests by Applicants.

In addition, Applicants respectfully request that pursuant to §2.749 of the Rules of Practice, the Board, eliminate from the proceeding the issue asserted by CEE in Contention 11 of the Stipulation of Contentions adopted by the Board's Order of March 21, 1979. CEE's answer to Applicants' Interrogatory 7, together with the information that Applicants provided in response to CEE's interrogatories, reveals that no genuine issue as to material fact exists with respect to Contention 11. These responses demonstrate, moreover, that Applicant is entitled to prevail as a matter of law on the issue raised in Contention 11. Accordingly, and as more fully developed below, Applicants move the Board for a summary disposition in their favor of Contention 11.

Argument

I.

CEE'S ANSWERS TO FIVE OF APPLICANTS'
INTERROGATORIES ARE EVASIVE AND INCOMPLETE
AND THE BOARD SHOULD COMPEL CEE TO ANSWER ADEQUATELY

The "response" made by CEE to each of Applicants' Interrogatories 2, 3, 4, 5, and 6 constitutes, in each

case, either a direct refusal to answer or a transparent attempt to hide CEE's obviously complete failure to fulfill the discovery obligations attendant upon participation in this proceeding. In each of the five responses, the position taken by CEE is not only inadequate, but also inexcusable. Indeed, CEE's responses are so insufficient and evasive that the Board would be justified in viewing with suspicion the contentions alleged by CEE, Ruiz v. Hamburg-American Line, 478 F.2d 29 (9th Cir. 1973)^{3/}, and might reasonably conclude that CEE will be unable to contribute to this proceeding in any way. Put another way, the failure of CEE to make meaningful responses may be a "glimpse of the future" in this proceeding. Thus, dismissal of the intervention may be in order. Northern States Power Co. (Tyrone Energy Park, Unit 1), 5 NRC 1298 (1977).

At this time, however, Applicants simply request that the Board order CEE to make complete, explicit, and responsive answers to the interrogatories that Applicants propounded nearly four months ago. A repeated failure by

^{3/} Discovery between all parties except the Staff follows the Federal Rules of Civil Procedure. Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), 5 NRC 489 (1977). Guidance is therefore available from legal authorities construing those rules. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), 1 NRC 579 (1975).

CEE to answer the interrogatories would unquestionably demonstrate CEE's inability to contribute to the proceeding.

The responses served by CEE are uniformly inadequate on their face. Common to all of these responses, moreover, is the observation that CEE is apparently ignorant of its obligation to provide now whatever part of the requested information it does have, however limited its information may be at this time. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), 1 NRC 579 (1975).

The five responses individually raise distinct objections, however. Thus, for the Board's benefit, Applicants set forth below separate bases for this motion with respect to each of the responses. In accordance with §2.740(f)(1), Applicants also set out below each interrogatory and response.

Interrogatory 2:

Identify each member of CEE who is referred to in the first sentence of Contention 4 and state separately for each such person:

- a) the specific nature and extent of his "direct knowledge", if any, of the matters set forth in each subparagraph of Contention 4;
- b) the specific nature and extent of his "indirect knowledge", if any, of the matters set forth in each subparagraph of Contention 4;
- c) whether such person is or has ever been
 - (i) employed by The Detroit Edison Company; or

- (ii) otherwise employed in connection with the design, construction, inspection, maintenance or security of the Fermi 2 facility; and, if so,
- d) the dates he was employed;
- e) his job title or a description of his job; and
- f) the specific reason for termination of employment, if no longer employed.

CEE Response:

CEE is prepared to release the information requested to the Nuclear Regulatory Commission, but is not ready at this time to release such information to the Detroit Edison Company, or any employee, servant or attorney representing Applicant, being fearful of possible direct repercussions and possible adverse effects on the employment of such individual(s).

This response is objectionable on more than one level. As a technical matter it is deficient because, if CEE is seeking to protect or limit the disclosure of certain information, the appropriate response by CEE would have been to move for a protective order pursuant to §2.740(c) of the Rules of Practice. The procedural failure is not immaterial. A motion for a protective order, if properly made, would have set forth the precise legal bases relied upon by CEE for the motion, and thus, would have enabled the other parties and the Board to address the legal issue CEE seeks to raise more effectively than is now possible. Furthermore, the failure of CEE to proceed responsibly under

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the Commission's Rules of Practice can no longer be excused in view of the fact that an attorney has now entered an appearance as counsel to CEE in this proceeding.

More important, the response to Interrogatory 2 is objectionable on substantive grounds. The assertion of a fear of reprisals upon which a motion for a protective order, if made, would apparently be based is without legal merit. CEE once before, at the December 18, 1978 special prehearing conference, suggested that it would refuse to identify the individuals allegedly possessing evidence of quality assurance matters at Fermi 2. A member of the Board attempted to disabuse CEE of the notion that it could assert these allegations without identifying such individuals. The Board stated that any case against Applicants' application would "dissolve in [such a] demand for secrecy." Prehearing Conference Transcript at 68.

Quite apart from the untenable legal position in which this demand for secrecy puts CEE, the fear of "repercussions" CEE professes is ludicrous. It is absurd, if for no other reason, because the close scrutiny that this Board undoubtedly would give to subsequent treatment of such individuals would deter any attempts at "direct repercussions and . . . adverse effects on the employment of such individual(s)."

There is evidence in CEE's response that these professed concerns are disingenuous. Interrogatory 2 requested more than merely the identity of individuals. At least some of the information sought could easily have been supplied, if in fact CEE has any such information, without revealing the source of the information. CEE's failure to provide that information, or to even offer to provide it, suggests that this response was an attempt to conceal, not identities, but the lack of the specific information CEE previously claimed to have.

Interrogatory 3:

With respect to Contention 4(b),

- a) state each fact that CEE relies upon to support its allegation that Applicants' Quality Assurance Inspection Program "has not been executed in conformance with Criterion X of Appendix B to 10 C.F.R. Part 50"; and
- b) for each "reinspection" on which CEE expects to rely, state or identify:
 - i) the date (or dates) on which such reinspection was conducted;
 - ii) the individuals involved in such reinspection;
 - iii) the specific materials or workmanship reinspected;
 - iv) the results or findings of such reinspection;

- v) a summary of the grounds for contending that such results or findings relate to quality control prior to the interruption in construction at the Fermi 2 site in 1974.

CEE Response:

In response to (a), CEE will be better able to respond after reviewing the materials submitted by Applicant in response to CEE's interrogatories. CEE is attempting to obtain further information on the reinspection contention, and will provide a more detailed response as soon as such information becomes available to it.

Contention 4(b) alleges a failure of the Quality Assurance Inspection Program to conform to Criterion X of Appendix B to 10 C.F.R. Part 50. Interrogatory 3 is a simple attempt to discover what specific evidence CEE has of non-conformance. The response, if it is taken to be complete, means that CEE has no evidence and that therefore there is no basis for their contention. Another possible interpretation of this response, however, is that CEE has some evidence but is reluctant, for whatever reason, to disclose it until it has an opportunity to complete a review of Detroit Edison's records. Under either interpretation the response is inappropriate because it is evasive, and CEE should be compelled to clarify or complete the answer.

This answer, in addition to evading the question of the state of CEE's current information, is not an

acceptable because it is merely a guise to conceal CEE's failure to make a bona fide effort to answer the interrogatory. DiGregorio v. First Rediscount Corp., 506 F.2d 781 (3d Cir. 1974) (answer "presently unknown" does not evidence bona fide attempt to respond). Whatever the state of CEE's knowledge, CEE has an obligation to set forth in detail the efforts it has made to date to settle these questions. Miller v. Doctor's General Hospital, 76 F.R.D. 135 (W.D. Okl. 1977); Milner v. National School of Health Technology, 73 F.R.D. 628 (E.D. Pa. 1977).

Obviously, CEE's response gives neither the Board nor Applicants nor the NRC Staff any assurance that CEE is in fact preparing for this proceeding. Rather, a contrary conclusion is suggested. In addition, such complete non-response prevents Applicants from going forward with the preparation of their response at the hearing to CEE's allegations. CEE's statement, moreover, that it is "attempting to obtain further information on the reinspection contention" (emphasis added) is merely an attempt to obscure the fact that CEE has not yet responded with any information.

Interrogatory 4:

With respect to Contention 4(c), provide:

- a) a description of each document that CEE contends is

- i) not presently available; and
 - ii) required "to comply with Criterion XVII of Appendix B to 10 C.F.R. Part 50";
- b) a summary of the facts upon which CEE relies to support its allegation that "records have been destroyed or lost during the course of construction", stating separately for each incident
- i) the time, date, and place it occurred;
 - ii) the person or persons directly responsible; and
 - iii) the person or persons, if any, having supervisory authority over the person or persons directly responsible, who authorized, directed, or approved the action.

CEE Response:

CEE will be better able to respond to (a) after reviewing Applicant's responses to our interrogatories. In regards to (b), CEE understands that destruction of records through burning may have taken place shortly after construction work was halted in 1974. We are attempting to obtain further specifics and will provide such information when it becomes available to us.

The points made with respect to the response to Interrogatory 3 apply equally here. The response either reveals the disingenuousness of CEE's earlier claims to possessing specific evidence, or it reveals CEE's failure to understand its duty both to make partial responses when possible and to make a bona fide effort to eventually complete the responses. In either case, an order compelling CEE to answer responsibly and clearly is necessary.

Interrogatory 5:

With respect to Contention 5, identify each

- a) specific provision of 10 C.F.R. Part 20 and 10 C.F.R. Part 50 to which CEE contends the radiation monitoring system will not conform during plant operation; and
- b) specific provision of Applicants' emergency plan which CEE contends Applicants could not implement as a result of the deficiencies alleged.

CEE Response:

10 C.F.R. Part 20 and 10 C.F.R. Part 50 set general criteria for radiation monitoring systems. CEE contends that the lack of provision for continuous monitoring that can be read remotely does not conform with the general criteria. CEE needs to review Applicant's site emergency plan to respond to (b).

Each of the CEE responses addressed above feigned either possession of specific information or an effort to secure such information. The response made to Interrogatory 5, unlike those above, however, is an undisguised restatement of Contention 5 and nothing more. It is not an answer to the interrogatory. CEE must do better than this or state unequivocally that it cannot. The lack of specific information this response implies, if genuine, moreover, cannot be reconciled with the suggestion made by CEE at the prehearing conference that CEE desired an opportunity "to present more information" on, among other things, Contention 5. Prehearing Conference Transcript at 173.

CEE's statement that it "needs to review Applicants' site emergency plan" in order to respond is nothing more than an admission of CEE's failure to discharge the obligations it assumed by intervening. At least since the December special prehearing conference, CEE has had possession of a copy of Applicants' Final Safety Analysis Report which contains the site emergency plan referred to in the interrogatory. CEE, therefore, has had sufficient opportunity to examine the emergency plan.

Interrogatory 6:

With respect to Contention 6(c), identify each specific guideline set forth in Standard Review Plan §9.5.1 with which CEE contends Applicants cannot demonstrate compliance.

CEE Response:

CEE does not currently have in its possession a copy of "Standard Review Plan" referred to by Applicant. We are making efforts to obtain this document and will respond to this interrogatory after we have an opportunity to fully study the Review Plan and Applicant's response to it.

The statement by CEE that it does not have a copy of Standard Review Plan is incredible. Contention 6(c) alleges that Applicants have not demonstrated compliance with the cable tray guidelines set forth in Standard Review Plan §9.5.1. It is difficult to imagine how CEE could assert this contention in good faith without some under-

standing of the Standard Review Plan. If CEE is to maintain this contention, it must assume some responsibility for advancing prehearing preparation on the issue. If CEE fails to produce any substantive response to Interrogatory 6, it will be apparent that a summary disposition of Contention 6(c) is in order.

II.

NO ISSUE OF MATERIAL FACT EXISTS
WITH RESPECT TO CONTENTION 11 AND
AS A MATTER OF LAW APPLICANTS ARE
ENTITLED TO A SUMMARY DISPOSITION
OF THE CONTENTION

Contention 11 attempts to raise in this proceeding a safety-related issue by asserting that

. . . high-water conditions have occurred in the vicinity of the site since the construction permit was granted that exceed the maximum probable flood value for which the plant was designed.

At each juncture in this proceeding prior to discovery, Applicants attempted, without success, to elicit from CEE the specific information that CEE viewed as support for this allegation. No support or explanation of this contention was ever given. Applicants have at all times maintained the position that information contained in Applicants' FSAR, however, demonstrates that there is no basis for the allegation.

In the first round of discovery, both Applicants and CEE propounded interrogatories seeking from each other information that would confirm or refute the contention. In response to CEE's Interrogatory 11, Applicant provided CEE with the specific information contained in the FSAR which conclusively refutes the allegation. Specifically, Applicants stated that the basic design flood elevation of the plant is 588.0 feet and that, in addition, the flood design level for the exposed faces of the Reactor Building and Auxiliary Building is 593.0 feet. See attached Statement of Material Facts as to Which There is No Genuine Issue ("Statement") at ¶1-¶2. These elevations compare with an estimated Probable Maximum Meteorological Event ("PMME") level of only 586.9 feet stillwater elevation. Statement at ¶3.

The FSAR states that the maximum recorded lake level occurred in June 1973. Mean lake level recorded at that time was at an elevation of 575.4 feet with the highest instantaneous peak elevation being 578.7 feet. Statement at ¶5-¶6.

Obviously, the flood design level for the plant is greater than the PMME value contained in the FSAR. Statement at ¶4. The PMME value, in turn, is much greater than the highest recorded flood elevation. It follows,

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then, that the flood level for which Fermi 2 was designed has never been exceeded since records have been kept, Statement at ¶7, and a fortiori, it has not been exceeded since the Fermi 2 construction permit was issued originally in September, 1972.

Applicants' interrogatories to CEE sought any information that CEE might have contradicting these values. Specifically, Interrogatory 7 requested that CEE:

for each high-water condition in excess of the maximum probable flood value in the FSAR that CEE contends has occurred "in the vicinity of the site since the construction permit was granted," provide:

- a) the year, month, and day of the occurrence;
- b) the rise above sea-level of water that occurred;
- c) a description of each document which CEE intends to rely upon to demonstrate such occurrence.

In response to this interrogatory, CEE simply stated:

7. According to information provided by the Army Corps of Engineers, the maximum height above sea level since 1973 appears to be about 575 feet, occurring in June, 1973.

The high-water condition referred to here is obviously the June 1973 flood documented in FSAR subsection 2.4.2.1. Equally obvious is the fact that this 1973 rise in water did not exceed the flood design level of Fermi 2.

It is now clear that CEE does not have any data or other evidence contradicting the data and values contained in the Hydrologic Engineering section of the FSAR. Put another way, CEE has no basis for its contention that the flood design values of Fermi 2 have been exceeded since issuance of the construction permit. There is no basis, therefore, to take issue with the finding by the construction permit Licensing Board that

[t]he design of the plant, its elevation and shore protection will prevent equipment essential to plant safety from being jeopardized by a maximum hypothetical flood.

Applicants submit that in view of the above they are now entitled, as a matter of law, to a decision by the Board in their favor on Contention 11.4/

4/ In Duke Power Co. (William B. McGuire Nuclear Stations, Units 1 and 2), 5 NRC 680 (1977), a Licensing Board ruled that safety-related issues are not ripe for summary disposition prior to issuance of the Staff's Safety Evaluation Report and the ACRS report. This ruling does not appear relevant, however, to the present case. In McGuire, the Licensing Board, in effect, was holding that it is inappropriate to render summary judgment on the merits of a safety-related issue before Staff and ACRS review. Here Applicants seek summary dismissal of a contention because it now is clear that no issue has been raised.

Conclusion

For the foregoing reasons, Applicants respectfully request that this Board enter an order compelling CEE to provide full and complete answers to Applicants' Interrogatories 1 through 6, inclusive. Applicants further respectfully request that this Board issue a decision disposing of Contention 11 pursuant to §2.749 of the Commission's Rules of Practice.

Respectfully submitted,

LeBOEUF, LAMB, LEIBY & MacRAE

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