

RELATED CORRESPONDENCE
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

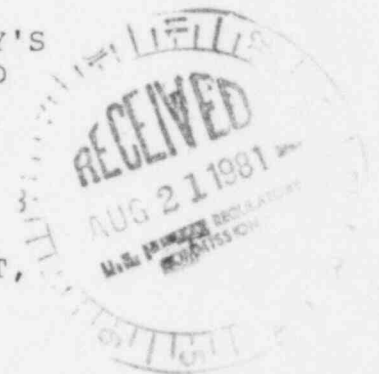
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)	Docket No 50-367
)	
NORTHERN INDIANA PUBLIC)	(Construction Permit
SERVICE COMPANY)	Extension)
)	
(Bailly Generating Station,)	August 18, 1981
Nuclear-1))	

NORTHERN INDIANA PUBLIC SERVICE COMPANY'S
MOTION TO COMPEL ANSWERS TO ITS THIRD
SETS OF INTERROGATORIES TO

- (1) PORTER COUNTY CHAPTER OF THE IZAAK
WALTON LEAGUE OF AMERICA, INC.
- (2) CONCERNED CITIZENS AGAINST BAILLY
NUCLEAR SITE
- (3) BUSINESSMEN FOR THE PUBLIC INTEREST,
INC.
- (4) JAMES E. NEWMAN
- (5) MILDRED WARNER



I. Introduction

On June 22, 1981, Northern Indiana Public Service Company (NIPSCO) separately served its third set of interrogatories on each of the listed organizations or persons: Porter County Chapter of the Izaak Walton League of America, Inc.; Concerned Citizens Against Bailly Nuclear Site; Businessmen for the Public Interest, Inc.; James E. Newman; and Mildred Warner (hereinafter PCCI).

On August 3, 1981, "Edward W. Osann, Jr., agent of each of the above parties" and "Robert J. Vollen, one of the attorneys for each of" the listed parties filed a document entitled "Answers and Objections of Porter County Chapter of

DS03
1/1

the Izaak Walton League of America, Inc.; Concerned Citizens Against Baily Nuclear Site; Businessmen for the Public Interest, Inc.; James E. Newman and Mildred Warner to NIPSCO's Third Sets of Interrogatories" (hereinafter "Answers and Objections").^{*/}

The answers provided by PCCI are largely non-responsive to the interrogatories, and the objections are not well taken. NIPSCO therefore files this Motion to Compel.

II. PCCIs' Objections to Interrogatories

PCCI have objected to a number of interrogatories^{**/} which requested the identity of (1) those documents upon which they have relied, (2) those documents to which they have referred, and (3) those persons with whom they have consulted, in formulating Contention 5.^{***/} The grounds for the objections are that the interrogatories allegedly seek "information

^{*/} These Answers and Objections are patterned on Answers filed by Illinois. This Motion to Compel is therefore somewhat repetitive of NIPSCO's Motion to Compel Answers to Its Third Set of Interrogatories to Illinois filed on the same date as this Motion to Compel.

^{**/} Interrogatories 36(a), 38, and 39.

^{***/} All references herein to contentions are to those numbered contentions in Joint Intervenor's First Supplement to Petition for Leave to Intervene (Feb. 26, 1980) (hereinafter PCCIs' First Supplement).

as to the work product and mental processes" of the attorneys for PCCI and that "information about the process" of formulating a contention is "irrelevant." (Answers and Objections, pp. 9-10).

PCCI have either misperceived the nature of these interrogatories or fail to understand the work product rule. The interrogatories merely seek the identity of persons consulted and documents referenced in formulating the factual statements comprising Contention 5. A litigant has a right to discover the "specific facts upon which a party's contentions are based." (Rheem Manufacturing Co. v. Strato Tool Corp., 276 F. Supp. 1005, 1007 (D. N.J. 1967); Hickman v. Taylor, 329 U.S. 495, 507 (1977)). This right extends to the identity of persons consulted by an attorney in preparing a case (see, Roberson v. Ryder Truck Lines, Inc., 41 F.R.D. 166, 167 (N.D. Miss. 1966); 4 Moore's Federal Practice ¶ 26.57[2] at 26-200 to 26-203 (2d ed. 1979); see also 10 C.F.R. § 2.740(b)(1)); and to documents referenced by an attorney in preparing a case. (See Olmert v. Nelson, 60 F.R.D. 369, 371-72 (D. D.C. 1973); 4 Moore's Federal Practice ¶ 26.58 at 26-216 (2d ed. 1979); see also 10 C.F.R. § 2.740(b)(1)). NIPSCO's interrogatories do not request the production of documents prepared by or for PCCIs' attorneys in anticipation of litigation, nor do they seek the mental impressions, conclusions, opinions, or legal theories of PCCIs' attorneys. Thus, the interrogatories are not objectionable as the work product of PCCIs' attorneys. (See 10 C.F.R. § 2.740(b)(2); Rule 26(b)(3) of the Federal Rules of Civil Procedure; Hickman v. Taylor, 329 U.S. 495 (1977)).

Moreover, the interrogatories do not seek information concerning the "process" by which PCCIs' attorneys derived their contentions. The interrogatories only attempt to discover the identity of documents and individuals relied upon by PCCI in formulating Contention 5. Presumably, those documents and individuals possess relevant information; otherwise they would not have been relied upon by PCCI. Thus, PCCIs' objections on the ground of relevance is specious at best.

Since PCCIs' objections to these interrogatories are invalid, the Board should order PCCI to answer the interrogatories.

III. Deficient Answers

A. Interrogatories 28(a), 30(f)-(h), and 37(d)

These interrogatories request PCCI to specify the adverse environmental impacts resulting from certain identified occurrences. In each case, PCCI responded by referencing Contention 4 and PCCIs' answer to Interrogatory 21(b).^{*/}

Contention 4 merely alleges that additional dewatering of the Bailly site will cause "irreparable injury to the fragile and unique vegetation and ecosystem in the National Lakeshore," and the "elimination of those species of flora which presently exist in the wetland system, including the

^{*/} PCCIs' answers to Interrogatories 30(f) and 37(d) also state that water levels will be different and the wetlands will be drier as a result of the specified occurrences. These general statements alone do not provide the specificity sought by the interrogatories.

'Bog Indicator' species." (PCCIs' First Supplement, pp. 9-10). The answer to Interrogatory 21(b) states that "drying (or flooding) of the root structures of a plant can cause a plant to be stressed to the point of damage and/or death," and the "plants thus adversely affected would die out and be replaced by other more common plants of less 'special' significance." (Answers and Objections of Porter County Chapter of the Izaak Walton League of America, Inc.; Concerned Citizens Against Bailly Nuclear Site; Businessmen for the Public Interest, Inc.; James E. Newman and Mildred Warner to NIPSCO's Second Sets of Interrogatories (July 8, 1981), pp. 7-8).

In short, both Contention 4 and the answer to Interrogatory 21(b) are wholly lacking in the specificity requested by these interrogatories. Neither identifies any species (other than the "Bog Indicator") which allegedly will be affected; neither identifies the geographic area in which such species would be affected; neither identifies the magnitude of any such effects; and neither specifies whether such effect will be irreparable.

The purpose of these interrogatories is to discover the bases of PCCIs' allegations in Contention 4. Merely referring back to the statements in Contention 4 is not responsive to the interrogatories. PCCI should be required to provide specific details for their claim that adverse environmental impacts will result to the National Lakeshore from additional dewatering. If PCCI are not aware of any such specific environmental impact, they should so state.

B. Interrogatory 29(e)

This interrogatory requests PCCI to "specify the length of the 'additional period of construction time'" to which they had referred in Contention 5.A. (Emphasis added). PCCI responded by stating: "[t]hat length of time during which dewatering will be carried out beyond the amount of time during which NIPSCO had represented in the construction permit proceeding dewatering would be carried out." (Answers and Objections, p. 3).

This answer is not responsive to the interrogatory, and PCCI should be required to supplement their answer. NIPSCO requested PCCI to specify a length of time. PCCI only provided a definition of the term "additional period of construction time" and failed to specify a length. If PCCI are not aware of the specific length, they should so state.

C. Interrogatory 29(f)(2)

This interrogatory requests the basis for the answer to a previous interrogatory. PCCI responded by referring to their "knowledge and understanding." (Answers and Objections, p. 3).

This answer is not responsive. Naturally, all answers to interrogatories are based, at least initially, upon the knowledge and understanding of the person providing the answers. However, in the final analysis, all such knowledge and understanding must be based upon conclusions drawn from documents, statements by other individuals, or personal experience. Obviously, NIPSCO is requesting the identity of those documents, statements, or experience from which PCCIs' knowledge and understanding was derived, and PCCI should be required to provide

this information. If PCCIs' knowledge and understanding are groundless, PCCI may so state.

D. Interrogatories 29(f)(3), 30(a)(2), 30(b)(2),
and 30(c)(2)

These interrogatories request PCCI to specify various water "levels" for all areas in the National Lakeshore which PCCI allege will be potentially affected by additional dewatering. The interrogatories also request PCCI to specify the level for each pertinent area, if the levels are different in different areas. PCCI responded by stating that all levels will be affected.

These answers are not responsive to the interrogatories. Obviously, NIPSCO was requesting PCCI to specify a numerical value for the relevant water levels; otherwise it would not have requested PCCI to specify the level for each area, if the levels are different in different areas. PCCI should be required to provide a numerical value for the various water levels.^{*/} Naturally, if PCCI are not aware of such levels, they may so state.

E. Interrogatory 31(a)

This interrogatory requests PCCI to define their term "natural seasonal cycles." (See Contention 5.B., p. 11). PCCI responded by stating "[t]hose seasonal cycles which occur naturally." (Answers and Objections, p. 5).

^{*/} PCCI should also be required to supplement their answers to Interrogatories 29(f)(4), 30(a)(3), 30(b)(3), and 30(c)(3), which request PCCIs' bases for their answers to the above interrogatories.

Obviously, such a tautological response is not adequate. PCCI should be instructed to describe the "natural seasonal cycles" to which they have referred.

F. Interrogatory 31(c)

This interrogatory requests PCCI to provide the bases for their statement that "[v]ariations of water levels must also be timed to coincide with the timing of natural seasonal cycles" (See PCCIs' First Supplement, p. 11). PCCI responded by stating that NIPSCO's proposed water replacement program does not assure that water levels will rise and fall in accordance with the natural seasonal water cycles.

PCCI have responded to a question which NIPSCO did not ask. NIPSCO did not inquire into any alleged deficiencies of its proposed water replacement program, but instead was only seeking the basis for the statement quoted above. PCCI should be required to provide such a basis.

G. Interrogatory 33(g)

This interrogatory requests PCCI to identify any "natural processes," other than flow rate, which conditions the natural water, and to describe the effect of each such process on the characteristics of the water. PCCI responded by stating that all such processes are not known, and that "circulation" is a known process.

The answer is not fully responsive to the interrogatory. PCCI should be required to identify all such processes which are known, and to describe the effect of each such process, including "circulation," on the characteristics of the water.

IV. Execution of Answers and Objections

The Answers and Objections were executed by "Edward W. Osann, Jr., agent of each" of the listed parties and "Robert J. Vollen, one of the attorneys for each of the" listed parties. (Answers and Objections, p. 11). Mr. Osann has also signed an "Affirmation" which recites that he is "an attorney for" the named organizations and persons; that he has "the authority as agent for each of those parties to submit their respective answers" to NIPSCO's interrogatories and does so "as agent." The Affirmation records that Mr. Osann has read the answers and objections and "conferred with other attorneys for these parties concerning them and that they are true and correct to the best of [his] knowledge and belief." (Answers and Objections, pp. 12-13).

Therefore, as in the case of the Answers to NIPSCO's First and Second Sets of Interrogatories, it appears that there has been no consultation with the organizations and persons admitted to this proceeding in preparation of the responses. Furthermore, the individual parties have failed to execute their answers, as required by NRC regulations. (10 C.F.R. § 2.740b(a)). We shall not repeat the arguments made in NIPSCO's Motion to Compel Responses to the First Set of Interrogatories (May 26, 1981) but refer the Board to that document.

V. Observation

In large part, the Answers and Objections filed by Porter County Chapter of the Izaak Walton League of America,

Inc.; Concerned Citizens Against Bailly Nuclear Site; Businessmen for the Public Interest, Inc.; James E. Newman and Mildred Warner are apparently patterned upon the "Answers of the People of the State of Illinois to NIPSCO's Third Set of Interrogatories" (August 3, 1981). These Answers and Objections fall substantially below the standard which is required of parties in NRC proceedings, particularly those represented by counsel.

The Third Sets of Interrogatories seek clarification, elaboration, definition of the contentions which these parties proposed as issues in this proceeding. They probe subjects with which these intervenors must be presumed to be familiar. Yet the answers provide little of substance. The answers and objections appear to have been contrived for the purpose of evasion; in any event they are without merit.

The Commission recently reminded its Licensing Boards and the parties in its proceedings that:

The purpose of discovery is to expedite hearings by the disclosure of information in the possession of the parties which is relevant to the subject involved in the proceeding so that issues may be narrowed, stipulated, or eliminated and so that evidence to be presented at hearing can be stipulated or otherwise limited to that which is relevant.

(Statement of Policy of Conduct of Licensing Proceedings, 46 Fed. Reg. 28,533, 28,535 (May 27, 1981)). However, these intervenors appear determined to thwart accomplishment of that purpose and to use discovery for the purpose of delay.

We regret that it has been necessary to request frequently that the Board intervene in the discovery process. However, there is no alternative when parties obviously -- or purposefully -- seek to avoid their responsibilities with respect to discovery.

It would therefore appear appropriate for the Board to remind these intervenors of the obligation which each assumed by seeking party status and of the fact that sanctions may be imposed upon those who fail to meet their obligations. (See, e.g., Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station), Memorandum and Order on Pending Motions, pp. 23-28 (May 20, 1981)).

VI. Conclusion

NIPSCO requests the Licensing Board to issue an order compelling each of the three organizations and two individuals to file full, complete, and properly executed answers,^{*/}

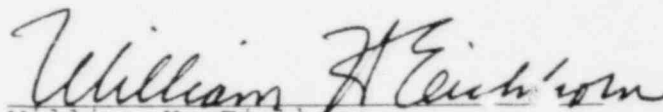
^{*/} Joint answers are unobjectionable if they otherwise meet NRC requirements.

complying with the requirements of NRC regulations, to NIPSCO's
Third Sets of Interrogatories.

Respectfully submitted,

EICHHORN, EICHHORN & LINK
5243 Holman Avenue
Hammond, Indiana 46320

By:


William H. Eichhorn

Attorneys for Northern Indiana
Public Service Company

LOWENSTEIN, NEWMAN, REIS
& AXELRAD
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036