

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 SET OF INTERROGATORIES TO ILLINOIS

I. Introduction

On June 22, 1981, Northern Indiana Public Service Company (NIPSCO) served its third set of interrogatories on the State of Illinois (Illinois). On August 3, 1981, Illinois filed Answers of the People of the State of Illinois to NIPSCO's Third Set of Interrogatories (hereinafter Answers). The "Answers" are in substantial part non-responsive and the objections to the interrogatories therein stated are not well taken; NIPSCO therefore files this Motion to Compel.

II. Illinois' Objections to Interrogatories

A. Interrogatories 38(a), ^{*}/ 40, and 41

These interrogatories request the identity of (1) those documents upon which Illinois has relied, (2) those documents

^{*}/ Illinois did not answer Interrogatory 38(b), based upon its objections to Interrogatory 38(a). Since Illinois' objection to Interrogatory 38(a) is invalid, Illinois should also be required to answer Interrogatory 38(b).



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to which Illinois has referred, and (3) those persons with whom Illinois has consulted, in formulating Contention 3.^{*/} The grounds for Illinois' objections are that the interrogatories allegedly seek "information as to the work product and mental processes" of the attorneys of Illinois and that the documents relied upon and the persons consulted in formulating a contention are "irrelevant." (Answers, pp. 5-7).

Illinois has either misperceived the nature of these interrogatories or fails 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 3. 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 Illinois' attorneys

^{*/} All references herein to contentions are to those numbered contentions in Supplemental Petition of the State of Illinois (Feb. 26, 1980) (hereinafter Supplemental Petition).

in anticipation of litigation, nor do they seek the mental impressions, conclusions, opinions, or legal theories of Illinois' attorneys. Thus, the interrogatories are not objectionable as the work product of the Illinois' 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)).

Furthermore, Illinois' argument is specious to the extent it asserts that the identity of documents and persons relied upon by Illinois in formulating Contention 3 is irrelevant. Presumably, those documents and individuals possess relevant information; otherwise they would not have been relied upon by Illinois.

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

B. Interrogatory 33(a)

Illinois objects to answering Interrogatory 33(a), which requests a definition of Illinois' term "natural seasonal cycles." (See Supplemental Petition, pp. 9-10). Illinois bases its objection to this interrogatory on the ground that the term is "self-explanatory."

Illinois cites no authority in support of the novel proposition that a party may object to answering an interrogatory on the ground that the answer is self-evident. In any case, NIPSCO submits that the term "natural seasonal cycles" as used with respect to water levels in the National Lakeshore is not self-explanatory, since Illinois has not provided any information

regarding the causes, effects, timing, magnitude, etc. of such cycles. Illinois should be required to answer this interrogatory.

III. Deficient Answers

A. Interrogatory 30(a)

This interrogatory requests Illinois to describe the experience at River Bend and at Caorso, Italy, to which Illinois had referred in its Supplemental Petition, pp. 7-8, for the purpose of substantiating its allegation that dewatering of Bailly will be required during the entire period of construction, and for several months afterward. Illinois responded by stating that "[t]he experiences at River Bend and Caorso, Italy are experiences which suggest that water infiltration after construction is completed constitutes a problem for which remedial steps must be taken." (Answers, p. 1).

This answer is obviously deficient. NIPSCO requested that Illinois describe the River Bend and Caorso "experience." In response, Illinois merely parroted the language of the interrogatory without providing any description of the experiences whatsoever. Illinois should be required to describe the experiences to which it has referred.

B. Interrogatory 31(e)

This interrogatory requests Illinois to "specify the length of the 'additional period of construction time'" to which it had referred in Contention 3. (Emphasis added). Illinois responded by stating: "[t]he additional length of time after

September 1, 1979 during which NIPSCO intends to engage in construction." (Answers, p. 2).

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

C. Interrogatory 32(f)

This interrogatory requests Illinois to describe the "probable environmental consequences of a failure to 'key' replacement water levels during the 'additional period of construction time' to" various identified water levels.

(See Contention 3.B.2, Supplemental Petition, p. 9). Illinois responded by stating that the water levels "will all be different from what they would have been without NIPSCO's activities at the Bailly site." (Answers, p. 3).

This answer is not responsive to the interrogatory. The obvious implication of Contention 3.B.2 is that, if the replacement water levels are not keyed to the identified water levels, the water levels will be different from what they would have been without NIPSCO's activities. This interrogatory seeks to discover the environmental consequences, if any, of such different water levels. Illinois should be required to specify such consequences. Naturally, if Illinois is not aware of any consequences, it should so state.

D. Interrogatories 32(g)-(h) and 39(d)

These interrogatories request Illinois to specify the adverse environmental impacts resulting from certain identified occurrences. In each case, Illinois responded by referencing Contention 3.

Contention 3 merely alleges that additional dewatering of the Bailly site will cause "irreparable injury" and the "elimination of those species of flora which presently exist in the wet land system, including the 'Bog Indicator' species." (Supplemental Petition, p. 8). Contention 3 is wholly lacking in the specificity requested by these interrogatories. It does not identify any species (other than the "Bog Indicator") which allegedly will be affected; it does not identify the geographic area in which such species would be affected; it does not identify the magnitude of any such effects; and it does not specify whether each such effect will be irreparable.

The purpose of these interrogatories is to discover the bases of Illinois' allegations in Contention 3. Merely referring back to the statements in Contention 3 is not responsive to the interrogatories. Illinois should be required to provide specific details for its claim that adverse environmental impacts will result to the National Lakeshore from additional dewatering. If Illinois is not aware of any such specific environmental impact, it should so state.

E. Interrogatory 35(g)

This interrogatory requests Illinois 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. Illinois responded by stating that all such processes are not known, that "circulation" and the presence of Sphagnum moss are a known process, and that a low pH slows decomposition and preserves the natural history of the site. (Answers, p. 4).

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

F. Interrogatory 39(c)

Interrogatory 39(c) inter alia requests Illinois to identify the length of time required for specified effects to be manifested. Illinois failed either to answer or object to this question. Illinois should be required to respond to this interrogatory.

IV. Observation

We submit that the "Answers of the People of the State of Illinois to NIPSCO's Third Set of Interrogatories" fall substantially below the standard which is required of parties in NRC proceedings, particularly those represented by counsel. These interrogatories seek clarification, elaboration, definition of the contentions which Illinois proposed as issues in this proceeding. They probe subjects with which Illinois must be presumed to be familiar. Yet the answers provide little of substance. The objections raised in the Answers appear

to have been contrived for the purpose of evasion; in any event, they are without merit.

We urge the Board to order Illinois to file promptly full and complete answers to NIPSCO's Third Set of Interrogatories. Those answers may, of course, state that Illinois does not know the answer to an interrogatory when that is the case. We suggest that the Board may wish to remind Illinois of the obligation which it assumed by seeking party status and of the fact that sanctions may be imposed upon those who fail to meet their obligations.

Respectfully submitted,

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