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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

Pacific Gas and Electric Company

(Diablo Canyon Nuclear Power
Plant, Units 1 and 2)

)
) Docket Nos. 50-275-OLA - 2
) 50-323-OLA
) (Construction Period
) Recovery)
)

PACIFIC GAS & ELECTRIC COMPANY'S
MOTION TO COMPEL DISCOVERY
FROM THE SAN LUIS OBISPO MOTHERS FOR PEACE

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.740(f) and 2.740(e)(3), Pacific Gas and Electric Company ("PG&E") moves that the Atomic Safety and Licensing Board ("Licensing Board") enter an Order compelling the San Luis Obispo Mothers for Peace ("MFP") to answer certain of "Pacific Gas and Electric Company's First Set of Interrogatories and Request for Production of Documents," dated February 19, 1993 ("PG&E's First Set"), and imposing on MFP the duty specified in NRC regulations to supplement insufficient responses. For the reasons set forth below, MFP's response^{1/} to PG&E's First Set, dated

^{1/} "San Luis Obispo Mothers for Peace Response to First Set of Interrogatories and Request for Production of Documents Filed by Pacific Gas and Electric Company and Motion for Protective Order," March 22, 1993 ("Response").

March 22, 1993, is incomplete. MFP should be compelled to adhere to the discovery standards mandated by 10 C.F.R. § 2.740(e)(1).

II. BACKGROUND

On February 3, 1993, the Licensing Board conducted a telephone conference call to establish discovery and hearing schedules in the above-captioned proceeding. Thereafter, the Licensing Board issued a Memorandum and Order^{2/} setting the schedule for discovery in this proceeding as follows: initial discovery requests were to be filed by March 8, 1993; all discovery responses (including objections) must be filed 30 days following receipt of the discovery requests, with final responses due on April 12, 1993. Scheduling Order at 3-4.

Consistent with the timetable established in the Licensing Board's Scheduling Order, PG&E's First Set of interrogatories is dated February 19, 1993. It consists of seven questions, numbered A-1 through A-7. In its Response, MFP objects in full to two of the questions (A-6 and A-7) which relate to non-witness experts. MFP indicates that it will respond to three other questions (A-1, A-2, and A-5) when it determines who its expert witnesses will be in this proceeding. With respect to the remaining two questions (A-3 and A-4), MFP objects only in part, stating that it "will

^{2/} "Memorandum and Order (Discovery and Hearing Schedules)," February 9, 1993, ("Scheduling Order").

identify documents that its witnesses will rely on in the case when this information is known." Response at 2.^{3/}

At this time, PG&E does not take issue with MFP's objections to questions A-6 and A-7,^{4/} or to its partial objections to questions A-3 and A-4. However, PG&E does take issue with the inadequate, and perhaps insincere, responses to questions A-1, A-2, A-3, A-4, and A-5. MFP's response to questions A-1 through A-5 boils down to a deferral: that is, MFP denies present knowledge and promises to respond later when it knows more. PG&E believes that the discovery requests are appropriate and that, given MFP's pattern of evasion on the matter, an Order imposing the duty to respond is appropriate.

^{3/} Presumably, in response to A-4, which requested document production, MFP will at that time also provide copies of these documents or make copies available.

^{4/} PG&E notes, however, that these objections all relate largely to discovery of the identity and assistance of non-witness experts. Contrary to MFP's global claim, discovering the identity of non-witness experts has been allowed in NRC proceedings. General Elec. Co. (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 NRC 461, 465-68 (1978) ("the identities of the persons assisting the Intervenor are expressly discoverable under the Commission's rules [§ 2.740(b)(1)] . . . experts assisting the Intervenor are, or have been, specially engaged in connection with this case and are quite likely to have information or knowledge concerning this specific case."); see also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-86-7, 23 NRC 177, 178-79 (1986) ("it is clear to us that the decision on whether to adopt Rule 26(b)(4), in the absence of a parallel NRC rule or decision by higher authority, is still open to the interpretation of this Board.") Furthermore, 10 C.F.R. § 2.740(e)(1) refers to the duty to supplement discovery responses concerning the identity of persons with knowledge of discoverable matters.

III. DISCUSSION

In modern administrative practice, including that of the NRC, pretrial discovery is intended to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately for a more expeditious hearing. E.g., Texas Utils. Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241, 243 (1981). Thus, "[a]ll parties have a responsibility to respond to discovery so that their opponents may gain an understanding of the bases of their contentions." Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-86-4, 23 NRC 75, 81 (1986).^{5/} The test as to whether particular matters are discoverable is one of "general relevancy." This test is easily satisfied unless it is clear that the evidence sought is beyond the scope of the admitted issues and can have no possible bearing on those issues. Commonwealth Edison Co. (Zion Station,

^{5/} In the Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981), the Commission emphasized that

[f]airness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations.

Units 1 & 2), ALAB-185, 7 AEC 240 (1974). See 10 C.F.R. §2.740(b)(1).^{9/}

A discovering party is entitled to direct answers or objections to every relevant interrogatory posed. The burden of persuasion is on the objecting party to show that the interrogatory should not be answered, that the information called for is privileged, not relevant, or in some way not the proper subject of an interrogatory. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1944 (1982). While a lack of knowledge may be a truthful and adequate response, parties are required under the Commission's rules to supplement responses on the identity of expert witnesses (and other individuals) and on the substance of expected expert testimony. Accordingly, a party cannot be allowed to continually avoid a response on these matters.

Section 2.740(e)(1) states:

A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at the hearing,

^{9/} For an example of truly irrelevant discovery, see MFP's discovery requests, dated February 16, 1993, related to Contention V in this proceeding. See also "Pacific Gas & Electric Company's Response to San Luis Obispo Mothers for Peace Motion to Compel Re: Contention V," dated March 30, 1993.

the subject matter on which he is expected to testify, and the substance of his testimony.⁷

Similarly, a claim of a lack of knowledge can extend only so far. Section 2.740(e)(2) states:

A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

It appears from its response to PG&E's First Set that MFP is being evasive. At the Prehearing Conference in December 1992, MFP announced grandly that "[w]e have expert witnesses who would come forth." Tr. 94. However, when pressed by the Licensing Board, MFP at that time declined to identify those experts, beyond asserting that they are "people who are qualified to be expert witnesses." Id. The present answers to questions A-1 through A-5 are the same. MFP, on the one hand, promises expert testimony; on the other it steadfastly declines to provide any particulars. This evasion of justified discovery is exacerbated by the fact that MFP also declines to response to question A-6, which simply asks MFP to identify those people, if any, currently providing technical assistance to MFP.

⁷ PG&E's discovery requests also highlighted this obligation. PG&E's First Set at 5.

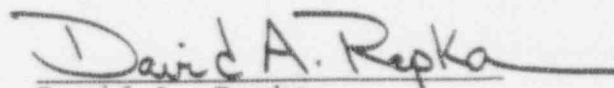
MFP's assertion of a lack of knowledge also strains credulity. MFP has made no secret that it has, at the least, retained MHB Technical Associates ("MHB") for technical assistance. A representative of MHB participated on MFP's behalf during a recent scheduling conference call with the Licensing Board. And MHB has been authorized by MFP to represent it in discovery dealings directly with PG&E. It would seem that MFP must know, or should very soon know, whether individuals from MHB will testify, what issues they will testify on, and what documents they will rely upon. PG&E is entitled to know the information in order to understand the bases for MFP's contentions and to prepare for hearing. Accordingly, PG&E requests an Order imposing on MFP the duty to respond, in a timely fashion, to the pending discovery requests.

IV. CONCLUSION

PG&E's motion to compel discovery should be granted. The Licensing Board should impose on MFP the duty codified in 10 C.F.R.

§ 2.740(e) and order MFP to respond to interrogatories A-1, A-2, A-3, A-4 and A-5, as soon as possible.

Respectfully submitted,


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Dated in Washington, DC
this 6th day of April, 1993

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CERTIFICATE OF SERVICE

I hereby certify that copies of "PACIFIC GAS & ELECTRIC COMPANY'S MOTION TO COMPEL DISCOVERY FROM THE SAN LUIS OBISPO MOTHERS FOR PEACE" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk (*), by deposit for Federal Express overnight delivery, this 6th day of April, 1993.

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