RELATED CORRESPONDENCE

FILED: FEB. 4, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '83 FEB -7 P12:01

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the matter of:

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al	Docket Nos.	50-443 OL 50-444 OL

(Seabrook Station, Units 1 and 2)

Seacoast Anti-Pollution League's Objection to Applicant's Motion to Compel Answers to Interrogatories and Motion for Issuance of a Protective Order

The Seacoast Anti-Pollution League (SAPL) objects to the Applicant's Motion to Compel pursuant to 10 C.F.R. §2.730 (c) and therefore moves pursuant to 10 C.F.R. 2.740 (c) that the Board enter a protective order disallowing the applicant's interrogatories relating to whether or not SAPL intends to conduct cross-examination or offer proposed rulings or findings based on any cross-examination conducted in these proceedings.

I. THE APPLICANT'S INTERROGATORIES.

The Applicant's interrogatories propounded on December 8, 1982, were arranged in groups. Each group of interrogatories focused on a separate contention. The first interrogatory in each group asked whether or not SAPL intended to "litigate" that particular contention. The interrogatory called for a "yes" or an unqualified "no" answer. The instructions stated that in the event of an unqualified "no", SAPL needn't answer any of the subsequent interrogatories with respect to that contention.

In its section on definitions, the Applicant defined "litigate" as follows:

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"Litigate" with regard to a topic or contention means to offer direct testimony relating to, to cross-examine on, to offer proposed findings or rulings regarding, or to urge the denial (or allowance subject to conditions) of the pending application on the basis of the topic or contention.

II. SAPL'S RESPONSES.

With respect to the first twenty-four groups of interrogatories, SAPL's response was "no". In answering "no", however, SAPL made clear that it would not waive its rights to cross-examine witnesses or to urge the denial (or allowance subject to conditions) of the pending application on the basis of the topic or contention. SAPL's rights in this regard are recognized under the Prairie Island Rule. (In the Matter of Northern States Power Company, 2 NRC 392, Note 6).

The first question propounded in each of the groups I through XXIV, inquired as to whether SAPL intended to "litigate" the particular contention. SAPL contends that its qualified "no" response was entirely appropriate. SAPL understands that under the regulations, it is obligated to answer the interrogatories "separately and fully in writing under oath or affirmation". 10 C.F.R. §2.740 (b). This obligation has been fulfilled. SAPL does not intend to "litigate" the contentions referred to in the Applicant's interrogatories I through XXIV. By qualifying its "no" responses, however, SAPL puts the Applicant on notice that it reserves the right to make a future determination as to whether or not it will cross-examine witnesses or offer proposed findings based on information received from cross-examination.

In its Motion to Compel, the Applicant argues that since it included cross-examination in its definition of "litigation", SAPL should be compelled to answer extensive and detailed interrogatories

with respect to cross-examination conducted regarding each of the twenty-four c. .entions. SAPL strongly objects to this argument. First, it would be unduly burdensome for SAPL to respond to the interrogatories in light of the fact that it has not yet decided to cross-examine witnesses testifying with respect to contentions other than those sponsored by SAPL. SAPL should not be compelled to make such a determination before it has had an opportunity to review submitted pre-file testimony.

Secondly, the Applicant's argument is entirely at odds with previous ASLB rulings on precisely this issue.

In (In the Matter of Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc., 10 N.R.C. 597, 1979), the ASLB Board recognized that extensive discovery requests propounded by the Applicants concerning contentions advanced by other parties were unduly burdensome to the intervenors. In its Memorandum and Order on Discovery Motions (2) (October 30, 1979), the Board stated that:

> Finally, several interpretations of the discovery rules advanced by the Applicants and Staff have had the effect of enormously compounding the discovery burden imposed on the intervenors. For example, the Applicants have made discovery requests of each party requiring responses with respect to contentions, or parts of contentions, advanced by the other parties. In other words, ECNP (an intervenor) has been asked questions and has been requested to produce documents relating not only to its own contentions, but also those of CAND (another intervenor), (SEA,. . .and other intervenors have been treated similarly. The justification advanced by the Applicants is that 'Since all Intervenors are entitled to cross-examination on all contentions at the hearing..., answers to the interrogatories by all Intervenors are needed for Applicant to prepare to respond to such cross-examination.' 10 NRC 604 (1979)

The Board recognized that although such a request was not prima facie inconsistent with the Rules of Practice, it did produce a

result which was "patently unfair" to the Intervenors. 10 N.R.C. 605 (1979). Consequently, the Board ordered that:

> 3. All parties are directed, to the extent that they have not already done so, to respond by December 14, 1979 to the discovery requests on the environmental contentions, except that no party need answer questions with respect to contentions or portions of contentions, which it is not sponsoring. We recognize that the Applicant's Staff may possibly be surprised by the cross-examination of Intervenors on other than their own contentions; but we are pursuaded by the circumstance that this cross-examination is mainly for our benefit, rather than that of the questioning party, and we are disinclined to impose on Intervenors a heavy discovery burden to serve that purpose. [Emphasis added.]

One factor in the Board's decision was that the Applicant had moved for protective orders against discovery requests filed by Intervenors relating to any contentions other than those sponsored by the Intervenors making the request. Although this has not happened to SAPL in this case, it is likely that had SAPL propounded discovery requests upon the Applicant relating to any contentions other than those it is sponsoring, Applicant would most likely have requested such a protective order.

The Applicant would no doubt argue that by reserving its right to cross-examine witnesses, SAPL is in fact "sponsoring" the contentions referred to in Applicant's interrogatories I through XXIV. This is not the case. Through its "no" responses, SAPL has made it clear that it will not be sponsoring those contentions, as it will offer no direct evidence on those issues. Consequently, SAPL urges that this Board rule in a manner consistent with the Board's ruling in Pennsylvania Power and deny Applicant's Motion to Compel with respect to its interrogatories I through XXIV. SAPL respectfully requests that the Board issue a protective order properly

disallowing the Applicant's interrogatories relating to SAPL's reservation of rights under the Prairie Island Rule.

III. INTERROGATORY XXV-4.

SAPL responded to Applicant's interrogatory XXV-4 in a manner consistent with its position on the Class 9 issue. However, since the Applicant insists that a separate description of potential consequences from a core melt accident is relevant to the contention as submitted, SAPL is fully prepared and willing to supplement its response in a manner consistent with that requested in the Applicant's motion. SAPL's supplement answer to Interrogatory XXV-4 is being prepared and will be submitted shortly.

IV. INTERROGATORIES XXIV-3 THROUGH 25, XXXI-2, XXXII-2 THROUGH 12 AND XXXIII-2 THROUGH 20.

In each of these cases, SAPL intends to litigate the corresponding contentions except for Contention NECNP-III.3 referred to in Applicant's interrogatory XXXI-1. SAPL's "yes" response to that interrogatory was in error, and should be disregarded. SAPL will amend its response to a qualified "no" in its supplemental responses to be filed shortly.

SAPL's responses to these remaining interrogatories was stated as follows:

> SAPL has not yet finalized its position on this contention. These answers will be supplemented as required by NRC regulations. (See SAPL's Responses to Applicant's Interrogatories and Request for the Production of Documents, pg. 10.)

First, SAPL wishes to make clear that it takes seriously its obligations under 10 C.F.R. §2.740(e)2. SAPL asserts that its response to these Interrogatories was "complete when made", and

understands that it is required under §2.740(e)2 to supplement that response when the response is no longer true and the circumstances are such that a failure to amend the response would be in substance a "knowing concealment". SAPL fully intends to comply with these regulations and is currently preparing supplemental answers to these specific interrogatories.

It is unfortunate that the Applicant construed SAPL's response as an "I don't want to tell you yet". This interpretation is not justified. In its Motion, the Applicant says that it would have been satisfied with an "I don't know" answer, and that is essentially what SAPL stated in its response. Regulations require that SAPL's responses be truthful, and the truth at the time of SAPL's response was that it had not yet finalized its position on those contentions.

SAPL further objects to the Applicant's assertion that it is attempting to render the Rules of Practice and the Board's specific orders a "nullity". SAPL has no intention of using "delay tactics" in these proceedings and recognizes the interests of the Applicant in understanding SAPL's position on its contentions. Consequently, it is unnecessary for the Board to issue an order compelling SAPL's response to these interrogatories as SAPL is currently preparing supplemental answers and will file them as soon as possible.

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