

UCS - October 18, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONDOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of
METROPOLITAN EDISON COMPANY
(Three Mile Island Nuclear
Station, Unit No. 1)

OFFICE OF SECRETARY
Docket No. 50-289 SP
(Restart Remand on
Management)

UCS' MOTION TO COMPEL GPU RESPONSE
TO UCS' SIXTH SET OF INTERROGATORIES AND DOCUMENT REQUESTS

Pursuant to 10 C.F.R. § 2.740(f), the Union of Concerned Scientists ("UCS") moves the Atomic Safety and Licensing Board to compel Licensee to respond in full to Interrogatories 6-1 through 6-8, as set out in UCS' Sixth Set of Interrogatories and Document Requests, dated September 27, 1984.

Background

The interrogatories for which UCS now seeks responses fall into three categories. Interrogatories 6-1 and 6-2 seek specific information concerning the Reconstituted OARP Committee's work since it prepared its Special Report. Interrogatories 6-3 to 6-6 and 6-8 seek evaluations of training program personnel and specific information about the duties and activities of Mr. Frederick, who was the Supervisor of Licensed Operator Training. Interrogatory 6-7 seeks evaluations of one reactor operator.

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Interrogatories 6-1 and 6-2

The text of Interrogatories 6-1 and 6-2 follows:

6-1 Has the Reconstituted OARP Committee or any members thereof undertaken any analyses, or investigations, gathered any further information or done any further work since the preparation of the Special Report to prepare for the remanded proceedings? If so,

- a. Describe specifically the nature of the analyses, investigations, information gathering or other work.
- b. Identify the person(s) who performed the work.
- c. State when the work was performed.
- d. Provide all documentation of the work, including notes, memoranda, or any other documents.
- e. If further documents were reviewed, identify each and state the purpose for which it was reviewed.

6-2 Has the ROARP Committee or any members thereof, since the preparation of the Special Report, interviewed or contacted individuals beyond those listed in the Appendix to the Report? If so:

- a. Identify each person interviewed or contacted.
- b. State the purpose of the contact.
- c. State the topic and substance of the contact.
- d. State when the interview or contact took place.
- e. State who in the ROARP Committee conducted the interview or contact.
- f. Provide all documentation of the interview or contact, including the notes of all parties and any other documentation

In essence, these interrogatories seek information concerning the work that the Committee has done, the documents it has reviewed, and the individuals whom it has contacted in preparing for the remanded proceeding on training. Licensee objects to both of these interrogatories on the ground that the information sought is beyond the scope of permissible discovery of expert witnesses or constitutes privileged work product material.

These objections are baseless. UCS simply seeks to know the work done and the information gathered by the Committee in the course of preparing for its testimony in the remanded proceeding on training. Nothing is more basic to UCS' preparation for this litigation, nor more clearly discoverable.

Rule 26(b)(4)

Licensee asserts that the information sought is beyond the scope of permissible discovery of expert witnesses as established by Fed. R. Civ. P. 26(b)(4). Licensee does not explain the basis for that assertion.

The rule states, in relevant part,

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope . . . as the court may deem appropriate.

There is no Commission discovery rule on this point.

Accordingly, the Licensing Board, in its most recent decisions, has held that, "In considering whether to follow the federal guidance, a Board should determine whether the situation before it is analagous to the situation the federal rule governs and whether the policy rationale underlying the federal rule is persuasive." Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 N.R.C. 971, 978 (1983). The extent to which the federal rule governs depends upon the facts of each case, as does the application of

the rule if it does govern. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 N.R.C. 490, 497 (1983); Carolina Power and Light Co., 17 N.R.C. at 979.

As reflected in the notes of the Advisory Committee on Rules, which follow Rule 26, the purpose of the protections afforded to expert witnesses in the discovery process is to prevent abuses, particularly attempts by discovering parties to develop their own direct cases through an opponent's experts. That is not what UCS seeks through these interrogatories. UCS has not posed substantive questions here that would bring the witnesses' expertise to bear on this litigation on any issue or in any way that is different from Licensee's reliance upon that expertise. Rather, UCS seeks the work that the witnesses have performed and the conversations that the witnesses have had in preparing their testimony, and documentation of that work and those conversations.

Under the language of the rule, UCS may seek "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." The responses sought by UCS would provide precisely that information. Moreover, to the extent, if any, that UCS' request is broader than that specific language, it is well within the appropriate scope of discovery that may be ordered by a court and should be ordered by the Board. A party need make only a minimal showing of good cause in order to justify discovery beyond that specifically provided for by the rule. Henlopen Hotel Corp. v. Aetna Ins. Co., 33 F.R.D. 306 (D., 308 Del. 1963).

UCS seeks, in essence, the bases for the witnesses' testimony, including particularly the analyses that the witnesses have performed and the materials that they have reviewed in order to prepare that testimony. This is essential to permit UCS to evaluate and probe their testimony. This is also considerably less intrusive than the sort of information that may be discovered. See, e.g., Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 553 F. Supp. 45 (S.D.N.Y. 1982).

Accordingly, Rule 26(b)(4) does not permit Licensee to avoid responding to Interrogatories 6-1 or 6-2.

Work Product

Licensee also objects to these Interrogatories on the ground that the information that Licensee would provide is privileged as attorney work product. UCS does not seek information that falls under this privilege. However, these interrogatories appear to call for little, if any, such material.

Most oral and written advice by counsel would presumably be protected, subject to some exceptions. It is clear, however, that reports by the experts themselves are not protected by the work product privilege. Beverage Marketing Corp. v. Ogilvy & Mather Direct Response, Inc., 563 F. Supp. 1013 (S.D.N.Y. 1983).

Since Licensee has failed here even to indicate what sort of documents or responses it considers to be protected by the work product privilege, UCS is at a serious disadvantage in determining the legitimacy of Licensee's claim or in moving to compel responses. Based upon discussion with Licensee's counsel, however, UCS understands that the objection may extend

to factual documents provided to the witnesses by counsel or at the direction of counsel, but on which the witnesses do not specifically rely in their testimony.

To the extent that this understanding is accurate, the responses are not privileged. UCS is entitled to know both what the witnesses rely upon in their testimony and the materials that they have reviewed, but for some reason, chosen not to reference or rely upon. These materials, and the reasons that the witnesses rejected them, are part of the bases for the witnesses' ultimate direct testimony. As such, they are not privileged. Moreover, they are not comparable to materials that may be used on cross-examination, which would normally be privileged because their release would reveal the attorney's legal theories and thought processes.

Beyond these materials, UCS is unable to evaluate Licensee's claims because Licensee has failed to provide sufficient information.

Accordingly, UCS moves that the Board compel Licensee to respond to Interrogatories 6-1 and 6-2 with respect to all information provided to the witnesses by counsel or at the direction of counsel if the material itself (as opposed to the fact of its identification or provision by counsel) is not privileged. In addition, UCS moves that the Board compel Licensee to identify all materials for which it claims the work product privilege and to state the justification in each case.

Interrogatories 6-3 to 6-6 and 6-8

The language of Interrogatories 6-3 to 6-6 and 6-8 follows:

6-3. Provide all evaluations of Mr. Frederick since 1981, including but not limited to evaluations by Mssrs. Long, Newton, Knief and Ross.

6-4. Provide all evaluations of Mr. Long since 1981.

6-5. Provide all evaluations of Mr. Newton since 1981.

6-6. Provide all evaluations of the current GPU licensed operator instructors since 1981.

6-8. State specifically what Mr. Frederick's duties were during his assignment to the training program, when they began and when they terminated. State whether Mr. Frederick prepared and/or approved any examinations and, if so, identify.

Licensee objects to responding to these interrogatories on the ground that TMIA, not UCS, is the lead intervenor with respect to the relevant issues. This is incorrect, at least with respect to information concerning Mr. Frederick. It is also irrelevant.

UCS is the lead intervenor with respect to the following question:

Do the NRC and Company examinations reliably measure the operator's ability to safely operate the plant?

As Supervisor of Licensed Operator Training, Mr. Frederick either prepared or reviewed most, if not all, recent GPU examinations, and he was involved in the grading and evaluation of candidates based upon the examinations. He has recently been removed from that position. In order to address the adequacy of the examinations, UCS is entitled to pursue the qualifications and activities of the individual who appears to have the most direct and substantial involvement in their preparation and implementation. That is the subject of Interrogatories 6-3 and 6-8.

Interrogatories 6-4 to 6-6 request evaluations of training department personnel and licensed operator instructors. This information is relevant to the adequacy of the examinations, as discussed above. It is also vital to the issues with respect to which TMIA is lead intervenor.

Licensee's objection is that UCS is not lead intervenor with respect to these matters. As previously discussed, that is inaccurate. More important, it does not justify failure to respond. There is no Commission rule, nor is there any directive from the Board in this case prohibiting discovery by parties other than the lead intervenors on particular issues, particularly where the issues are so closely related as these.

UCS has consulted with TMIA with respect to its ability to pursue these issues in recent weeks and its view of the need for the information in question. As the Board is aware, TMIA has been either taking or preparing for depositions with respect to the Dieckamp Mailgram issue for many weeks. TMIA has authorized UCS to represent that it has not had time during that period to pursue adequately its discovery on the training issues. UCS has discussed these particular matters with TMIA, which agrees that the information is necessary for its own preparation as well as UCS' preparation. Accordingly, UCS is authorized to represent that TMIA joins in this motion.

Interrogatory 6-7

Interrogatory 6-7 states,

6-7. Provide all evaluations of Mr. Olive since 1981, including but not limited to evaluations by Mssrs. Long, Newton, Knief, Ross and Frederick.

Licensee objects to providing a complete response to this interrogatory on the ground that performance reviews are highly confidential. Licensee cites no basis for this objection, and there is none.

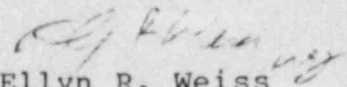
UCS does not know what Mr. Olive's performance reviews contain, but if the reviews are effective, the information is personal in nature, and it may be highly critical. Without in any way characterizing Mr. Olive, UCS notes that such highly personal information as an individual's unstable mental condition or his dishonesty or evasiveness would be crucial to an evaluation of the adequacy of the Licensee's training program. If the Licensee is recruiting and passing through its program individuals with these types of problem, the Licensee's program is seriously defective. UCS and the Board must know that information.

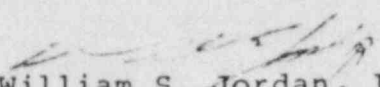
Conclusion

For these reasons, Licensee's objections to UCS' Sixth Set of Interrogatories are baseless. UCS urges the Board to compel the Licensee to respond, as described above. In light of the lateness of the hour, UCS also moves that the Board establish a

deadline of Monday, October 22, 1984 for Licensee to hand deliver its response to UCS.

Respectfully submitted,


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Dated: October 18, 1984

October 18, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of the UNION OF CONCERNED SCIENTISTS' MOTION TO COMPEL GPU RESPONSE TO UCS' SIXTH SET OF INTERROGATORIES AND DOCUMENT REQUESTS, October 18, 1984, were served on the following by deposit in The United States mail, first class, postage prepaid, on October 18, 1984.

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