481

50-445-OL-2
50-446 OL-2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

In the Matter of	)	
	)	Docket Nos. 50-445-2 and
TEXAS UTILITIES ELECTRIC COMPANY, ET AL.	)	50-446-2 '84 AUG 31 P4:59
	)	
	)	(Application for Operating
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	Licenses)

APPLICANTS' STATEMENT REGARDING
THE PROPER SCOPE OF THE DISCOVERY
DEPOSITION OF INTERVENOR'S EXPERT WITNESS

During the hearing in this proceeding held August 27, 1984, the parties and the Board discussed the proper scope of the discovery deposition of Intervenor's expert witness, Dr. Irwin L. Goldstein, which is now scheduled for the week of September 3, 1984. See Hearing Tr. 14140-148. As promised at the conclusion of that discussion (Tr. 14147), Applicants herein set forth the proper scope of that deposition.

Applicants agree that the scope of the Goldstein deposition should be governed by reference to the standards for discovery of experts set forth by the Federal Rules of Civil Procedure, at Rule 26(b)(4)(A), which has to do with discovery of experts a party expects to call at trial. That Rule provides:

> (4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (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

8409050522 840831
PDR ADOCK 05000445
Q PDR

DS03

> 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 and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

The federal courts have uniformly decided that Rule 26(b)(4)(A) requires a two-step discovery process: (1) interrogatories (or the equivalent of the information which would be obtained by them), under 26(b)(4)(A)(i), followed by (2) further discovery as appropriate, under 26(b)(4)(A)(ii). United States v. John R.- Piquette Corp., 52 F.R.D. 370 (E.D. Mich., 1971); Herbst v. Int'l Tel. & Tel. Corp., 65 F.R.D. 528 (D.Conn. 1975); In re IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39 (N.D. Calif., 1977).

The functional equivalent of the interrogatory responses appropriate under subdivision (A)(i) has been supplied, as counsel for Intervenor acknowledged at the August 27, 1984 hearing, (Tr. 14124), by the prefiled testimony of Dr. Goldstein, and by Intervenor's representation that he is its only expert. In essence, Dr. Goldstein has been "identified" as the expert witness Intervenor expects to call at trial. Moreover, Dr. Goldstein's testimony generally identifies the "subject matter" in his testimony, "the substance of the facts and opinions to which [he] is expected to testify and a summary of the grounds for

each opinion," at least to the extent that this information would be set forth in response to interrogatories.[1]

In Herbst, supra, the court had no difficulty accepting the fact that the subdivision (A)(i) requirement for interrogatories could be met by production of functionally equivalent information:

> Although the parties have not referred the court to particular information in the record, both sides assumed that the information allowed under subsection (b)(4)(A)(i) has already been provided. In addition, the plaintiffs' brief spells out the subject matter on which each expert is expected to testify and the substance of the opinions each is expected to give. Thus the issue is whether the court should now "order further discovery by other means" (depositions). Fed.R.Civ.P. 26(b)(4)(A)(ii).

Herbst, supra, 65 F.R.D. at 529 (footnote omitted).

The scope of "further discovery by other means," before the court in Herbst, is the issue before the Board with respect to the upcoming deposition of Dr. Goldstein. Counsel for Intervenor has not objected to the taking of Dr. Goldstein's discovery deposition (See, e.g., Tr. 14125). The Board, by its actions at the August 24, 1984 hearing, has ordered that deposition to go forward, with the understanding that a statement regarding its scope be supplied in advance by Applicants. Thus, it is the scope of further

---

[1] "Answering an interrogatory of [the] kind [contemplated by Rule 26(b)(4)(A)(i)] only requires the opponent to give information that he would have to obtain from his expert for his own use in preparing for trial; it requires no extra time for the expert, and does not increase the cost to the party who retained the expert." 8 C. Wright & A. Miller, Federal Practice and Procedure § 2030 at 252 (1970).

discovery the courts have permitted under Rule 26(b)(4)(A)(ii), on which Applicants focus in the remainder of this memorandum.[2]

The majority of courts considering this issue have begun their discussions by noting that Rule 26(b)(4)(A) "provides for quite liberal discovery of the opinions of experts . . ." and is "intended to facilitate cross-examination and rebuttal of experts at trial." R.-Piquette, supra, 52 F.R.D. at 371-72. As the court in Herbst put it:

> This . . . liberal view seems the better considered. All but experts may be freely deposed before trial in keeping with the liberal spirit that pervades the federal rules. Once the traditional problem of allowing one party to obtain the benefit of another's expert cheaply has been solved, there is no reason to treat an expert differently than any other witness.

Herbst, supra, 65 F.R.D. at 530-31.

The "traditional problem" referenced by the court in Herbst bears brief mention. As the comments of the Advisory

---

[2] Judge Grossman may have erred on the law at the August 27, 1984 hearing when he characterized (Tr. 14142) the rule on discovery of experts as being "done through interrogatories, but if that's not adequate, the same type of information that is generally ascertained through interrogatories can be taken through discovery . . ." (emphasis supplied). While Applicants found one case to support this view, Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202, 204 (N.D. Miss., 1972), it is inconsistent with the weight of authority, and explicitly rejected by such cases as Herbst, supra. This view is both too restrictive and overly broad. It is too restrictive in the sense that further discovery under subdivision (A)(ii) is not limited to duplicating the information that was supplied in response to interrogatories, as discussed in detail below. It is overly broad in the sense that the courts which have considered the issue have not merely viewed further discovery under (A)(ii) as an alternative to interrogatories under (A)(i). Instead, as R.-Piquette, Herbst, and In re IBM, supra, all make clear, interrogatory responses or functionally equivalent information under (A)(i) must come first, followed by further discovery under (A)(ii).

Committee on the 1970 amendment to the Federal Rules of Civil Procedure, which added Rule 26(b)(4), point out:

> Past judicial restrictions on discovery of an adversary's expert particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subsection (b)(4)(A) holds that risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. . . . Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Advisory Committee's Explanatory Statement Concerning Amendments to the Discovery Rules, 48 F.R.D. 487, 504 (Judicial Conference of the United States, 1970), cited in Herbst, supra, 65 F.R.D. at 530.

In this proceeding, there is no need for an order compelling the payment of expenses, because Applicants have agreed to pay Dr. Goldstein his usual fees for his time. Thus, there is no impediment to treating the permissible scope of his deposition like that of any other witness.[3]

---

[3] If it appears appropriate after the conclusion of the deposition, the Board may entertain a motion that Applicants contribute to the fees and expenses of Dr. Goldstein, which may have been incurred by Intervenor in obtaining information from him, under Rule 26(b)(4)(C). Applicant would stress, however, that contrary to the assertion of counsel for Intervenor at the August 27, 1984 hearing (Tr. 14125), it is Dr. Goldstein's fees which Applicants may be called upon to contribute to, and not attorneys' fees incurred by counsel for Intervenor. See the Advisory Committee's Explanatory Statement Concerning Amendments to the Discovery Rules, 48 F.R.D. 487 (Judicial Conference of the United States, 1970), which notes that "these provisions for fees (footnote continued)

Of course, there are limits to the scope of the discovery deposition of an expert witness, as there are in the case of any other witness. Rule 26(b)(1) provides that a party may obtain discovery regarding any matter, not privileged,[4] without regard to whether the information sought is admissible, so long as such information "appears reasonably calculated to lead to the discovery of admissible evidence."[5] With regard to experts, this

---

(footnote continued from previous page)
and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum." 48 F.R.D. at 505. The fact that it is the fees and expenses of the witness upon which the cost-sharing provision is focused is emphasized by the absence of such a provision when the deposed expert is regularly employed by the other party. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2034 at 259 (1970). Finally, Professor Moore in his treatise points out that "[i]t is to be doubted that situations will arise with any frequency that will justify cost-sharing . . . [I]t seems likely that discovery under (b)(4)(A)(ii) will add no cost to that already sustained by the opposing party. Therefore, if the party seeking the information is called upon to compensate the expert for the additional time spent, no occasion will arise for requiring that he reimburse the opposing party." 4 MOORE'S FEDERAL PRACTICE ¶ 26.66 [5] at 26-424 (1984). By implication, this rules out a reading of subdivison (4)(C) that would comprehend the award of attorneys', rather than witness', fees.

[4] Applicants point out that the term "privileged" in Rule 26(b) means privilege as that term is used in the law of evidence. "The privileges contemplated by Rule 26(b) are those such as the husband-wife, physician-patient, or attorney-client privilege -- privileges specifically recognized by state law." Lincoln American Corp. v. Bryden, 375 F.Supp. 109, 111 (D. Kansas, 1973) (citation omitted).

[5] Rule 26(b)(1) provides in relevant part:

> (b) Discovery Scope and Limits. . . .
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party,

(footnote continued)

limitation is written into subsection (b)(4)(A), and applies both to facts and opinions acquired or developed in anticipation of litigation or for trial and material prepared in other contexts. In re IBM, supra, 77 F.R.D. at 42.

Applicants fully recognize the limit imposed by Rule 26(b)(1). Thus, for example,

> [t]he fact that an expert's testimony will be based upon his "background, knowledge, and prior experience" does not make every document he ever wrote or reviewed relevant,

id., and a request of such breadth, for production of documents under Rule 34, in anticipation of an expert's deposition, will be denied. On the other hand, however, the following document request in anticipation of an expert's deposition was found appropriate in Quadrini v. Sikorsky Aircraft Division, United Aircraft Corp., 74 F.R.D. 594 (D.Conn. 1977), and recommended by the court in In re IBM, supra, 77 F.R.D. at 42, as a good guideline for drawing an appropriate request:

> All reports, memoranda, papers, notes, studies, graphs, charts, tabulations, analyses, summaries, data sheets, statistical or informational accumulations, data processing cards or worksheets, and computer generated documents, including drafts or preliminary revisions of any of the above, prepared in connection with this litigation by or under the direction or supervision of any

---

(footnote continued from previous page)

> including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

> witness whom you expect to call as an expert witness at the trial of this matter.

Quadrini, supra, 74 F.R.D. at 594.

The reason for allowing discovery of this breadth was forcefully explained by the court in Quadrini, a case involving personal injury resulting from an allegedly defective helicopter that crashed, killing plaintiff's decedent:

> Expert testimony will undoubtedly be crucial to the complex and technical factual disputes in this case, and effective cross-examination will be essential. Discovery of the reports of experts, including reports embodying preliminary conclusions, can guard against the possibility of a sanitized presentation at trial, purged of less favorable opinions expressed at an earlier date.

Quadrini, supra, 74 F.R.D. at 595. In this statement, the court by analogy set forth the appropriate scope of the Rule 26(b)(1) limitation on a deposition, which Applicants will follow with regard to Dr. Goldstein.

The only other limitation is that the party taking the deposition, or conducting other discovery, limit itself to "obtaining information for cross-examination." In re IBM, supra, 77 F.R.D. at 41. As the Advisory Committee on the 1970 Amendments to the Rules pointed out, Rule 26(b)(4) is intended to reduce the tendancy for "lengthy- and often fruitless-cross-examination during trial" and to "facilitate effective rebuttal." If this knowledge "is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated." Proposed Amendments to Civil Rules, 43 F.R.D. 211 at 234 (Judicial Conference of the United

States, 1967). Applicants will conduct the deposition of Dr. Goldstein with this limitation firmly in mind.

Applicants, in other words, recognize that the scheduled deposition is a discovery deposition, to obtain information for cross-examination, but is not itself the cross-examination of Dr. Goldstein:

> While it is contemplated that a party will be entitled to obtain full disclosure of an expert's opinion and the facts and reasons upon which it is based, it is not contemplated that a party will be allowed, by deposition or otherwise, to conduct a preliminary cross-examination of his opponent's experts for the purpose of developing material to be used for impeachment nor to obtain the opinion of his opponents' expert on other facts than those on which he shaped his opinion.

Knighton v. Villian & Fassio e Compagnia, 39 F.R.D. 11, 13-14 (D.Md. 1965).[6] Thus, Applicants will save impeachment of Dr. Goldstein until the appropriate time during cross-examination at the hearing. In addition, while freely deposing him as to the identity, nature, quality, and quantity of factual information he did and did not rely upon in reaching the conclusions set out in his prefiled prepared testimony, Applicants will reserve until cross-examination at the hearing the possibility of pursuing lines of inquiry into different opinions, if any, Dr. Goldstein might offer, had he been given the opportunity to review more of the

---

[6] According to the Wright & Miller treatise, this case, which predates the 1970 amendments to the Rules, was the "case creating the procedure on which the 1970 amendment [adding Rule 26(b)(4)] was based," and was written by a judge who served as a member of the Advisory Committee on the 1970 amendments. See 8 C. Wright & A. Miller, Federal Practice and Procedure § 2030 at 251 n. 66 and § 2031 at 254 (1970).

record in this proceeding than Intervenor decided was appropriate in preparation for his direct testimony.[7]

Finally, there is one possible limitation which, it should be emphasized, does not apply here. Two early decisions under the amennded Rule 26(b)(4) denied discovery of experts' written reports, importing Rule 26(b)(3)'s requirement that, before work product of attorneys or their consultants "prepared in anticipation of litigation or for trial" may be discovered, "substantial need" must be shown. See Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (N.D. Mass, 1972); Wilson v. Resnick, 50 F.R.D. 510 (E.D. Pa. 1970). No court has imported this "substantial need" requirement as a prerequisite for taking an experts' deposition under Rule 26(b)(4)(A)(ii), and every court that has since considered the possibility of incorporating this Rule 26(b)(3) requirement into document discovery under Rule 26(b)(4), has rejected it. See Quadrini, supra, 74 F.R.D. at 595 n.1 ("Rule 26(b)(3) specifically provides that it is subject to the provisions of subdivision (b)(4)."); In re IBM, supra, 77 F.R.D. at 41 (similar). In sum, Applicants need not show a "substantial need" either to depose Dr. Goldstein, to inquire into otherwise relevant matters at his deposition, or to obtain in advance of its taking the relevant documents which are needed to depose him fully. The scope of discovery with regard to this

---

[7] Applicants, however, will also conduct the deposition in line with the views Judge Bloch expressed at the August 27, 1984 hearing (Tr. 14147-48) to the effect that "some limited probing of the Applicants' version of the facts and [Goldstein's] opinion on that" is proper in the interest of expediting the September evidentiary hearing before the Board.

expert is ruled exclusively by subdivision (b)(4)(A) of Rule 26, not subdivision (b)(3).

CONCLUSION

Applicants are not limited, under the Federal Rules, to conducting a deposition of Dr. Goldstein which reiterates only the questions which would be the subject of interrogatories under Rule 26(b)(4)(A)(i). Instead of that rather meaningless exercise -- which would be cumulative in light of the contents of Dr. Goldstein's prefiled testimony -- Applicants will, in accord with the standards the courts have set for further discovery under Rule 26(b)(4)(A)(ii), depose him freely, as they would any other witness. The deposition will be conducted within the bounds of Rule 26(b)(1). And, the scope of the deposition will always be limited by the fact that Applicants' only interest is in obtaining information for cross-examination, so that it need not be "lengthy-and-fruitless" at the hearing and so that Dr. Goldstein's testimony may effectively be rebutted at the hearing. Applicants

will save cross-examination itself for the hearing. Given the fact that Applicants have agreed to pay Dr. Goldstein's normal fee for the time he devotes to his deposition, these are the only appropriate limitations on the scope of the deposition.

Respectfully submitted,

Joseph Tasker, Jr.

Bruce L. Downey
Joseph Tasker, Jr.
BISHOP, LIBERMAN, COOK, PURCELL
& REYNOLDS
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 857-9800

Dated: August 31, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	'84 AGO 31 P4:59
	)	
TEXAS UTILITIES ELECTRIC COMPANY, et al.	)	Docket Nos. 50-445-2 and 50-446-2
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	(Application for Operating Licenses)

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Statement Regarding the Proper Scope of the Discovery Deposition of Intervenor's Expert Witness" in the above-captioned matter were served upon the following persons by hand-delivery,* overnight delivery,** or by deposit in the United States mail,*** first class, postage prepaid, this 31st day of August, 1984:

*Peter B. Bloch, Esq.
Chairman, Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

**Dr. Walter H. Jordan
881 West Outer Drive
Oak Ridge, Tennessee 37830

*Herbert Grossman, Esq.
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

***Mr. John Collins
Regional Administrator
Region IV
U.S. Nuclear Regulatory Commission
611 Ryan Plaza Drive
Suite 1000
Arlington, Texas 76011

***Chairman, Atomic Safety and Licensing Appeal Panel
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Mr. William L. Clements
Docketing & Services Branch
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Stuart A. Treby, Esq.
Office of the Executive Legal Director
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

***Chairman, Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

***Renea Hicks, Esq.
Assistant Attorney General
Environmental Protection
Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711

***Lanny A. Sinkin
114 W. 7th Street
Suite 220
Austin, Texas 78701

*Anthony Z. Roisman, Esq.
Executive Director
Trial Lawyers for Public Justice
2000 P. Street, N.W.
Suite 600
Washington, D. C. 20036

*Ellen Ginsberg, Esq.
Atomic Safety and Licensing
Board Panel
U. S. Nuclear Regulatory
Commission
Washington, D. C. 20555

Bruce L. Downey

cc: John W. Beck
Robert Wooldridge, Esq.