UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

May 12, 1981

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Bradford
Commissioner Ahearne

FROM: B. Paul Cotter, Jr. BPC
Chief Administrative Judge
Atomic Safety and Licensing Board Panel

SUBJECT: PANEL RESPONSE TO PROPOSAL TO LIMIT THE NUMBER OF INTERROGATORIES FILED IN A PROCEEDING

The Licensing Panel favors the control and management of discovery. Attached is a summary of the Panel Members' views on the original proposal to limit the number of interrogatories filed in any proceeding. The data also includes five staff members' views. (Also attached is an estimate of time from the SSER to the initial decision.)

The members' conclusions vary. Divergences seem traceable to views of lawyers versus scientists and full time versus part time members.

Of 26 members polled, 15 do not oppose a limitation. Eleven members do oppose a limitation. All but one of those eleven nonetheless answered some or all of questions 2 through 11.

Five permanent lawyer members and two permanent technical members opposed any limitation on interrogatories. Two permanent lawyers and three permanent technical members did not oppose a limitation.

I see three possible courses of action: (1) limit the number of interrogatories in the entire proceeding by rule, subject to Board discovery; (2) state the limitation as a guideline in Section D of the Policy

Statement; or (3) limit the number of interrogatories after the SSER subject to Board discretion. In the case of a rule change, I prefer the last because of the problems I anticipate with the first.

Limiting the number of interrogatories in the entire proceeding may well have the following consequences: (1) it could bias discovery in favor of those parties that can afford to use depositions in place of interrogatories; (2) additional staff time will be required to respond to an additional round of motions for additional interrogatories; (3) Board rulings will vary from strict to liberal; and (4) fewer interrogatories more carefully drawn could require staff work in answering comparable to that for more, less carefully phrased interrogatories.

Time frames become important after the SSER. Prevention of discovery abuse prior to the SSER is also important, but it becomes urgent thereafter. Consequently, if the Commission wishes to limit one aspect of discovery, I favor a limitation of 50 interrogatories after the SSER, subject to Board discretion.

Of course, my preference is specific guidance in the policy statement rather than by a new requirement in the rules of procedure. The former course better recognizes the diversity in size, complexity, and needs among licensing proceedings.

Attachments

AGREE WITH IDEA OF A LIMITATION (20)

DISAGREE (11)

| QUESTION NO. 1 | (a) | (b) | No Limitation |
|---|---|---|---|
| Who should limits on interrogatories apply to: | -0- | 22 | 7 |

(a) Limit interrogatories filed on the staff.

(b) Limit interrogatories filed on all parties.

Recommendation: (b)

Comments

"(a)" is appropriate only if limitations are also placed on depositions; if not, "(b)" is appropriate.

Number of pages of interrogatories should also be limited.

| QUESTION NO. 2 | (a) | (b) | (c) | No Limitation |
|---|---|---|---|---|
| To which proceedings should rule apply? | 20 | 2 | 2 | 5 |

(a) All proceedings.

(b) CP, OL, and license amendment proceedings.

(c) OLs, CPs (excluding Antitrust).

Recommendation: (a)

Comments

Apply limitation to all proceedings except Antitrust.

Apply to OLs and amendments; explore idea of applying to CPs.

| | | | | |
|---|---|---|---|---|
| Limits should be X number of interrogatories filed: | 16 | 7 | | 5 |

(a) by a party on another party.

(b) by a party on another party per each contention.

Recommendation: (a)

Comments

"(b)" should be adopted with the additional limitation that discovery should be permitted only between parties adverse to each other on a given contention.

| QUESTION NO. 4 | (a) | (b) | (c) | No Limitation |
|---|---|---|---|---|
| Number of interrogatories permitted should cover: | 21 | 3 | 2 | 5 |

(a) the entire proceeding.

(b) each SER, EIS or supplement thereto.

(c) Permit X number on safety issues and X number on environmental issues.

Recommendation: (a)

Comments

None.

| QUESTION NO. 5 | (a) | (b) | (c) | No Limitation |
|---|---|---|---|---|
| What is the number that will be permitted absent leave for the Board to file additional interrogatories? | 4 | 11 | 5 | 7 |

(a) 25

(b) 50

(c) 75

Recommendation: 50 or 75.

Comments

Limit to 50 or 75: 3.

Limit to 30: 1.

| QUESTION NO. 6 | (a) | (b) | No Limitation |
|---|---|---|---|
| What constitutes an interrogatory? | 4 | 22 | 4 |

(a) Each subpart of a question counts as an interrogatory.

(b) Each subpart counts as an interrogatory except that requests for supporting reasoning or documents relied upon or the name of a witness who will testify as to a matter covered by an interrogatory response will not be counted separate from the interrogatory response.

Recommendation: (b)

Comments

No response: 1.

| QUESTION NO. 7 | (a) | (b) | No Limitation |
|---|---|---|---|
| The standard the Board should apply in granting a request to pose additional interrogatories should be: | 14 | 8 | 3 |

(a) A response is essential for the party to adequately prepare its case and the information is not available from another source (similar to present rule applied to staff).

(b) Standard (a) plus other more restrictive criteria. [ANY IDEAS?]

Recommendation: (b) [ANY IDEAS?]

Comments

Board should have authority to restate or consolidate interrogatories and to change the method of obtaining information.

No response: 2

Adopt as standard that interrogatories are reasonably necessary to prepare for trial. In applying standard, consider the adequacy, candor, and forthrightness of previous answers.

Adopt as standard: "a response is essential for the party to adequately prepare its case."

Adopt as standard: "good cause shown."

| QUESTION 8. | (a) | (b) | No Limitation |
|---|---|---|---|
| Do we apply revised rule to present proceedings? | 26 | - | 3 |

(a) Yes, but apply prospectively to interrogatories not yet filed.

(b) Yes, but apply retroactively.

Recommendation: (a).

Comments

No response: 2.

| QUESTION NO. 9 | (a) | (b) | No Limitation |
|---|---|---|---|
| Do we permit motions to compel? | 26 | 2 | 1 |

(a) Yes.

(b) No.

Recommendation: (a)

Comments

No response: 2

| QUESTION NO. 10 | (a) | (b) | No Limitation |
|---|---|---|---|
| Do we permit written responses to motions to compel? | 14 | 13 | 1 |

(a) Yes.

(b) No.

Recommendation: (b)

Comments

No response: 2.

Should be at discretion of the Board.

| QUESTION 11 | (a) | (b) | No Limitation |
|---|---|---|---|
| Do we reduce time provided for service of documents by permitting Board at its discretion to require service by air express mail? | 26 | 3 | 1 |

Recommendation: (a)

Comments

No response: 1

# ASLBP PROPOSED
# TIME-LINE GUIDELINE

| Day | |
|---|---|
| 0 | SSER |
| 12 | Discovery on Staff commences with respect to new information in SSER relevant to preexisting contentions.<br><br>New contentions based on new information in SSER filed.<br><br>Requests for additional interrogatories on new and preexisting contentions filed as necessary. |
| 23 | PHC to consider day 12 filings. Board hears oral responses of Staff and rules orally. Motions for reconsideration made orally and disposed of orally. Order subsequently reduced to writing and served. |
| 26 | Additional interrogatories filed on Staff. Staff interrogatories on new contentions filed. |
| 42 | Interrogatory responses due. |
| 54 | Motions to compel due. |
| 64 | Rulings on motions to compel. |
| 78 | Discovery complete. |
| 93 | Testimony filed. |
| 108 | Hearing commences. |
| 148 | Record closes. |
| 178 | Applicant's proposed findings. |
| 188 | Intervenor's proposed findings. |
| 198 | Staff's proposed findings. |
| 208 | Applicant's reply findings. |
| 248 | Initial Decision. |

The above time-line is designed to maximize the period of time between the prehearing conference (when rulings are made on newly filed contentions and requests for additional interrogatories) and the start of the hearing. Thus this time-line encompasses 85 days between the prehearing conference and the start of the hearing, whereas the OGC-ELD Alternative Schedule encompasses only 48 days. Providing for this longer period should increase the likelihood that prehearing procedures will not delay the start of the hearing.

The time-line assumes that discovery between applicant and intervenor will be completed by 30 days after the SSER. Consequently the time-line focusses on procedures engaged in between Staff and intervenor.

The time-line does not provide for motions for summary disposition on the theory that at this late stage it is probably better to go to hearing than to seek to remove an issue by this procedure. The fact that the present rule requires these motions to be filed at least 45 days prior to hearing means that, if the hearing is to start on day 108, motions for summary disposition must be filed by day 63, prior to the completion of discovery. Removal of the 45-day limitation would make these motions more useful.