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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
COMMONWEALTH EDISON COMPANY)
(Braidwood Station, Units 1 and 2)

Docket Nos. 50-45602
50-45702

NRC STAFF RESPONSE TO INTERVENORS' MOTION TO
COMPEL DISCOVERY FROM APPLICANT AND THE NRC STAFF

1. INTRODUCTION

On September 4, 1985, Intervenor Bridget Little Rorem, et al. ("Intervenors") filed a motion to compel answers to certain interrogatories from Applicant and Staff. In their motion Intervenor sought responses to Interrogatories 17, 20 and 57. Pursuant to 10 C.F.R. § 2.730(c), the NRC Staff hereby opposes that portion of "Intervenors' Motion to Compel Discovery From Applicant and the NRC Staff" ("Motion") which applies to the Staff on the grounds that Intervenor have failed to meet their burden under NRC Regulations. Intervenor failed to demonstrate that (1) the information sought appears reasonably calculated to lead to discovery of admissible evidence or (2) it is relevant to the issues before this Board, or (3) the answers are necessary to a proper decision in the proceeding and (4) are not reasonably obtainable from any other source. 10 C.F.R. § 2.720(h) (2)(ii). In addition to its opposition to Intervenor's Motion, the Staff requests that the Board

issue the protective order requested in Staff's July 30, 1985 "Motion for a Protective Order."

II. BACKGROUND

On July 2, 1985, Intervenor served "Rorem, et al. Quality Assurance Interrogatories and Requests to Produce, First Set" [QA Interrogatories] on Applicant Commonwealth Edison Company and the NRC Staff. On the same date Rorem filed "Intervenors' Motion to Require NRC Staff Answers to Interrogatories" [July Motion]. On July 30, 1985, the NRC Staff filed its objections to certain QA Interrogatories and the July Motion as well as a Motion for a Protective Order concerning each interrogatory to which it had objected. "NRC Staff Objections To Interrogatories And Motion For A Protective Order". [hereinafter Objections]. In its response the Staff stated that, in order to expedite this proceeding, the Staff would attempt to answer certain interrogatories. However, the Staff specifically stated that it did not waive the right to object to any interrogatories it believed merited objection. (Objections at 3).

The Staff has provided responses to those QA Interrogatories to which it did not object. As stated in the Staff's September 3, 1985 status report, based on an August 14, 1985 meeting with Intervenor and Applicant to resolve discovery disputes, the Staff voluntarily agreed to supplement some of its earlier responses and provide responses to several interrogatories to which it had originally objected.

On September 4, 1985, Rorem, filed "Intervenors' Motion to Compel Discovery from Applicant and the NRC Staff" seeking a Board order to compel responses to Interrogatories 17, 20 and 57 by the NRC Staff and

responses to numerous interrogatories from the Applicant. For the reasons set forth below, the Staff opposes this Motion insofar as it relates to the Staff.

III. DISCUSSION

A. Standards for Discovery Against the Staff

In general, 10 C.F.R. § 2.740(b)(1) limits discovery to "those matters in controversy which have been identified by . . . the presiding officer in the prehearing order. . . ." The regulations further require that "the information sought appear reasonably calculated to lead to the discovery of admissible evidence." 10 C.F.R. § 2.740(b)(1).

Where the Staff is concerned, "discovery against the Staff is on a different footing" than discovery against other parties. Pennsylvania Power and Light Co., et al. (Susquehanna Steam Electric Station), ALAB-613, 12 NRC 317, 323 (1980). Most Staff records and documents relevant to licensing proceedings are by regulation made available for inspection and copying in the NRC Public Document Room. 10 C.F.R. § 2.790(a). The Appeal Board in Susquehanna citing Commission policy and procedure ^{1/} observed that "[t]he contemplation is that these 'should reasonably disclose the basis for the staff's position' thereby reducing any need

^{1/} 10 C.F.R. Part 2, Appendix A.IV.(d) states in pertinent part:

In general, staff documents that are relevant to a proceeding will be publicly available as a matter of course unless there is a compelling justification for their nondisclosure.

for formal discovery." Susquehanna, ALAB-613 supra at 313. In furtherance of this policy Commission regulations governing discovery against the Staff require a "finding by the presiding officer that answers to the interrogatories are necessary to a proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source" before the Staff is required to answer written interrogatories. 10 C.F.R. § 2.720(h)(2)(ii).

Commission regulations require that motions to compel discovery must set forth (1) the nature of the questions or the request, (2) the response or objection of the party upon whom the request was served and (3) arguments in support of the motion. 10 C.F.R. § 2.740(f)(1). It is well established that the moving party has the burden of proving that its motion should be granted. Consolidated Edison Co. (Indian Point Station, Units 1, 2 and 3), CLI-77-2, 5 NRC 13, 14 (1977).

B. NRC Staff Objection to Specific Interrogatory 20 and Lack of Argument by Intervenors are Sufficient to Justify Denial of Intervenors' Motion and Issuance of a Protective Order

In its July 30, 1985 Objection, the Staff objected to answering Interrogatory 20 ^{2/} stating that "this information is directly known to

^{2/} Interrogatory 20 reads:

Please identify in detail all documents, including correspondence, reports, minutes of meetings or notes of oral conversations, reflecting disagreements, disputes or differences of opinion between Quality Control Inspectors and their supervisors or

(FOOTNOTE CONTINUED ON NEXT PAGE)

Applicant, who is therefore the appropriate source for the requested information." (Objection at 8). The Staff reasoned that "the information sought pertains to Applicant's organizations and activities." (Objection at 3). "Therefore, the information requested should be readily known to Applicant." Id. "[T]he information sought is reasonably available from sources other than the Staff, namely the Applicant or publicly available NRC inspection reports . . . and the Staff objects to [it] on that basis." Id.

In the introductory portion of their Motion, Intervenor's assert that the Staff's objection to Interrogatory 20 is "invalid." Motion at 3. Intervenor's Motion does not set forth the nature of the interrogatory as required by 10 C.F.R. § 2.740(f)(1). Not a single supporting argument is presented by Intervenor's in support of their position. The basis for Intervenor's belief that the Staff objection is invalid remains unknown to all but the Intervenor's. In short, Intervenor's have failed to demonstrate that the answer to Interrogatory 20 is either "necessary to a proper decision in this proceeding" and that the information is "not reasonably obtainable from any other source." 10 C.F.R. § 2.720(h)(2)(ii).

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Commonwealth Edison or its contractors' management.
Include the subject, date, names of persons
involved and resolution for each instance so
reflected.

Thus, Intervenor, the moving party, have not met their burden of proof and the motion to compel discovery of Interrogatory 20 should be denied and a protective order entered.

C. NRC Staff Objections to Specific Interrogatories 17 and 57 are Sufficient to Overcome Intervenor's Assertions that the Interrogatories Raise Mixed Questions of Fact and Law and that the Responses Would Focus the Issues in the Case

1. Interrogatory 17

The Staff objected to answering Interrogatory 17 ^{3/} stating that it was not the appropriate source for the requested information. (Objection at 7). The Staff reasoned that Intervenor had not demonstrated that the answer was both necessary to a proper decision in the proceeding and not reasonably obtainable from any other source. (Objection at 2).

Intervenor contend that Interrogatory 17 raises questions of the "application of law to fact," (Motion at 6) and as such -- quoting the Advisory Committee Note to Rule 33(b) of the Federal Rules of Civil Procedure -- "can be most useful in narrowing and sharpening the issues..." (Motion at 6). Intervenor's quote from the Advisory Committee goes on to say that "interrogatories may not extend to issues of 'pure law,' i.e., legal issues unrelated to the facts of the case." Id.

The Staff contends that Interrogatory 17 does not relate to any questions of fact which are ripe for discovery. Indeed, Interrogatory 17

3/ Interrogatory 17 reads:

Please describe in detail the circumstances and procedures, if any, under which Quality Control inspection criteria may be waived.

is so broad and ambiguous that the Staff is unable to determine what exactly is being asked. In the Staff's view the interrogatory does not even mention Braidwood. Any response to such a vague interrogatory cannot be necessary to a proper decision in this proceeding.

In addition to propounding an incomprehensible interrogatory, Intervenor's mischaracterize the Staff's objection. Although Intervenor's Motion discusses recent expansion of Rule 33(b) of the Federal Rules of Civil Procedure concerning mixed questions of law and fact, Intervenor's do not attempt to demonstrate that any question of fact concerning the application of inspection criteria at Braidwood exists. The stringency of the application of the criteria and "the circumstances and procedures for waiver of such criteria (Motion at 5) appear to be pure legal questions and not questions of fact. Even if Interrogatory 17 were interpreted to raise an issue of fact, the Intervenor's have not demonstrated how the interrogatory narrows and sharpens the issues.

Pursuant to the Commission's regulations at 10 C.F.R. § 2.740(b)(1), the party seeking discovery of information which would not be admissible as evidence has the burden of demonstrating that the information sought is reasonably calculated to lead to the discovery of admissible evidence. See Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 and 2), LBP-82-33, 15 NRC 887, 890-91 (1982); Illinois Power Company (Clinton Power Station, Unit 1), LBP-81-61, 15 NRC 1735, 1741 (1981).

Intervenor's failed to demonstrate that any information elicited would be reasonably calculated to lead to discovery of admissible evidence. Furthermore, Intervenor's do not present any argument as to why the

response is necessary to a proper decision. Intervenors simply assert without any supporting argument that the circumstances under which inspection criteria ^{4/} are waived or applied are "plainly relevant and discoverable subjects."

Even if Interrogatory 17 was sufficiently narrowed and imbued with reasonable specificity and could be reasonably calculated to lead to admissible evidence, Intervenors failed to meet their burden to demonstrate that the information was not reasonably obtainable from any other source. Intervenors' arguments are insufficient to overcome the Staff's objection to Interrogatory 17 and the Motion to compel discovery of Interrogatory 17 should be denied and a protective order entered.

2. Interrogatory 57

The Staff's objection to Interrogatory 57 ^{5/} was grounded on its belief that it was (1) not necessary to a proper decision in this proceeding, (2) irrelevant, (3) not reasonably calculated to lead to the discovery of admissible evidence, and (4) seeking a legal opinion on the

^{4/} While Intervenors attempt to define the term "inspection criteria" by "like terms" in 10 C.F.R. Part 50, Appendix B an examination of Appendix B, Criterion V and X by the Staff did not clarify this term.

^{5/} Interrogatory 57 reads:

In what respects are NRC requirements understood to be either minimum or maximum requirements with regard to the design and construction of Braidwood? Please explain in detail and identify any documents which reflect this answer.

scope of NRC requirements without any showing as to the relevance of such legal opinion to the admitted contention. (Objection at 12).

In support of their Motion, Intervenorors once again assert that the interrogatory raises a mixed question of fact and law and is thus within the scope of discovery as embodied in Federal Rule 33(b). Intervenorors do not suggest what the question of fact might be nor do they present any argument to the effect that the answer is necessary to a proper decision in this proceeding. 10 C.F.R. § 2.720(h)(2)(ii). Once again, the interrogatory does not even mention the Braidwood Station or any of the factual allegations contained in the quality assurance contention. Although Intervenorors generally contend that "responses to these interrogatories will significantly advance the conduct of this proceeding by focusing and narrowing the issue in dispute", (Motion at 5), Intervenorors neglect to provide or discuss the basis for this contention. Intervenorors interpret the question as a request for "information on the respects in which NRC requirements are understood . . . to be either maximum . . . or minimum requirements . . . a description of the margin of error for deficient workmanship . . . and the relationship between site imposed acceptance criteria and NRC requirements, where different." Intervenorors describe a scenario and claim their entitlement "to probe this anticipated defense through discovery" (Motion at 9) without discussing how this might be relevant to the issues before the Board or reasonably calculated to lead to the discovery of admissible evidence. 10 C.F.R. § 2.740(b)(1).

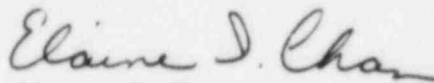
The Staff believes that Interrogatory 57 calls for a legal opinion which is in no way related to the admitted contention and is thus not

properly a subject of discovery. Even if this was not an issue of pure law, Intervenor's have not met their burden of proof to demonstrate how Interrogatory 57 is related to a matter in controversy or that it narrows or sharpens the issues or how a response would be reasonably calculated to lead to discovery of admissible evidence. In short, Intervenor's have not met their burden as the moving party to overcome the Staff's objections. Thus, their Motion should be denied and a protective order entered.

III. CONCLUSION

For the reasons discussed above, Intervenor's have not met their burden under the Commission's regulations to overcome the Staff's objections to Interrogatories 17, 20 and 57. Intervenor's Motion to Compel should be denied in its entirety and Staff's Motion for Protective Order for Interrogatories 17, 20 and 57 should be granted.

Respectfully submitted,



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Counsel for NRC Staff

Dated at Bethesda, Maryland
this 23rd day of September, 1985

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Docket Nos. 50-456
50-457

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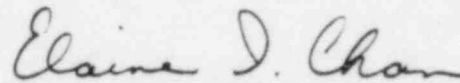
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