527

RELATED CORRESPONDENCE

September 16, 1985

DOCKETED
USNRC

'85 SEP 18 P1:25

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter Of:	)	
	)	
COMMONWEALTH EDISON COMPANY	)	
	)	Docket Nos. 50-456 OL
(Braidwood Station, Units 1 and 2)	)	50-457 OL
	)	

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

On July 2, 1985, Intervenors Bridget Little Rorem, et al. served on Applicant Commonwealth Edison Company and the NRC Staff "Rorem, et al., Quality Assurance Interrogatories and Requests to Produce, First Set" ("QA Interrogatories"). Applicant filed objections to certain of the QA Interrogatories and sought a protective order as to each interrogatory or portion thereof to which it objected on July 29, 1985. Applicant has provided responses to those QA Interrogatories to which it has not objected. By motion dated September 4, 1985, Intervenors seek an order compelling further responses to their QA Interrogatories. The Motion to Compel seeks an order compelling answers both to certain interrogatories which Applicant has answered and to certain interrogatories to which Applicant has objected and accordingly provided no response. Applicant opposes Intervenors' Motion to Compel

D503

in its entirety and urges the Licensing Board to issue an appropriate protective order as requested by Applicant on July 29, 1985.

I. Applicant's Objections Specific Interrogatories 1-9, 17 And 57 Are Sufficient To Overcome Intervenors' Arguments Concerning Mixed Fact/Law Questions.

Intervenors characterize Specific Interrogatories 1-9, 17 and 57 as "Mixed Fact/Law Questions." Intervenors' grouping and accompanying argument seems to be unrelated to the objections actually posed by the Applicant to these interrogatories. Applicant has posed legal conclusion and attorney work product objections to Specific Interrogatories 1, 2, 3, 4, 7 and 8. Applicant has objected to Specific Interrogatories 1, 3, 5, 6, 9 and 57 as beyond the scope of permissible discovery as limited by the Amended QA Contention and Joint Stipulation. Applicant has also posed an "irrelevant and inmaterial" objection to Specific Interrogatory 1; objected to Specific Interrogatory 17 as incomprehensible; and objected to certain terms in Specific Interrogatory 5 as vague and amorphous. Finally, Applicant has stated that Specific Interrogatories 2, 4, 5 and 8 are inapplicable because Applicant has objected to and declined to answer the underlying interrogatories.

Intervenor's Motion to Compel is insufficient to

overcome Applicant's objections based on legal conclusion and work product, scope of contention, and vague and amorphous wording for those interrogatories characterized by the Intervenors' as "Mixed Fact/Law Questions." Much of Intervenors' argument concerning these interrogatories consists of broad unsupported allegations that responses will "significantly advance the conduct of this proceeding" or that the interrogatory seeks information which "is obviously relevant and discoverable." Such rhetoric is an inadequate response to Applicant's objections.

Intervenors appear also to compare Applicant's objections to NRC Staff's responsive answers. Staff's discovery obligations are different and independent from Applicant's. The validity of Applicant's objections is neither controlled by or limited by Staff's failure to pose similar objections or Staff's willingness to respond to interrogatories to which Applicant has objected.

A. Legal Conclusion and Attorney Work Product: Specific Interrogatories 1, 2, 3, 4, 7 and 8.

Applicant has objected to Specific Interrogatories 1, 2, 3, 4, 7 and 8 as calling for legal conclusions and privileged attorney work product. Intervenors attempt to refute these objections by quoting language from the Federal Rules of Civil Procedure which is not contained in the NRC Regulations governing discovery and which has not been

adopted by in any published NRC decision. Indeed, at least one NRC licensing board has recognized that interrogatories seeking legal conclusions are improper. Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579.588 (1975); but see Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937, 1946 (1982).[1/]

Applicant has objected that these interrogatories impermissibly seek materials which are protected by the work product privilege. Privileged information is not discoverable. 10 CFR § 1.740(b)(1). A party may obtain discovery of trial preparation materials only upon a showing of substantial need for the materials in the preparation of its case and a showing that it cannot, without undue hardship, obtain the substantial equivalent of the sought-for-materials by other means. 10 CFR § 2.740(b)(2). Furthermore disclosure of the mental impressions, conclusions, opinions and legal theories of attorneys and other representatives is prohibited. Id. Interrogatories which seek the legal basis

---

1/ In the Catawba proceeding, the board interprets interrogatories seeking the "regulatory basis" or "legal theory" of intervenor's contentions as the equivalent of which NRC regulation was violated by deficiency alleged in the contention and concluded that the interrogatories should be answered by the Intervenor. In the Braidwood proceeding, Intervenors' interrogatories are distinguishable in that they seek broad legal opinions from the Applicant as to the manner in which the NRC might or might not interpret its own licensing regulations.

or legal authority for the Applicant's position with respect to issues raised by the Contention are objectionable on this basis. The legal basis for any position that Applicant takes will be formulated by its counsel, and as such, constitutes attorney work product.

Intervenors have failed to make any showing that they have a substantial need for the legal conclusions and theories of the Applicant and its counsel in the preparation of their case. Intervenors assert that "responses to these interrogatories will significantly advance the conduct of the proceeding by focusing and narrowing the issues in dispute and apprising intervenors of the Applicant's case." It is difficult to imagine how responses to these broad interrogatories could narrow the issues in dispute. To the extent known at this time, Applicant's theory of its affirmative case is set forth in its responses to other interrogatories.

The NRC decisions cited by Intervenors do not discuss discovery issues and have no relevance to their Motion to Compel the discovery of privileged material and information which is beyond the appropriate scope of discovery in this proceeding. Union Electric Company (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343 (1983) ("Callaway"); Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power Station), CLI 72-33, 16 NRC 1489 (1982) ("Zimmer")

Callaway discusses neither the discoverability of legal conclusions nor the appropriate scope limitations for a contention which has been limited to "the specific alleged occurrences of deficiencies." Indeed, the issues in Callaway focused on the potential for undetected and unrectified construction deficiencies. Zimmer was based on an NRC investigation which exposed numerous examples of noncompliance with twelve of the quality assurance criteria of 10 CFR Part 50, Appendix B. The opinion does not support Intervenors' requested discovery from the Applicant as to its interpretation of how the NRC may or may not interpret its own licensing regulations.

B. Specific Interrogatories 1, 3, 5, 6, 9 and 57 Seek Information Beyond The Scope Of Permissible Discovery.

Applicant has posed valid objections to Specific Interrogatories 1, 3, 5, 6, 9 and 57 that these interrogatories are beyond the scope of permissible discovery.

In this particular proceeding, the Board has carefully identified the matters in controversy. The Board did not accept all of the allegations made by Intervenors in their motion to admit their Amended QA Contention, but specified the issues raised by Intervenors' pleading which it was admitting for litigation:

> We view the actual contention itself to be the preamble at page 16 through the second line of page 17, the last two lines of page 18, and pages 19-47. The limits of the contention are controlled by the specific alleged occurrences of deficiencies set forth in the lettered paragraphs, despite broad language in the preamble and the numbered paragraph which introduces each of the 14 Appendix B criteria groupings of alleged violations.

Memorandum and Order Admitting Rorem et al. Amended Quality Assurance Contention at 7, n. 3 (Slip op. 6/24/85) (hereafter "Order").

A further issue was admitted by stipulation of the parties and is delineated by that stipulation. The Joint Stipulation limits litigation in this proceeding to claims of harassment and intimidation of Quality Control (QC) inspectors employed by the Braidwood site electrical contractor, the L. K. Comstock Engineering Company. Joint Stipulation of Quality Control (QC) Inspector Harassment Contention (7/23/85) ("Joint Stipulation").

The scope of discovery in NRC licensing proceedings is limited to the matters in controversy identified by the Licensing Board. 10 C.F.R. § 2.740(b)(1); id. Part 2, Appendix 4, IV(a). Nevertheless, Specific Interrogatories 1, 3, 5, 6, 9 and 57 seek information which is not limited to the matters in controversy delineated in the Board's order admitting the Amended QA Contention and the parties' Joint Stipulation. Under the Commission's regulations, a

party may seek discovery of information that would not be admissible as evidence, so long as the information is reasonably calculated to lead to the discovery of admissible evidence. 10 CFR § 2.740(b)(1). However, the party seeking discovery bears the burden of showing that its request is appropriate under that standard. 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).

With respect to the non-harassment portion of the Amended QA Contention, the Licensing Board has made clear that it will not allow Intervenors "to pursue a course of attempting to demonstrate patterns of inadequacies beyond the specific instances set forth under each alleged pattern in the contention as it now stands." Order at 12, n.6. Therefore, information about potential instances of QA inadequacies not specifically alleged would not be admissible in evidence. With regard to interrogatories which seek such information, Intervenors must show that they would be reasonably calculated to lead to information about the specific instances alleged in the Contention.

With respect to Specific Interrogatories 1, 3, 5, 6, 9 and 57, Intervenors fail to demonstrate that these interrogatories relate to matters in controversy identified in the Contention and fail to meet their burden of showing

that such discovery is reasonably calculated to lead to the discovery of admissible evidence. Applicant notes that it has answered Interrogatory 9 to the extent that it requests information concerning the specific deficiencies alleged in the Amended QA Contention and, in its answer to Interrogatory 10, will provide a list of all 50.55(e) reports initiated at all of its construction sites.

To the extent that specific NRC requirements are implicated by the alleged deficiencies and their corrective action, Applicant has provided this information in response to Specific Interrogatories 58 and 59. Any additional information as to regulatory requirements should be the subject of a more focused request as Intervenors are not "entitled" to probe generic requirements. The mere assertion of entitlement does not satisfy Intervenors burden to show that such information is reasonably calculated to lead to the discovery of admissible evidence.

C. Specific Interrogatory 17 Is Incomprehensible.

The Board should refuse to grant the Motion to Compel a response to Specific Interrogatory 17 because the interrogatory is incomprehensible.

Applicant's objection to this interrogatory consists of two parts. First, Applicant objects that the entire interrogatory is so amorphous that it cannot under-

stand the question. Applicant cannot even determine if it is within the scope of permissible discovery as limited by the Amended QA Contention and Joint Stipulation.

Second, Applicant objects that the phrase "inspection criteria" is vague and amorphous. Intervenors have provided an equally unhelpful explanation by stating that "the term 'inspection criteria' is employed here in the same manner in which like terms are used in 10 CFR Part 50, Appendix B, e.g. Criterion V, X." Intervenors Motion to Compel at p. 8 (emphasis added). Applicant cannot determine what Intervenors mean by "like terms."

II. Applicant's Responses To Specific Interrogatories 19, 51, 52 And 58 Provides The Location Of Persons Having Knowledge Of Discoverable Matters And Does Not Restrict Intervenors' Access To Employees.

Applicant has fully complied with its discovery obligations in identifying persons having knowledge of discoverable matters and has not "hampered" or "restricted" Intervenor's access to its employees or the employees of its contractors.

Commission rules provide for discovery of "the identity and location of persons having knowledge of any discoverable matter." 10 C.F.R. § 2.740(b)(1). For individuals no longer employed by the Applicant or its contractors, Applicant has provided the last known home ad-

dresses and telephone numbers as the location of these individuals. For employees of Applicant or its contractors, Applicant has provided work addresses and phone numbers. Intervenors may contact these employees by mail or phone. The employees are then free to provide their home addresses and phone numbers or arrange another means of contact if they wish. This means of identification satisifies Applicant's duty to respond to interrogatories requesting the location of persons having knowledge of discoverable matters but preserves the privacy of its employees and the employees of its contractors without interfering with the Intervenor's ability to contact current employees.

Intervenors appear to claim that Applicant is "screening" their access to its employees and the employees of its contractors. Neither Applicant or its contractors "screen" the incoming personal calls or mail of employees. The identity of an individual calling the Braidwood site is not requested, nor is mail opened by anyone other than the addressee. Nor, has Applicant or its contractors instructed employees that they should not cooperate with the Intervenors.

In support of their mischaracterizations of Applicant's response, Intervenors claim that they are prepared to make a formal showing that their ability to contact employees has been impaired. Intervenors' allegation does

not demonstrate whether an employee's willingness to cooperate with the intervenors was "chilled" by on-the-job contact or "attempts" to reach an employee on the job or whether the employee was simply unwilling to cooperate with the Intervenors. Indeed, if Intervenors can make such a showing, they should have set forth more facts in their pleading or in an attached affidavit instead of merely threatening to make such a showing. Similar to Intervenors' Motion for Confidential Treatment of Prospective Quality Assurance Witnesses, Intervenors' Motion to Compel contains no details which substantiate their allegatiors.

Furthermore, Intervenors reliance on the Catawba decisions is misplaced. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-21, 18 NRC 1303 (1983); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-83-24A, 17 NRC 674 (1983); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), Slip opinion (April 6, 1983). In Catawba, applicant sought to limit the intervenor's access to employees to require that the intervenor use only an applicant approved form letter, and to impose a requirement that intervenor would not contact employees or former employees who did not respond to the letter. Commonwealth Edison has not restricted Intervenors' ability to contact employees or former employees, has not required or requested prior approval of Intervenors' communications with

either employees or former employees, and has neither requested or attempted to compile through any "screening process" a list of which employees intervenors have contacted.

Applicant has fully complied with its obligation to provide the location of persons with knowledge while preserving to the extent possible the privacy of its employees at home. Release of last known addresses for former employees was Applicant's only means of providing location information for those individuals and does not, as Intervenors suggest, indicate that Applicant has waived privacy concerns for current employees.

III. Applicant's Response To Interrogatories 58 And 59 Provides Comprehensive Information Regarding The Cause And Correction Of Quality Assurance Deficiencies Cited In The Contention.

Interrogatories 58 and 59 are framed as requests for information on the circumstances, causes, and corrective actions for each quality assurance violation or unresolved or open item cited in the admitted QA Contention. In its response to this inquiry, Applicant identified and provided comprehensive narrative answers for 68 subparts of the contention. In addition, Applicant responded to Intervenors' request to "[p]lease identify any documents which

reflect these answers" by providing an index of documents related to these 68 issues which are available for inspection and copying at the office of Applicant's counsel.

Intervenors now claim categorically that Applicant's response to Interrogatories 58 and 59 is "evasive or incomplete." However, Intervenors cite no instances wherein a portion of their discovery request has not been answered. Rather, Intervenors' motion to compel a further response to these two interrogatories appears to seek information not requested by the outstanding interrogatories and information which Applicant has no obligation to develop and provide to Intervenors.

Intervenors attempt to support their motion to compel further answers to interrogatories 58 and 59 on a "straw man" argument that Applicant has inadequately specified documents in lieu of answers to the discovery requests. As is apparent from a reading of the over 200 pages of narrative response supplied by Applicant and as indicated to counsel for Intervenors during discussions with Applicant's counsel, Applicant has not incorporated documents into its response in lieu of a written answer. Such an option was indeed available to Applicant, but, for purposes of clarity, Applicant chose to provide narrative responses for each of the 68 subparts of the contention falling within the request of Interrogatory 58. Applicant's narrative

response, together with the listings of persons involved and index of documents which reflect the answers, provides a comprehensive response to Intervenors' request to the extent such information is available and known to Applicant.[2/]

Intervenors assert that the introductory language to the answer to Interrogatories 58 and 59 leaves them wondering whether the answer is fully responsive. However, much of their difficulty stems from the way in which Intervenors framed their requests. By using a single generic request to seek information related to 68 unique and varied issues, Intervenors have sought information which simply does not exist or is not known to the Applicant for certain of the subparts of the contention. In order to be as responsive as possible to the Interrogatories, the introduction to Applicant's answer fully describes remedies and corrective actions which may be applicable to all the issues raised in the contention.

In their motion to compel, Intervenors for the first time apparently seek information as to the signi-

---

2/ Applicant has objected to those portions of Interrogatories 58 and 59 which seek information concerning "any corrective action taken with regard to the existence of other related deficiencies" and has sought a protective order for such information. Intervenors' motion to compel does not challenge Applicant's objection. Therefore, Applicant considers this portion of Intervenors' request to have been withdrawn.

ficance of the responses provided and the documents identified as reflecting those responses. Applicant should not and cannot be expected to determine for Intervenors which responses or documents they may find significant to their case. Moreover, it is not incumbent upon Applicant to somehow summarize documents or differentiate among documents for Intervenors where documents have been adequately identified by type of document, date, author, and recipient and are readily retrievable. This is particularly true where production involves a very large quantity of documents as a result of a request for all documents which reflect or relate to an issue. See Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 588 (1975).

With regard to the lists of References provided with each subpart of Applicant's answer to Interrogatories 58 and 59, Applicant has provided inform ion beyond what is required by the requests and the accompanying discovery obligations. The narrative answers are complete responses in themselves. The References provide an easy means whereby documents discussed in the narrative answers can be identified by number for retrieval from documents made available. The indices for Interrogatories 58 and 59 serve to identify the documents which reflect the answers provided, including documents not discussed in the narrative answers.

Intervenors also assert that they have difficulty understanding the lists of names and addresses supplied with each of the subparts to the answer. These lists serve as Applicant's response to the request for an identification of the name and addresses of persons involved in each of the issues.

In sum, Applicant has provided a clear and comprehensive response to Interrogatories 58 and 59. Indeed, Applicant has provided information beyond what the requests actually require. To the extent that Intervenors have further questions related to the issues in the Contention, additional discovery requests or questioning of witnesses in depositions may be appropriate. However, a motion to compel which seeks information beyond what was originally requested and which seeks to have the Applicant assess for the Intervenor the significance of responses and documents made available is not well-founded and should be denied.

IV. Applicant's Scope Objections To Interrogatories 50 And 52 Are Consistent With The Licensing Board's Interpretation Of The QA Contention.

In Interrogatory 50, Intervenors recite and inquire into a statement by James Keppler which they previously had included in their proposed QA Contention. The Licensing Board rejected that portion of the contention and

specifically limited the scope of the admitted contention to "the specific alleged occurrences of deficiencies set forth in the lettered paragraphs." Memorandum and Order Admitting Rorem, et al. Amended Quality Assurance Contention at 7, n. 3 (Slip op. dated June 24, 1985). Therefore, as asserted in Applicant's objection to Interrogatory 50, this interrogatory impermissibly seeks information beyond the scope of the admitted contention. To the extent that the Staff or the Applicant may have identified management inadequacies as the cause of specific violations or deficiencies which are the subject of the Contention, this information would be found in the responses to Interrogatories 58 and 59. Insofar as Interrogatory 50 seeks information beyond what has been provided in response to Interrogatory 58 and other interrogatories, the request is not reasonably calculated to lead to the discovery of admissible evidence. See 10 C.F.R. §2.740(b)(1). Hence, Applicant's scope objection to Interrogatory 50 should be sustained.

Similarly, Interrogatory 52 seeks information beyond what could be reasonably calculated to lead to admissible evidence. If management action or inaction has been identified as the cause of any of the specific deficiencies which are part of the admitted contention, this information would be found in the responses to Interrogatory 58 and others. Information as to the causes of weaknesses

or deficiencies other than the specific alleged occurrences of deficiencies included in the Contention are beyond the scope of information reasonably calculated to lead to admissible evidence. Accordingly, Applicant has no obligation to further respond to the first portion of Interrogatory 52.

Th remainder of Interrogatory 52 seeks information concerning adverse personnel actions as a result of QA deficiencies or weaknesses. Insofar as this request is directed to harassment or intimidation, it must be limited in scope to actions taken against Comstock QA personnel. As indicated in the response provided to Interrogatory 52, such information has been provided in response to Interrogatories 19 and 20.

Applicant understands that Interrogatory 52 also might be read as requesting information generally related to adverse personnel actions prompted because of a determination that a particular QA deficiency or weakness was caused by a certain individual. In most circumstances, deficiencies are not attributed to particular individuals. To the extent that an individual has been identified as having been the cause of a deficiency within the scope of the Contention or to the extent that some adverse personnel action has been taken as the corrective action for such a deficiency, this information already would have been provided in response to Interrogatory 58 and other interrogatories. Intervenors

have failed to show how further information sought by Interrogatory 52 would be reasonably calculated to lead to admissible evidence. Thus, the motion to compel should be denied.

CONCLUSION

For the reasons set forth above, Intervenors' Motion to Compel should be denied in its entirety and Applicant's Motion for Entry of a Protective Order for Interrogatories 1-9, 17, 19, 50, 51, 52, 57, 58 and 59 should be granted.

Respectfully submitted,

Michael D. Miller /BPZ

One of the Attorneys For
Applicant
COMMONWEALTH EDISON COMPANY

Isham, Lincoln & Beale
Three First National Plaza
Suite 5200
Chicago, Illinois 60602
(312) 558-7500

DATED: September 16, 1985