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UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
CONSUMERS POWER COMPANY)
)
(Midland Plant, Units 1)
and 2))

Packet Nos. 50-329
50-330

4-26-71

OBJECTIONS OF AEC REGULATORY STAFF TO "FIRST SET
OF INTERROGATORIES OF CERTAIN INTERVENORS DIRECTED TO THE
ATOMIC ENERGY COMMISSION AND THE ADVISORY COMMITTEE ON
REACTOR SAFEGUARDS"

I. Introduction

On March 22, 1971, intervenors Saginaw Valley Nuclear Study Group et al. (intervenors) served on the Secretary of the Atomic Energy Commission (AEC) a "First Set of Interrogatories...Directed to the Atomic Energy Commission and the Advisory Committee on Reactor Safeguards" (ACRS),^{1/} containing 336 numbered interrogatories,^{2/} many of which consist of two or more parts. On April 2 and 3, 1971, in conference with the Chairman

^{1/} We note that 10 CFR Part 2, the AEC "Rules of Practice," contains no provision authorizing the submission of interrogatories to the ACRS. Accordingly, we view the entire set of interrogatories as having been submitted to the Secretary of the AEC pursuant to 10 CFR 2.720(h)(2)(ii). In any event, the ACRS should not be required to respond to any of the interrogatories for essentially the reasons stated in the applicant's brief dated April 19, 1971.

^{2/} The 336th interrogatory is actually numbered 337. This discrepancy is due to the fact that no interrogatory is set forth where the numeral 320 appears in the set.

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of the presiding Atomic Safety and Licensing Board (Board) and attorneys participating in this proceeding, the staff voiced a general objection to the interrogatories on the grounds, briefly, that they are unreasonable and reflect a misconception as to the role of the staff in a proceeding such as the captioned matter. The Board, however, deferred ruling on the interrogatories pending receipt of the staff's formal objections, the intervenors' reply thereto, and the views of the other parties.

The intervenors' set of interrogatories can be divided into three groups. Included in the first and largest group are interrogatories 1 through 232, which deal, for the most part, with matters covered in the Preliminary Safety Analysis Report (PSAR) of Consumers Power Company (applicant). These interrogatories are incorporated in the set of interrogatories for the AEC regulatory staff en bloc by reference to the 232 interrogatories which the intervenors simultaneously propounded to the applicant. The intervenors seek to require the staff to provide its own direct response to each interrogatory to the applicant which calls for information considered by the staff in its safety evaluation of the proposed Midland facilities; as to each interrogatory calling for information not considered by the staff, the intervenors seek, in effect, the staff's justification for not considering such information. The second group within the set consists of 80 nonconsecutive interrogatories,^{3/}

^{3/}
Nos. 239-42, 244-78, 280-98, 300-17, 327-30.

each of which appears to relate to the text of the staff's Safety Evaluation. The third group comprises the balance of the set, 24 miscellaneous interrogatories.

The interrogatories cover a wide range of systems, components, and technical subjects and in many instances call for detailed responses. Among the first and second groups of interrogatories are many which demand an explanation in detail of the basis for a statement or conclusion in the PSAR or Safety Evaluation, or description in detail of some aspect of the applicant's design or the staff's review. The second group, for example, includes some 50 interrogatories of this general type.

Our objections to these interrogatories are set forth in Parts II and III below. Part II restates in somewhat more detail the general objection we expressed during the conference on April 2-3, 1971. In Part III we set forth certain additional and more specific objections.

II. General Objection

The issue presented by this general objection is whether this particular set of interrogatories, if allowed, would impose an unreasonable burden on the AEC regulatory staff. In our view, the intervenors' set of interrogatories to the staff would impose a plainly unreasonable burden on the staff and should therefore be disallowed by the Board.

We do not here suggest that the Board should rule, in addition, that the intervenors may serve no interrogatories upon the staff in this proceeding. The staff is willing to discuss a reasonable set of interrogatories.^{4/} In short, we contend only that utilization of 10 CFR 2.720(h)(2)(ii), which authorizes the service of interrogatories upon the AEC, is subject to the constraint of a rule of reason and that the intervenors have gone far beyond its bounds in their first set of interrogatories to the staff.^{5/}

That responding to the intervenors' interrogatories would involve a very substantial undertaking by the staff is, we believe, evident from even cursory examination of the set. We estimate that the

^{4/} See Tr. 947. In addition, consistent with the staff's role in this proceeding discussed below, we will comment on the applicant's responses to interrogatories as in our judgment is required for the development of an accurate and reasonably complete record. The staff will, of course, also present appropriate witnesses at the evidentiary hearing.

^{5/} The staff seeks relief along the lines of that granted to the defendant in Stephen Amusements, Inc. v. Paramount Film Distributing Corp., 4 F.R. Serv. 2d 33.353, Case 2 (S.D. N.Y. 1961), a treble-damage antitrust action, where the court sustained the defendant's objection to the plaintiff's 78 interrogatories in their entirety but afforded the plaintiff an opportunity to serve "a reasonable number of interrogatories, in all respects complying with this memorandum". The court stated that some of the interrogatories had more than 15 subdivisions. We note here that many of the intervenors' 336 interrogatories to the staff also have subdivisions. Interrogatory 126, for example, has 8 subdivisions; interrogatory 292 has 14.

the staff would need to devote about 150 to 200 man-days in order to prepare written answers directly responsive to these interrogatories. In order to illustrate what such an effort would mean in terms of diversion of the staff from its assigned duties, we note that the staff's evaluation of the Midland PSAR consumed approximately 700 man-days (Tr. 191).

The reasonableness of imposing such a burden on the staff turns on the intervenors' need for the information which the interrogatories seek to elicit. In this connection, it is important to bear in mind that regardless of the outcome of their efforts to require the staff to respond to interrogatories, the intervenors will have a mass of pertinent information to assist them in the preparation of their case. To mention the obvious, the intervenors have access to the PSAR, the Safety Evaluation, the staff's draft environmental statement, the correspondence between the staff and the applicant, and the other documents on file in the AEC Public Document Room. In addition, the staff has provided the intervenors with a list of 159 documents upon which staff relied in preparing the Safety Evaluation, a set of AEC Division of Compliance inspection reports concerning the Midland Plant, and a collection of 136 additional documents, including staff notes on meetings and telephone conversations with the applicant. Furthermore, the applicant has served upon the intervenors, in two bulky volumes, its answers to the intervenors' 232 interrogatories.

Finally, the intervenors have been granted access to a mass of documents under the control of the applicant.^{6/}

Considering the burdensomeness of the interrogatories to the staff and the intervenors' other resources for trial preparation, a strong showing of need is indicated. The intervenors, however, have made no such showing. The intervenors should not be permitted to call upon the staff to provide information otherwise available or ascertainable through analysis of available information.^{7/} Nor should they be permitted, on the basis of mere curiosity, to summon the staff to set out its analyses of the proposed facilities in extenso.

The intervenors seem to claim, however, that the adequacy of the staff's review of the Midland application is an issue proper for consideration in this proceeding.^{8/} Apparently, it is on this theory that the intervenors seek to justify their set of interrogatories to the staff, for the ostensible thrust of the interrogatories

^{6/} The applicant has reported sending "well in excess of 8000 pages" of copied documents to the intervenors pursuant to their request. See letter to the Board dated April 17, 1971, from counsel for the applicant.

^{7/} At least where a heavy burden is involved, a party should not be allowed to use interrogatories as a means of forcing another party to do work which he could also do. Triangle Mfg. Co. v. Paramount Bag Mfg. Co., 35 F.R.D. 540 (E.D. N.Y., 1964).

^{8/} See, e.g., letter dated April 14, 1971, from counsel for intervenors to Chairman of the presiding Atomic Safety and Licensing Board.

is to require the staff to set out in great detail the bulk of the analysis underlying the Safety Evaluation. But to define the scope of this proceeding as including a review of the staff's Safety Evaluation is tantamount to requiring the staff to assume a burden of proof in that regard. The Commission's "Rules of Practice", 10 CFR Part 2, however, leave no doubt that the burden of proof is to be carried by the applicant, who is the proponent of the authorization sought (§2.732 and App. A, §III c.(1)).

The real contest in this proceeding is between the applicant and the intervenors, not the staff and the intervenors. The AEC staff is not on trial. A license application is in controversy. Even if the Board were to consider a particular staff conclusion unsoundly based or not entitled to full weight, the Board would nevertheless have to take into account the evidence presented by the applicant on the same technical subject, which evidence might be sufficient to enable the Board to find in favor of the applicant. Thus, whether the staff had an adequate basis for a particular conclusion is, in the last analysis, a nondispositive question.^{9/}

^{9/}This does not mean, of course, that the staff is a mere bystander in this proceeding. As in other contested proceedings of this type, the staff will assist in the development of an accurate and complete record for findings by the Board and subsequent review. In so doing, staff will introduce the results of its safety review and thereafter confine its participation to matters of particular significance as to which correction, clarification, or supplementation of the record is required in the public interest. The staff will not undertake to make a presentation of the scope which the applicant will make in order to fulfill his burden of proof.

The issue before the Board by reason of this general objection is one of great practical significance not only for this proceeding but for similar proceedings now underway or to be commenced in the future. If the scope of discovery to be had from the staff is to be as extensive as the intervenors propose by their interrogatories, then discovery could become the cause of significant and -- in view of the urgent need for additional power-generating capacity -- costly delays in these proceedings. The prospects for controlling these delays would be indeed slim if the staff were to become subject to sweeping requests for information, such as that represented by the intervenors' interrogatories, without a convincing showing of need. We strongly believe that sanctioning the intervenors' approach to discovery from the staff would invite abuse of the discovery process and encourage dilatory tactics in AEC reactor licensing proceedings.^{10/}

The intervenors' interrogatories point up, also, the broader public policy issue of whether the staff should be required to assume a vastly expanded role in contested hearings. The staff has primary

^{10/} In our view, the intervenors' interrogatories to the staff add the force of immediate experience to the Board's earlier observation: "It seems almost self-evident that competent counsel, not under any compulsion to limit the time devoted to the case, can, by utilizing the normal litigation techniques of cross-examination, pretrial examination, etc., prolong the hearing almost indefinitely." Order dated March 3, 1971, p. 6.

responsibility for considering and resolving in a review process apart from hearings safety questions presented, generally and individually, by applications to construct and operate nuclear reactors. Nothing, obviously, should be permitted to divert the technical staff from the discharge of this overriding responsibility.

For the foregoing reasons, we respectfully request that the Board disallow the intervenors' "First Set of Interrogatories ... Directed to the Atomic Energy Commission and the Advisory Committee on Reactor Safeguards".

III. Additional Objections

We object to the interrogatories listed below to the extent and for the reasons indicated. These objections are in addition to the general objection stated in Part II above. We reserve the right to assert additional specific objections in the event that our general objection is not sustained or sustained only in part.

Interrogatory or
Interrogatories
Objected To _____

Brief Statement of Basis for Objection

1-232

These interrogatories are unreasonably duplicative of interrogatories propounded to the applicant. In any event, the staff has offered to review and supplement, as appropriate, the answers submitted by the applicant (Tr. 945).

- 233 The interrogatory is unreasonable in the absence of any showing that a "WASH 740" accident is a credible event.
- 235 The interrogatory is an attempt to circumvent 10 CFR 2.744, "Production of AEC records and documents".
- 236 The interrogatory seeks privileged information and is an attempt to circumvent 10 CFR 2.744.
- 237-238 To the extent these interrogatories seek analysis and evaluation, they constitute an attempt to circumvent 10 CFR 2.744.
- 239 The interrogatory calls for irrelevant information. Whether the referenced exemption was properly granted is a question beyond the scope of this proceeding.
- 243 The interrogatory calls for irrelevant information. What, if any, role was played by the AEC in the referenced journey of persons alleged to be members of intervenor Midland Nuclear Power Committee would have no bearing on any issue in this proceeding.

- 279 The interrogatory calls for irrelevant information, i.e., information regarding systems not included in the applicant's design.
- 291 The interrogatory calls for irrelevant information, i.e., information concerning transportation and off-site disposal of solid wastes, the subject of separate licenses and authorizations. See 10 CFR Parts 30, 40, 70 and 71; 49 CFR Parts 170-189; 14 CFR Part 103; and 46 CFR Part 146.
- 299(b) This part of the interrogatory is unduly vague, as it calls for a statement of what the regulatory staff "would like".
- 319(d) This part of the interrogatory calls for irrelevant information regarding other facilities.
- 319(f) This part of the interrogatory is argumentative and improper.
- 323-324 Same objection as stated with respect to interrogatory 279.
- 326 The interrogatory calls for speculation as to which of a variety of financial protection arrangements

the staff would accept as meeting the requirements of 10 CFR Part 140 in hypothetical circumstances.

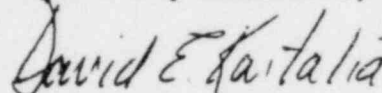
335 The staff has already submitted a list of potential staff witnesses. Such further information as is sought by the interrogatory should not be required before the issues in this proceeding have been determined.

337 To the extent the interrogatory seeks the listing of documents of the types referred to in 10 CFR 2.744(c), it calls for privileged information.

IV. Conclusion

For the reasons stated herein, the Board should sustain the staff's objections to the interveners' "First Set of Interrogatories ... Directed to the Atomic Energy Commission and the Advisory Committee on Reactor Safeguards" and issue an appropriate protective order.

Respectfully submitted,



David E. Kartalia
Counsel for AEC Regulatory Staff

Dated at Bethesda, Maryland,
this 26th day of April, 1971.