

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

11/6/80

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RECEIVED DISTRIBUTION SERVICES DIVISION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of  
NORTHERN INDIANA PUBLIC  
SERVICE COMPANY  
(Bailly Generating Station,  
Nuclear-1)

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Docket No. 50-367  
(Construction Permit Extension)

15 NOV 1980  
DISTRIBUTION SERVICES  
BRANCH

NRC STAFF RESPONSE TO PORTER COUNTY  
CHAPTER INTERVENORS' MOTION TO COMPEL  
DISCOVERY AND MOTION FOR PROTECTIVE ORDER

INTRODUCTION

On September 17, 1980, the Porter County Chapter Intervenors (PCCI) filed a request in the captioned proceeding, pursuant to 10 C.F.R. §2.270(h)(2)(i) for a designation by the NRC Executive Director for Operations of an NRC Staff witness(es) to testify at a deposition on October 15, 1980 until completed at the offices of PCCI counsel in Chicago, Illinois. By letter, dated October 7, 1980, counsel for PCCI was informed that Mr. M. David Lynch, the Bailly project manager, would be available for deposition on October 30-31, 1980, or some other mutually convenient date, at the NRC Staff offices in Bethesda, Maryland. On October 17, 1980, PCCI filed a motion to compel the deposition of Mr. Lynch at the offices of counsel for PCCI. The NRC Staff opposes the motion for the reasons given below. Further, the NRC Staff hereby moves, pursuant to 10 C.F.R. § 2.740(c)(2), for the entry of a protective order specifying that the deposition of Mr. Lynch be held in Bethesda unless and until Mr. Lynch otherwise plans to be in the Chicago area under circumstances which would permit his deposition there and then.

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DISCUSSION

For practical and policy reasons, discovery upon the Staff stands on a "different footing than that applicable to other parties to an NRC adjudication under the Commission's discovery rules or Federal Rules of Civil Procedure. Pennsylvania Power and Light Co., et al. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 11 NRC \_\_\_\_, slip op. at 6-7 (September 23, 1980).<sup>1/</sup> The Appeal Board has further concluded that a showing of "exceptional circumstances" is required to depose staff personnel and that the prior "permission" of the licensing board is necessary.<sup>2/</sup>

The Commission's rules do not specify where a deposition should be taken. The Porter County Chapter Intervenors object to conducting their deposition of the designated Staff witness in Bethesda. They insist that the deposition be conducted in Chicago. The Staff believes that this position is unreasonable and improperly places the convenience of the party seeking the deposition above that of the prospective deponent. The illogic of such a position on equitable grounds is apparent. It is, after all, PCCI, not the Staff, that is seeking the deposition. It seems reasonable, therefore, to expect the former to make reasonable attempts to accommodate the latter rather than the converse.

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1/ See also 10 C.F.R. Part 2, App. A, § IV.

2/ Id. at 8.

The Staff has indicated its preparedness to make Mr. Lynch available for deposition without the necessity of a showing of "exceptional circumstances" or of obtaining prior Licensing Board action.<sup>3/</sup> Nonetheless, it maintains that, under the exigencies of this proceeding, the deposition of Mr. Lynch should be conducted at Staff offices. Mr. Lynch has considerable professional responsibilities which will occupy his time and energies in the foreseeable future and he has no plans to otherwise be in the Chicago area. He is also caring for his mother who is seriously ill with cancer. See attached affidavit of M. David Lynch. Mr. Lynch's deposition in Chicago, for some indeterminate period of time,<sup>4/</sup> coupled with the requisite travel time, will appreciably interfere with the performance of his professional responsibilities and take him away from home at a time of acute family concerns. Counsel for the Staff also has an active case load, quite apart from his representation in this proceeding, and has a number of competing professional responsibilities in that connection. Like Mr. Lynch, he has no present plans to otherwise travel to the Chicago area.<sup>5/</sup>

Porter County Chapter Intervenors contend that the presence of its counsel in Chicago, and the close proximity of other intervenors and the Applicant

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3/ Cf. Susquehanna, supra.

4/ The subject deposition request does not place a date or time limitation on the deposition. Several days of deposition involving Applicant witnesses have, and will be, conducted by PCCI. One such witness, Mr. Russell Bohn, has already been deposed on two separate occasions and is scheduled to be deposed again at a later date.

5/ Another attorney has attended several of the depositions taken of Applicant witnesses on behalf of the Staff. Staff participation in future such depositions will be on an individual basis.

militate in favor of conducting the deposition in Chicago. The Staff does not agree. As an initial matter, the other intervenors have not expressed an interest in taking Mr. Lynch's deposition nor are they represented in this proceeding by counsel for PCCI, at least officially. They are certainly welcome to participate in any prospective deposition taken at the Staff offices to the extent they have a discernible interest in the matters to be covered therein. If they choose not to, they could still order a copy of the transcript of such deposition. Further, the Applicant is represented by counsel in Hammond, Indiana and Washington, D. C. The former could have to travel some distance to a deposition in Chicago while the latter could readily attend a deposition in Bethesda and has indicated her preparedness to do so. Thus, the conduct of Mr. Lynch's deposition in Chicago would essentially serve only the cognizable interests of counsel for PCCI and no others.

Porter County Chapter Intervenors also claim that it will impose some form of economic hardship on them to conduct the deposition in Bethesda. There is absolutely no evidence to support this claim. They are certainly not the "run-of-the-mill" intervenors with limited resources. Porter County Chapter Intervenors have apparently had the inestimable resources with which to engage in almost continued litigation involving the Bailly project since the original construction application was filed ten years ago. The cost of taking the subject deposition in Bethesda would seem a minimal expense when thus viewed. Moreover, they elected to depose the Staff. It

seems reasonable, therefore, to expect them to take such deposition at a time and place convenient to the prospective Staff deponent. In this regard, it should also not be assumed that the NRC has unlimited resources to expend for official travel. It does not. Conducting the subject deposition in Chicago would require Mr. Lynch and Staff counsel to travel and remain in Chicago on one, and possibly more occasion(s), for some indeterminate duration each time. This would necessarily divert money allocated for official travel from other Staff undertakings.

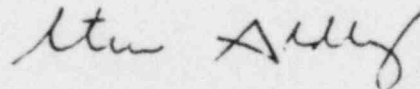
MOTION FOR PROTECTIVE ORDER

On the basis of the foregoing, the NRC Staff hereby moves, pursuant to 10 C.F.R. § 2.740(c)(2), for the entry of a protective order specifying that the deposition of Mr. Lynch be held in Bethesda unless and until Mr. Lynch otherwise plans to be in the Chicago area under circumstances which would permit his deposition there and then.

CONCLUSION

In light of the above, the Staff opposes the present motion to compel discovery and requests the grant of its motion for protective order.

Respectfully submitted,



Steven C. Goldberg  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 6th day of November, 1980