

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
NUCLEAR ENGINEERING COMPANY, INC.) Docket No. 27-39
)
(Sheffield, Illinois Low-Level)
Radioactive Waste Disposal Site))

MOTION BY NUCLEAR ENGINEERING COMPANY, INC. TO COMPEL
THE STATE OF ILLINOIS TO ANSWER NECO'S REQUESTS FOR
ADMISSIONS AND INTERROGATORIES AND
TO COMPEL PRODUCTION OF DOCUMENTS

Background

Pursuant to the Prehearing Conference Order and Order Setting Time for Discovery, dated September 9, 1980, entered by the Atomic Safety and Licensing Board ("Licensing Board" or "Board") in the captioned proceeding, Nuclear Engineering Company, Inc. ("NECO") moves to compel answers to its requests for admissions and interrogatories and to compel production of the documents sought by NECO in its discovery requests served upon the State of Illinois on October 10, 1980. As noted in NECO's earlier Motion to Strike,^{1/} the State of Illinois has filed what purports to be a blanket "Objection to Discovery," by which the State of Illinois impermissibly sought to grant itself a further extension of time within which to serve appropriate objections and answers.

^{1/} See Motion by NECO to Strike State of Illinois' Objection to Discovery (filed October 30, 1980).

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NECO now moves to require the State of Illinois to answer its requests for admissions and interrogatories and to produce the documents requested by NECO. In view of the total failure of the State of Illinois to make any proper and timely objections or to answer the discovery, the relief sought by NECO should be granted.

Argument

The essential facts and the position of NECO with respect to the service of its request for admissions, interrogatories and request for production of documents upon the State of Illinois, including the failure of the State to serve any appropriate response in the time provided by the Board's Order, are discussed in NECO's previously filed Motion to Strike State of Illinois' Objection to Discovery (filed October 30, 1980), which NECO hereby incorporates by reference. NECO's motion demonstrates why the State of Illinois has waived any possible objection it otherwise might have raised with respect to NECO's discovery request. It is also a matter of record that the State of Illinois has not filed any answers or produced any documents in response to NECO's discovery requests. Each of NECO's discovery requests is proper under 10 C.F.R. §2.740(b)(1) as seeking relevant information or information reasonably calculated to lead to the admission of admissible evidence. See Pennsylvania Power & Light Company (Susquehanna Steam

Electric Station, Units 1 and 2), ALAB-613, slip opinion at 6 (September 23, 1980).

On October 28, 1980, Mr. Anspach, the Assistant Attorney General for the State of Illinois presently assigned this matter, called Mr. Conner, counsel for NECO, to request an extension of time with regard to NECO's discovery requests 2(a) and 2(b), stating that there had been some difficulty in retrieving the State's records concerning the sums of money paid to it by NECO and the disposition of those funds. Mr. Anspach requested an extension to November 18, 1980 to answer those particular items. Subsequently, counsel for NECO received a proposed Stipulation which would have extended the time for the State of Illinois to file its "response"^{2/} as to all of NECO's requests for admissions, interrogatories and requests for production of documents. By letter dated November 3, 1980, counsel for NECO returned the proposed Stipulation, signed with those limitations.

On November 5, 1980, Mr. Anspach spoke with Mr. Rader, counsel for NECO, asking NECO to withdraw its Motion to

^{2/} In normal usage, a discovery "response" includes possible objections as well as any answers. It was NECO's understanding that the State of Illinois was seeking additional time only to gather material in order to answer items 2(a) and 2(b). Accordingly, there was no need to discuss objections at that time since the State had already filed its "general objection." Mr. Anspach, however, did not inform Mr. Conner during their conversation on October 28, 1980, that he intended to supplement his earlier "objection" by filing more specific objections later on November 18, 1980.

Strike and to stipulate to an extension to November 18, 1980 as to all of NECO's discovery, at which time the State proposed to file its specific objections and answers. ^{3/}

Counsel for NECO declined to agree to this extension, pointing out that the Board's Prehearing Order had been quite specific on the time for discovery and that the State of Illinois, as a party, had had sufficient time to respond or to seek alternative relief from the Board. ^{4/} Mr. Anspach was advised that any further relief in this regard would

^{3/} Mr. Anspach also stated that, in his earlier discussions with Mr. Conner, he had explained the difficulty in obtaining unavailable financial information responsive to NECO's items 2(a) and 2(b) as examples, but had intended to ask for an extension as to all of NECO's discovery. Mr. Rader point out that Mr. Conner's recollection had been quite precise on that point and that, in any event, NECO would not have agreed to an extension as to all of the discovery because NECO did not want to tamper with the Board's discovery schedule so as to create unnecessary delay. It is apparent from the State's recently filed Objections to NECO's Motion to Strike (filed November 7, 1980) that Mr. Anspach's apparently uncommunicated intent was to ask for an extension of time to answer all, rather than only two, of NECO's discovery requests. As Mr. Rader stated during the subsequent phone conversation on November 5, 1980, NECO never would have agreed to any general enlargement of time. Such delay is unfair to NECO, which is currently performing on-site maintenance without compensation.

^{4/} Thus, NECO does not believe that the State of Illinois can show good cause for permitting established time limits to pass without an appropriate response simply because a new Assistant Attorney General was assigned the matter. While there is certainly no reason to hold Mr. Anspach personally at fault, the State of Illinois cannot escape its responsibility as a party to comply with the Board's orders simply because a new attorney is assigned the case. By comparison, NECO has complied with the Board's discovery schedule, notwithstanding the voluminous discovery sought by the NRC Staff and the State of Illinois.

have to be sought from the Board. As previously noted, NECO has, as of this date, received neither answers nor a motion requesting an extension of time from the State of Illinois in response to its discovery requests.

In view of the preeminent correctness of NECO's position in its motion to strike, it is assumed that the relief sought will be granted and that the State of Illinois will not be permitted to perfect its impermissible general objection by the untimely filing of more specific objections. While the State presents several points in opposing NECO's Motion to Strike, the only relevant fact is that the State filed an unauthorized "general objection," as it implicitly concedes even now. Although the State's new counsel may have intended to seek NECO's consent as to an extension in order to gather information for its answers, no mention was made as to filing late objections until the telephone conversation of November 5, 1980. In any event, no party, especially one represented by counsel, may let a deadline pass; the State should have requested an extension of time from the Board. Virginia Electric & Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-568, 10 NRC 554 (1979); Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 2), ALAB-474, 7 NRC 746 (1978); Florida Power & Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), "Memorandum and Order," slip opinion at 2 n.3 (November 7, 1979). Since the State of

Illinois has neither filed any adequate, timely objection,^{5/} nor served any answers to NECO's discovery requests, it follows that the instant motion to compel should be granted.

In a recent decision in the Allens Creek proceeding, the Appeal Board reiterated "the imperative necessity that all participants in NRC adjudicatory proceedings . . . familiarize themselves at the outset with [the NRC's Rules of Practice]." The Appeal Board noted that by doing so, "participants will both (1) enhance their ability to protect adequately the rights of those they represent; and (2) avoid the waste of time and resources which inevitably accompany the taking of action forbidden by the Rules."^{6/} NECO believes this is the minimal standard to which the State of Illinois, represented by experienced counsel, should be held.

^{5/} The cases on waiver are discussed in NECO's Motion to Strike at 3.

^{6/} Houston Lighting & Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-609, slip op. at 2 n.1 (August 25, 1980); Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, slip op. at 3-4 (September 29, 1980). See generally NECO's Motion to Strike at 4.

Conclusion

For the reasons more fully set forth above, NECO respectfully submits that its Motion to Compel should be granted.

Respectfully submitted,

CONNER & MOORE

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November 15, 1980