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 NRC STAFF TO ANSWER NECO'S REQUESTS FOR
ADMISSIONS AND INTERROGATORIES AND
TO COMPEL PRODUCTION OF DOCUMENTS

Background

In accordance with the Order of the Atomic Safety and Licensing Board ("Licensing Board" or "Board"), dated September 9, 1980, Nuclear Engineering Company, Inc. ("NECO") served its Requests for Admissions, Interrogatories and Requests for Production of Documents to the NRC Staff on October 10, 1980. On October 23, 1980, the NRC Staff filed its objections to NECO's discovery request, and on November 3, 1980, it filed its answers. Pursuant to the Board's Order and 10 C.F.R. §2.740(f), NECO now moves to compel answers to certain of its requests for admissions and interrogatories and to compel production of the requested documents, as specified below.

The objections made by the Staff go deeper than merely attempting to deny NECO access to particular facts critical to its proof; the Staff's reasoning would completely deprive

NECO of any opportunity to present its theory of the case. The Staff has done so notwithstanding the Commission's repeated assurance to NECO that it would receive a full and fair hearing on its legal theories.[1/]

Essentially, the Staff disavows the relevancy of the Commission's prior practice regarding the burial of low-level radioactive waste, and asks that this Board close its eyes to the literally hundreds and thousands of licensing cases preceding the Sheffield case. There is simply no reason to believe, much less presume, however, that the Commission intended this Board to decide the issues before it on an ad hoc basis contrary to the Commission's past licensing practices. Further, the Staff's arguments on relevancy ignore the proper standard under 10 C.F.R. §2.740 (b)(1) for allowing discovery of information that is reasonably calculated to lead to the discovery of admissible evidence.

NECO's motion should be granted for the reasons more fully discussed below.

Argument

1. The past licensing practices of the Commission as well as its policies regarding low-level waste disposal are

---

1/ See Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-79-6, 9 NRC 673, 678-79 (1979); Nuclear Engineering Company, Inc. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 6 (1980). See generally NECO's letter to the Atomic Safety and Licensing Board (July 31, 1980).

relevant to the first and second issues designated by this Board. Overall, the Staff has objected to NECO's requests for admissions and discovery requests numbered 1(a)-(c), 2(a)-(c), 3(a)-(c), 4(a)-(c), 5(a)-(c), 6(a)-(c), 7(a)-(c), 8(a)-(c), 9(a)-(c), 10(a)-(c), 11(c) in part, 12(a) and (b),[2/] 13(a)-(c), 14(a)-(c), 15(a)-(c), 16(a)-(c), 17(a)-(c). In practically each instance, the Staff has objected on the ground that actions taken by the NRC with respect to other materials licensees are not relevant to NECO's legal rights and obligations in this proceeding.[3/] The fact that the Staff disagrees with NECO's legal arguments is, however, no basis for an objection. Clearly, a party may not refuse to respond to discovery on the ground that the discovery request is based on an assumption that contradicts the answering party's theory of the case. United States v. Article of Drug, etc., 43 F.R.D. 181, 189 (D. Del. 1967); United

---

2/ Although objecting only to Request for Admission 12(a) in its filed objections, the Staff purports to amend its objections in its recently filed response to NECO's discovery requests. See page 18, infra.

3/ The Staff itself seems a bit wary of the objection's validity. It hedges that requests for admissions and discovery requests 5(a)-(c), 6(a)-(c) and 8(a) are "not clearly relevant" or "not necessarily relevant" to the issues. Obviously, there is no basis under the NRC Rules of Practice or the analogous Federal Rules of Civil Procedure for objecting to discovery as not "clearly" or "necessarily" relevant. Indeed, as noted, discovery is to be allowed under 10 C.F.R. §2.740(b)(1) if it appears that it is reasonably calculated to lead to the discovery of admissible evidence.

States v. Two Hundred Sixteen Bottles, More or Less, etc., 36 F.R.D. 695, 700-701 (E.D.N.Y. 1965). As noted, the Commission has, in this very proceeding, expressly provided that NECO would have an opportunity to pursue its own theory of the case,[4] which NECO now seeks to formulate in context of the first and second issues designated by this Board.

The Staff's premise for objecting is deficient on its face. The proposition that "regulatory agencies may embark on new courses and regulate its [sic] licensees in ways that have not been tried before"[5] fundamentally misses the point for two reasons. First, even assuming, arguendo, that the Commission could lawfully determine under the Atomic Energy Act of 1954, as amended, and its existing regulations that a materials licensee (1) may not voluntarily surrender its license and cease burial operations without prior Commission action or (2) is deemed in possession of buried waste,[6] it does not follow that the Commission intends to adopt this

---

4/ See footnote 1, supra.

5/ Objections of NRC Staff at 5.

6/ An agency's prior administrative practice is strong evidence weighing against the assertion of new regulatory authority, Trans-Pacific Freight Conference v. Federal Maritime Board, 302 F.2d 875, 879 (D.C. Cir. 1962)(assertion of new, interim injunctive power); NLRB v. Guy F. Atkinson Co., 195 F.2d 141, 149 (9th Cir. 1952)(assertion of greater regulatory jurisdiction struck down by court), especially where the new and old policies present "diametrically inconsistent positions," FTC v. Jantzen, Inc., 356 F.2d 253, 257 n.4 (9th Cir. 1966), rev'd on other grounds, 386 U.S. 228 (1967).

approach. Contrary to the Staff's unsupported hypothesis, the Commission presumably wants this Board to decide the issues based upon its established practices and policies rather than any ad hoc theorizing by its regulatory staff in litigation. The NRC's past practices and policies governing materials licenses are unquestionably relevant and probative on this point.

The Staff's objection is improper for a second reason. Fundamental fairness in administrative law requires that an agency provide sound, well-explained reasons for departing from past policies and practices, even assuming the departure is statutorily authorized. As stated by the Court of Appeals for the District of Columbia in Greyhound Corp. v. ICC, 551 F.2d 414, 416 (D.C. Cir. 1977):

> This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them. See Columbia Broadcasting System, Inc. v. F.C.C., 147 U.S.App.D.C. 175, 454 F.2d 1018 (1971); Greater Boston Television Corp. v. F.C.C., 143 U.S.App.D.C. 383, 444 F.2d 841 (1970), cert. denied, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed. 2d 701 (1971); F.T.C. v. Crowther, 139 U.S.App.D.C. 137, 430 F.2d 510 (1970); Marine Space Enclosures, Inc. v. F.M.C., 137 U.S.App.D.C. 9, 420 F.2d 577 (1969). Of course, the agency is free to make reasoned changes in its policies. However, as this court noted in Columbia Broadcasting System, Inc. v. F.C.C., supra, there is an "equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being

> changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." 147 U.S.App.D.C. at 183, 454 F.2d at 1026 [footnote omitted].

To the same effect is the statement by the Court in Local 777, Democratic Union Organizing Committee v. NLRB, 603 F.2d 862, 872 (D.C. Cir. 1978):

> The Board cannot, despite its broad discretion, arbitrarily treat similar situations dissimilarly, e.g., Carnation Company v. NLRB, 429 F.2d 1130 (9th Cir. 1970); Burlington Truck Lines v. United States, 371 U.S. 156, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962); NLRB v. WCOK, Inc. 384 F.2d 500 (5th Cir. 1967); Burinskas v. NLRB, 123 U.S. App.D.C. 143, 357 F.2d 822 (1966). When it both fails to distinguish contradictory decisions rendered in similar cases and also misapplies accepted principles of law, it errs doubly, NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438, 443, 85 S.Ct. 1061, 13 L.Ed.2d 951 (1965). An agency in its deliberations is under an obligation to follow, distinguish, or overrule its own precedent . . . .

Likewise, the Court of Appeals for the Tenth Circuit in Squaw Transit Co. v. United States, 574 F.2d 492, 495-96 (10th Cir. 1978), stated that it was "greatly concerned with the inconsistency of the Commission" and therefore required the agency "to adhere to its own pronouncements, or explain its departure from them." The Court of Appeals for the Seventh Circuit in Niedert Motor Service, Inc. v. United States, 583 F.2d 954, 962 (7th Cir. 1978), found that prior decisions of the agency "were inexplicably ignored in the

case at bar," and held that if "the Commission made a conscious and deliberate decision to abandon these apparently sound principles . . . then it was required to provide an adequate explanation." And, as the Court of Appeals for the Fourth Circuit stated in Contractors Transport Corp. v. United States, 537 F.2d 1160, 1162 (4th Cir. 1976), "the grounds for an agency's disparate treatment of similarly situated applicants must be reasonably discernable."[7/]

Thus, contrary to the Staff's position, there are real, substantive limits upon the authority of the NRC to change its licensing practices, and even if a change is permissible, it must be adequately explained in the context of the Commission's prior policies. Such examination clearly requires a fully developed record as to the Commission's prior policies and practices. In any event, it is certainly not the Staff's option to determine unilaterally for the Commission that a change in its regulatory policies regarding materials licensees shall be implemented, thereby foreclosing all discovery on past practices.

7/ See also Oil, Chemical and Atomic Workers International Union v. NLRB, 547 F.2d 598, 603 n.4 (D.C. Cir. 1976), cert. denied, 429 U.S. 1078 (1977); Chem-Haulers, Inc. v. ICC, 565 F.2d 728, 733 (D.C. Cir. 1977); Office of Communication of the Church of Christ v. FCC, 560 F.2d 529, 532 (2nd Cir. 1977). Even shifts in policy emhasis requires an explanation. International Detective Service v. ICC, 613 F.2d 1067, 1078 n.23 (D.C. Cir. 1979).

2. NECO's discovery requests do not seek legal conclusions or opinions. A central theme of the Staff's opposition is that a party may not seek legal conclusions or opinions by way of a request for admission under 10 C.F.R. §2.742. Accepting this limitation, arguendo, the simple fact is that NECO has not requested any opinion or legal conclusion from the Staff.[8/]

For example, the Staff objects to Request for Admission 1(a) on the ground that it calls for an opinion and legal interpretation of what is meant by "affirmative action by the Commission." This is sheer pettifoggery. The concept of agency action is a universally understood term of art in the law and is in fact defined by the Administrative Procedure Act, 5 U.S.C. §551(13).[9/]

Similarly, as to Request for Admission 3(a), NECO simply asks whether site closure conditions sought by the

---

8/ Moreover, as discussed in Section 4, infra, even if any particular request for admission were technically improper on this ground, it would not excuse the Staff from answering a related interrogatory seeking information or producing requested documents on the same subject matter.

9/ As discussed in Section 3, infra, there is no merit to the alternative objection that such terms are too vague. In asserting that NECO's requests for admissions and discovery requests utilize a terminology calling for legal opinions and conclusions, the Staff implicity suggests that there are distinguishable situations, some of which may or may not be covered by the request, depending on the definition of certain terms. Yet, the Staff never explains what distinctions give it difficulty in responding, nor does the Staff offer any real evidence that such distinctions actually exist.

Staff for Sheffield have ever been imposed elsewhere. These conditions have been enumerated explicitly;[10] if any conditions have been imposed at other low-level radioactive waste disposal sites prior to closure, it should be a simple matter for the Staff to compare the two sets and determine whether common conditions exist.[11] Moreover, Interrogatory 3(b) and Document Request 3(c), asking for specific instances as well as a description of closure conditions and final inspection reports for five specific sites, can be answered independently of the request for admission.[12]

Request for Admission 4(a) only asks the Staff to acknowlege that the NRC has received what the provisions of 10 C.F.R. §20.302(b) ostensibly require. Although the specific custodial functions required under the commitment may be a matter of contention between the NRC and the State

---

10/ NRC Staff's letter to the Board, Appendix A (July 17, 1980).

11/ The request does not ask the Staff to admit or explain "how conditions imposed on other licensees relate to NECO's situation" or whether "the sites of various waste disposal facilities are similar to the subject site." NRC Staff Objections at 8. If the Staff wishes to pursue these matters as part of its theory of the case, it may do so.

12/ As discussed in Section 4, infra, a predominant flaw in the Staff's objections is the erroneous assumption that an objection applicable to a request for an admission, particularly one on technical grounds, automatically renders an interrogatory or document request invalid simply because they relate to the same or similar subject matter.

of Illinois, whether or not the Commission has received such a commitment requires simply a yes or no answer. Again, Interrogatory 4(b) and Document Request 4(c) stand on their own, especially in asking for other instances in which the Commission has taken the position that a State has been relieved of long-term custodial obligations at low-level waste disposal sites.

In a number of other Requests for Admission, namely 5(a), 6(a), 7(a), 8(a), 9(a), and 10(a), NECO has asked the Staff to admit that certain NRC regulations invoked in this proceeding against NECO have never been invoked against other materials licensees in other proceedings. NECO has only asked that the Staff admit the fact that these regulations have not been invoked, not whether they were properly invoked as a matter of law. As discussed in Section 1, supra, proof of prior NRC practice is critical to NECO's case. Thus, NECO is not inquiring into the legality or validity of these prior actions, but merely their existence. Here again, the interrogatories and document requests directed at specific incidents can and should be answered regardless of any disposition as to any related requests for admission. Obviously, it is NECO's position that the Staff's position on Sheffield is unprecedented. If the Staff may fairly deny NECO's requests for admissions, it ought to state

the specific facts upon which it bases its denials without semantic hairsplitting over so-called legal opinions or conclusions.

Similarly, in a number of Requests for Admission, namely, 13(a), 14(a), 15(a), 16(a), and 17(a), NECO asked the Staff to admit or deny that the position of the Commission is as stated in the request. Obviously, whether the Commission holds such a position is a fact, and not an opinion.[13/]

The requests for admissions and discovery requests which NECO has made are, in this respect, indistinguishable from the request for admission that was sustained as proper in Anderson v. United Air Lines, Inc., 49 F.R.D. 144, 149 (S.D.N.Y. 1969), where the court stated: "An admission or denial that United is required to maintain two-way radio contact with the Federal Aviation Agency under certain conditions does not require the interpretation of a statute." The Staff's objections are also substantially the same as those that were overruled in United States ex rel. Seals v. Wiman, 304 F.2d 53, 64 (5th Cir. 1962), cert. denied, 372 U.S. 915 (1963), where the court distinguished between

---

13/ As discussed in Section 3, infra, it can hardly be said that words like "compatible" or "possess" call for an opinion or conclusion of law when they are in fact words of art within the Atomic Energy Act of 1954 itself.

admissions calling for a legal conclusion and those which merely supported a party's legal theory of the case:

> The requests on their fact indicate that no legal conclusions or ultimate facts have been included, and it is irrelevant to their admissibility that they will support certain legal conclusions. To say that the court cannot draw legal conclusions from facts found in requests for admissions would be to eliminate any purpose for Rule 36.

To the same effect is the explanation of Rule 36 by Professor Moore:

> Most facts involve some measure of inference or conclusions and the circumstance that a fact stated in a request embodied such a conclusory element was not held to be a ground for objection to the request. 14/

Even if NECO's interrogatories could be construed as involving an opinion or legal conclusion, the courts have held that interrogatories requiring legal opinions as answers should be permitted if, by answering, the adjudication could be expedited; information obtained could lead to relevant evidence; issues could be narrowed; unnecessary testimony and wasteful preparation could be avoided; or any other substantial purpose sanctioned by the discovery rules could be served. 15/ Leumi Financial Corp. v. Hartford Accident &

14/ 4A Moore's Federal Practice, ¶36.04[4] at 36-39 (2d ed. 1980)(footnote omitted).

15/ For example, in Zinsky v. New York Central Railroad Co., 36 F.R.D. 680, 681 (N.D. Ohio 1964), the court held that interrogatories asking whether plaintiffs followed the usual customs, rules and practices in performing their work and, if they did not, asking what customs, rules or practices they disregarded, were sustained as requiring only factual rather than legal conclusions.

Indemnity Co., 295 F.Supp. 539, 541-42 (S.D.N.Y. 1969); Empire Scientific Corp. v. Pickering & Co., 44 F.R.D. 5, 6 (E.D.N.Y. 1968); United States v. Renault, Inc., 27 F.R.D. 23, 29 (S.D.N.Y. 1960); Luey v. Sterling Drug, Inc., supra.

Simply put, NECO's discovery is intended to establish that the Staff's position with regard to the issues of possession and license termination is without precedent.[16/] Establishing this basic fact will do much to narrow the issues, limit trial preparation and proof, and thereby expedite the entire proceeding. If there are no cases which the Staff can cite in support of its position here, it should be required to admit as much without quibbling. And, if there are truly certain cases which, by clarification or explanation, support the Staff's position here, they should be cited and explained. The Staff obfuscates by refusing to admit that its position is novel while broadly referring to distinguishing circumstances in other cases which it refuses to discuss.

3. NECO's discovery requests are sufficiently clear and definite in their terms so as to permit a response. In some instances the Staff has objected to NECO's discovery requests on the ground that some of the terms are imprecise, so as to call for an "interpretation" or an "opinion" or so

---

16/ It is noted that the Commission has only recently promulgated Part 72 to cover, inter alia, decommissioning for materials licensees possessing spent fuel. See 10 C.F.R. §72.38 (effective November 28, 1980).

as to require a "qualification" of an admission or denial. Each of these objections is without merit, inasmuch as the terms used in NECO's discovery requests are terms of art in the law, including the Atomic Energy Act of 1954, as amended, and well understood within the practice of administrative law before the Nuclear Regulatory Commission.

As noted earlier, it is incomprehensible that an experienced section leader within the Office of the Executive Legal Director would not understand the meaning of "affirmative action by the Commission,"[17/] when agency action is explicitly defined by the Administrative Procedure Act, 5 U.S.C. §551(13). Thousands of licenses issued by the AEC and NRC under the Atomic Energy Act of 1954, as amended, have been issued and later "terminated,"[18/] meaning that the licensee is no longer authorized to conduct the activities or operations for which it was licensed. There can be no reasonable misunderstanding as to which licenses have been terminated.

Similarly, the essence of the binding "commitment" made by a State to the NRC pursuant to 10 C.F.R. §20.302(b)[19/] is well understood. So is the nature of "long-term custodial responsibilities." Surely, the Staff does not mean to say

---

17/ Request for Admission 1(a).

18/ Id.

19/ Request for Admission 4(a).

that it lacks even a general concept of what a State has assured and guaranteed for future performance when the NRC accepts a commitment from a State under 10 C.F.R. §20.302(b) prior to issuing a license for land burial of low-level radioactive waste.[20/]

Like the terms used in discovery requests that were sustained as proper in another case, these are terms of art used in the industry which are "incapable of misunderstanding" and "clear in intent." Luey v. Sterling Drug, Inc., 240 F.Supp. 632, 636 (W.D. Mich. 1963). The Staff should therefore be required to answer these requests for admissions. Just as in Havenfield Corp. v. H & R Block, Inc., 67 F.R.D. 93, 97 (W.D. Mo. 1973), NECO's requests for admissions are not "so complex or imprecise as to necessitate qualified responses," but rather "are couched in general, unequivocal terms which appear to facilitate unequivocal admissions or denials." (Emphasis added.)

Further, even were there any uncertainty as to the meaning of terms, this is not a proper basis for refusing to answer NECO's related interrogatories or produce the requested documents. As the court stated in Struthers Scientific & International Corp. v. General Foods Corp.,

---

20/ In this regard, the Staff's claim that it requires a definition for such terms as "substantive additional conditions," "invoke," "impose" and "custody" [Requests for Admission 10(a)]; or "compatible" [Request for Admission 13(a)]; or "possessed," and "disposed" [Request for Admission 14(a), 15(a), 16(a) and 17(a)], is equally fanciful.

45 F.R.D. 375, 379 (S.D. Tex. 1968):

> The requirement of definiteness is satisfied so long as it is clear what it is the interrogated party is called on to answer. The inquiries need not be phrased in terms of technical precision. . . . The court finds that the interrogatories under consideration are not unduly vague and the objection based on this ground will be overruled. The defendant, however, will be permitted to qualify or restrict its answer as may be necessary because of any uncertainty.

Under these standards, NECO's terminology is sufficiently clear to permit an intelligent response.

4. All of NECO's interrogatories and requests for production of documents are independent of its requests for admissions and can be answered separately. Throughout its response, the Staff makes a number of objections to NECO's requests for admissions, based upon what the Staff contends are certain technical limitations in seeking admissions under the Commission's Rules of Practice. In virtually each instance, NECO's follow-up interrogatories and requests for production of documents are met with the pat objection that the interrogatory and document request are "predicated" on the preceding request for admission and are therefore also objectionable.

While the Staff's objections to NECO's requests for admissions are improper for the reasons discussed above, NECO's interrogatories and document requests are clearly not

subject to any of the technical limitations cited by the Staff as a basis for objecting to the requests for admission. On their face, they permit a factual response independent from any admission, denial or objection to a request for an admission.[21/] A party may not refuse to answer an interrogatory on the ground that its answer may require some explanation or qualification. Liquidometer Corp. v. Capital Airlines, Inc., 24 F.R.D. 319, 325 (D. Del. 1959); Struthers Scientific & International Corp. v. General Foods Corp., supra.

5. The Staff may not refuse to produce relevant documents without any search whatever. Another theme throughout the Staff's responses to NECO's discovery is its objection that it is not required to produce "all" documents which discuss or relate to the particular point of inquiry in the request for admission. It is true that shotgun requests for production with respect to the general subject matter of an examination by deposition are objectionable,[22/] but NECO's

---

21/ As to any relevancy objection, NECO has established in Section 1, supra, that the Commission's past practice and policy regarding materials licenses should indeed be considered in this proceeding to determine (1) what is the Commission's present policy, as inferred from past precedent, for the disposition of NECO's prior license at Sheffield, and (2) whether there is a reasoned basis for departing from any such previous policy even assuming that the Commission might wish to do so.

22/ See Objections of NRC Staff at 7, citing Illinois Power Company (Clinton Nuclear Station, Units 1 and2), ALAB-340, 4 NRC 27, 34 (1976).

document requests are well focused and particularized. Each request is sufficiently precise to enable the Staff to know what documents are sought. Seeking "all" documents within such discrete categories is therefore a proper form of discovery. Also, the Staff is surely on slippery ground in objecting to "all" doc[illegible] when it has in fact refused to produce "any." Certai[illegible]arty is entitled to "all" facts which support th[illegible]ing party's position. Rheem Manufacturing Co. v. Strato Tool Corp., 276 F.Supp. 1005, 1006-07 (D.N.J. 1967).

To the extent that the Staff objects on the grounds of burdensomeness, it is no excuse that the requested documents may not be "readily retrieved" from the Commission's files.[23/] It is well settled that a party's difficulty in retrieving relevant documents from its filing system is not a proper basis for objection. Alliance to End Repression v. Rochford, 75 F.R.D. 441, 447 (N.D. Ill. 1977); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76-77 (D. Mass. 1976). The categories of documents sought by NECO are defined with sufficient precision so as to permit a reasonably expeditious search for the documents requested.

Morever, a party may not oppose document requests as burdensome without some explanation of the hardships involved or some suggestion as to how discovery might be limited in

---

23/ Objections of NRC Staff at 19.

order to eliminate the hardship. See Paramount Film Distributing Corp. v. Civic Center Theatre, Inc., 333 F.2d 358 (10th Cir. 1964); General Petroleum Corp. v. District Court, 213 F.2d 689 (9th Cir. 1954); United States v. Grinnell Corp., 30 F.R.D. 358 (D.R.I. 1962); United States v. Maryland & Virginia Milk Producers Association, 20 F.R.D. 441 (D.D.C. 1957). The Staff has failed to meet even this minimal requirement.

6. The Staff's answers to NECO's discovery requests are inadequate. In addition to the deficiencies in the Staff's objections, the Staff's answers are likewise deficient. In response to Interrogatory 12(b), the Staff states that it will not respond unless it is ordered to answer Request for Admission 12(a). As noted, however, the Staff did not object to Interrogatory 12(b).[24/] The Staff cannot object well after the deadline simply by arguing that the interrogatory is "dependent" upon the preceding request for admission.[25/]

24/ The Staff made no objection in its filing on October 23, 1980. A purported objection was filed with the Staff's Response to NECO's discovery on November 3, 1980. Of course, for the reasons discussed by NECO in its recently filed Motion to Strike (October 30, 1980), the Staff has waived any objection to Interrogatory 12(b), independent of the objection's invalidity for the reasons discussed above.

25/ As demonstrated in Section 4, supra, the interrogatory, in any event, clearly may be answered independently of the request for admissions. In fact, the Staff has provided documents related to the interrogatory.

As discussed in Section 5, supra, some of the Staff's answers do not comply with the obligations of a party under 10 C.F.R. §2.741 for the production of documents. Specifically, the Staff states in response to Document Request 11(c) that it has made no effort at all to search for documents discussing the possession of licensed material as a basis for the exercise of regulatory authority over the person or entity having such possession. Also, NECO's Other Request 2 seeks documents not specifically requested by NECO relating to conditions at Sheffield or the NRC's position on site closure and withdrawal by NECO. The Staff has stated that it "believes" that such documents have been provided, but that it "has not made an exhaustive search of its files." Here again, the Staff chooses to adopt an all-or-nothing approach to discovery. Any complexity in its filing system, as NECO has shown in the preceding discussion, is simply no basis for the Staff's refusal to produce relevant documents. Certainly, the Staff, like any other party, is obliged to conduct a reasonably diligent, good-faith search for requested documents. See Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, slip opinion at 30 n.26 (September 23, 1980). The NRC Rules, like the Federal Rules of Civil Procedure, favor full discovery, and hardship or inconvenience is rarely an accepted basis for denying information to a litigant. Biliske

v. American Live Stock Insurance Co., 73 F.R.D. 124, 126 (W.D.Okla. 1977); Rockaway Pix Theatre, Inc. v. Metro-Goldwyn-Mayer, Inc., 36 F.R.D. 15, 17 (E.D.N.Y. 1964). See generally 4A Moore's Federal Practice ¶34.19 [.2] at 34-106 (2d ed. 1980).

Conclusion

By its Order dated September 9, 1980, this Board has recognized that NECO should be afforded a full opportunity to litigate the legal issue of the Commission's jurisdiction over NECO in terms of the "possession and license termination issues. The Staff's objections purport to erect a stone wall against discovery relevant to those issues. Not a single discovery request by NECO relating to those issues has escaped Staff objection. Contrary to the apparent Staff position that these matters should be decided without reference to any facts whatsoever, NECO believes that a complete factual record is indispensable to the proper disposition of the legal issues.

Also, the Staff has refused to make any search for relevant documents, beyond those which are apparently within its immediate access, far below the minimum standard for production under the NRC's Rules of Practice.

Accordingly, for the reasons more fully discussed above, NECO respectfully submits that the NRC Staff objections should be overruled and that the Staff should be required to furnish the requested discovery.[26/]

Respectfully submitted,

CONNER & MOORE

Troy B. Conner, Jr. /RMR

Troy B. Conner, Jr.

Robert M. Rader

Robert M. Rader
Counsel for NECO

November 15, 1980

26/ In view of the Board's previous Order setting the schedule for discovery, NECO suggests that any further discovery required of the Staff, the State of Illinois, the County of Bureau or Intervenors Schieler, et al., as a result of NECO's three Motions to Compel be furnished within two weeks after the Board's ruling.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the following documents: (1) NECO's Motion to Compel Intervenors Schieler, et al., and County of Bureau to Answer NECO's Interrogatories and to Compel Production of Documents; (2) 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; and (3) Motion by Nuclear Engineering Company, Inc. to Compel the NRC Staff to Answer NECO's Requests for Admissions and Interrogatories and to Compel Production of Documents, all dated November 15, 1980, in the captioned matter, have been served upon the following by deposit in the United States mail this 15th day of November, 1980:

Alan S. Rosenthal, Esq.
Chairman, Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Richard S. Salzman, Esq.
Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Andrew C. Goodhope, Esq.
3320 Estelle Terrace
Wheaton, Maryland 20906

Dr. Forest J. Remick
305 E. Hamilton Avenue
State College, Pennsylvania 16801

Dr. Linda W. Little
Member, Atomic Safety and Licensing Board Panel
5000 Hermitage Drive
Raleigh, North Carolina 27612

Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Roy P. Lessy, Esq.
Counsel for the NRC Staff
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

D.J. McRae, Esq.
217 West Second Street
Kewanee, Illinois 61443