UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	)	Docket Nos. 50-443 50-444
	)	
(Seabrook Station, Units 1 and 2)	)	

RESPONSE OF THE NRC STAFF TO NECNP'S MOTION TO COMPEL APPLICANT'S RESPONSE TO THREE INTERROGATORIES

I. STATEMENT OF THE CASE

By Memorandum And Order dated November 6, 1980, this Appeal Board, inter alia, established a schedule for hearing in this remanded proceeding and "encouraged the parties to conduct all necessary discovery on an informal basis" ("Memorandum and Order," p. 5, n. 4). On January 2, 1981, Intervenor NECNP served the Permittee, Public Service Company of New Hampshire, a set of interrogatories. On January 21, 1981, the Permittee filed timely responses thereto but in its response objected to interrogatories 8, 9, and 15, on the ground that each of those interrogatories related to the "tectonic province" encompassing the Seabrook site, and that this subject matter was irrelevant to any issue before the Board. The Permittee further stated: "The reopened proceeding was ordered with respect to two issues; a relitigation of the proper tectonic province was not one of them."[1/] On February 2,

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1/ "Permittees' Answer And Objections To Interrogatories Of NECNP," p. 6 (January 21, 1971).

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1981, NECNP filed its ". . . Motion To Compel Applicant's Response To Interrogatories." On February 3, 1981 the Appeal Board advised the Staff that if it desired to file a response to NECNP's motion to compel, such response should be in the hands of the Appeal Board by noon of February 10, 1981. The Staff herein submits its response. For the reasons discussed below, the Staff opposes the motion to compel as filed by NECNP.

II. DISCUSSION

A. The Propounded Interrogatories Are Beyond The Scope of This Limited Remanded Proceeding

Even a cursory examination of the propounded interrogatories reveals NECNP's assumption that the description of the "tectonic province"[2/] which should be used in this proceeding is not only not settled, but is completely open to re-discussion and re-definition. NECNP's Interrogatory No. 8 requests the Permittee to "justify [its] choice of a tectonic province or seismic area in detail," including "all tectonic structures and seismic features which Applicant previously considered in reaching its conclusions" as well as any new information concerning tectonic features or activity "in the Northeastern United States." That interrogatory also requests a justification or explanation of the "Boston-Ottawa seismic trend." Interrogatory 9 requests Permittee to describe and explain any other possible tectonic

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2/ "Tectonic province" refers to "a region of the North American continent characterized by a relative consistency of the geologic structural features contained therein. 10 C.F.R. Part 100, Appendix A, § III(h).

provinces Applicant considered but rejected. Interrogatory No. 15 requests a justification of the maximum epicentral intensity that will ever occur within the province described in response to Question 8. In the Staff's view, these inquiries concern matters that were not re-opened by the Commission in its Order of September 25, 1980.[3/]

This remanded proceeding emanates, in part, from ALAB-422, 6 NRC 33 (1977) wherein the Appeal Board, inter alia, considered NECNP's challenges to the Licensing Board's findings concerning "reactor site criteria" for the Seabrook facility. 6 NRC at 54-65. In the words of the Appeal Board:

> The Coalition advances three different theories for its claim that the safe shutdown earthquake should at a minimum be a Modified Mercalli intensity IX. We will treat them seriatum . . . . 6 NRC at 57.

The Coalition's "theories" concerned: (1) the probabilistic hypothesis of Dr. Chinnery for determining the maximum earthquake intensity at a given site (6 NRC at 57-60); (2) the appropriateness of treating "the entire Boston-Ottawa [seismic] belt" "as if it were a single [tectonic] province"[4/] thus bringing the 1732 Montreal earthquake to the site for purposes of seismic analysis under Appendix A to 10 C.F.R. Part 100[5/] (6 NRC at 60-62); (3), the argument that the 1775 Cape Ann earthquake was really an intensity IX earthquake rather than an intensity VIII earthquake as found by the

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3/ "Order," CLI-80-33, 12 NRC 295 (September 25, 1980).

4/ 6 NRC at 61.

5/ Id.

Licensing Board (6 NRC at 62) and (4), the tesitmony of NECNP witness Dr. Mihalo Trifunac that the "reasonable upper bound" for the design horizontal acceleration of an intensity VIII earthquake should be approximately 0.4g rather than the 0.25g design value as found below (6 NRC at 62-64).

The record in this proceeding was re-opened by the Commission in its Order of September 25, 1980 with respect to only two of these four matters, i.e. the factual validity of Dr. Chinnery's probabilistic methodology and the consistency of the Staff's methodology for correlating vibratory ground motion (acceleration) with Appendix A. The Appeal Board recognized these two limited issues in its initial Order in this remanded proceeding of September 29, 1980.[6/] The Coalition, however, argues in its motion that the Commission did in fact "specifically refer" to tectonic provinces in its September 25, 1980 Order.[7/] That statement is not entirely correct. The Commission in one sentence in that Order stated:

> However, in calculating the recurrence time of a greater than historical earthquake in the tectonic province containing the Seabrook site, only data from that province are used.[8/]

Thus, the Commission referred to a single tectonic province, not "tectonic provinces," and that province in the words of the Commission was "the tectonic province containing the Seabrook site." The Commission did not express any dissatisfaction with the findings below regarding, in the Commission's words,

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6/ Unpublished Order, pp. 1-2, (September 29, 1980).

7/ NECNP Motion, p. 3.

8/ 12 NRC at 297 (emphasis supplied).

"that province," notwithstanding NECNP's previous challenge to those findings before the Commission. NECNP is thus requesting detailed justifications and scientific explanations of findings which have been upheld on Appeal. Even though those matters were once part of NECNP's past challenges to the previous findings concerning the Seabrook facility, NECNP should not be permitted to bootstrap its rejected theories into this limited reopened proceeding at this time.

B. Applicable Commission Regulations and Precedent Do Not Support NECNP's Motion

Commission discovery practice is governed by 10 C.F.R. § 2.740 b)(1) which provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, . . . In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery . . . shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order . . . . It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The regulation clearly states that discovery must relate to the matters in controversy which have been delineated by the Commission or presiding officer.[9/] This principle was clearly recognized in the most recent decision

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9/ Such a requirement is clearly reasonable. As pointed out in Frilette v. Kimberlin, 508 F.2d 205, 208 (citing Davis, Administrative Law Treatise) (3rd Cir. 1974), cert. den. 421 U.S. 980 (1975) generally, discovery is not available in administrative proceedings. The Administrative Procedure Act contains no provision for pre-trial discovery and the Federal Rules of Civil Procedure do not apply to administrative proceedings. Therefore, in the absence of a special statute or administrative regulation [such as 10 C.F.R. §2.740,] no procedure for discovery is normally available in an administrative proceeding. Id.

in Pennsylvania Power and Light Co. and Allegheny Electric Cooperative Inc. (Susquehanna Steam Electric Station Units 1 and 2), ALAB-613, 12 NRC 317 (September 23, 1980). In Susquehanna, the Appeal Board stated that "Discovery requests must be relevant to the subject matter of the proceeding; that is they may relate only to those matters in controversy which have been identified by the [Licensing Board following a special] prehearing conference. 12 NRC at 322. The Appeal Board later stated that "It is therefore against the number and nature of the issues actually raised that the reasonableness of a party's discovery requests must be balanced."[10/]

The question of the selection and justification of tectonic provinces was clearly omitted from the delineation of issues both by the Commission in its September 25, 1980 Order and by the Appeal Board in its September 29th Order. The subject matter of the objected to interrogatories is, in the Staff's view, not relevant to this proceeding.

If the interrogatories in question are not relevant, is there another basis to permit discovery by NECNP with respect to the non-germane matter? This question has been addressed in Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977). In that proceeding, the Licensing Board addressed the question of "workable bounds" to discovery in light of "practical considerations" as follows:

> In considering the question of relevancy under Rule 26 of the Federal Rules of Civil Procedure, the Federal courts have long recognized that discovery processes must be kept within workable bounds on a proper and logical basis for the determination of the relevancy of that which is sought to be discovered. When the information sought is irrelevant to the proceeding, the Federal courts will not hesitate to

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10/ 12 NRC at 331-32.

sustain objections to such interrogatories. Massachusetts Bonding & Ins. Co. v. Harrisburg Trust Co., 2 F.R.D. 197, 198 (M.D. Pa. 1941). See Dunbar v. United States, 502 F.2d 506, 509-510 (5th Cir. 1974); Goodman v. International Business Machine Corp., 59 F.R.D. 278, 279 (N.D. Ill. 1973); Griffin v. Memphis Sales & Manufacturing Co., 38 F.R.D. 54, 57 (N.D. Miss. 1965). As the district court stated in Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc., 21 F.R.D. 347, 352 (S.D.N.Y. 1958):

> practical consideration dictate that the parties should not be permitted to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.

The Staff is in agreement with that analysis and believes the answer to the question is clearly in the negative under the circumstances present here.[11/]

This is not to say, however, that mention of tectonic provinces is forbidden in the context of this remanded proceeding. Rather, for purposes of this remand, the appropriate tectonic province under Appendix A to Part 100 which has been upheld, is the New Hampshire White Mountain Zone.[12/] Accordingly, interrogatories which require the respondent to define and justify the use of tectonic provinces "which the Applicant believes to exist," as well as other possible tectonic provinces which may have been examined in

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11/ The primary functions of discovery include narrowing of issues and avoidance of surprise. See, e.g., Wright & Miller, Federal Practice & Procedure: Civil § 20001 (1970). The inclusion of the reopening of the tectonic issue into this remanded proceeding will not serve those functions. The issues will obviously be broadened, not narrowed. In addition, in a limited remand proceeding with both a specific delineation of issues by the Commission and a record of previous hearings and appeals with respect to the question, there is very little chance of "surprise."

13/ See e.g. 6 NRC at 61.

the past but not selected (with a justification therefor) are clearly beyond the scope of this limited remanded proceeding.

NECNP also appears to have promulgated a fall-back position, that "Assuming that the issue of the proper tectonic province has not been reopened, NENCP's interrogatories are relevant to a reassessment of Dr. Chinnery's methodology and are calculated to lead to the discovery of admissible evidence" (NECNP Motion, p. 6).[13/] Unfortunately, the actual interrogatories propounded, on their face, attempt to completely reopen the issue of tectonic provinces. For example, interrogatories eight and nine, require a justification for each tectonic province selected or even considered. As stated above, the Staff believes that Dr. Chinnery is left to describe the factual validity of his methodology in the context of previous findings regarding tectonic provinces. Therefore, evidence as to other possible provinces which another party may have considered (if it did) would not appear to be "admissible" as being irrelevant and immaterial to the issues at hand. Thus, the interrogatories do not meet NECNP's fallback position because the interrogatories do not lead to the discovery of admissible evidence.

13/ There is authority to the contrary. See, e.g., Goodman v. IBM, 59 F.R.D. 278, 279 (N.D. Illinois) where the district court held that interrogatories must be relevant notwithstanding the argument that discovery should be permitted of any matter reasonably calculated to discovery of admissible evidence.

III. CONCLUSION

For the reasons discussed above, the Staff believes that NECNP's motion to compel Applicant's response to three interrogatories concerning tectonic provinces should be denied.[14/]

Respectfully submitted,

RP Lessy

Roy P. Lessy
Deputy Assistant Chief
Hearing Counsel

Dated at Bethesda, Maryland
this 10th day of February, 1981.

14/ On February 6, 1981, in compliance with the requirements of 10 CFR § 2.740(c), Permittee filed a brief "Motion For A Protective Order." For the reasons contained in this response, the Staff supports that motion.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF THE NRC STAFF TO NECNP'S MOTION TO COMPEL APPLICANT'S RESPONSE TO THREE INTERROGATORIES" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 10th day of February, 1981:

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

Dr. John H. Buck*
Atomic Safety and Licensing
Appeal Board
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Ivan W. Smith, Esq.*
Atomic Safety and Licensing
Board Panel
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

Joseph F. Tubridy, Esq.
4100 Cathedral Avenue, N.W.
Washington, D.C. 20016

Dr. Ernest O. Salo
Professor of Fisheries Research
Institute
College of Fisheries
University of Washington
Seattle, Washington 98195

Dr. Kenneth A. McCollom
1107 West Knapp Street
Stillwater, Oklahoma 74074

Robert A. Backus, Esq.
O'Neill, Backus, Spielman, Little
116 Lowell Street
Manchester, New Hampshire 03101

Thomas G. Dignan, Jr., Esq.
John A. Ritsher, Esq.
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110

Norman Ross, Esq.
30 Francis Street
Brookline, Massachusetts 02146

E. Tupper Kinder, Esq.
Assistant Attorney General
Office of Attorney General
State House Annex
Room 208
Concord, New Hampshire 03301

Francis S. Wright, Asst. Atty. Gen.
Laurie Burt, Esq., Asst. Atty. Gen.
Commonwealth of Massachusetts
Environmental Protection Div.
One Ashburton Place
19th Floor
Boston, Massachusetts 02108

William C. Tallman
Chairman and Chief Executive Officer
Public Service Company of New
Hampshire
1000 Elm Street
Manchester, NH 03105

Ellyn R. Weiss, Esq.
Harmon & Weiss
1725 I Street, N.W.
Suite 506
Washington, D.C. 20006

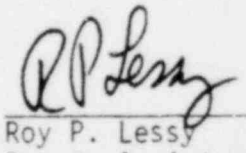
Atomic Safety and Licensing
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ms. Elizabeth H. Weinhold
3 Godfrey Avenue
Hampton, NH 03842

D. Pierre G. Cameron, Jr., Esq.
General Counsel
Public Service Company of New
Hampshire
1000 Elm Street
Manchester, NH 03105



Roy P. Lessy
Deputy Assistant Chief Hearing Counsel