

Nov 7, 1980



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
NORTHERN INDIANA PUBLIC)	Docket No. 50-367
SERVICE COMPANY)	(Construction Permit
)	Extension)
(Bailly Generating Station,)	
Nuclear-1))	

MOTION FOR PROTECTIVE ORDER
WITH RESPECT TO NOTICE OF DEPOSITION

On October 24, 1980, Porter County Intervenors filed a Notice of Deposition of Eugene W. O'Rorke and a Motion to Extend Time to Complete Answer ^{1/} to GE's Motion for a Protective Order, dated October 14, 1980, which purports to provide the basis for the Notice of Deposition. In response to the Notice of Deposition, GE hereby files this Motion for a Protective Order. In support of its Motion, GE states the following:

1. The Notice of Deposition would require Eugene W. O'Rorke, General Manager, Domestic BWR Projects Department, General Electric Company, to appear at the offices of BPPI in Chicago, Illinois at 10:00 am. on November 17, 1980, ostensibly for the purposes of examination upon matters pertaining to his affidavit, which was filed in this proceeding on October 17, 1980, in support of GE's

1/ Hereinafter referred to as Porter County Motion to Extend Time.

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Motion for a Protective Order dated October 14, 1980. Mr. O'Rorke works at the GE offices in San Jose, California and resides in the vicinity of San Jose.

2. GE appeared specially in this proceeding and moved for a protective order in connection with the discovery of certain contracts between GE and NIPSCO. In its Partial Answer in opposition to GE's Motion for a Protective Order, dated October 24, 1980,^{2/} Porter County repeatedly asserts that GE is a non-party to this proceeding, and that GE, as a non-party, has no rights under NRC's discovery rules (see, e.g., Porter County Partial Answer at 2, 3, 4, and 5). Porter County is incorrect. Non-parties have the right to appear specially in NRC proceedings in order to contest discovery requests which may affect them, particularly where the discovery requests involve confidential or proprietary information. See e.g., Kansas Gas & Electric Co. (Wolf Creek 1), ALAB-311, 3 NRC 85, 87-88 (1976); Consumers Power Co. (Midland 1 and 2), ALAB-122, 6 AEC 322 (1973). Thus, GE has the right to seek a protective order not only with respect to the contracts but also with respect to the proposed deposition of Mr. O'Rorke.

3. Initially, it should be noted that Porter County has provided no legally cognizable justification for the proposed deposition at this juncture. This unusual discovery request by Porter

^{2/} Hereinafter referred to as Porter County Partial Answer.

County (a deposition concerning the contents of an affidavit submitted in connection with a motion for a protective order related to a prior discovery request) has no basis in NRC's Rules of Practice, nor is any precedent cited for such a request.^{3/} Porter County has made no showing as to how the contracts in question would be relevant to its contentions or that discovery of the contracts would lead to the discovery of relevant evidence as required by 10 C.F.R. § 2.740(b)(1), let alone any showing as to how the deposition of Mr. O'Rourke would do so. Porter County is simply attempting to conduct discovery on the nature of the discovery that is to be permitted in this proceeding. The ostensible basis for the Notice of Deposition consists solely of a series of vague assertions by Porter County concerning its general dissatisfaction with Mr. O'Rourke's Affidavit (see Porter County Motion to Extend Time at 2). More importantly, the actual justification for Porter County's attempt to conduct this unusual form of discovery (i.e., in order to substantiate a prior discovery request) may well cease to exist once final rulings are rendered by the Board on the admissibility of Porter County's contentions.^{4/}

GE believes that the justification for this deposition advanced by Porter County is inadequate to support the taking of the deposition under any circumstances. At the very least, in order to avoid the waste of resources inherent in further

^{3/} Contra BPI v. AEC, 502 F.2d 424, 428-49 (D.C. Cir. 1974) (Intervenor has no right to discovery in licensing proceeding prior to stating his contentions).

^{4/} See BPI v. AEC, supra; GE Answer to Porter County Intervenor's Motion to Compel, dated November 7, 1980.

procedural disputes concerning the discovery of the contracts, the Board should grant the instant motion for a protective order pending final rulings on the admissibility of all of Porter County's contentions. See e.g., Detroit Edison Co. (Enrico Fermi 2), LBP-78-37, 8 NRC 575, 584 (1978) (premature discovery request denied).

4. In any event, the NRC's rules of procedure regarding discovery are to be construed in parallel with the Federal Rules of Civil Procedure.^{5/} Under the Federal Rules, it is well settled that a non-party can only be compelled to attend a deposition upon the issuance of a subpoena and not merely through the issuance of a Notice of Deposition. Cleveland v. Palmby, 75 F.R.D. 654 (W.D. Okla. 1977); Application of Johnson & Johnson, 59 F.R.D. 174 (D.D.C. 1973). Given Porter County's insistence that GE is a non-party to this proceeding, it follows that Mr. O'Rourke is presently under no compulsion to attend the proposed deposition because he has not been subpoenaed.

5. Even where the deposition of a party is involved, the party seeking to depose a corporate defendant or a specifically named officer, director or managing agent of a corporate defendant, must take the deposition at the corporation's principal place of business or at the place where the corporate officer, director or managing agent resides. For example, in Salter v. Upjohn Co. 593 F.2d 649 (5th Cir. 1979), the Fifth Circuit upheld the protective

^{5/} See e.g., Commonwealth Edison Co. (Zion 1 and 2), ALAB-196-7 AEC 457, 460 (1974); Toledo Edison Co. (Davis-Besse), ALAB-300, 2 NRC 752, 760 (1975). See also 10 C.F.R. Part 2, Appendix A, ¶ IV (a).

order issued by the trial judge requiring the deposition of a corporation to be taken at its principal place of business stating:

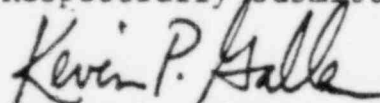
It is well settled that [t]he deposition of a corporation by its agents and officers should ordinarily be taken at its principal place of business especially when, as in this case, the corporation is the defendant. [Citations omitted].

Salter v. Upjohn Co., supra at 651. See also Buryan v. Max Factor & Co., 41 F.R.D. 330 (S.D.N.Y. 1967); Guy v. Continental Marketing Assoc. Inc., 315 F. Supp. 826 (N.D. Ga. 1970). The rationale behind the decisions is that a corporate defendant is not required to produce witnesses at a time and place convenient to the plaintiff alone. Where, as here, Porter County seeks to cause a "non-party" to travel to Chicago for its convenience, the rationale applies with even greater force. The deposition, if it is to be taken at all, must be taken in San Jose.

6. Nevertheless, if the deposition is taken in Chicago, neither GE nor Mr. O'Rourke should be required to bear the burden and expense associated with a deposition in Chicago. Hirsch v. Glidden Co., 79 F. Supp. 729 (S.D.N.Y. 1948); Buryan v. Max Factor & Co., 41 F.R.D. 330 (S.D. N.Y. 1967); Deep South Oil Co. of Tex. v. Metropolitan Life Ins. Co., 21 F.R.D. 341 (S.D.N.Y. 1958); see also Pacific Gas & Electric Co. (Stanislaus 1), ALAB-550, 9 NRC 683, 700 (1979). See 10 C.F.R. § 2.790(d) (witnesses summoned by subpoena shall be paid, by the party at whose instance they appear, the fees and mileage paid to witnesses in the district courts of the United States).

Accordingly, GE requests that the Board issue a Protective Order that the proposed disposition may not be taken or that it not be taken until the Board has issued final rulings on Porter County's contentions. Alternatively, GE requests that the Board issue a Protective Order that the deposition may only be taken pursuant to a subpoena issued by the Board conditioned upon (1) the deposition being taken in San Jose, or (2) Porter County reimbursing GE for expenses associated with the taking of the deposition in Chicago.

Respectfully submitted,

for 
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Dated: November 7, 1980