

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))

GE ANSWER IN OPPOSITION TO
PORTER COUNTY INTERVENORS
SECOND MOTION TO COMPEL
PRODUCTION OF DOCUMENTS

On October 24, 1980, the Porter County Intervenors moved the Board to enter an order compelling NIPSCO to produce certain contracts between GE and NIPSCO. ^{1/} On October 14, 1980, GE had appeared specially and moved for a Protective Order in regard to the contracts in question. GE hereby responds to the Porter County Chapter Intervenors' Motion to Compel Production of Documents, dated October 24, 1980, as follows:

1. The Porter County Intervenors' Motion rests on two basic grounds: (a) it would be unfair to Porter County to defer production by NIPSCO until the Board has ruled on GE's Motion for a Protective Order (Porter County Motion at 2); and (b) two of the

1/ Hereinafter referred to as "Porter County Motion."

alternative forms of a protective order sought in GE's Motion are without merit, while the third alternative will be shown to be without merit (Porter County Motion at 3).

2. Porter County's concept of fairness is misplaced. If Porter County's Motion were granted, it would require production before the Board has an opportunity to rule on GE's Motion. This would be manifestly unfair to GE. GE has the right to be heard concerning the issues presented in its Motion for Protective Order. ^{2/} GE has alleged that these contracts contain confidential and proprietary business information, the release of which will cause competitive harm to GE. If production by NIPSCO is ordered before a ruling on GE's Motion, the documents in question would be publicly disclosed, and the harm which GE is attempting to avoid would have already occurred. ^{3/} This harm would be irreparable and GE's right to be heard on this issue would become academic. ^{4/} Inasmuch as there is no firm schedule for discovery in this proceeding, the deferral of production, pending a ruling on GE's Motion, would have

^{2/} See e.g., Kansas Gas & Electric Co. (Wolf Creek 1), ALAB-311, 3 NRC 85 (1976); Consumers Power Co. (Midland 1 and 2), ALAB-122, 6 AEC 322 (1973).

^{3/} As the court noted in Wearly v. FTC, 462 F. Supp. 589, 593 (D.N.J. 1978), vacated on other grounds, 616 F.2d 662 (3rd Cir. 1980) "the disclosure of the tenor and content of proprietary information destroys its value as well as the property interest in it."

^{4/} As for Porter County's argument that the third alternative form of protective order sought by General Electric will be shown to be without merit, see GE's Motion for a Protective Order With Respect to Notice of Deposition, dated November 7, 1980.

no adverse effect upon Porter County or any other party. Porter County's assertion to the contrary notwithstanding, fairness would mandate deferral of production pending a ruling by the Board on GE's Motion.

3. Porter County's related assertion that "the first two alternatives sought in General Electric's Motion for a Protective Order are without merit" (Porter County Motion at 2) is itself without merit. Porter County relies upon its Partial Answer in Opposition to Motion for Protective Order, dated October 24, 1980. ^{5/} (Porter County Motion at 2). The Partial Answer, in turn, rests on four basic propositions:

- a. A bald assertion that the requested documents are relevant to contentions which have been admitted (Porter County Partial Answer at 4).
- b. A conclusion and statement that GE has not shown that future rulings on contentions could affect the production of documents (Porter County Partial Answer at 4).
- c. An aside that "as a non-party, [GE's] . . . views on the relationship between the scope of admitted contentions and the breadth of discovery requests are beside the point" (Porter County Partial Answer at 4).

^{5/} Hereinafter referred to as "Porter County Partial Answer."

d. An outright refusal to specify how the information sought is relevant to matters at issue (Porter County Partial Answer at 4).

4. GE clearly has a right to be heard on the issue of whether it is entitled to a protective order to prevent or condition disclosure of the documents in question. See e.g., Kansas Gas & Electric Co., ALAB-311, supra. It should be noted that discovery in this proceeding is also clearly limited to the scope of Porter County's Contentions. Allied General Nuclear Services (Barnwell), LBP-77-13, 5 NRC 489, 492 (1977); Illinois Power Co. (Clinton 1 and 2), ALAB-340, 4 NRC 27 (1976). Where, as here, discovery seeks public disclosure of the proprietary information from a third party, there is even greater reason for insisting that relevance be shown. Cf. Illinois Power Co., supra. Porter County has an affirmative obligation to specify how these contracts are relevant to its contentions or how discovery of these contracts will lead to the discovery of admissible evidence. 10 C.F.R. § 2.740(b)(1). Porter County has not yet done so.

Porter County's Partial Answer is proof in itself of its refusal to specify how these contracts are relevant to its contentions and resolve the instant controversy. After final rulings by the Board on the admissibility of Porter County's contentions, it may become obvious that the documents in question are irrelevant and disclosure under any circumstance may prove unnecessary.

As a result, it seems both fair and reasonable to defer production until such time as the process of rulings on contentions creates the framework in which an intelligent ruling on production can be made. In any event, it would be premature for the Board to order production of these documents at this time. Detroit Edison Co. (Enrico Fermi 2), LBP-78-37, 8 NRC 575, 584 (1975) (premature discovery request denied).

5. GE remains willing to produce the documents subject to a fair and reasonable protective order designed to protect GE against public disclosure of the contents of these contracts while at the same time accommodating Porter County's interests in this proceeding. While Porter County would appear to be dissatisfied with the form of protective order attached to GE's Motion for Protective Order, dated October 14, 1980, ^{6/} this form of order is based upon an order endorsed by the Appeal Board in the Wolf Creek proceeding and utilized in many subsequent NRC licensing proceedings.

It should also be noted that in Porter County Chapter of the Izaak Walton League of America, Inc v. USAEC, 380 F. Supp. 630, 634 (N.D. Ind. 1974), the court upheld the AEC's denial of an FOIA request seeking public disclosure of proprietary information submitted to the AEC by GE in connection with original construction permit proceedings for the Bailly plant. In so holding, the Court noted that

^{6/} See footnote, Porter County Partial Answer at 3.

Defendants [AEC et al.] stated and plaintiffs [Porter County] did not disagree, that plaintiffs, as parties to the AEC licensing proceeding, could have received access to the 'proprietary' information in issue pursuant to an appropriate protective arrangement prohibiting further dissemination.

(Gossick affidavit, para. 13). Thus, at stake here was not plaintiffs' own access to the information, but rather whether the Government must make the material publicly available, without any restrictions whatsoever. In addition to what has already been said, the Court believes that unrestricted release of such private commercial information would tend to adversely affect the Government's own ability to gain access to similar information in the future. Ultimately, such release could seriously affect the thoroughness of AEC review of license applications, and have an adverse impact on public health and safety.
(emphasis added).

6. GE submits that a fair balance of the competing interests in the instant controversy would support either:
(1) deferring production until final rulings on contentions,
(2) requiring Porter County to specify how the documents are relevant or could be relevant to matters in issue, or (3) disclosing of the contracts pursuant to a protective order designed to protect against any form of public disclosure of the contracts or their contents. Up until this point in time, Porter County has refused to provide the necessary specificity and the Board should therefore enter an order deferring production or permitting production only

in accordance with the form of protective order previously submitted by GE.

Accordingly, GE requests that its Motion for a Protective Order be granted.

Respectfully submitted,

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Dated: November 7, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify, this 7th day of November, 1980, that copies of GE's Motion For Protective Order With Respect To Notice Of Deposition and GE Answer In Opposition To Porter County Intervenors' Second Motion To Compel Production Of Documents have been served by hand upon those on the following list marked by an asterisk, and by mail, first class and postage prepaid, upon the remainder:

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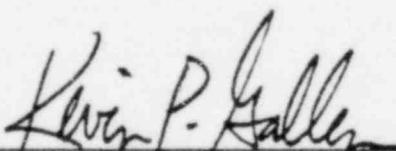
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