

September 12, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of)	
)	
TEXAS UTILITIES GENERATING)	Docket Nos. 50-445
COMPANY, <u>et al.</u>)	50-446
)	
(Comanche Peak Steam Electric)	(Application for
Station, Units 1 and 2))	Operating License)

APPLICANTS' MOTION TO COMPEL AND
ANSWER TO ACORN'S MOTION FOR AN
EXTENSION OF TIME AND MOTION FOR PROTECTION

Pursuant to 10 C.F.R. §§2.730(c) and 2.740(f), Texas Utilities Generating Company, et al. ("Applicants") hereby move the Atomic Safety and Licensing Board ("Board") in the captioned proceeding for an order compelling Texas Association of Community Organizations for Reform Now ("ACORN") to respond to the Applicants' interrogatories and produce for inspection the documents requested in Applicants' First Set of Interrogatories and Requests to Produce, filed August 13, 1980. Applicants also oppose ACORN's motions for "protection" and for an extension of time set forth in its undated 1/ objections to Applicants' First Set of Interrogatories.

1/ Applicants note that the Board has requested that all parties put the date of their filings on the front page thereof. The certificate of service indicates the document was served on August 28, 1980. Applicants received the filing on September 8.

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I. Discovery

ACORN's objections to Applicants' interrogatories and requests to produce appear to be founded in substantial part on a misconception of the purpose and scope of discovery in NRC licensing proceedings. Accordingly, Applicants set forth below a summary of important recognized principles applicable to the discovery process which should serve as guidance to all parties in conducting discovery.

Discovery in litigation before the courts, as well as in NRC licensing proceedings, is intended to insure that "the parties have access to all relevant, unprivileged information prior to the hearing." Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 582 (1975). Indeed, discovery in modern administrative practice is to be liberally granted "to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately" for the hearing. Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978).

As to the scope of permissible discovery, it is well-settled that

interrogatories seeking specification of the facts upon which a claim or contention is based are wholly proper, and that the party may be required to answer questions which attempt to ascertain the basis for his claim or, for example, what deficiencies or defects were claimed to exist with respect to a particular situation or cause. [Pilgrim, supra, 1 NRC at 582 (footnote omitted)].

A party has the right to find out what the other parties know with respect to a particular contention, viz., the positions of adversary parties and the information available to those parties to support their position. Pennsylvania Power & Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), ASLB Memoranda and Orders, January 4, 1980, slip op. at p. 6 and August 27, 1979, slip op. at p. 5-6. Discovery inquiries are limited only by the requirements that they be reasonably relevant to a sensible investigation, Pilgrim, LBP-75-30, supra at 582, and the information sought is reasonably calculated to lead to the discovery of admissible evidence, 10 C.F.R. .740(b)(1).

With respect to objections to discovery requests, the burden of persuasion is on the objecting party to show that the interrogatory should not be answered. Pilgrim, LBP-75-30, supra at 583. General objections are not sufficient. Id. Indeed, answers to discovery requests are important to a party's ability to prepare its case for trial, particularly in the case of an applicant's request for discovery because the applicant has the burden of proof. As was observed by the Licensing Board in Tyrone,

The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the positions of the intervenors, discharging that burden may be impossible. To permit a party to make skeletal contentions, keep the bases for them secret, then require

its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record. [Northern States Power Company, et al. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977) (footnote omitted).]

Further, intervenors must be mindful of the distinction between the basis requirement regarding admission of Contentions (see 10 C.F.R. §2.741(b)), and the information necessary to avoid the disposition of issues on summary disposition (see 10 C.F.R. §2.749), or to win on the merits at the hearing. A Contention may be admitted in an NRC licensing proceeding even though it is not supported by sufficient bases or information (i.e., evidence) to overcome a motion for summary disposition or to succeed on the merits. See e.g., Houston Light & Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC ____ (April 22, 1980), slip op. at pages 12-16. Therefore, in responding to interrogatories concerning the basis for a particular Contention, intervenors should recognize that discovery requests in Commission proceedings apply to information and bases to support a claim or Contention in addition to whatever information served as a basis for admitting the Contention. Of course, if no further information is intended to be relied upon in support of a Contention, the intervenors should so respond.

Finally, intervenors must conduct their participation in NRC licensing proceedings in a responsible manner. As

the Supreme Court has stated, in a nuclear licensing proceeding:

. . . it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions. [Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553 (1978)].

Discovery is one of the principal means for achieving such meaningful participation. Susquehanna, ASLB Memorandum and Order (January 4, 1980), supra, slip op. at 3.

II. Applicants' Motion to Compel

ACORN specifically objects to 36 of Applicants' interrogatories, dealing with seven Contentions. The objections are separated into two groups, basically reflecting two different types of interrogatories. ACORN does not file particular objections to any other interrogatories. Applicants move that the Board compel ACORN to respond to all interrogatories and requests to produce.

- A. Interrogatories 1, 2, 11, 26, 27, 31, 32, 44, 46, 57, 71, 72, 101, 102, 142, 143, 189, 190, 214, 215, 246 and 247.

The first group of interrogatories that are the subject of ACORN's objections involve, in essence, the following questions:

- a. Please state in your own words the meaning of Contention _____. (Interrogatories 1, 31, 71, 101, 142, 189, 214).

- b. What is your basis for Contention ___? Please list all documents not elsewhere identified in these interrogatories on which you rely for your position on Contention ___. Please provide these documents for inspection and copying. (Interrogatories 2, 32, 72, 102, 143, 190, 215).
- c. What do you mean by "___"? or Please state in your own words what "___" means in Contention ___. (Interrogatories 11, 26, 27, 44, 46, 57, 246).
- d. What is your basis (legal and/or other) for your response to Interrogatory ___? (Interrogatory 247).

ACORN objects to these interrogatories as not being relevant to the pending litigation, as not being calculated to lead to the discovery of admissible evidence, as constituting harassment and annoyance and as an attack on the wording of Contentions previously admitted.

ACORN has failed to sustain its burden of persuasion with respect to its objections. ACORN has provided only general statements in support of those objections without showing how the requests are improper subjects of interrogatories. Pilgrim, supra, 1 NRC at 583. Contrary to ACORN's assertions, the interrogatories are clearly relevant to the issues in this proceeding. Each interrogatory is identified with respect to the Contention it relates and each interrogatory is clearly intended to discover the precise issues to be raised by ACORN so as to refine those issues before the hearing, Vanislaus, supra, 7 NRC at 1040, and to ascertain

the basis of ACORN's claims and the deficiencies or defects that are claimed to exist. Pilgrim, supra, 1 NRC at 582. Also, each interrogatory is obviously reasonably calculated to lead to the discovery of admissible evidence, e.g., as included in the information supporting the Contention.

As to ACORN's claims of harrassment or annoyance, it is beyond comprehension how ACORN could make such claims with respect to straight-forward requests for further specification of the issues and the claims raised by ACORN, and the basis, if any, for its claims (other than the basis previously supplied with regard to the admission of the Contentions). To avoid a patently unfair proceeding Applicants must be permitted to inquire into the positions of the intervenors, including the support to be used at the hearing for their contentions. Tyrone, supra, 5 NRC at pp. 1300-01.

Further, ACORN's claim that the interrogatories are an attack on the wording of the Contentions simply demonstrates a lack of understanding as to the nature of discovery regarding admitted Contentions. The issues to be raised by ACORN at the hearing will, of course, be derived from the scope of the Contentions, as worded. The general language of the Contentions, however, does not provide any more than the thrust of ACORN's concerns. It is uncumbent upon ACORN to identify, in response to Applicants' interrogatories, the

precise claims, i.e., the deficiencies or defects with respect to a particular situation, Pilgrim, supra, 1 NRC at 582, that it intends to raise at the hearing.

For the foregoing reasons, Applicants move that the Board issue an order compelling ACORN to promptly respond to Interrogatories 1, 2, 11, 26, 27, 31, 32, 44, 46, 57, 71, 72, 101, 102, 142, 143, 189, 190, 214, 215, 246 and 247.

B. Interrogatories 4, 5, 34, 35, 74, 75, 104, 105, 146, 147, 193, 194, 218 and 219.

ACORN's second set of objections deals with two interrogatories posed with respect to seven Contentions, which are, in essence, as follows:

- a. What are the dates of all meetings or contacts with the other intervening parties with respect to Contention ___? Please specify the purpose of such meetings or contacts, and the results of such meetings or contacts. (Interrogatories 4, 34, 74, 104, 146, 193 and 218).
- b. What are the dates of the meetings or contacts you have had with persons other than the intervening parties with respect to Contention ___? Please identify the purpose of those meetings or contacts, the other persons involved, and the results of such meetings or contacts. (Interrogatories 5, 35, 75, 105, 147, 194 and 219).

ACORN objects to these interrogatories as not relevant, as not reasonably calculated to lead to the discovery of admissible evidence, as being designed "to annoy and oppress ACORN" and as being "a form of harassment and intimidation."

Again, contrary to ACORN's assertions, each interrogatory is relevant to the subject matter involved in this proceeding and is directly designed to lead to the discovery of admissible evidence. Each interrogatory relates only to meetings or contacts with respect to a specified Contention. The information sought is designed to discover whether Applicants should pursue discovery against persons or groups (parties or third parties) other than ACORN with respect to ACORN's contentions. Discovery from persons other than parties is contemplated by Commission regulations. See, 10 C.F.R. §§2.740(c), (f)(3) and 2.720(f), and Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-118, 6 AEC 263; ALAB-122, 6 AEC 322 (1973). Applicants are not seeking information regarding meetings other than that which relates to the Contentions at issue. ACORN's generalized objections fail to meet its burden of persuasion to show how the information called for is not discoverable. Pilgrim, supra, 1 NRC at 583.

For the foregoing reasons, Applicants move that the Board issue an order compelling ACORN to promptly respond to Interrogatories 4, 5, 34, 35, 74, 75, 104, 105, 146, 147, 193, 194, 218 and 219.

C. Remaining Interrogatories and Requests to Produce.

ACORN fails to identify any interrogatories other than the ones discussed above to which it objects. ACORN has

not responded to any interrogatories or requests to produce and apparently seeks "protection" from both interrogatories and requests to produce. Applicants can only conclude that ACORN does not intend to supply any responses.

ACORN has patently failed, with respect to the remaining interrogatories, to carry its burden of persuasion regarding objections to discovery requests, see Pilgrim, supra, 1 NRC at 583. ACORN also has failed to comply with the NRC Rules of Practice regarding the statement of objections to interrogatories, 10 C.F.R. §2.740b(b), and requests for production of documents, 10 C.F.R. §2.741(d). Those regulations require that ACORN must, in a timely fashion, either respond or state its objections with respect to each interrogatory or request to produce. ACORN has not done so.

For the foregoing reasons, Applicants move that the Board issue an order compelling ACORN to promptly respond to all of Applicants' First Set of Interrogatories to ACORN and Requests to Produce.

III. Applicants' Answer to ACORN's Motion for Protection

ACORN requests that the Board issue an "order for protection." As grounds for its request ACORN generally claims that responding to Applicants' "lines of inquiry" would cause annoyance, expense, oppression, burden and harassment, invasion of privacy and would "chill" ACORN's participation.

ACORN does not specify which interrogatories or requests to produce the "request for protection" encompasses.

ACORN must demonstrate "good cause" for a protective order with respect to discovery. 10 C.F.R. §2.740(c). Also, the NRC Rules of Practice require that a motion must state with particularity the grounds and the relief sought. 10 C.F.R. §2.730(b). In the instant situation, ACORN has failed patently to demonstrate good cause for a protective order. Mere recitation of the general purposes of protective orders (e.g., protect against oppression, undue burden or expense, etc.) does not demonstrate good cause for the order or demonstrate that the purpose of Applicants' requests are as claimed. See Midland, ALAB-118, supra, 6 AEC at 263.

Further, ACORN does not identify with particularity the relief it seeks. Applicants can only assume that ACORN seeks a protective order with respect to all interrogatories and requests to produce in that to date ACORN has supplied no responses to any discovery requests. Absent particularization and substantiation of its claims, ACORN has not satisfied the NRC Rules of Practice, 10 C.F.R. §§2.730(b) and 2.740(c), and has not sustained its burden with regard to the order of which it is the proponent, 10 C.F.R. §2.732. ACORN should not, therefore, be granted a protective order with respect to any of Applicants' discovery requests. Accordingly, the Board should deny ACORN's request for a protective order.

In addition, in its request for protection ACORN has again confused the role of discovery vis-a-vis admitted Contentions. As discussed above, while Contentions admitted by the Board provide the general scope of the issues for the hearing, those issues must be further particularized, in substantial part through discovery, to enable the parties to determine the precise issues to be litigated at the hearing. ACORN, however, when it is claiming to be burdened and oppressed, states that this proceeding is still at the early stages of development of the issues. Yet when ACORN claims that Applicants' discovery requests would chill its participation, it somehow reasons that those requests "attack contentions previously admitted." In other words, ACORN claims, as it suits its arguments, either that the issues are yet to be developed, or that they have already been determined. Responding to such obviously frivolous arguments approach a waste of this Board's time. Applicants request that the Board caution ACORN that it is incumbent upon intervenors to fashion their participation so that it is meaningful and in full compliance with the Rules of Practice. Vermont Yankee, supra, 435 U.S. at 553.

IV. Applicants' Answer to ACORN's Request
for Extension of Time

ACORN requests an unspecified extension of time to answer Applicants' interrogatories. A request for an

extension of time may be granted upon a showing of good cause. 10 C.F.R. §2.711. While Applicants have not objected to requests for extensions of time in this proceeding where such extensions are reasonable and specific, 2/ ACORN has not provided any sound reasons for its request and the request is completely open-ended. Therefore, Applicants obviously object to ACORN's request.

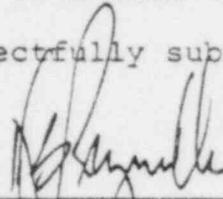
ACORN has not demonstrated good cause for an extension of time. ACORN claims that its request for an extension should be granted because of Counsel's vacation and the fact that responses to interrogatories "would be of little benefit to Applicants" at this stage of the proceeding. ACORN's reasoning is wholly without merit. NRC licensing proceedings cannot be postponed while counsel for the parties go on vacation. ACORN must have other members who can fulfill its responsibilities. Further, ACORN's claim that its responses to interrogatories would be of little use to Applicants flies in the face of the NRC Rules of Practice. Discovery is to commence upon issuance of the order following the special prehearing conference provided for in 10 C.F.R. §2.751a and be concluded before the prehearing conference held pursuant to 10 C. F.R. §2.752, except for good cause shown. See 10 C.F.R. §2.740(b)(1). If ACORN claims discovery

2/ See Applicants' Responses to CASE's and CFUR's Requests for Extensions of Time, August 26 and September 9, 1980.

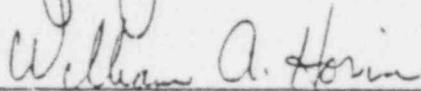
should be conducted at some other stage of the proceeding it should seek relief from the Commission, but it is beyond this Board's jurisdiction to change NRC regulations.

For the foregoing reasons, Applicants urge that the Board deny ACORN's request for an extension of time.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Applicants' Motion To Compel And Answer To ACORN's Motion For An Extension Of Time And Motion For Protection," dated September 12, 1980, in the captioned matter were served upon the following persons by deposit in the United States mail, first class postage prepaid this 12th day of September, 1980:

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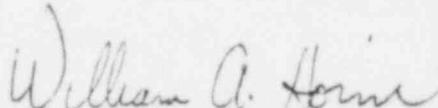
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