

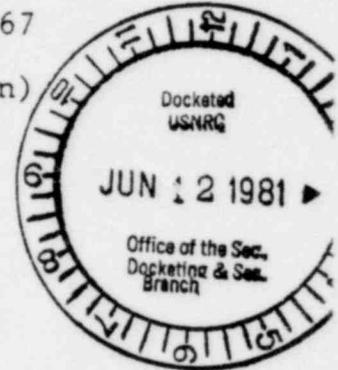
RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
NORTHERN INDIANA PUBLIC)
SERVICE COMPANY)
(Bailly Generating)
Station, Nuclear-1))

Docket No. 50-367
(Construction
Permit Extension)



PORTER COUNTY CHAPTER INTERVENORS'
REPLY IN SUPPORT OF MOTION TO COMPEL

Both NIPSCO, in its "Response to PCCI Motion to Compel Production of Documents Dated May 11, 1981" ("NIPSCO Response") and the Staff, in its "Response to Porter County Chapter Interveners' Motion to Compel Production of Documents by NIPSCO" ("Staff Response") have taken issue with PCCI's "Motion to Compel Production of Documents by NIPSCO Pursuant to PCCI's Third Request to NIPSCO for Production of Documents" ("Motion"), asserting that PCCI have urged an impermissibly broad scope of discovery. NIPSCO also resists production of specific categories of documents on various other grounds. PCCI submit that each of the documents requested in PCCI's Third Request to NIPSCO falls within the scope of the admitted contentions and NIPSCO should be ordered to produce them.

1. Scope of Contentions. This Board, in its Order Following Prehearing Conference dated August 7, 1980, admitted PCCI's Contentions 1 and 3, "to the extent that the reasons for the delay

are other than offered by the Permittee, that the actual reasons do not constitute good cause for the extension, and that the period of extension requested is unreasonable." */ (August 7, 1980 Order at p. 53) PCCI submit that the requests at issue are reasonably calculated to lead to evidence which falls within these contentions, notwithstanding NIPSCO's assertions that the documents are not relevant to "any admitted contention." **/

Further, it is not for NIPSCO to determine whether a document is relevant to an admitted contention. Rather, it is for the Board to determine (in the face of NIPSCO's objection) whether the request is "reasonably calculated to lead to the discovery of admissible evidence." 10 CFR §2.740(b)(1). Once it is determined that the request meets this minimal standard, the documents within the request must be produced. To allow NIPSCO to make relevancy decisions for PCCI is improper: only PCCI can determine whether a given document will be useful in the preparation of their case. Cf. Alderman v. United States, 493 U.S. 165, 180-82 (1969). If NIPSCO is allowed to base its production on what it claims is relevant to a contention, instead of on whether a request is

* The issue of whether NIPSCO can show good cause for its requested extension has also been put into issue by NIPSCO in its applications for an amendment extending the latest completion date. The letter from NIPSCO by E.M. Shorb to Harold R. Denton dated February 7, 1979 asserts that the facts alleged in the letter "constitute good cause for the requested extension." (at p. 2)

** For this reason, all of the argument offered by NIPSCO and the Staff concerning the scope of this proceeding is quite beside the point as to the instant Motion.

properly calculated, the effect is to allow NIPSCO to determine how PCCI will try their case.*/

Finally, both NIPSCO and the Staff ignore the fact, set forth in PCCI's Motion, at p. 2, n.*, that the Staff requested, and NIPSCO provided, much of the information contained in the subject documents. The cover letter transmitting the Staff's request**/ states that the information is needed in connection with the Staff's evaluation of NIPSCO's request for extension. Under 10 CFR 2.740(b)(1), PCCI is allowed to discover, inter alia, matters relating to the claim or defense of any other party. It is inconceivable how such information could be relevant to the Staff's case but undiscoverable to PCCI.***/

2. Paragraphs 2, 8 and 16. NIPSCO has not chosen to move for a protective order to protect what it alleges is confidential information, although it is unclear from NIPSCO's filings exactly

* Using NIPSCO's hypothetical (see Response at p. 10), if a conversation regarding the Mark II containment could lead to evidence showing that there were containment problems that could not be resolved by September 1, 1979 and if PCCI show that NIPSCO purposely delayed construction for that reason, the notes of the conversation would clearly be relevant, in spite of the fact that they mention the subject of an excluded contention, or do not appear to NIPSCO to be relevant to an admitted contention. To allow otherwise is to allow NIPSCO to determine PCCI's strategy for preparation of their case.

** Letter from Robert L. Tedesco, Assistant Director for Licensing to NIPSCO, Attn. H.P. Lyle, dated November 21, 1980, and served by PCCI on all parties on December 2, 1980.

*** Much of NIPSCO's response deals with such irrelevant issues as the validity of the contentions requirement, the applicability of §2.740(b)(1) to a proceeding on a construction permit amendment, and the applicability of the Federal Rules of Civil Procedure, none of which PCCI has disputed. NIPSCO's arguments are beside the point and serve only to cloud the issue before the Board. They should be disregarded.

what information it asserts is confidential. Rather, it submits affidavits in response to PCCI's Motion to Compel. First, it should be noted that by submitting the affidavits (as well as by producing other documents concerning its power commitments) NIPSCO has given part of the information - the names of five of its largest customers - which it has claimed to be confidential (NIPSCO Response at p. 8). Further, none of the affidavits states when such information has been furnished, and NIPSCO does not appear to claim that the information is indeed contained in the documents it has withheld. Finally, PCCI's offer to let NIPSCO delete the names of customers from the documents has been declined in that the "identities of NIPSCO's six largest industrial customers" (NIPSCO Response at p. 8) would be apparent - five of which identities are presumably disclosed by NIPSCO's affiants. It is the identifiability of each customer with a specific plan which PCCI's proposal would keep secret. NIPSCO has no claim that such a plan is unreasonable or would be harmful to it or its customers.

3. Paragraph 14. NIPSCO has produced only excerpts of the requested documents. A document means an entire document, not just the portion one party may wish the other to see. To rule otherwise is to allow NIPSCO to grant itself a protective order (which it has not sought) any time it did not wish to allow inspection of a complete document. Such a practice is contemplated neither by the Commission's rules nor by the Federal Rules of Civil Procedure upon which the Commission's rules are based. In fact, the Federal rules provide that "[a] party who produces

documents for inspection shall produce them as they are kept in the usual course of business..." FRCP 34(b). The documents should be produced "as they are kept" - unedited.

4. Paragraph 15. NIPSCO again objects to production of these documents on the ground of scope, which PCCI has shown is without merit. NIPSCO has produced what it claims are all "documents - or portions thereof - which pertain to admitted contentions"^{*/} (NIPSCO Response at p. 10). However, as pointed out above, this assertion is irrelevant. If the request is reasonably calculated to lead to the discovery of admissible evidence, the documents must be produced, notwithstanding NIPSCO's judgment concerning what is relevant to PCCI contentions. As shown on p. 3, n. *, even using NIPSCO's own hypothetical, the request is proper, and NIPSCO should be ordered to produce all documents falling within the request, not just those which it judges are relevant to its view of admitted contentions.

5. Paragraph 17. This paragraph requests a file referred to by counsel for NIPSCO during Mr. Shorb's deposition. Thus the fact that Mr. Shorb did not know what file was referred to is irrelevant. The entire file is requested and production of one document from the file is not responsive to a request for the entire file.

* Production of a portion of a document is improper, as explained above.

CONCLUSION

NIPSCO has shown no valid objection to its failure to produce the requested documents. It should be ordered to produce them.

DATED: June 10, 1981

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served copies of the following documents:

Answer of Porter County Chapter Intervenors to NIPSCO's "Motion to Compel Responses to Its First Set of Interrogatories to the Intervenors Frequently Denominated 'Porter County Chapter Intervenors'";

Motion for Leave to File Reply Brief; and

Porter County Chapter Intervenors' Reply in Support of Motion to Compel

on the persons on the attached Service List by causing them to be deposited in the U.S. mail, first class postage prepaid, on this 10th day of June, 1981.

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