Nov 24, 1980

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' RESPONSE TO GENERAL ELECTRIC'S MOTION FOR PROTECTIVE ORDER WITH RESPECT TO NOTICE OF DEPOSITION

Porter County Chapter Intervenors, by their attorneys, hereby respond to General Electric Company's Motion for Protective Order With Respect to Notice of Deposition. For the reasons set forth below, that motion should be denied and General Electric should be ordered to make Mr. O'Rorke available for his deposition in Chicago.

On October 14, 1980, GE appeared specially in this proceeding and filed a motion which, in the alternative, sought to delay discovery of certain documents requested by Porter County Chapter Intervenors from NIPSCO, sought to require that Porter County Chapter Intervenors make certain showings of relevancy, and sought the entry of a protective order in the form proposed by GE. In support of the third alternative in that motion, GE submitted, on October 17, 1980, the Affidavit of Eugene W. O'Rorke. Porter County Chapter Intervenors

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responded to the first two alternatives by pointing out that GE lacked standing to make claims concerning the relevancy of discovery and to increase the burdens on a party seeking discovery. (See Porter County Chapter Intervenors' Partial Answer to GE's Motion for Protective Order, dated October 24, 1980.) As to the third alternative, because it was based entirely upon the unspported assertions made in the O'Rorke Affidavit, Porter County Chapter Intervenors determined that it was appropriate to interrogate the affiant to determine what facts existed to support GE's claim. Accordingly, we noticed the deposition of Mr. O'Rorke on the matters contained in the Affidavit, to take place at the office of counsel for Porter County Chapter Intervenors on November 17, 1980. GE did not produce Mr. O'Rorke as requested in the Notice and filed the instant Motion for Protective Order With Respect to Notice of Deposition.

GE first asserts that the deposition of Mr. O'Rorke should not be taken at all. If the Board were to accept that position, it would be acquiescing in GE's effort to have its claim for protection based on an entirely one-sided record. GE has made broad assertions concerning the proprietary nature of documents and the harm that would befall GE if they were disclosed. Fundamental fairness requires that we have the opportunity to test and contest the conclusions of the affidavit. An essential step is the opportunity to depose the affiant. Contrary to the repeated assertion by GE, there is nothing

unusual about taking the deposition of a person who has signed an affidavit in support of a motion, to determine whether there is factual support for the assertions in the affidavit. It is a commonplace occurrence.

GE next asserts that Mr. O'Rorke cannot be deposed pursuant to notice, but that a subpoena must be issued. GE bases that position on the fact that we have pointed out that GE is a "non-party" to this proceeding. Of course GE is a non-party and thus lacks standing to object to discovery on relevancy grounds. Equally as clear is that GE has a right to appear pursuant to 10 CFR §2.713 for purposes of protecting itself from objectionable discovery.*/ By so appearing, it has subjected itself to the duties of a party for the limited purposes for which it appeared. Surely, just as GE has the right to invoke the jurisdiction of this Board to seek a protective order, it has the concomitant duty to submit to the process of the Board for a determination as to whether it is entitled to that protection. GE was not forced into this proceeding. It injected itself for the ostensible purpose of seeking protection. It must comply with the consequences of so injecting itself. Thus, the Notice is sufficient under 10 CFR §2.740a(a) to require Mr. O'Rorke's appearance.

Finally, GE asserts that Mr. O'Rorke be deposed only in San Jose, California, or that Porter County Chapter Intervenors

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*/ Alternatively, GE was free to let NIPSCO protect GE's interests on its behalf. See Kansas Gas and Electric Company (Wolf Creek Nuclear Generating Station), ALAB-311, 3 NRC 85, 87-89 (1976). That NIPSCO chose not to do. Indeed, NIPSCO, which does have standing to object to discovery on relevancy grounds, has explicitly disclaimed any intentions to raise "any grounds for non-production in addition to those cited by GE." (NIPSCO's Response to Second Motion to Compel, dated November 10, 1980.)

be required to reimburse GE for "expenses associated with" deposing Mr. O'Rorke in Chicago. (GE Motion at pp. 5-6). The location of a deposition is of course a matter for the sole discretion of the tribunal. */ Tomingas v. Douglas Aircraft Co., 45 F.R.D. 94, 97 (S.D. N.Y. 1968). Factors to be considered include who is most able to bear the expenses of travel, and whether any business harm would be suffered due to the deponent's absence. See Terry v. Modern Woodmen of America, 57 F.R.D. 141, 144 (W.D. Mo. 1972); Tomingas v. Douglas Aircraft Co., supra at 97. GE has not alleged the existence of any of these factors. The burden, of course, is on the party or person seeking the protective order to show good cause for its entry. 10 CFR §2.740(c); Baker v. Standard Industries, Inc., 55 F.R.D. 178, 180 (D. P.R. 1972). No such showing has been made by GE. Indeed, it has even failed to allege that it would suffer the annoyance, embarassment, oppression, or undue burden or expense required by §2.740(c) for the entry of a protective order. In point of fact, the location of all parties to this proceeding, and their counsel, either in the Chicago area or the Washington, D.C. area, make it obvious that the most convenient, least expensive place for Mr. O'Rorke's deposition to be taken is Chicago. Moreover, there can be no doubt that GE is far better able to bear the expenses of travel than are Porter County Chapter Intervenors.

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*/ It is unclear how GE has arrived at its position that it should be treated as a "corporate defendant," (GE Motion at pp. 4-5), when, in fact, it initiated this entire dispute by seeking to prevent Porter County Chapter Intervenors' access to NIPSCO's documents. Nevertheless, there is no special rule for treatment of "corporate defendants" as opposed to other types of parties.

CONCLUSION

Porter County Chapter Intervenors are entitled to depose Mr. O'Rorke. The notice served is sufficient under 10 CFR §2.740a(a) to require Mr. O'Rorke to appear. GE has failed to establish any grounds for a protective order and, accordingly, Mr. O'Rorke should be required to come to Chicago for his deposition, at a date to be agreed upon by counsel, or to be ordered by the Board.

DATED: November 24, 1980

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Porter County Chapter Intervenors' Response to General Electric's Motion for a Protective Order With Respect to Notice of Deposition, dated November 24, 1980, by sending copies of same to all persons listed on the attached Service List, and by causing same to be deposited in the U.S. mail, first-class postage prepaid, this 24th day of November, 1980.

_____
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