

3/31/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
U.S. ECOLOGY, INC.)	Docket No. 27-39
)	
(Sheffield, Illinois Low-Level)	
Radioactive Waste Disposal Site))	

SECOND NRC MOTION FOR AN ORDER COMPELLING U.S. ECOLOGY
TO RESPOND TO CERTAIN INTERROGATORIES AND REQUESTS FOR DOCUMENTS

On October 10, 1980 the NRC Staff (Staff) filed its first set of interrogatories and requests for production of documents to U.S. Ecology (Licensee). On October 20, 1980 the Licensee filed objections to certain Staff interrogatories and requests for production of documents. On February 13, 1981 this Board held a prehearing conference at which all the parties appeared. The purpose of the conference was to hear from the parties on all their various requests for discovery and objections thereto, including certain NRC Staff interrogatories and requests (numbered 1a, b, c, d, e, f, g, h, i, j, u, v, and aa; 2; and 8) from its first set of interrogatories. These specific NRC Staff requests are the subject of the instant motion to compel. See 10 C.F.R. §2.740(f).

By Order dated February 25, 1981, the Board ruled that each of the above interrogatories and document requests must be answered. The Board ruled: (at pages 1 and 2)

The information called for by Staff requests 1, 2, 8, 10 and the first 11 will either be identified by U.S. Ecology, Inc. if previously filed with the

NRC or will be made fully available for inspection by the Staff at the offices of U.S. Ecology, Inc. [emphasis added].

Pursuant to the Board's Order on March 16, 1981 the Licensee filed its "Answers By U.S. Ecology, Inc. to NRC Staff's First Set of Interrogatories and Request For Production of Documents" (Answer).

As is discussed more fully below the Licensee has failed to comply with this Order in that it did not "identify" the information requested by NRC Staff interrogatories and document requests 1a, b, c, d, e, f, g, h, i, j, u, and v and wholly failed to respond to NRC Staff interrogatory and document requests 1aa, 2 and 8.^{1/}

II. DISCUSSION

A. The Licensee Failed To Comply With The Board's Order To Identify Information Requested By NRC Staff Requests 1, a, b, c, d, e, f, g, h, i, j, u and v

As set forth above, this Board ruled in its "Prehearing Conference Order and Order Ruling on Discovery Requests, Objections and Motions" dated February 25, 1981 that the documents requested by the NRC Staff, including its request number 1" will be identified by the U.S. Ecology, Inc. if previously filed with the NRC or will be made fully available (at pages 1 and 2). As indicated below this has not been done.

^{1/} The Licensee by its motion entitled "Motion By U.S. Ecology For Clarification of Prehearing Conference Order and Ruling on Discovery Requests, Objections and Motions" dated March 10, 1981 seeks to overturn the Board's February 25, 1981 ruling with respect to NRC Staff interrogatories and requests numbered 2 and 8b. The Staff opposed that motion in its response entitled "NRC Staff Response to Licensee's Motion Dated March 10, 1981, Regarding the Board's Ruling to NRC Staff Document Requests," dated March 30, 1981.

NRC Request 1

1. Provide in a central depository all "documents," in file folders if they are so filed, which "relate to":

- a. the acquisition by NECJ in 1968 of California Nuclear, Inc.
 - b. the transfer in 1968 of California Nuclear's license concerning the Sheffield low-level radioactive waste disposal site
 - c. the 99-year lease between NECO and the State of Illinois
- [emphasis added]

The Licensee Responded: (at page 1)

Answer:

All technical documents and the lease are a part of the record of this proceeding.

This response does not comply with the Board's Order to "identify" not only the specific items listed by the Staff in 1a, b and c but all documents which "relate to" the listed items. Furthermore, the Licensee only mentions "technical documents" and the lease. This is not what the Staff requested nor is it consistent with the Board's Order to identify all the information requested by the Staff if the Licensee has previously filed such documents with the Staff or make such documents fully for inspection by the Staff at the offices of U.S. Ecology, Inc." (Order available for inspection by the Staff.^{2/}

^{2/} At the NRC Staff's search of documents at the offices of U.S. Ecology at the Sheffield site conducted on March 24, 1981, certain materials were withheld from the Staff's inspection. The Licensee's personnel indicated, when asked by the Staff if the documents they were inspecting represented "all documents," that financial information and "other privileged documents" were at the office but were not being made available for inspection.

Staff Request 1d

1. Provide in a central depository all "documents" in file folders if they are so filed, which "relate to": . . .

d. NECO's application in 1968 to renew its AEC (NRC) license.

The Licensee Responded (at pages 1 and 2):

Answer:

This application is part of the record of this proceeding. See NECO letter dated August 16, 1968 to AEC and NECO letter dated May 3, 1969. 6 AEC.

This response fails to indicate whether or not the two referenced letters represent all the documents which "relate to" the above Staff request.

Staff Request 1e

1. Provide in a central depository all "documents," in file folders if they are so filed, which "relate to": . . .

e. NECO's application in 1968 to expand the AEC licensed burial site to the adjacent 168 acres

The Licensee Responded:

Answer

No such application exists. The application to expand the site was submitted as a reapplication at the request of the NRC and was included as enclosures to NECO letter dated December 29, 1976 and is a part of the record of this proceeding.

The NRC Staff's request was not limited to the application or reapplication but included all documents that "relate to" such application. The Licensee has failed in accordance with the Board Order to "identify" such documents.

Staff Requests lf, g, h, i, j and u and respective Licensee responses:

1. Provide in a central depository all "documents," in file folders if they are so filed, which "relate to":

Request

f. the letter from James N. Neel to William J. Dircks dated December 27, 1978 requesting suspension of further proceedings on its application for license renewal and site expansion

Answer

The document is a part of the record of this proceeding.

Request

g. NECO's December 27, 1978 motion to the Licensing Board to suspend further proceedings on its application

Answer

The motion is a part of the record of this proceeding.

Request

h. NECO's March 8, 1979 "Notice to Atomic Safety and Licensing Board of Withdrawal of Application and Termination of Licensing for Activities at Sheffield."

Answer

The letter is a part of the record of this proceeding.

Request

The Letter from Troy B. Conner to William J. Dircks of March 8, 1979 that NECO was (1) withdrawing its pending application to renew its license and expand the Sheffield site and (2) terminating its license for all activities at Sheffield.

Answer

The letter of March 8, 1979 is a part of the record of this proceeding.

Request

j. The March 23, 1979 "Answer of Nuclear Engineering Company, Inc. To Order To Show Cause and Demand For Hearing.

Answer

The answer is part of the record of the proceeding.

Request

u. All documents which relate to the transfer or attempted transfer of the site or the NRC/AEC license to the State of Illinois, the IDPH, or any other federal or state agency, or any other entity.

Answer

These documents are a part of the record of this proceeding.

In each response to Requests 1f, g, h, i, j, and u the Licensee completely ignores the language of the Staff's request for all documents that "relate to" the referenced document. The responses only specify the basic documents themselves which the Staff has already identified as in "the record of this proceeding" and fails to provide the documents the Staff requested which "relate to" those Staff identified documents. This is an evasion of Licensee's discovery responsibilities. Further, the response does not even comply with the Board's Order to identify such documents" if previously filed with the NRC."^{3/}

^{3/} Order of February 25, 1981 at page 2.

Staff Request 1v

1. Provide in a central depository all "documents" in file folders if they are so filed, which "relate to": . . .

v. all documents, or references to documents, which relate to permeability and other soils engineering characteristics of trench caps at the site

The Licensee Response:

Answer

These documents are part of the Safety Analysis Report and other documents in the record in this proceeding.

The last part of this answer reveals a failure to comply with the Board's Order of February 25, 1981 to identify such documents "if previously filed with the NRC." Further, there is no indication if these are all the documents the Licensee has on these subjects.

B. The Licensee Completely Failed To Respond To NRC Staff Interrogatories and Requests For Documents 1aa, 2 and 8

As indicated above the Board in its Order dated February 25, 1981 ruled that the Licensee must respond to certain Staff requests, including 1aa, 2 and 8. The Licensee has failed to give any response to Staff requests 1aa, 2 and 8.^{4/} It should again be ordered to respond to these requests.

4/ Staff Request 1aa provides:

1. Provide in a central depository all "documents," in file folders if they are so filed, which "relate to": . . .

aa. all other "documents" which relate to this proceeding in any way, either directly or indirectly.

C. The Licensee Failed To Permit The Staff To Inspect Certain Documents At The Licensees' Office Contrary To The Board's Order

As noted above the Board clearly ruled that the documents requested by the Staff be made fully available for inspection. The Board stated: (at pages 1 and 2)

The information called for by Staff requests 1, 2, 8, 10 and the first 11 will either be identified by U.S. Ecology, Inc. if previously filed with the NRC or will be made fully available for inspection by the Staff at the offices of U.S. Ecology, Inc. [emphasis added].

Pursuant to this Order, on March 24, 1981, the NRC Staff conducted a search of documents at the Licensee's Sheffield office. When Staff counsel asked Licensee personnel if the materials presented for inspection represented all of the documents requested by the Staff, the Staff was informed that financial information and "other privileged

4/ FOOTNOTE CONTINUED FROM PRECEDING PAGE

Staff Request 2 provides:

2. Provide all documents described in request 1(a-y) above between NECO and Teledyne, Inc., and to, from, or between Teledyne and NECO, and between or among any agent, attorney, contractor, officer, or director of NECO and any such agent, attorney, contractor, officer, or director of Teledyne.

Staff Request 8 provides:

8.a. Provide all documents which relate in any to actions to be taken by or for NECO before NECO may "quit," decommission, or stabilize the site, including but not limited to environmental monitoring, site security, gradation and stabilization of site surface, and site buffer zone.

8.b. Explain in detail any discussions or communications NECO has had which relate to 8(a) with the State of Illinois or any other state or private entity.

documents "were at the office but would not be made available for inspection. This refusal to permit the Staff to conduct its inspection of requested documents defies the Board's clear ruling to make documentation not "identified by U.S. Ecology, Inc. if previously filed with the NRC" fully available for inspection.

Even if specific documents could be identified by the Licensee as "proprietary" or privileged, the Licensee should have fully identified the documents for which privileged or proprietary treatment is sought and requested a protective order consistent with 10 C.F.R. §2.740. Moreover, the Commission's law is clear that one asserting entitlement to a protective order based on a theory of information asserted to be proprietary or confidential must demonstrate, inter alia, that the information in question is of a type customarily held in confidence by its originator; that there is a rational basis for having customarily so treated the information; and that the information has, in fact, been kept in confidence and is not to be found in public sources.^{5/}

The Board also ruled with regard to inspection of documents at the Licensee's Louisville office that the parties "are directed to agree upon a prompt date for this" (Order at page 2). The Staff has twice suggested dates for such an inspection.^{6/} In both instances the Licensee has evaded such an inspection.

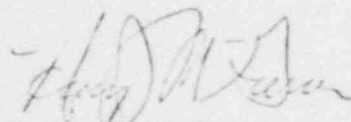
^{5/} Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23, 27 (1979).

^{6/} See letter of March 16, 1981 from the NRC Staff to Licensee's counsel, Robert M. Rader.

III. RELIEF SOUGHT

Based on the foregoing, the Staff respectfully requests an Order prohibiting the Licensee from introducing any evidence in this proceeding unless the Licensee provides the information required to be produced by the Board's Order of February 25, 1981 regarding Staff requests 1, a, b, c, d, e, f, g, h, i, j, u, v, and aa; 2, and 8 within 15 days of the Board's action on this motion, and allows the Staff to inspect all documents at its Louisville, Kentucky office by that date.^{7/}

Respectfully submitted,


Henry J. McGurren
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 31st day of March, 1981

^{7/} The Board's authority to enter such an order is contained in 10 C.F.R. 2.707(a) allowing the entry of appropriate orders upon a default in complying with any order issued under 10 C.F.R. 2.740. See Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station), LBP-79-31, 10 NRC 597, 606 (1979). The authority granted in 10 C.F.R. 2.707 is similar to that provided in the Federal Rules of Civil Procedure. See Rule 37(b)(2). Under the Federal Rules and the Rules of the Commission, even a stricter penalty of dismissing a party has been imposed, than that penalty sought by the Staff in this proceeding. See Public Service Electric and Gas Co. (Atlantic Nuclear Generating Station, Units 1 and 2), LBP-75-62, 2 NRC 702 (1975); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 817 (1975); Northern States Power Company (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977); Emerick v. Fenick Industries, Inc., 539 F.2d 1379, (Fifth Cir. 1976); and Mertens v. Minnelli, 587 F.2d 862 (Seventh Cir. 1978).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "SECOND NR. MOTION FOR AN ORDER COMPELLING U.S. ECOLOGY TO RESPOND TO CERTAIN INTERROGATORIES AND REQUESTS FOR DOCUMENTS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 31st day of March, 1981:

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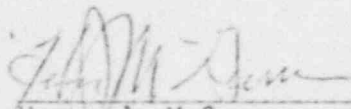
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