UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket No. 50-367
NORTHERN INDIANA PUBLIC SERVICE COMPANY	)	(Construction Permit Extension)
(Bailly Generating Station, Nuclear-1)	)	May 26, 1981

NORTHERN INDIANA PUBLIC SERVICE COMPANY'S
RESPONSE TO PCCI MOTION TO COMPEL PRODUCTION
OF DOCUMENTS DATED MAY 11, 1981

Porter County Chapter Intervenors (PCCI) filed their "Third Request to NIPSCO for Production of Documents" on March 20, 1981. Northern Indiana Public Service Company (NIPSCO) responded on April 24, 1981, objecting to certain requests and stating that it was withholding some documents from production. On May 11 PCCI filed a Motion to Compel Production ("Motion") to which NIPSCO now responds.

"Scope of Discovery/Scope of the Proceeding"

PCCI has again returned to its recurrent themes: "The scope of this proceeding is whether NIPSCO can show the 'good cause' required by Section 185 of the Atomic Energy Act" (Motion, p. 2) and the scope of PCCI's participation is as broad; more particularly, neither the proceeding nor intervenors' participation is limited by the contentions which have been admitted by the Board. This theory has

been rejected by the Board in its Order Regarding Discovery (Nov. 20, 1980); it must again be rejected.*/

PCCI offers no substantive argument in support of the theory and its application to discovery. PCCI appears to rely upon 10 C.F.R. § 2.740 but, in fact, that regulation precludes the PCCI theory. PCCI correctly notes that under the regulation the information sought in discovery need be "reasonably calculated to lead to the discovery of admissible evidence" (10 C.F.R. § 2.740(b)(1)) but it ignores the fact that, under Section 2.740, discovery "shall relate only to those matters in controversy which have been identified by . . . the presiding officer in the prehearing order entered at the conclusion of" the prehearing conference. (Id.) That is the limiting context of the other language in Section 2.740(b) which PCCI quotes: "Parties may obtain discovery regarding any matter . . . which is relevant to the subject matter involved in the proceeding . . . ." (Emphasis added.)

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*/ This theory in effect attempts to revive the argument that intervenors cannot be required to state contentions and have their participation limited to those contentions. This view was long since and unequivocally rejected. (Northern States Power Co. (Prairie Island Nuclear Generating Plant), CLI-73-12, 6 AEC 241 (1973), aff'd, BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974).)

PCCI may intend to argue that the narrower language limits only proceedings involving applications for construction permits and operating licenses and that it does not apply to this permit extension proceeding. That argument may arise from a literal and narrow reading of the provision:

> In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery shall begin only after the prehearing conference provided for in § 2.751a and shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference.

(10 C.F.R. § 2.740(b)(1).) That argument is unpersuasive for a number of reasons. The Commission's Rules of Practice (which include 10 C.F.R. § 2.740) govern

> the conduct of all proceedings, other than export and import licensing proceedings described in Part 110, under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, for (a) granting, suspending, revoking, amending, or taking other action with respect to any license, construction permit, or application to transfer a license . . . .

(10 C.F.R. §2.1.) Furthermore, Section 2.740 is within Subpart G of Part 2, "Rules of General Applicability," and the regulations state:

> The general rules in this subpart govern procedure in all adjudications initiated by the issuance of an order to show cause, an order pursuant to § 2.205(e), a notice of hearing, a notice of proposed action issued pursuant to § 2.105, or a notice issued pursuant to § 2.102(d)(3).

(10 C.F.R. § 2.700 (emphasis added).) The notice of opportunity for a hearing which initiated this proceeding was issued pursuant to 10 C.F.R. §2.105. (44 Fed. Reg. 69,061 (1979).)

Finally, there is simply no logical reason for concluding that the scope of permissible discovery should be broader in one type of NRC proceeding than another. It is, we submit, nonsensical to argue that an intervenor in, for example, an operating license proceeding, is limited to discovery on his admitted contentions while an intervenor in a construction permit extension proceeding has freedom to discover on any and all topics within some broader "scope of the proceeding" and regardless of the issues which he was admitted to litigate. The ultimate effect of PCCI's position would be more serious than nonsensical--it would defeat a substantial part of the very purpose of having contentions.

Discovery under NRC regulations is not the unfettered, free-form activity which intervenors envision.

> All discovery requests must be relevant to the subject matter of the proceeding; that is, they may "relate only to those matters in controversy which have been identified by the [Licensing Board following a special] prehearing conference." (10 C.F.R. § 2.740(b)(1).)

(Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station), ALAB-613, 12 NRC 317, 322 (1980); Allied-General Nuclear Services. (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489 (1977).)

NRC discovery is patterned on Rule 26 of the Federal Rules of Civil Procedure and cases interpreting that rule are useful in assessing the scope of discovery. (Commonwealth Edison Co. (Zion Station), ALAB-196, 7 AEC 457, 460 (1974); Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 581-83 (1975).) Although there is no "contention" requirement per se in the Federal Rules, the cases interpreting Rule 26 recognize that there must, of necessity, be practical limitations on the scope of legitimate discovery. (Hickman v. Taylor, 329 U.S. 495 (1947).) Liberal discovery is contemplated under Rule 26; however, "practical considerations dictate that the parties should not be permitted to roam in shadow zones of relevancy . . . ." (Broadway & Ninety-Sixth Street Realty Co. v. Loew's Inc., 21 F.R.D. 347, 352 (S.D. N.Y. 1958); Surety Association of America v. Republic Insurance Co., 388 F.2d 412 (2d Cir. 1967).)

Similarly, it has been held that "[f]ull and complete discovery should be practiced and allowed, but its processes must be kept within workable bounds on a proper and logical basis for the determination of the relevancy of that which is sought to be discovered." (Jones v. Metzger Dairies,

Inc., 334 F.2d 919, 925 (5th Cir. 1964), cert. denied, 379 U.S. 965 (1965).)*/

We urge the Board to reject the arguments made by PCCI concerning the relevance of document requests under Paragraph 2, 8, 16, 14, 15, and 17.

Paragraphs 2, 8 and 16. NIPSCO produced the vast majority of documents requested by these requests even though the requested documents are beyond the scope of permissible discovery. NIPSCO did so in an effort to expedite discovery and avoid the necessity of seeking Board intervention; these efforts have obviously been unsuccessful.**/

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*/ Federal Communications Commission procedure is analogous to that of the NRC. FCC regulations limit the scope of discovery in Commission proceedings to those matters "relevant to the hearing issues . . . ." (47 C.F.R. § 1.311(b).) In In Re Sumiton Broadcasting Co., 16 Rad. Reg. 2d (P. & F.) 427 (1969), the Review Board affirmed the Hearing Examiner's decision that the information sought by the intervenors was irrelevant to the issues in the proceeding. It was not sufficient that the required discovery might develop evidence that could bear on the credibility of parties and witnesses; discovery was denied.

Similarly in In Re Regal Broadcasting Corp., 15 Rad. Reg. 2d (P. & F.) 703 (1969), the Review Board denied an appeal from the Hearing Examiner's refusal to compel answers to interrogatories. In the Review Board's view, the Examiner did not abuse his discretion in holding that "the material [sought was] not patently relevant to the issues" and that the appellant had "failed in its pleadings to disclose its relevance." (Id. at 704, quoting the Hearing Examiner).

**/ PCCI argues (See, Motion, p. 2 n.) that "NIPSCO should not now be heard to object" because it failed to raise objections earlier in connection with other requests for similar information. We find this unremitting, pitched-battle view of discovery novel but consistent with PCCI's general approach to discovery.

The documents sought under Paragraphs 2, 8 and 16 are those upon which NIPSCO bases its projections of peak demand, energy sales, capacity, reserve margins, etc. Clearly, these documents all relate to the future need for power from the NIPSCO system. That is not an issue in this proceeding and no allegation has been made that production of the requested documentation will lead to admissible evidence. Thus, none of these requests is proper. Nevertheless, NIPSCO has produced all the documents requested except a few specified documents pertaining to individual industrial customers and their future plans. As a result of this production, PCCI has obtained all of NIPSCO's forecasts and other information requested except for a very small portion of the backup documentation which refers to the future plans of a few individual customers.

The motion to compel discovery seeks documents which are not relevant to this proceeding and must be denied for that reason.

Furthermore, NIPSCO has stated that the public dissemination of information regarding future demand by particular industrial customers could be detrimental to its customers. Intervenors state that this claim is "unsupported by facts or logic and [is] purely speculative." (Motion, p. 3.) On the contrary, logic does support the claim; as NIPSCO's response explained, major industrial customers' plans for future production and sales and plant additions would be

revealed. The information has not been publicly announced and would obviously be useful to competitors. In any event, we attach the affidavits of several of these customers which demonstrate that the harm is not "speculative." (See Attachments 1-5.)*/ Public dissemination of the information can also be detrimental to NIPSCO as recorded in the attached affidavit executed by Ira J. Roberts. (See Attachment 5.) We note also that intervenors' suggestion that the documents be produced with the customers' identities concealed is unfortunately not practical since the identities of NIPSCO's six largest industrial customers will be apparent even if the names are deleted.

Intervenors have not alleged any reason why these documents, which provide backup detail for forecasts contained in other documents which have been furnished (though, in our view, beyond the proper scope of discovery), are essential to them.

The request to compel discovery should be denied.

Paragraph 14. PCCI seeks copies of the complete minutes of "all meetings of NIPSCO's Board of Directors at which the Bailly facility has been discussed . . . ." In our

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*/ The affidavits of Mr. Lambeth of Youngstown Sheet and Tube Company and Mr. Messenger of Union Carbide Corporation are telecopied copies of the original as the originals were mailed but not yet received. The originals and copies thereof will follow.

view, that request is impermissibly broad. PCCI has made no allegation of relevancy and only an unsubstantiated and unexplained claim that the request "is calculated to lead to evidence of the reasons for the failure to construct Bailly." (Motion, p. 4.)

Despite these insufficiencies, NIPSCO produced certified copies of all portions of meeting minutes "at which the Bailly facility has been discussed . . . ." However, PCCI seeks to compel production of the entire minutes of those meetings regardless of the other subjects discussed--e.g., the natural gas aspects of NIPSCO's operations. PCCI claims that NIPSCO improperly excerpted only those portions of the minutes which cover discussions of the Bailly facility. In PCCI's view, such "editing" is impermissible. No authority is cited for that position and, we submit, none exists. On the contrary, NIPSCO is entitled to submit only relevant portions of Board meeting minutes.*/

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*/ The position taken by PCCI has not apparently been pursued seriously in reported cases. We have found one case on point. In Cooke v. N.M. Junior College Bd., 579 F.2d 568, 569 (10th Cir. 1978), the defendant sought production of all "diaries or chronological notes by the plaintiff . . ." for a period of approximately two years. The plaintiff refused to comply but offered to submit "copies of any and all entries in the diary which in any way related to the present controversy between the parties." (Id. at 570.) The court held:

> This, then, is not an instance where the plaintiff is stonewalling, and his offer to produce relevant entries should be amply sufficient to satisfy the defendants in their discovery efforts. . . . The only possible reason the defendants would want to inspect and copy non-relevant entries would be to cause embarrassment.

(Id.)

We know of no legitimate purpose on the part of the intervenors which would be served by inspection of directors' meeting minutes on subjects unrelated to Bailly--and none is alleged. The request to compel discovery should be denied.

Paragraph 15. PCCI seeks notes and summaries of telephone conversations with NRC personnel by NIPSCO employees. NIPSCO has produced the documents--or portions thereof--which pertain to admitted contentions but objects to producing those which do not. PCCI in effect claims that it is entitled to all notes and summaries of telephone conversations with NRC personnel by NIPSCO employees without regard to the subject matter of the conversations. For example, PCCI would presumably claim the right to discover notes of a conversation regarding the Mark II containment although its proposed contention on that topic was expressly rejected by the Board in this proceeding. We submit that the PCCI claim is baseless--and incorrect. The request to compel discovery should be denied.

Paragraph 17. PCCI requested "[t]he file referred to by William H. Eichhorn during the deposition of Eugene M. Shorb on September 30, 1980, at pages 239-40 of the transcript of that deposition."

Attachment 7 is an extract from the transcript (pp. 234-40) of the deposition which provides the background of this request. It demonstrates that Mr. Shorb was unable to identify the "file" in which his secretary would find "Shorb Deposition

Exhibit 9." The discussion does contain several references to "the file" and "that file" but no one identified which file it was.

However, the basic point is that the documents which were sought by Mr. Vollen (see page 239, lines 14-19)--i.e., "memoranda of telephone conversations between Mr. Shorb and Mr. Boyd on this subject between the period of July 18, '78 and January 5, '79" have been produced pursuant to earlier document production requests filed by PCCI. Moreover, Mr. Shorb's files have been thoroughly reviewed in response to PCCI's document requests and all documents within proper requests have been produced. We are aware of no requirement to produce an entire "file" if it contains one document properly requested in discovery. The Motion cites no authorities for this proposition and must be rejected.

Conclusion

For all of the above and foregoing reasons, PCCI's Motion to Compel Production of Documents dated May 11, 1981, should be denied in all respects.

Respectfully submitted,

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