

ON

ing Board

Before the Atomic Safety and Licensing Board

Docket No. 50-471

A circular 'RECEIVED' stamp from the U.S. Nuclear Regulatory Commission. The stamp features the word 'RECEIVED' in large, bold, sans-serif capital letters at the top. Below it, the date 'JUL 31 1981' is stamped in a similar font. At the bottom, the text 'U.S. NUCLEAR REGULATORY COMMISSION' is written in a smaller, sans-serif font. The entire stamp is enclosed within a circular border with tick marks. The stamp is placed over the bottom right portion of the document, partially obscuring the text '31, the' and the bottom of the 'U.S. NUCLEAR REGULATORY COMMISSION' line.

The Commonwealth hereby files, pursuant to 10 C.F.R. §2.730, this Answer in Opposition to the Staff's Motions for a Protective Order. The Commonwealth asks that the objections outlined below be overruled, that the Staff's motions for a protective order as to these questions be denied, and that the Staff be ordered to provide answers thereto.

DSO³
50/1

Before addressing specific interrogatories, the Commonwealth would like to point out that the Staff has seriously misperceived and mischaracterized the nature of a number of its questions. The Staff states, in its 10 C.F.R. §2.720(h)(2)(ii) response, that the similarity between many of the questions asked of the Staff and questions asked of Boston Edison Company demonstrates that the information sought is available from another source and, therefore, not properly the subject of discovery as against the Staff. What the Staff apparently fails to realize is that the Commonwealth is asking in many of its interrogatories for the Staff's position on a number of issues germane to this proceeding. The Commonwealth has similarly asked Boston Edison Co. to provide its position on a number of these issues. Obviously, the Staff's position cannot be discovered by way of interrogatories to Boston Edison Company or from any source other than the Staff itself. It is equally clear that the Commonwealth is entitled to learn by way of discovery of the Staff's and Applicant's positions on relevant issues. Thus, the Atomic Safety and Licensing Appeal Board held, as recently as June 1 of this year, that

. . . Parties to a proceeding are entitled to obtain in advance of hearing much more than simply a summary statement of the bases for their adversaries' claims and some identification of potential witnesses whose testimony might support those claims. Rather, as we had recent occasion to stress, "[i]n modern administrative and legal practice, pretrial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare

adequately for a more expeditious hearing or trial." Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 322 (1980), quoting from Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978). In the same vein, the Supreme Court has noted that, as a result of the availability of discovery, "[t]he way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." Hickman v. Taylor, 329 U.S. 495, 501 (1947).

South Carolina Electric and Gas Company, et al. (Virgil C. Summer Nuclear Station, Unit 1) ALAB-642, [1981] 2 NUCLEAR REGULATION REPORTER (CCH). ¶30,591, at 29,793.

The Commonwealth's Interrogatories to the Staff were carefully drafted to help it "ascertain the facts," "refine the issues" among the parties, and prepare for an "expeditious hearing" on complex matters. As such, they are entirely consistent with the purposes and scope of discovery in the modern era, where it is recognized that the adversary system is most effective when discovery is "liberally granted" and issues are decided on their merits and not on the basis of unequal knowledge among parties or their attorneys.

The right to liberal discovery is particularly crucial to a fair and efficient hearing process in the context of administrative proceedings such as this one, where the issues are generally highly complex and technical, where the agency staff has access to a wealth of information not known by or as readily available to the other parties to the proceeding, and

where the hearing process provides the only opportunity for public participation in decision-making on issues of crucial importance. To grant the Staff's requests for a protective order in this case would be effectively to deny the citizens of the Commonwealth of Massachusetts their right to discovery of the facts and issues relevant to this proceeding and, hence, their right to effective participation in the licensing proceeding.

Moreover, it is certainly interesting to note that the Applicant, Boston Edison Company, has readily provided answers to most of the Commonwealth's Interrogatories to it pertaining to the same issues and involving comparable "burdens" to those reflected in the Commonwealth's Interrogatories to the Staff. The Commonwealth suggests that if these Interrogatories were so irrelevant or unduly burdensome, the Applicant would have been unwilling or unable to respond thereto.

Instruction C

The Commonwealth asks that the Board overrule the Staff's objection to identifying "all documents known to the Staff which pertain to the subject matter questioned but which do not serve as bases for the Staff's answer, including documents which provide or support an answer different from that provided by the Staff." [Emphasis Supplied]. The Commonwealth has not, as the Staff's objection would suggest, asked that the Staff conduct a literature search. It has asked only that the Staff

identify any documents known to it at the time of preparing its responses which contradict its answer to any given question or are otherwise relevant to that question.

The Commonwealth sees no valid reason why the Staff should wish to shield from public view any documents which, to its knowledge, contradict its answers. Nor is it an answer to this Instruction that many of the documents may be available in the Public Document Room or from other sources, since this is a request for identification, not production, of documents and without such prior identification the Commonwealth will have no knowledge as to documents which it should attempt to locate in the PDR or from other sources.

To the extent that documents do contradict the Staff's answers or otherwise pertain to the subject matters questioned, they most certainly are relevant to this proceeding, necessary to the Commonwealth's preparation for this hearing, and likely to lead to the discovery of admissible evidence. Given the very specific nature of most of the Commonwealth's questions and the limitation of this Instruction to documents known to the Staff, there should be no undue burden involved in complying with this request. The fact that the Applicant has been able to comply with it is certainly evidence of the lack of any undue burden.

Finally, with respect to the application of Instruction C to Interrogatories 1 and 2, the Commonwealth states that the Staff is simply incorrect in its assertion that a request which

asks for identification of "generic" studies which pertain to Pilgrim II is internally inconsistent, vague, or ambiguous. Studies pertaining to all PWR's are, for example, generic studies which pertain to Pilgrim II.

Instruction E

The Commonwealth asks the Board to overrule the Staff's objection to its request that the Staff set forth "the name and title of any Staff member who did not participate in the preparation of the Staff's answer and who has, or may have, more direct personal knowledge of the subject matter of the question than the individual(s)" who participated in the preparation of the Staff's response. 10 C.F.R. §2.720(h)(2)(i) provides that parties may move for the attendance and testimony at the hearing of particular named NRC employees who have "direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations" The Commonwealth, like other parties to licensing proceedings, has no practicable way of knowing the names of any such individuals in the absence of their identification by the Staff. Therefore, if provision of this procedural right is to be anything other than a meaningless gesture, this Board must order the Staff to comply with Instruction E.

Interrogatories 1 and 2

For the reasons outlined in its discussion of Instruction C above, the Commonwealth asks the Board to overrule the Staff's objections to these interrogatories. The Commonwealth is at a loss to understand how studies dealing with the particular factors set forth in the footnotes to questions 1 and 2 and having relevance to Pilgrim II could conceivably be viewed as irrelevant to this proceeding, since the Commission's regulations on emergency planning provide that just such factors must be considered in determining the appropriate size and configuration of the EPZs for any particular site. See 10 C.F.R. Part 50, Appendix E; 10 C.F.R. §50.33(g), and 10 C.F.R. §50.47(c)(2).

Interrogatory No. 3

In view of the Staff's "voluntary" response to this question, and without waiving any rights to pursue the issues raised by the Staff's objection to this interrogatory at a later time, the Commonwealth will not now object to the Staff's Motions for a Protective Order with respect to this question.

Interrogatory No. 4

The Commonwealth asks the Board to overrule the Staff's objections to this interrogatory to the extent that it seeks "the range of [evacuation time] estimates which would have been acceptable to the Staff" and "the highest evacuation time estimates which would have been acceptable to the Staff for

each evacuation sector drawn in the PSAR." These questions are directly relevant to the Staff's conclusion, contained in SER Supplement No. 5, that evacuation of the population surrounding the Pilgrim site is feasible and to the means by which it reached that conclusion. The Commonwealth wishes to know the procedures and standards applied by the Staff in reaching its determinations that the Applicant's evacuation time estimates are acceptable and evacuation feasible. If determination of an acceptable range for, or upper limit on, evacuation time estimates played no part in the Staff's review process, then the Staff can so state in response to this question.

Interrogatory No. 5

The Commonwealth asks the Board to overrule the Staff's objection to this interrogatory. It is, again, directed at discovering the procedures and standards employed by the Staff in its review of evacuation time estimates. The conclusions reached by the Commission and/or Staff as to the appropriateness of estimates for other sites, and the procedures and standards which led to those decisions, could lead to evidence that different, and perhaps inappropriate, procedures and criteria were involved in this case. Alternatively, the information could demonstrate or suggest that the Commission and/or Staff have not yet determined an upper limit for evacuation time estimates, a fact which is certainly relevant to whether the Staff has correctly

determined that the estimates for Pilgrim II are acceptable. This request is, therefore, reasonably calculated to lead to admissible evidence and an answer thereto is necessary to a proper decision by this Board on the feasibility of evacuation at Pilgrim II.

Interrogatory No. 6

The Commonwealth asks the Board to direct the Staff to answer those portions of this question to which it has not objected and for which it has not provided an answer--namely, those portions relating to site-specific studies of the consequences associated with BWR-1 to BWR-4 releases at Pilgrim I. The Staff apparently has no objection to answering this question, but has inadvertently failed to do so. The question is reasonably calculated to lead to admissible evidence since any studies which are specific to the Pilgrim site, even if not to the proposed Unit II, will have some relevance to the consequences of an accident at Unit II and, hence, to the feasibility of and plans for emergency measures in the event of such an accident.

Interrogatory No. 8

The Commonwealth asks the Board to overrule the Staff's objection this interrogatory. It is somewhat difficult to respond to the Staff's objection, since there is no explanation of the manner in which the interrogatory does or may exceed information required by the Commission's emergency planning

requirements for a construction permit. The Commonwealth can only state that it is, again, at a loss to understand how this could be true.

As the Staff itself states, in its "voluntary" answer to Interrogatory No. 11, the principal issue at the construction permit stage is the feasibility of emergency measures. The relevant areas for the determination of feasibility are the plume exposure pathway and ingestion pathway EP2s. As we stated above, the Commission's emergency planning regulations require that the size and shape of the EP2s for any given site be determined on the basis of site-specific factors. While the Applicant and Staff have apparently agreed on the appropriate size and shape of the Pilgrim II EP2s, that is certainly one aspect of the current emergency plans which the Commonwealth will be contesting in this proceeding. Since the Commonwealth intends to argue that the plume exposure EP2 as drawn by BE Co. for Pilgrim II is too small, questions relating to the feasibility of evacuation outside that zone as drawn by BE Co. are reasonably calculated to discover the Staff's position as to issues which will be in controversy at the hearing.

The Commonwealth also asks that the Staff be required to answer that portion of Interrogatory No. 8 to which it did not object but for which it nonetheless failed to provide an answer--namely, that portion relating to assumptions made as to an acceptable level of risk to the evacuating population. If

the Staff wishes to be understood as saying that, in its opinion, evacuation can be accomplished with no risk to the evacuating population, then it should so state. If the Staff is accepting some level of risk, it should describe that level. If the Staff is accepting some level of risk but cannot quantify that level, it should so state. This question is directly relevant to the standards by which the Staff has judged the feasibility of evacuation at Pilgrim II.

Interrogatory No. 10

The Commonwealth asks that the Staff be directed to answer those portions of this interrogatory to which it has not objected but which it has nonetheless failed to answer--namely, those portions calling for identification of the potential voluntary evacuees and their numbers. These answers are necessary to an understanding of the Staff's position regarding the phenomenon of spontaneous evacuation as it relates to the Pilgrim site--a phenomenon which figures into both the feasibility of emergency measures and the adequacy of current plans therefor. If the Staff has no position on these matters, it should so state.

Interrogatory No. 11.

The Commonwealth asks the Board to overrule the Staff's objections to this interrogatory. It is designed to discover the Staff's position as to the manner in which spontaneous evacuation will be controlled at Pilgrim II so as not to

interfere with other evacuating traffic and, therefore, is not reasonably obtainable from another source.* The question is directed to understanding the Staff's position as to the significance of the phenomenon of spontaneous evacuation for the Pilgrim site. The comparison to other sites is necessary to understand fully the nature and ramifications of the Staff's approach to this issue in this case. The Commonwealth assumes that the Board is as anxious as it to know whether there is any other site in the country where there are plans to preclude spontaneous evacuation.

The Commonwealth also asks that the Staff be directed to answer those portions of Interrogatory No. 11 to which it did not object and for which it has nonetheless failed to provide answers--namely, that portion of subsection (b) relating to the CLEAR model and that portion of subsection (c) relating to the period of time during which spontaneous evacuation off the Cape will be precluded.

Interrogatory No. 12

The Commonwealth asks the Board to direct the Staff to answer that portion of this interrogatory to which it did not object and which it has nonetheless failed to answer--namely,

* Subsection (d) should be read as requesting, again, the Staff's position or understanding as to whether this particular means for traffic control would be used and, if so, when. That this is the intent of the subsection is clear from the context of the entire question.

whether BE Co. satisfies the quoted requirement of 10 C.F.R. Part 50, App. E, if one assumes evacuation of some or all of the Cape population and/or of other persons outside the plume exposure pathway EP2 drawn by BE Co. As the Staff apparently recognizes, this question is not objectionable as it is designed to help determine the significance of the Staff's approach to the phenomenon of spontaneous evacuation in this case. Again, the Commonwealth assumes the Board is equally anxious to learn whether the Staff has endorsed the concept of precluding evacuation off the Cape because evacuation at Pilgrim is not feasible if such occurs. Similarly, it is certainly relevant to know whether the Staff has accepted BE Co.'s proposed plume exposure EP2 for the reason that evacuation of any greater area is not feasible.

Interrogatory No. 13

For the reasons outlined under Interrogatory No. 8 above, the Commonwealth asks the Board to overrule the Staff's objections to this interrogatory, which relates to the feasibility of sheltering, and to order a more responsive answer to subsection (d) than that provided voluntarily by the Staff. If the Staff has no knowledge as to available shelter, it should so state. The Commonwealth can find no ambiguity in its question.

Interrogatory No. 14

The Commonwealth asks that the Board overrule the Staff's objections to this interrogatory (noting that the reference to 10 CFR §50.47(s)(2) should be to 10 CFR §50.54(s)(2)), since any determinations which have been made by the Staff or Commission as to the state of emergency preparedness at Pilgrim I may well be relevant to or lead to admissible evidence on the feasibility of emergency measures at Pilgrim II or the adequacy, even under construction permit standards, of current plans therefor.

Interrogatory No. 16

The Commonwealth asks that the Board overrule the Staff's objections to this interrogatory, which seeks the Staff's position as to what constitutes an acceptable level of risk to the public surrounding the Pilgrim site. If the Staff has no position on this issue at the present time, it can so state. However, it is certainly relevant to know whether the Staff has made such a judgment and, if so, what that judgment is, since the question bears directly on the process and standards by which the Staff has assessed the feasibility of emergency measures at Pilgrim.

Interrogatory No. 18

The Commonwealth asks the Board to overrule the Staff's objections to sections (c) and (d) of this interrogatory. Again, the Commonwealth is asking for the Staff's position on a

subject relevant to this proceeding--namely, whether radioprotective drugs should be administered and, if so, by what means. Since the emergency planning regulations require that an applicant's PSAR address, at a minimum, "[t]he protective measures to be taken within . . . each EPZ" and the "procedures by which these measures are to be carried out," this level of detail is clearly relevant at the construction permit stage. Again, the Commonwealth seeks only identification, not production, of relevant documents known to the Staff and should not be forced to spend endless effort searching for documents in the PDR or from other sources when the Staff can readily narrow the scope of such a search.

Interrogatories 19-23

The Commonwealth asks the Board to overrule the Staff's objection to those portions of these interrogatories relating to the public transportation-dependent population. Again, the Commonwealth asks for the Staff's positions relative to this issue and those cannot be learned from anyone but the Staff. The Commonwealth further asks that the Staff be ordered to answer Interrogatories Nos. 22 and 23 since those questions do not inquire as to "the number of people without automobiles and dependent on public transportation" and are, therefore, not even covered by the Staff's objection.

Interrogatory No. 24

The Commonwealth asks the Board to order a more responsive answer to this interrogatory. The Staff has not objected thereto, but has failed to provide, as requested, the reasons for its belief that separate evacuation times for special facilities are unnecessary, despite that requirement in NUREG-0654 and the Staff's March, 1981 request for the information. The Commonwealth wishes to know what "experience" the Staff had between March, 1981 and July, 1981 which led it to abandon this requirement.

Interrogatory No. 26

The Commonwealth asks the Board to overrule the Staff's objection to this Interrogatory, since it again seeks the Staff's position on a relevant issue--namely, the number of non-resident employees who work within the proposed EP2 on summer weekends. If the Staff has no data on this subject, it should so state.

Interrogatory No. 33 .

The Commonwealth asks that the Staff be directed to answer that portion of this interrogatory to which they did not object and which they have nonetheless failed to answer--namely, the request for the Staff's opinion as to the number of vehicles which will experience the problems described in subsections a, b, and c. in the event of an evacuation. If the Staff feels it has no basis for making such estimates, it should so state.

Interrogatory No. 35

The Commonwealth asks the Board to overrule the Staff's objection to this interrogatory, which again seeks the Staff's position on a highly relevant matter--namely, the adequacy of the Applicant's evacuation time estimates.

Interrogatory No. 36

The Commonwealth asks that the Board overrule the Staff's objection to this interrogatory at least insofar as it seeks identification of Commission and other federal guidance relative to PAGs known to the Staff. The Commonwealth should not be obliged to conduct an exhaustive search of the PDR and the records of other agencies when the Staff can readily limit the scope and burden of such a search.

Interrogatory No. 39

The Commonwealth asks that the Staff be directed to answer that portion of this interrogatory--that relating to Commission findings regarding the Massachusetts Comprehensive Emergency Response Plan and/or local plans--to which it has not objected.

Interrogatory No. 46

The Commonwealth asks the Board to overrule the Staff's objections to this interrogatory. Information concerning modifications to the "CRAC Code" is relevant to this proceeding, as the Commonwealth will be arguing that such an analysis must be performed for the Pilgrim site before a

determination can be made as to the feasibility of evacuation and other emergency measures. The Applicant has advised the Commonwealth that it will counter with arguments regarding the deficiencies of the CRAC Code. Thus, information as to improvements which have been made to that Code is directly relevant to the Commonwealth's case. Upon information and belief, the Commonwealth states that the CRAC Code was originally prepared by or for the NRC Staff. Therefore, the Staff is the appropriate party from which to seek this information regardless of where the Code is currently "maintained."

Attached hereto is an Application of the Commonwealth for a Subpoena directed to the Argonne National Computer Center. In the event that the Board allows the Staff's Motions for a Protective Order with respect to the portion of this interrogatory regarding improvements to the CRAC Code, the Commonwealth asks the Board to grant this request for a subpoena.

Those portions of Interrogatory 46 which relate to the conduct of CRAC Code or comparable analyses for other sites are relevant to the Commonwealth's feasibility contention and its argument that feasibility cannot be assessed in the absence of such an analysis. The Commonwealth is entitled to know whether the Staff and/or Commission have undertaken or ordered consequence analyses in circumstances comparable to those

presented by the proposed construction of Pilgrim II. The Commonwealth can see no valid reason for the Staff's apparent desire to withhold this information from the citizens of Massachusetts.

Interrogatory No. 51

The Commonwealth asks that the Staff be directed to answer that portion of this interrogatory to which it did not object but which it nonetheless failed to answer--namely, the request for identification of the pre-planned evacuation routes used in the Staff's calculations of evacuation time estimates (the CLEAR model) and the populations assigned to each route.

Interrogatory No. 52

The Commonwealth asks that the Staff be directed to answer that portion of this interrogatory to which it did not object but which it nonetheless failed to answer--namely, the request that it "[e]xplain in detail the effect which using HMM's [i.e., BE Co.'s] assumptions with respect to lane capacities would have on the estimates derived by use of the CLEAR model."

Interrogatory No. 54

The Commonwealth asks that the Staff be directed to answer that portion of this interrogatory to which it did not object but which it nonetheless failed to answer--namely, the request for the Staff's opinion as to the "average daily traffic flow on that portion of Route 3 which is included in

the evacuation traffic network." If the Staff has no data upon which to base such an opinion, it should so state.

Interrogatory No. 58

The Commonwealth asks that the Staff be directed to provide a responsive and intelligible answer to this interrogatory. The Staff has not objected to this interrogatory, but has provided an answer which is totally incomprehensible (even assuming the reference to "90 seconds" for preparation time should read "90 minutes") and not responsive to the question asked, except as to the portion of the question regarding staggered notification.

Interrogatory No. 59

The Commonwealth asks that the Staff be directed to provide a responsive answer to this interrogatory. The Staff, in its answer, has simply referred the Commonwealth to SER Supplement No. 5 and NUREG/CR-1745, neither of which in fact answers this question. The Staff has not objected to this interrogatory.

Interrogatory No. 74

The Commonwealth asks that the Staff be directed to answer that portion of this interrogatory to which it did not object but which it nonetheless failed to answer--namely, the request that the Staff describe any means, aside from meetings, by which it has solicited and/or received state or local input regarding Pilgrim II emergency plans and the nature of all input received.


Interrogatory No. 75

The Commonwealth asks that the Staff be directed to answer that portion of this interrogatory to which it did not object but which it nonetheless failed to answer--namely, the request for a description of any instructions or guidelines which guided the Staff's or Battelle's review of PSAR Amendments 40 and 41. If there were no instructions or guidelines other than those contained in the documents identified in response to Interrogatory No. 76, the Staff should so state.

Interrogatory No. 77

The Commonwealth asks that the Staff be directed to answer that portion of this interrogatory to which it did not object but which it nonetheless failed to answer--namely, the request for identification of the roads which were visited and evaluated by the Battelle representatives in the course of their site visit.

Respectfully submitted,

By: 
JO ANN SHOTWELL
Assistant Attorney General
Environmental Protection Division
Public Protection Bureau
Department of the Attorney General
One Ashburton Place, 19th Floor
Boston, Massachusetts 02108
(617) 727-2265

Dated: *July 24, 1981*