Filed: January 25, 1983

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

before the

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, et al.	)	Docket Nos. 50-443 OL 50-444 OL
(Seabrook Station, Units 1 & 2)	)	

APPLICANTS' MOTION TO COMPEL
ANSWERS TO INTERROGATORIES BY
THE STATE OF NEW HAMPSHIRE (ATTORNEY GENERAL)

The Applicants' move pursuant to 10 CFR § 2.740(f) that the Board enter an order compelling the State of New Hampshire (Attorney General) ("NHAG") to answer the interrogatories propounded to it by them on December 7, 1982, in the respects set forth herein.

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Interrogatories VIII-2 through -5,
IX-2 through 6, X-2 through -8,
XII-2 through -15, XIII-2 through -31,
XV-2 through -9, XVII-2 through 5,
XVIII-2 through -4, XIX-2 through -4,
XXII-2, XXIII-2, XXIV-2 and
XXX-2 through -25

The interrogatories propounded by the Applicants to each of the persons admitted as full parties followed a designed pattern. The interrogatories were framed in groups corresponding to each of the admitted contentions. The first interrogatory in each group called upon the party to declare whether or not it intended to litigate (as was defined in the interrogatories[1]) the particular contention; this interrogatory called for a "yes" or a "no" answer. The instructions advised that, in the event of an unqualified "no," the party needn't answer any of the

[1] "'Litigate' with regard to a topic or contention means to offer direct testimony relating to, to cross-examine on, to offer proposed findings or rulings regarding, or to urge the denial (or allowance subject to conditions) of the pending applicationon the basis of the topic or contention."

remaining specific questions in that group.

The last interrogatory in each group called for certain information regarding expert witnesses which the party might call to the stand; the intervening interrogatories propounded specific questions regarding the particular contention.

In each of the cases identified above, NHAG answered the first question with the effective equivalent of a "yes" answer:

> "New Hampshire does not intend to offer direct testimony relating to this contention. However, the State reserves the right to cross-examine or offer proposed findings and rulings on the contention, based on the testimony presented."

In each case, NHAG's answer to all of the specific interrogatories on the contention that it proposes to litigate was the totally meaningless response, "See answer to [ ]-1."[2]

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[2]The Applicants' are satisfied that NHAG needn't answer the last question in each group (relating to expert witnesses), since NHAG has responded that it does not intend to call any expert witnesses to the stand with respect to the contentions involved.

In each case, what NHAG is attempting to do is to preserve its freedom to litigate particular contentions while wholly avoiding any responsibility for disclosing its positions -- and the theories against which the Applicants' will have to litigate -- on those contentions. NHAG cannot have it both ways. This Board should order NHAG either to answer the questions at issue or surrender the right to litigate the contentions with which they are concerned.[3]

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[3]NHAG may argue that a party who has committed not to present direct testimony, but who has expressly preserved the freedom to cross-examine and to submit proposed findings of fact, is immune from discovery. Such an argument should be rejected out of hand. First, there is nothing in the Commission's Rules of Practice that so limits the responsibilities and duties of persons who have been allowed to intervene as full parties. To the contrary, NHAG's duty was to answer each question propounded to it unless the question was irrelevant (none of the Applicants' interrogatories have been asserted by NHAG to be irrelevant, and the time for doing so has not elapsed) or unless the interrogatory by its terms excuses the recipient from responding (which these interrogatories did not do in the case of a party intending to cross-examine or submit proposed findings of fact).

Second, NHAG's implicit assertion that the privileges of cross-examining witnesses and submitting proposed findings of fact are somehow of a lower order than the privilege of offering direct testimony is contrary to the Rules of Practice and decisions interpreting them. It is quite often the case that an intervenor will offer no direct testimony on one, more,

Interrogatory II-8

This interrogatory called for NHAG to specify the changes that it contends should be made in the Seabrook control room design:

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or all of the admitted contentions, explicitly hoping to make out his cases entirely from cross-examination. The Appeal Board has held that this is an acceptable approach (Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 356, reh. denied, ALAB-467, 7 NRC 459 (1978)); there is not a whit in either the Rules of Practice or the decisions of the Appeal Board to the effect that an intervenor who follows this approach may ignore interrogatories. If anything, the privilege of submitting proposed findings of fact is of a higher order than any other, for it is only by submitting proposed findings of fact that an intervenor (even if he has offered direct testimony or cross-examination) acquires any interest in the content of the Initial Decision on the point of the contention in question or any standing to complain on appeal if that part of the Initial Decision is not to his liking. E.g., Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 70 n.41 (1977), aff'd, CLI-78-1, 7 NRC 1, aff'd, 582 F.2d 87 (1st Cir. 1978).

In short, one litigates as much by cross-examination and proposed findings as by direct testimony, and the Applicants' response will be no less directed to litigation by cross examination and litigation by proposed findings as it will be to litigation by direct testimony. If there is any purpose at all in NRC practice to discovery, that purpose applies to what a party proposes to accomplish by cross examination or proposed findings equally as it

"Please specify each change in the Seabrook control room design that, if made, would satisfy NHAG that the Seabrook control room design complies with all applicable regulatory requirements."

The Applicants assumed that New Hampshire had something concrete in mind, given that New Hampshire had asserted in a formal pleading submitted to this Board that "The control room design for the Seabrook Plant does not provide adequate controls and instruments to monitor variables as appropriate to comply with General Design Criteria 13."[4] Nor is it too much to expect NHAG to be specific about its concerns, given that NHAG has had

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applies to what the party proposes to accomplish by direct testimony. The Applicants' therefore appropriately and properly defined "litigate" in the interrogatories; since NHAG intends to litigate, it must answer the interrogatories.

[4] "Amendment and Supplement to the Petition for Leave to Intervene and Request for Hearing fo the State of New Hampshire and Gregory H. Smith, Attorney General of the State of New Hampshire" filed by NHAG on 4/5/82, at 26.

See 10 CFR § 2.708(c): "The signature of [an attorney for a party] is a representation that the document has been subscribed in the capacity specified with full authority, that he has read it and knows the contents, that to the best of his knowledge, information and belief the statements made in it are true, and that it is not interposed for delay. If a document . . . is signed with intent to defeat the purpose of this section, it may be stricken."

the FSAR since November, 1981 (some fourteen months ago), and has had the control room design question under technical review since August, 1982 (some five months ago, albeit after the pleading quoted above). See NHAG Answer to Interrogatory II-11. Since nothing in the NHAG pleadings had disclosed the defects of which NHAG complained, however, the interrogatory made what we submit is the plainly reasonable request that it do so now.

It appears, however, that NHAG has yet to discover any defect in the Seabrook control room design. Such is the only fair reading of its answer to this interrogatory.[5] The answer is not only wholly non-responsive, but stripped of its fancy words and philosophy, it is also contentless. The answer should

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[5] "New Hampshire believes that changes to control room design and procedures should result from a thorough Control Room Design Review, including human factors and task analysis. New Hampshire has not performed such an analysis since this is the responsibility of the Applicant[s] under [NUREG-]0737, I.C.1, I.D.1, and I.D.2. Once a Control Room Design Review is produced and New Hampshire has an opportunity to review it, New Hampshire will comment on the proposed upgrading of control room design and procedures."

be stricken and NHAG ordered to answer the question responsively.

Interrogatory II-9

This answer is wholly non-responsive and should be stricken.[6]

Interrogatories VII-2 and -3

NHAG's answers to these two interrogatories are also wholly non-responsive.

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[6]The interrogatory was:

> "For each change specified in response to the foregoing interrogatory, please: (i) identify each and every United States nuclear power plant that incorporates the change specified, and (ii) identify each and every United States nuclear power plant that does not incorporate the change specified."

NHAG's answer was:

> "As far as is known to New Hampshire, every nuclear power plant in the United States is required to perform a Control Room Design Review and/or Assessment."

That answer is evasive. Bearing in mind that the contention admitted was NHAG's assertion that "The control room design for the Seabrook Plant does not provide adequate control and instruments . . .," the legitimate purpose of Interrogatories VII-8 and -9 was to pin down the changes NHAG was espousing and any offsetting considerations. All that NHAG has done is evade disclosing its hand on this point.

The contention at issue is premised on the assertion that a given set of equipment is "required for residual heat removal." The purpose of Interrogatory VII-2 was to tie down what equipment it is that NHAG contends is "required for residual heat removal." The Applicants do not have to be told what equipment they think is so required; they already know that. The question, rather, was what equipment does NHAG contend is required. NHAG's answer (a reference to RAI's submitted by the Applicants to the Staff) leaves that question wholly unanswered.

The next question sought (we submit, logically enough) to determine which of the items on NHAG's list of required eqipment it contends is not environmentally qualified. The purpose of the two questions was to give some focus to this contention, and, in particular, to eliminate items of equipment as to which there was either no contention that it is required for the stated purpose or no contention that it was insufficiently qualified. In response, NHAG has told us only on what it "will focus its testimony." That, however, wasn't the question that was asked; moreover, NHAG's blatant attempt to preserve the ability to litigate something later without disclosing it now is not consonant either

with the letter or spirit of the Rules of Practice or with the responsibilities of parties to NRC litigation. The Board should strike the answer to Interrogatory No. VII-2 and order NHAG to answer the question; and the Board should order either that NHAG specify all the equipment it contends is not sufficiently qualified or be limited to litigating the qualification of the steam generators.

Interrogatories XI-2 through -6,
XIV-2 through -8, XVI -2 through -8
XX-2 through -4, XXI-2 through 7
XXXII-2 through -13 and
XXXIII-2 through -21

In each of these cases, NHAG answered the first interrogatory with an unqualified "Yes," indicating that it intended to litigate the contentions at issue. In lieu of answering the specific interrogatories, however, NHAG stated as follows:

> "New Hampshire has not yet finalized its position on this contention. Therefore, it is unable to answer these Interrogatories at this time. These answers will be supplemented as required by NRC regulations."

While the Applicants fully understand that an answer of "I don't know" is, if truthfully stated, a complete answer to a question, NHAG hasn't responded with an "I don't know." What it really says is, "I don't want to

tell you yet," and this response tendered by NHAG to all of these interrogatories presents two problems.

First, it amounts to an evasion of this Board's orders regarding the time for discovery. NHAG did not like the deadlines that this Board ordered, and it sought, unsuccessfully, to have the time within which its answers were due enlarged by several months. Despite the failure of this effort, however, NHAG has now effectively told the Board and the Applicants that it will answer these interrogatories at its own pace anyway. If this approach is allowed to stand, then there is nothing that prevents NHAG from answering these interrogatories no sooner than the date on which it files is prefiled direct testimony, and both the Rules of Practice regarding discovery and the Board's specific orders on the subject will have been rendered a nullity.

Second, it must be remembered that these interrogatories referred specifically to matters that NHAG intends to make a matter for litigation. One must presume that NHAG has something in mind that it wishes to litigate and, if so, then it must answer interrogatories. If, on the other hand, NHAG is still

unable to answer interrogatories about a contention, then the contention ought to be dismissed.[7]

The Board should strike these answers and order NHAG either to answer the questions or state that it does not know the answers.

Respectfully submitted,

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Dated: January 25, 1983

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[7]It bears repeating that the Licensing Board adjudicatory process exists to serve controversies in search of a resolution; it does not exist to serve putative litigants in search of a controversy.

CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on January 25, 1983, I made service of the within "Applicants' Motion to Compel Answers to Interrogatories by the State of New Hampshire (Attorney General)" by mailing copies thereof, postage prepaid, to:

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