

NRC PUBLIC DOCUMENT ROOM  
UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



SERVED NOV 18 1978

In the Matter of )  
)  
NORTHERN STATES POWER COMPANY )  
(MINNESOTA), NORTHERN STATES )  
POWER COMPANY (WISCONSIN), ET AL. )  
)  
(Tyrone Energy Park, Unit 1) )

Docket No. STN 50-484 G  
(Remanded Issues)  
11/17/78

MEMORANDUM AND ORDER RULING ON MOTIONS  
TO COMPEL DISCOVERY

I. NORTHERN THUNDER'S MOTION

On August 25, 1978 Northern Thunder served discovery requests upon the Permittees and interrogatories upon the Nuclear Regulatory Commission Staff. On September 18, 1978 Permittees made a response to Northern Thunder's request, in some instances providing information and in other instances objecting to the discovery requests. Also on September 18, 1978 the NRC Staff responded to Northern Thunder interrogatories in two filings answering some interrogatories and objecting to others.

On September 28, 1978 Northern Thunder filed a single motion to compel discovery with respect to the Permittees and with respect to the Staff. On October 13 and October 15, 1978, respectively, the Permittees and the Staff filed responses to the motion to compel.

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A. Discovery of Permittees

In paragraph No. 1 of its motion to compel, Northern Thunder relies solely upon the following provision of 10 CFR §2.740(f):

Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section.

Northern Thunder's position is that Permittees, not having applied for a protective order under paragraph (c), may not now assert a valid objection to discovery requests. Therefore, according to Northern Thunder, Permittees must respond to all discovery requests no matter how objectionable they might have been. Permittees, however, do not want a protective order.

The cited portion of §2.740(f) does lend itself to some confusion but does not lead to the illogical result urged by the Intervenor. As Permittees point out, the Commission's rule parallels a similar provision of the Federal Rules of Civil Procedure where, in Rule 37(d), the phrase "failure to act" appears instead of "failure to answer or respond." The NRC rule also means "failure to act" in accordance with the rest of the discovery rules

which anticipate that a party must act upon discovery requests either by answering them with the requested information, by objecting to them, or by seeking a protective order under §2.740(c). Nothing in the NRC discovery rules would require a party to apply for an unnecessary protective order as a condition precedent to making an objection to, say, a totally irrelevant interrogatory.

Northern Thunder's motion where it is based upon the "protective order" argument is denied. This is the only basis advanced by Northern Thunder to compel discovery with respect to Interrogatories 6, 20, 21, 27, 34, and 38. Fourteen other interrogatories covered by the "protective order" argument are also the subject of other portions of Northern Thunder's motion to compel.

In paragraph 2 of its motion, Northern Thunder seeks answers to Interrogatories 10, 13, 14, 16, 17, 18, 22, 23, 24, 32, and 33 because they relate to the question of the ability of the surviving Permittees, Lake Superior District Power Company, Cooperative Power Association, and Dairyland Power Cooperative (together with Northern States of Wisconsin) to raise the necessary funds for Tyrone in light of the withdrawal of Northern States of Minnesota. Northern Thunder correctly points out that financial data relating to

LSDP, CPA, and DPC would be discoverable particularly under paragraph 2 of the Board's contention.

The Board would have been inclined to overrule Permittee's objections where they were based upon relevancy except that Permittees have now removed that portion of the Board's contention from controversy. On page 9 of the answer to the motion to compel, Permittees state:

To assist in so clarifying the issue in controversy here, Permittees voluntarily admit and stipulate for the purposes of this proceeding that they will not rely in any way on surviving permittees Cooperative Power Association, Dairyland Power Cooperative or Lake Superior District Power Company, to raise the necessary funds from other sources to replace those lost by the withdrawal of Northern States Power Company (Minnesota). The Board and the parties may rely upon this representation as the admission of the truth of a specified relevant matter of fact, just as if the admission had been requested pursuant to 10 C.F.R. § 2.742.

Based upon this admission the Board will find that Board contention paragraphs 2 and 3 to the extent they relate to CPA, DPC and LSDP are resolved against Permittees and in favor of Northern Thunder. No further evidence will be required on this issue. Accordingly the relief requested in paragraph 2 of Northern Thunder's motion to compel is denied as moot.

In paragraph No. 3 Northern Thunder seeks an answer to Interrogatory No. 25:

25. Produce for inspection and copying all written title opinions which have been prepared from January 1, 1973 through the current date, by any person on behalf of any Permittee, or actual or potential creditor of any Permittee, with respect to the status of the legal title to any real estate heretofore acquired or purportedly acquired, or to be acquired in the future, for use in connection with the construction of TEP.

The motion to compel is denied on several grounds. First the information sought is only remotely relevant to the proceeding. Second, the matter has already been decided in this proceeding after a hearing in which Northern Thunder was a full and active participant. 5 NRC 1238-39. We note also that Permittees have brought to the attention of Northern Thunder, Exhibit 14, a title opinion concerning the ownership of those portions of the Tyrone site in question. Motion to compel an answer to Interrogatory 25 is denied.

In paragraph No. 4 Northern Thunder seeks answers to Interrogatories 28 and 29 which relate to the applicability of the Public Utility Holding Company Act of 1935. In the Memorandum and Order of July 28, 1978, the Board rejected Northern Thunder's contention I.E. relating to this

subject matter. We stated then that we would not bring into controversy in this proceeding speculations concerning the outcome of a proceeding before the Securities and Exchange Commission. Northern Thunder apparently seeks to produce evidence on this point but has not advanced any reason why the Board should depart from its original ruling. Motion to compel answers to Interrogatories 28 and 29 are denied.

B. Discovery of the Staff

In paragraph No. 1 Northern Thunder makes the same "protective order" argument concerning its Interrogatories 2, 3, 4, and 5 to the Staff. The motion is denied for the same reason. In paragraph No. 2 Northern Thunder again raises the Public Utility Holding Company Act of 1935 with respect to its Interrogatories 2, 3, 4, and 5 to the Staff. The motion is denied for the same reason.

Finally, Northern Thunder summarizes its entire motion to compel by requesting responses to "all interrogatories propounded by Northern Thunder, Inc." The Board has considered only those interrogatories discussed by Northern Thunder in its motion and denies the blanket motion.

## II. PERMITTEES' MOTION

On August 25, Permittees served interrogatories (Set No. 3) upon Northern Thunder. Northern Thunder filed its Answer on September 20. Permittees filed its motion to compel discovery of Northern Thunder on October 3, asserting their responses to certain interrogatories were evasive and incomplete. Northern Thunder has not responded to Permittees' motion to compel.

Permittee's Interrogatory 1.c. asks Northern Thunder to state:

- c. What resources qualify an electric utility applicant to design and construct a nuclear power plant other than the technical competence of the company's employees, consultants and contractors?

Northern Thunder responds that the question cannot be answered because the resources referred to "are not given unto mortals or the institutions of mortals." Permittee's do not regard the response as serious and move to compel a complete response. The Board believes the response is exact and complete. It sets forth Northern Thunder's view. The response means that there are no resources which qualify an electric utility to design and construct a nuclear power plant. Permittees may proceed on that basis.

Permittees' Interrogatories 2a and b with Northern

Thunder's responses are as follows:

2. The Atomic Safety and Licensing Board, on the basis of the SNUPPS PSAR, the PSAR site addendum, and the Staff's Safety Evaluation Report, found that NSP-M was technically qualified to design and construct Tyrone Energy Park. See 5 N.R.C. 1197, 1210-1211 (1977).

[COMMENT:]

I do not have copies of the SNUPPS PSAR or the PSAR site addendum. I am advised there are copies of such documents at the Eau Claire Public Library but I haven't had time to get to Eau Claire. Therefore, my answers are based on the SER.

- a. Identify specifically each technical resource, including any individual, consultant or contractor organization, which that evidentiary record shows was available to NSP-M and which is not now available to NSP-W.

ANSWER:

I won't know the answer to this question until I have completed my discovery of the Permittees.

- b. For each technical resource identified in your answer to Interrogatory 2.a, identify the sources, documents, studies, analyses, correspondence and conversations upon which you have relied in formulating your answer.

ANSWER:

See response to Interrogatory 2a.

Permittees' Interrogatories 2a and b go to the very essence of Northern Thunder's contentions on technical qualifications. The Interrogatories are appropriate. The answers are desirable for Permittees to prepare properly to meet Northern Thunder's case on the contention, if Northern Thunder has a case. Despite the importance and relevance of the question



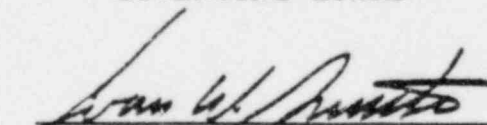
to Northern Thunder's contention, the answer provided is simply that Northern Thunder does not know the answers.

The question presented here is not so much one of discovery. A truthful "I don't know" answer is appropriate where the consideration is discovery alone. But the question is whether Northern Thunder seriously supports its technical qualifications contention or whether the Board erred in admitting the contention without a basis.

Northern Thunder correctly responded to the interrogatory in a literal sense. It was under no obligation to supplement its response when, if ever, it learned the answers to the interrogatories. §2.740(e). But now the Board wants answers to these interrogatories and wants to know if Northern Thunder intends to litigate its contention. Northern Thunder is directed to answer Permittee's Interrogatories 2a and b within fourteen (14) days of the service of this order. If Northern Thunder still does not know the answers to the interrogatories, the Board will consider whether there is a basis for its contention and whether Northern Thunder can make a contribution to the record on this issue.

BY ORDER OF THE BOARD.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
Ivan W. Smith, Chairman

Dated at Bethesda, Maryland  
this 17th day of November, 1978.