

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



Before the Atomic Safety and Licensing Board

In the Matter of)
)
WISCONSIN ELECTRIC POWER COMPANY) Docket Nos. 50-266
) 50-301
(Point Beach Nuclear Plant,) (OL Amendment)
Units 1 and 2))

LICENSEE'S MOTION FOR DISMISSAL OF
INTERVENOR WISCONSIN'S ENVIRONMENTAL DECADE, INC.

I. INTRODUCTION

By letter dated July 2, 1981, Wisconsin Electric Power Company ("Licensee") filed with the Director of the Office of Nuclear Reactor Regulation Technical Specification Change Request No. 69. In that request, Licensee seeks amendment of Facility Operating Licenses DPR-24 and DPR-27 (for Point Beach Units 1 and 2, respectively) to authorize operation with steam generator tubes which leak or have degradation exceeding 40% of the nominal tubewall thickness, but which have been repaired by sleeving.

A petition requesting a hearing was filed by Wisconsin's Environmental Decade, Inc. ("Decade") on July 20, 1981, in response to Licensee's July 2 letter. That petition set forth

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various contentions which Decade asserted for litigation in this proceeding. By its "Memorandum and Order Concerning The Admission of A Party and Its Contentions" (October 13, 1981), the Board admitted Decade Contentions 3, 4, 5 and 7, to be tried within the scope of the simplified issue stated in that order (as modified at Tr. 165).¹ However, in the same order, at page 5, the Board emphasized that it was applying a very low standard in admitting Decade's contentions, and that it might well have reached a contrary conclusion had it considered Licensee's post-July 2 filings in determining whether Decade had provided bases for its contentions. See also, "Memorandum and Order Authorizing Issuance of A License Amendment Permitting Return To Power With Up To Six Degraded Tubes Sleeved Rather Than Plugged" (November 5, 1981) ("November 5 Order"), at 7. The Board has repeatedly reiterated to Decade the low standard applied in initially admitting the contentions. See, e.g., Tr. 222, 226, 266, 268, 270, 370, 371-72.

The Board convened a hearing in Milwaukee on October 29 and 30, 1981, on Licensee's request for authorization to return Unit 1 to power, after a sleeving demonstration program, with up to six degraded tubes sleeved rather than plugged. After

1 The Board admitted Contention 4, 5 and 7 over the objections of the Staff and Licensee, who maintained that Decade had failed to adequately specify, in any of its filings, the bases for those contentions. Licensee also opposed the admission of Contention 3, on the same ground; the Staff did not.

two full days of extensive legal argument and the testimony of numerous witnesses, the Board concluded that Decade had failed to provide "any reason or authority" for the concerns expressed in its contentions, and that those contentions were "without basis." See Tr. 693-94 (Contention 3); Tr. 695 (Contention 4); Tr. 696 (Contention 5); Tr. 698-99 (Contention 7). See also, November 5 Order, at 15-16, 17, 18, 21. In its ruling from the bench, granting Licensee's request for authorization to return to power with six tubes sleeved rather than plugged, the Board noted the wealth of opportunities available to Decade to develop bases for its contentions, Tr. 686-87, and observed:

Our initial decision admitting contentions pointed out explicitly the standards that we were then applying, and we applied at that time quite lenient standards in which we expressly ignored materials that had been filed by Applicant. This decision that there is no basis for the contentions is based on a far more complete record.

Tr. 699. See also, November 5 Order, at 7.

"Licensee's First Set of Interrogatories and Request For Production of Documents To Intervenor Decade Relative To Full Scale Sleeving Program" were filed on November 10, 1981. Through those interrogatories and document requests, Licensee sought specific information related to the issues raised by Decade in its Contentions 3, 4, 5 and 7, as well as to any other issues timely raised by Decade, as those issues relate to Licensee's July 2 amendment request. Most of the interrogatories were carefully framed to elicit the bases for the specific assertions of Decade's contentions.²

² "Licensee's Second Set of Interrogatories and Request For Production of Documents To Intervenor Decade Relative To Full

"Decade's Answer To Licensee's First Set of Interrogatories Relative To Full Scale Sleeving" was filed on November 25, 1981. Those responses are so devoid of substance as to be tantamount to a willful and wholesale failure to respond to Licensee's interrogatories. The responses to those of Licensee's interrogatories specifically designed to elicit the bases for Decade's contentions are particularly egregious. In each instance, Decade refers to the "Qualification" set forth at the beginning of its responses, which states:

This answer does not repeat matters which are already included or referenced in the official record in the proceedings in * * * [the instant docket] or in the related proceedings before the Public Service Commission of Wisconsin in its dockets 6630-CE-20, 6630-UI-2 and 6630-ER-10, to which the Licensee has been a full party, nor does the answer include matters which are privileged. It is also noted that additional bases for the Contentions may arise in response to subsequent discovery, independent investigation and cross-examination.

Thus, at this late date -- some five months after the filing of Licensee's amendment request, nearly two months after the initial admission of its contentions, and more than five weeks after the completion of a two-day hearing (at which the Board afforded Decade the opportunity to cross-examine numerous witnesses) -- Decade has still refused to specify adequate

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Scale Sleeving Program" were filed on Decade, via Federal Express, on November 20, 1981. Those interrogatories were designed to identify and elicit the bases for any and all issues which Decade proposes for litigation, beyond the issues raised in its Contentions 3, 4, 5 and 7.

bases for its contentions, as required by Commission regulations. Nor has Decade availed itself of the discovery process to attempt to support the contentions which the Board found lacking.

Due to discussions in numerous conference calls and filings by Licensee, Decade is well aware of Licensee's interest in the expeditious approval of its amendment request, to facilitate full scale sleeving at Unit 2 in the spring 1982 outage, if necessary. Under these circumstances, Decade may well perceive that it can achieve many of its goals in this proceeding, and effectively frustrate Licensee's attempts to dispose of meritless claims, by refusing to specify the bases for its contentions.

Viewed in its "full procedural context," Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-24 (1981), slip op. at 11, Decade's failure to specify the bases for its contentions -- and particularly its failure to do so in response to Licensee's November 10 interrogatories -- constitutes a flagrant abuse of the hearing process and evidences a deliberate refusal to meet even the most fundamental obligations imposed on participants in an NRC licensing proceeding. Accordingly, and in light of the Commission's recent "Statement of Policy on Conduct of Licensing Proceedings," CLI-81-8, 13 N.R.C. 452 (1981), Licensee moves to dismiss Decade as a party to this proceeding.³

³ In a phone conversation with Peter Anderson, one of Decade's representatives, counsel for Licensee emphasized that

II. DISCUSSION

A. Decade's Failure to Respond to Licensee's Interrogatories

Licensee's November 10, 1981 interrogatories were addressed to, and designed to elicit the factual bases for, Decade Contentions 3, 4, 5 and 7 (as well as any other issues timely raised by Decade). Such interrogatories are clearly proper under the applicable Commission rules governing discovery.

[I]t is clear that interrogatories seeking specification of the facts upon which a claim or contention is based are wholly proper, and that a party may be required to answer questions which attempt to ascertain the basis for his claim or, for example, what deficiencies or defects were claimed to exist with respect to a particular situation or cause.

The Commission's Rules on intervention presume that the parties had specific factual bases for their contentions. . . . Where the discovery request seeks to determine the factual basis for the contention, the intervenor is obliged to provide a complete, unevasive answer to the best of his or her ability.

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Licensee considers Decade's reference to the "Qualification" to its responses as its answer to many of the interrogatories to be grossly insufficient, and indicated Licensee's intent to file a strong motion for relief. In response to the explicit question of counsel for Licensee, Mr. Anderson stated that he had reviewed the answers with Decade's counsel, Ms. Falk. Mr. Anderson further asserted that Decade would stand on the adequacy of its answers.

Power Authority of the State of New York (Greene County Nuclear Power Plant), "Board Order Concerning Discovery" (December 15, 1978), slip op. at 2-3 [emphasis supplied].⁴

As noted above, Decade's November 25, 1981 responses to Licensee's interrogatories are -- taken as a whole -- so devoid of substance as to effectively constitute a complete failure to respond. In the following discussion, Licensee first presents its arguments of general applicability to many of Decade's responses to Licensee's interrogatories. Licensee then sets forth each of the challenged interrogatory responses, with the associated interrogatory and Licensee's arguments specific to the individual interrogatory.

As its response to many of Licensee's interrogatories, Decade has simply referred to the "Qualification" set out at the beginning of its responses, quoted in the Introduction above. See Decade responses numbered 3-1, 3-3, 3-5, 3-6, 3-8, 3-11, 3-12, 3-13(a), 3-13(b), 3-15, 4-1, 4-6, 4-8(a), 4-8(b), 4-10, 5-1, 5-3, 5-4, 5-5, 5-6(a), 5-6(b), 5-8, 7-1, 7-6(a), 7-6(b), and 7-8. Such responses are patently insufficient.

The answer to an interrogatory must be responsive. It should be complete in itself and should not refer generally to the pleadings, or to depositions or other documents. See Budget Rent-A-Car of Missouri v. Hertz Corp., 55 F.R.D. 354,

⁴ A copy of this order is attached for the convenience of the Board and the parties.

357 (W.D. Mo. 1972); Kelleher v. Omark Industries, Inc., 20 F.R. Serv.2d 199, 202 (D. Mass. 1975); Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co., 61 F.R.D. 115, 120 (N.D. Ga. 1972). See also, United States v. Ciba Corp., 16 F.R. Serv.2d 95, 96 (D. N.J. 1971)(answers making reference to a mass of documents previously supplied are not sufficient); Hyster Co. v. Industrial Power Equip. Co., Inc., 9 F.R.D. 685 (W.D. Mo. 1950)(answers referring to depositions from which it is inferred proper answers might be learned are insufficient); J.J. Delaney Carpet Co. v. Forrest Mills, Inc., 34 F.R.D. 152, 153 (S.D.N.Y. 1963)(answer incorporating by reference portions of a deposition, much of it discursive, or the allegations of a pleading, is not responsive); Pilling v. General Motors Corp., 45 F.R.D. 366, 369 (D. Utah 1968)(material outside answers ordinarily not to be incorporated by reference); Smith v. Danvir Corp., 188 A.2d 118, 120-21 (Sup. Ct. Del. 1963) (party cannot answer by making reference to deposition or other documents that may appear otherwise in the case).

Decade's broad references to the "Qualification" to its responses are particularly insufficient answers to those interrogatories which specifically request the bases for Decade's assertions. Intervenors clearly are not permitted to incorporate massive documents by reference as the bases for their contentions. Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1 & 2), LBP-76-10, 3 N.R.C. 209, 216 (1976). Thus, Decade's attempt to avoid specifying the factual

bases for its contentions by broad references to the entirety of the record in this proceeding and the records in three proceedings before the Public Service Commission of Wisconsin is impermissible. Moreover, even if Licensee were willing to search the entirety of the four dockets to which Decade refers, Licensee cannot know, until informed by Decade, what Decade considers to be the factual bases for its claims.

Decade's generalized assertion of privilege in its "Qualification" is also impermissible. While it is true that privileged information is not discoverable, 10 C.F.R. § 2.740(b)(1), a party asserting the objection of privilege has the burden of establishing the existence of a privilege to protect specific information responsive to a posed interrogatory. Through specification of the nature and source of the privilege, the party asserting the privilege must -- by its objection -- give the interrogator sufficient information to enable the interrogator to independently evaluate the claim of privilege in determining whether to challenge it. See generally, Jackson v. Kroblin Refrigerated Xpress, Inc., 49 F.R.D. 134, 138 (N.D. W.Va. 1970). See also, Miller v. Doctor's General Hospital, 76 F.R.D. 136, 139 (W.D. Okla. 1977) (hospital's bald assertion that information sought was privileged was insufficient to show existence of privilege). Decade's filing neither identifies the nature and source of the asserted privilege, nor offers any information whatsoever about the communications asserted to be privileged. In fact,

Decade's inclusion of several distinct arguments in its "Qualification" makes it impossible to determine specifically those interrogatories as to which Decade is asserting a privilege. Accordingly, by its failure to timely and properly assert a claim of privilege, Decade has waived any privilege it may have had.

Finally, Decade's observation that "additional bases for the Contentions may arise in response to subsequent discovery, independent investigation and cross-examination" is to no avail. While it is certainly possible that intervenors may, through discovery, learn of additional bases for their contentions, intervenors are not entitled to discovery to frame their contentions. As noted in the Introduction above, the Commission's regulations presume that an intervenor has a basis for each contention, which basis he is obligated to provide to the Board and to the other parties as a precondition to his admission as a party and to the admission of his contentions. In the instant case, the Board applied a very low standard in initially admitting Decade's contentions; subsequently, the Board found Decade's original bases to be unsubstantiated. Decade was therefore obligated, at a minimum, to specify expeditiously any further bases it may have for its contentions. Its failure to do so -- particularly in response to Licensee's November 10 interrogatories -- constitutes a gross dereliction of its responsibilities as a party to this proceeding, and perverts the hearing process. As discussed in

greater detail infra, the case against Decade is particularly compelling where, as here, although not entitled to discovery to provide bases for its contentions, Decade has had the discovery process available but has not availed itself of it.

Decade's responses to Interrogatories 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-8, 3-10, 3-11, 3-12, 3-13, 3-15, 4-1, 4-2, 4-3, 4-6, 4-7, 4-8, 4-10, 5-1, 5-3, 5-4, 5-5, 5-6, 5-8, 5-9, 7-1, 7-3, 7-4, 7-5, 7-6 and 7-8 are thus insufficient, for these reasons and for the reasons stated below.

Contention 3

Decade Contention 3 alleges:

During sleeving, the braze or weld between the upper rim of the sleeve and the inner surface of the original tube will weaken the integrity of the tube even in laboratory conditions, and, in the field, may fatally compromise its integrity. This may lead to a circumferential rupture of the tube under various operating and/or accident conditions.

Interrogatory 3-1

3-1. State in detail the factual bases for the allegation that the proprietary heating process will weaken the integrity of the original tube in laboratory conditions.

Decade's Response

3-1. See Qualification.

Decade's response to Interrogatory 3-1, which simply refers to the broad "Qualification" to its responses generally, is a refusal to state the factual bases for its allegation, and

is insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 3-2

3-2. Identify with specificity the precise area in which, and quantify the extent to which, you contend the original tube will be weakened in the laboratory as a result of the proprietary heating process.

Decade's Response

3-2. The area in which we contend that the original tube may be weakened in the laboratory is at the point at which the original tube is bonded to the sleeve.

Though Decade's response to Interrogatory 3-2 does identify the area of the tube which Decade contends may be weakened in the laboratory as a result of the proprietary heating process, Decade completely failed to either answer or object to that portion of Interrogatory 3-2 which asks Decade to quantify the extent to which the tube may be weakened.

Interrogatory 3-3

3-3. State in detail the factual bases for the allegation that the proprietary heating process will weaken the integrity of the original tube in the field.

Decade's Response

3-3. See Qualification.

Decade's response to Interrogatory 3-3, which simply refers to the broad "Qualification" to its responses, is a refusal to provide the bases for its allegation, and is insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 3-4

3-4. Identify with specificity the precise area in which, and quantify the extent to which, you contend the original tube will be weakened in the field as a result of the proprietary heating process.

Decade's Response

3-4. The area in which we contend the original tube may be weakened in the field is at a point at which the original tube is bonded to the sleeve, and in the surrounding area of that bond where the bonding process may affect. See, also, Qualification.

Though Decade's response to Interrogatory 3-4 does identify the area of the tube which Decade contends may be weakened in the field as a result of the proprietary heating process, Decade completely failed to either answer or object to that portion of Interrogatory 3-4 which asks Decade to quantify the extent to which the tube may be weakened. Further, Decade's reference to the broad "Qualification" to its responses is insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 3-5

3-5. Do you contend that weakening of the original tube in the field as a result of the proprietary heating process will exceed weakening experienced in the laboratory? If so, state in detail the factual bases for that position.

Decade's Response

3-5. Yes. See Qualification.

Decade's response to Interrogatory 3-5, which simply refers to the broad "Qualification" to its responses, is a refusal to state the factual bases for its position, and is

insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 3-6

3-6. State in detail the factual bases for the allegation that the proprietary heating process may "fatally compromise" the integrity of the original tube, in the field.

Decade's Response

3-6. See Qualification.

Decade's response to Interrogatory 3-6, which simply refers to the broad "Qualification" to its responses, is a refusal to state the factual bases for its allegation, and is insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 3-8

3-8. State in detail the factual bases for the allegation that the proprietary heating process "may lead to a circumferential rupture" of the original tube during "various operating and/or accident conditions."

Decade's Response

3-8. See Qualification.

Decade's response to Interrogatory 3-8, which simply refers to the broad "Qualification" to its responses, is a refusal to provide the factual bases for its allegation, and is insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 3-10

3-10. Identify and quantify the types of forces and stresses to be experienced by the sleeved tubes in each of the "various operating and/or accident conditions" specified in response to Interrogatory 3-9, and explain how those forces and stresses will cause a "circumferential rupture."

Decade's Response

3-10. The forces at work during the conditions described in paragraph 3-9 are the primary to secondary pressure differentials arising from each of those conditions.

Decade's answer to Interrogatory 3-10 is wholly unresponsive. Decade simply states the obvious, i.e., that tubes are subject to a primary-to-secondary pressure differential. However, Decade neither identified nor quantified the specific types of forces and stresses which Decade contends that sleeved tubes will experience. Similarly, Decade completely failed to answer or object to that portion of Interrogatory 3-10 which asks that Decade explain how Decade contends the specified forces and stresses will cause a "circumferential rupture."

Interrogatory 3-11

3-11. Do you contend that the sleeve/tube combination (the new primary/secondary pressure boundary) will not meet all applicable criteria of the ASME Code? If so, state in detail the factual bases for that position, including a specific identification of each criterion which allegedly will not be met. If not, explain in detail what you consider to be the practical safety significance of any weakening of the original tube alone.

Decade's Response

3-11. Yes, insofar as field installation is concerned. See Qualification.

Decade's reference to the broad "Qualification" to its responses is simply a refusal to answer those parts of Interrogatory 3-11 which ask Decade to state the factual bases for its position that the sleeve/tube combination will not meet all applicable code criteria and to identify the specific criteria which it alleges will not be met, and is grossly insufficient for the reasons set forth in the general discussion of such responses, above. If Decade has no factual bases for its position and has no idea whether or not the applicable criteria are met, Decade must so state.

Interrogatory 3-12

3-12. Do you contend that the sleeve/tube combination will be weaker than the original tube? If so, state in detail the factual bases for that position. If not, explain in detail what you consider to be the practical safety significance of any weakening of the original tube alone.

Decade's Response

3-12. Yes, insofar as field installation is concerned. See Qualification.

Decade's reference to the broad "Qualification" to its responses is a refusal to answer those parts of Interrogatory 3-12 which ask Decade to state the factual bases for its position that the sleeve/tube combination will be weaker than the original tube, and is grossly insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 3-13

3-13. For each response to Interrogatories 3-1 through 3-6, 3-8, 3-10, 3-11, and 3-12:

(a) Identify all documents, including all relevant page citations, on which you rely to support each of your claims;

(b) State the name, present or last known address, and present or last known employer of each person known to you to have first-hand knowledge of the factual bases for each of your claims; and

(c) State the name of each person you intend to call as a witness to support each claim.

Decade's Response

3-13. (a) See Qualification.

(b) See Qualification.

(c) At this time, we do not have the name of any person whom we intend to call as a witness.

Decade's reference to the broad "Qualification" to its responses is a refusal to answer to Interrogatories 3-13(a) and 3-13(b) -- which ask Decade to identify, with respect to each of several specified interrogatories, those documents on which it relies to support its claims, and those persons known to it to have knowledge of the factual bases for the specified claims -- and is insufficient for the reasons set forth in the general discussion of such responses, above. Such discovery requests are clearly proper. See 10 C.F.R. § 2.740(b)(1).

Interrogatory 3-15

3-15. Identify all documents in your possession, custody or control (including all relevant page citations) pertaining to the subject matter of Contention 3.

Decade's Response

3-15. See Qualification.

Decade's response to Interrogatory 3-15, which simply refers to the broad "Qualification" to its responses, is a

refusal to identify the requested documents, and is insufficient for the reasons set forth in the general discussion of such responses, above.

Contention 4

Decade Contention 4 alleges:

The annulus between the original tube and the sleeve may give rise to an unexpectedly corrosive environment where the tube is or may be suffering in the future from a through wall crack and secondary water impurities seep into the narrow space.

Interrogatory 4-1

4-1. State in detail the factual bases for the allegation that the sleeving process will give rise to an "unexpectedly corrosive environment."

Decade's Response

4-1. See Qualification.

Decade's response to Interrogatory 4-1, which simply refers to the broad "Qualification" to its responses, is a refusal to state the factual bases for its allegations, and is insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 4-2

4-2. Describe in detail the phenomenon by which you contend an "unexpectedly corrosive environment" will be created in the annulus between the tube and the sleeve.

Decade's Response

4-2. Unexpectedly corrosive environment is defined to mean an environment in the annulus between the sleeve and the original tube in those cases where there is leakage into the annulus that is corrosive to either the original tube or the sleeve or the bond between the original tube and the sleeve.

Decade's answer to Interrogatory 4-2 is wholly unresponsive. Rather than detailing the phenomenon -- i.e., the scenario(s) -- by which it contends an "unexpectedly corrosive environment" will be created in the annulus (as the interrogatory requested), Decade has supplied a tautological definition of "unexpectedly corrosive environment" which provides the Board and the parties with no more information about the precise phenomenon with which Decade is concerned than did the original statement of Decade's contention, filed months ago.

Interrogatory 4-3

4-3. Describe in detail the nature and extent of the corrosive environment which you contend will be created in the annulus between the tube and the sleeve.

Decade's Response

4-3. The reason that we use the adjective "unexpectedly" is to reflect the fact that it may not be possible to predict the potentially corrosive environment, anymore than the vendor or licensee predicted the new corrosive effects that followed from sludge lancing or from converting to all-volatile treatment.

Decade's answer to Interrogatory 4-3 is unresponsive. Rather than detailing the nature and extent of the corrosive environment which Decade contends may be created in the annulus (as the interrogatory requested), Decade has explained why it used the term "unexpectedly" in its phrase "unexpectedly corrosive environment." If Decade's response is to be interpreted as an admission that Decade has no idea of the nature and extent of the environment in the annulus, that admission is

fatal to its Contention 4. The Commission's regulations do not permit an intervenor to trigger a proceeding on nothing more than a baseless fear that the analyses of the Staff, the licensee, and the vendor may be inaccurate.

Interrogatory 4-6

4-6. Do you contend that the sleeves will be insufficiently resistant to the "unexpectedly corrosive environment" which you contend may be created in the annulus between the tube and the sleeve? If so, state in detail the factual bases for your position.

Decade's Response

4-6. Yes. See Qualification.

Decade's reference to the broad "Qualification" to its responses is a refusal to state the factual bases for its position and, for the reasons set forth in the general discussion of such responses above, is a grossly insufficient answer to that part of Interrogatory 4-6 which asks that Decade provide the factual bases for its assertion that the sleeves will be insufficiently resistant to the "unexpectedly corrosive environment" which Decade contends may be created in the annulus.⁵

5 Decade's response to Interrogatory 4-6 (i.e., its assertion that the sleeves will be insufficiently resistant to the "unexpectedly corrosive environment" which it contends may be created in the annulus) is completely undermined by its response to Interrogatory 4-3 (i.e., its apparent admission that it has no idea of the nature or extent of the environment

Interrogatory 4-7

4-7. Explain in detail what you consider to be the practical safety significance of the "unexpectedly corrosive environment" which you assert will be created in the annulus between the tube and the sleeve.

Decade's Response

4-7. The practical safety significance from the unexpectedly corrosive environment in the annulus occurs when there is secondary-to-primary in-leakage during a loss-of-coolant-accident.

Decade's answer to Interrogatory 4-7 is completely unresponsive. Decade has not related the "unexpectedly corrosive environment" to "in-leakage" and has not explained how any "in-leakage" caused by sleeving would have safety significance during a LOCA.

Interrogatory 4-8

4-8. For each response to Interrogatories 4-1 through 4-7:

(a) Identify all documents, including all relevant page citations, on which you rely to support each of your claims;

(b) State the name, present or last known address, and present or last known employer of each person known to you to have first-hand knowledge of the factual bases for each of your claims; and

(c) State the name of each person you intend to call as a witness to support each claim.

Decade's Response

4-8. (a) See Qualification.

(b) See Qualification.

(c) At this time, we do not have the name of any person whom we intend to call as a witness.

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in the annulus), and appears to be inconsistent with its response to Interrogatory 4-5 (i.e., its assertion that it is not now taking a position on whether the heat treatment will significantly enhance the corrosive resistance of the sleeves).

Decade's reference to the broad "Qualification" to its responses is a refusal to answer Interrogatories 4-8(a) and 4-8(b), and is insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 4-10

4-10. Identify all documents in your possession, custody or control (including all relevant page citations) pertaining to the subject matter of Contention 4.

Decade's Response

4-10. See Qualification.

Decade's reference to the broad "Qualification" to its responses is a refusal to identify the requested documents, and is an insufficient answer to Interrogatory 4-10, for the reasons set forth in the general discussion of such responses, above.

Contention 5

Decade Contention 5 alleges:

The presence of the sleeve will make the interpretation of eddy current test results extremely difficult and increase the probability that tubes with incipient failures may go undetected and rupture during a loss of coolant accident.

Interrogatory 5-1

5-1. State in detail the factual bases for the allegation that "[t]he presence of the sleeve will make the interpretation of eddy current test results extremely difficult."

Decade's Response

5-1. See Qualification; see also answer to Interrogatory 5-8.

Decade's reference to the broad "Qualification" to its responses in partial answer to Interrogatory 5-1 is a refusal to provide the factual bases for its allegation, and is insufficient for the reasons set forth in the general discussion of such responses, above. Decade's reference to the answer to Interrogatory 5-8 is also unresponsive. That answer refers again to the "Qualification," and cites a memorandum which has nothing to do with sleeving.

Interrogatory 5-3

5-3. Do you contend that significant degradation will occur in the areas of the sleeved tube at which you assert there will be decreased sensitivity in detecting degradation by eddy current testing? If so, state in detail the factual bases for your position.

Decade's Response

5-3. Significant degradation may occur. See Qualification.

Decade's reference to the broad "Qualification" to its responses is a refusal to state the factual bases for its position and, for the reasons set forth in the general discussion of such responses above, is an insufficient answer to that part of Interrogatory 5-3 which asks Decade to state the factual bases for its claim that significant degradation may occur in the areas of the sleeved tube at which Decade asserts there will be decreased sensitivity in detecting degradation by eddy current testing.

Interrogatory 5-4

5-4. Do you contend that significant degradation occurring in areas of the sleeved tube at which you assert there will be decreased sensitivity in detecting degradation by eddy current testing will go undetected? If so, state in detail the factual basis for your position.

Decade's Response

5-4. Yes. See Qualification.

Decade's reference to the broad "Qualification" to its responses is a refusal to state the factual bases for its position and, for the reasons set forth in the general discussion of such responses above, is an insufficient answer to that part of Interrogatory 5-4 which asks Decade to state the factual bases for its claim that significant degradation occurring in specified areas of the sleeved tube will go undetected.

Interrogatory 5-5

5-5. State in detail the factual bases for the allegation that tubes with undetected degradation will "rupture during a loss of coolant accident."

Decade's Response

5-5. See Qualification.

Decade's reference to the broad "Qualification" to its responses is a refusal to state the factual bases for its allegation, and is an insufficient answer to Interrogatory 5-5, for the reasons set forth in the general discussion of such responses, above.

Interrogatory 5-6

5-6. For each response to Interrogatories 5-1 through 5-5:

(a) Identify all documents, including all relevant page citations, on which you rely to support each of your claims:

(b) State the name, present or last known address, and present or last known employer of each person known to you to have first-hand knowledge of the factual bases for each of your claims; and

(c) State the name of each person you intend to call as a witness to support each claim.

Decade's Response

5-6. (a) See Qualification.

(b) See Qualification.

(c) At this time, we do not have the name of any person we intend to call as a witness.

Decade's reference to the broad "Qualification" to its responses is a refusal to answer Interrogatories 5-6(a) and 5-6(b), and is insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 5-8

5-8. Identify all documents in your possession, custody or control (including all relevant page citations) pertaining to the subject matter of Contention 5.

Decade's Response

5-8. See Qualification. Also, Memorandum to Files from Peter Anderson, re Point Beach Tube Degradation - Eddy Current Test Effectiveness, dated January 3, 1980.

Decade's reference to the broad "Qualification" to its responses in partial answer to Interrogatory 5-8 is a refusal to identify the requested documents, and is insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 5-9

5-9. Identify all documents (including all relevant page citations) which you intend to offer as exhibits during this proceeding to support Contention 5, or which you intend to use during your cross-examination of witnesses presented by Licensee and/or the Staff on Contention 5.

Decade's Response

5-9. At this time, we have not assembled all documents which we intend to offer as exhibits or use during cross-examination.

Decade's response to Interrogatory 5-9 differs from its responses to parallel Interrogatories 3-16, 4-11, and 7-9 (in which responses Decade asserts generally that it has not yet determined documents for use as exhibits or in cross-examination on Contentions 3, 4 and 7). To the extent that Decade seeks to evade identifying its exhibits and documents for use in cross-examination on Contention 5 by its assertion that it has not yet assembled all such documents, such evasion is impermissible. Decade is required to identify now those documents which it currently intends to offer or use in cross-examination on Contention 5, regardless of whether it will add to that list in the future.

Contention 7

Decade Contention 7 alleges:

The large number of workers required to perform a full scale sleeving program in the highly radioactive environment of the primary side of the steam generator will exceed the ability of the licensee or vendor to provide from their stable work forces. This will necessitate the employment of untrained and

transient "jumpers" to perform the bulk of the work which quality may deteriorate as a consequence.

Interrogatory 7-1

7-1. State in detail the factual bases for the allegation that "untrained and transient 'jumpers'" will be employed as part of the full scale sleeving program "to perform the bulk of the work which quality may deteriorate as a consequence."

Decade's Response

7-1. See Qualification.

Decade's response to Interrogatory 7-1, which simply refers to the broad "Qualification" to its responses, is a refusal to state the factual bases for its allegations, and is insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 7-3

7-3. Describe in detail all deficiencies which you assert to exist in the training of channel head workers.

Decade's Response

7-3. We assert deficiencies in motivation, experience and qualifications, not in on-the-job training.

Decade's response to Interrogatory 7-3 is evasive and incomplete. First, Licensee's interrogatory was not limited to "on-the-job" training, as Decade's answer suggests. Further, Licensee's interrogatory tracks the precise language of Decade's contention, which expresses Decade's concern that workers will be "untrained." If Decade wished to define "untrained" as lacking in "experience" and "qualifications,"

Decade was nonetheless obligated to answer the interrogatory in good faith, albeit in that context -- i.e., having chosen to use the work "training" in its contention, Decade was not then free to evade interrogatories on a technicality, by repudiating the word "training" and substituting "experience" and "qualifications."

Interrogatory 7-4

7-4. Describe in detail all deficiencies which you assert to exist in the quality assurance program for the full scale sleeving program such that errors or omissions by channel head workers will go undetected.

Decade's Response

7-4. The post-installation inspections may not be performed for the correct tube and may not be adequate to detect improper installation.

The second part of Decade's response to Interrogatory 7-4 is so non-specific as to be incomplete. In essence, in response to Licensee's request that Decade detail the inadequacies asserted to exist in the QA program, Decade states simply that inspections may be inadequate to detect improper installation. A proper detailed response (in accordance with Licensee's request) would have included, at a minimum, an explanation of precisely why the inspections "may not be adequate," as well as an elucidation of the precise phase(s) of installation as to which it is alleged errors might go undetected.

Interrogatory 7-5

7-5. Identify with specificity all tasks assigned to channel head workers which you assert may not be performed or may not be correctly performed, including -- but not limited to -- an explanation of each error or omission which you assert may occur, an explanation of why that error or omission will not be detected by quality assurance controls, and an explanation of the safety significance of each such error or omission should it go undetected.

Decade's Response

7-5. The tasks which may not be performed or may be performed incorrectly include decontamination, cleaning, insertion and bonding. The error or omission may not be detected because either the wrong tube will be inspected or the inspection procedure will not be adequate. The safety significance of such an error or omission occurs when there is secondary-to-primary in-leakage during a loss-of-coolant-accident.

Decade's response to Interrogatory 7-5 is so non-specific as to be incomplete. Further, Decade's answer to Licensee's request for an explanation of the safety significance of alleged errors and omissions is wholly unresponsive. First, Decade was specifically asked to explain "each error or omission." It did not do so. Second, Decade failed to specify which of the listed tasks it asserts will not be performed and which it asserts will be performed incorrectly. Third, Decade's reference to the task of "cleaning" is overly vague; given the vast record now before Decade, it was obligated to more clearly identify the task to which it was referring (i.e., to state what it alleges may not be cleaned or may be cleaned incorrectly). Fourth, in response to Licensee's request that Decade explain why each alleged error or omission would not be detected by QA, Decade responded glibly that "the inspection

procedure will not be adequate." Such a response is nothing more than a paraphrasing of the interrogatory in the affirmative, and is insufficient for reasons set forth in the discussion of Decade's response to Interrogatory 7-4, above.

Finally, rather than explaining what the practical safety significance of each alleged undetected error or omission actually is, as the last part of the interrogatory requested, Decade stated its belief as to when the alleged (but still unspecified) safety significance will "occur." Such an answer is unresponsive to the question posed.

Interrogatory 7-6

7-6. For each response to Interrogatories 7-1 through 7-5:

(a) Identify all documents, including all relevant page citations, on which you rely to support each of your claims;

(b) State the name, present or last known address, and present or last known employer of each person known to you to have first-hand knowledge of the factual bases for each of your claims; and

(c) State the name of each person you intend to call as a witness to support each claim.

Decade's Response

7-6. (a) See Qualification.

(b) See Qualification.

(c) At this time, we do not have the name of any person whom we intend to call as a witness.

Decade's reference to the broad "Qualification" to its responses is a refusal to answer Interrogatories 7-6(a) and 7-6(b), and is insufficient for the reasons set forth in the general discussion of such responses, above.

Interrogatory 7-8

7-8. Identify all documents in your possession, custody or control (including all relevant page citations) pertaining to the subject matter of Contention 7.

Decade's Response

7-8. See Qualification.

Decade's reference to the broad "Qualification" to its responses is a refusal to identify the requested documents, and is an insufficient answer to Interrogatory 7-8, for the reasons set forth in the general discussion of such responses, above.

Thus, taken as a whole, "Decade's Answer To Licensee's First Set of Interrogatories Relative To Full Scale Sleeving" evidences no good faith effort whatsoever on the part of Decade to provide the specific factual bases for its contentions.

B. Decade's Reliance On Record As Bases For Contentions

Decade's glib and simplistic reliance on "the official record in the proceedings in the * * * [instant] matter or in the related proceedings before the Public Service Commission of Wisconsin" as the bases for its contentions also provides substantive grounds for the dismissal of those contentions. By its explicit adoption of the official record in this proceeding in its undifferentiated entirety, Decade adopted the ruling of this Board, at the conclusion of the October 29-30 hearing, that the contentions are without basis. Thus, the "See Qualification" response to Licensee's interrogatories seeking

the bases for Decade's contentions is an admission that there are no bases for its contentions. This fact alone compels dismissal of Decade as a party to this proceeding.

C. Decade's Failure To Timely Avail Itself of Discovery Process

Decade's failure to respond to Licensee's November 10 interrogatories is most tellingly viewed in light of the full procedural history of discovery in this proceeding, including the extraordinary procedural rights and opportunities which the Board has accorded to Decade.⁶ As early as the September 16, 1981 conference call, the Board urged Decade to begin discovery immediately, even though its contentions had not yet been admitted. See Tr. 60-64, Tr. 70; see also, Tr. 49-50. In its October 1, 1981 "Memorandum and Order Requesting Additional Information," at pages 4 through 5, the Board noted its September 16 oral order authorizing commencement of discovery prior to a ruling on Decade's contentions, reiterated its hope "that it [Decade] will * * * proceed to use this authorization," and stayed all discovery against Decade. At page 10 of the October 1 Order, the Board again expressly authorized Decade "to make immediate use of the discovery process with respect to its contentions 3 through 7" [emphasis supplied].⁷

⁶ Much of this history was concisely summarized by the Board in its October 30, 1981 ruling from the bench, Tr. 686-90, and at pages 3 through 5, 7, and 10 through 12 of its November 5 Order.

⁷ The Board itself framed two extensive sets of technical questions for Licensee well before Decade filed its single set

Despite the Board's repeated urgings, Decade's first (and, to date, only) discovery requests were not filed until October 23, 1981, some 37 days after the Board authorized Decade to begin discovery, and less than one week before the October 29-30 hearing.⁸

Further, though the bases which Decade originally alleged for its contentions were rejected at the close of the October 29-30 hearing, Decade has to date completely failed to avail itself of the discovery process, by which it might attempt to cure the fatal defect in its petition. Nor does it appear that Decade intends to file any discovery requests in the near future; for, while the Board's October 13 "Memorandum and Order Concerning The Admission of A Party and Its Contentions" directed the parties to include in their periodic discovery progress reports the "progress expected before the next report," Decade's most recent discovery progress report (late-filed on November 23, 1981) gives no indication whatsoever that Decade plans to even commence discovery within the next month.

In its November 5 Order, the Board noted at page 11:

We could conclude that if Decade had far more time it would have been able to find a basis

(continued)
of discovery requests. As noted in the Board's October 1 Order, at page 8, the Board's questions should have facilitated discovery by Decade.

⁸ The Board's October 13, 1981 "Memorandum and Order Concerning The Admission of A Party and Its Contentions" further discussed discovery procedures, and granted Decade extraordinarily wide latitude for discovery.

for its contentions, but that would be strict conjecture on our part.

Similarly, the Board could now conclude that Decade may, at some undetermined point in the future, find a basis for its contentions; again, however, that would be strict conjecture on the part of the Board. All the evidence to date suggests that Decade will continue to expend significant portions of its resources on this case protesting the pace of the proceeding, while at the same time refusing to even participate (in a substantive way and on a timely basis) in the very process which might enable it to develop support (if there is any) for its case. In the meantime, Licensee will be forced to expend its resources anticipating "intuitive arguments" and defending against straw men.

Decade either has no bases for its contentions, or simply refuses to specify the bases for the Board and the other parties. Either way, Decade's conduct in this proceeding contravenes fundamental tenets of NRC practice and procedure, and denies the Board and the other parties information which is crucial to the prosecution of their own cases, and which they were entitled to receive long ago. In the procedural context outlined above, and particularly in light of the extraordinary procedural rights and opportunities which the Board has accorded to Decade throughout this proceeding, Decade's failure to respond in good faith to Licensee's interrogatories seeking the bases for Decade's contentions -- coupled with Decade's

failure to timely avail itself of the discovery process in an attempt to develop some bases for its contentions -- warrants extraordinary action by the Board.

D. The Sanction To Be Imposed On Decade

The "Statement of Policy on Conduct of Licensing Proceedings," CLI-81-8, 13 N.R.C. 452 (1981), is the Commission's most recent comprehensive directive to licensing boards on the subject of the management of licensing proceedings. Emphasizing "the need for the balanced and efficient conduct of all phases of the hearing process," 13 N.R.C. at 453, the Commission admonished:

Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider

the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance.

13 N.R.C. at 454 [emphasis supplied].

Thus, in considering Decade's failure to specify the bases for its contentions (either as independently required by the Commission's regulations, or in response to Licensee's November 10 interrogatories), the first factor to be considered by the Board is "the relative importance of the unmet obligation." The importance of the obligation on which Decade has here defaulted is self-evident; the requirement for the specification of bases for one's contentions is at the very heart of the NRC hearing process, and is an absolute condition precedent to admission as a party to a proceeding.⁹

The second factor to be considered by the Board is the "potential for harm to other parties or the orderly conduct of the proceeding" attendant to Decade's default. In this

⁹ Since the Board initially applied a low standard in admitting Decade's contentions, and subsequently found them to be without basis, Decade effectively stands as a petitioner for intervention which has proposed contentions with respect to the amendment request for authorization for full scale sleeving, but which has not specified the requisite bases for those contentions.

instance, some of the harm is "potential" and some has already been realized. For example, Decade's failure to come forward with a full statement of the bases for its contentions necessitated the significant expenditure of the resources of Licensee and the NRC Staff on the October 29-30 hearing, and on the preparation for that hearing. Decade's default has also required the expenditure of the resources of Licensee and the NRC Staff¹⁰ on the framing of interrogatories designed to elicit those bases; had Decade independently provided a full statement of the bases for its contentions, as envisioned by the Commission's Rules of Practice, Licensee's interrogatories would have sought particular facts relevant to the specified bases or, perhaps, no interrogatories would have been filed. Decade's failure to respond to Licensee's interrogatories has necessitated the Licensee's preparation of the instant motion, which will further require Board action.

The greatest harm to the other parties and to the orderly conduct of the proceeding, however, is the crippling effect of Decade's default on the ability of Licensee and the Staff to prepare their own cases. As noted above, Decade is well aware of Licensee's interest in the expeditious approval of its amendment request. Decade may well perceive that it can achieve many of its goals in this proceeding, and effectively

¹⁰ See "NRC Staff Interrogatories To Intervenor Wisconsin's Environmental Decade" (December 2, 1981).

frustrate Licensee's interest, by refusing to specify the bases for the contentions. In the absence of Decade's statement of the bases for its contentions, Licensee and the Staff are critically constrained in the preparation of their cases for litigation on the merits. Even more immediately, Decade's statement of the bases for its contentions is information which is important -- perhaps crucial -- to the preparation by Licensee of a motion for summary disposition, and is information which the Board and the other parties were entitled to receive long ago. Further, Decade may well perceive that it can effectively defeat a motion for summary disposition by refusing to initiate any discovery until confronted with a motion for summary disposition, then filing a response speculating what its discovery requests to be filed at some point in the future might elicit. Licensee and the Staff should not be required to attempt to proceed to prepare their cases on a timely basis in the total absence of an indication of the substantive bases (if any) for Decade's concerns.

The third factor for the Board's consideration in evaluating Decade's conduct is "whether its occurrence is an isolated incident or part of a pattern of behavior." Construed in its full procedural context, Decade's failure to specify the bases for its contentions in response to Licensee's interrogatories simply cannot be characterized as "an isolated incident." Given the full procedural history of this case, including the "wealth of opportunities" available to Decade to

develop bases for its contentions (discussed at Tr. 686-87 and at page 7 of the Board's November 5 Order), Decade's conduct at the October 29-30 hearing, its failure to independently provide the bases for its contentions since the hearing, and its failure to date to avail itself of the discovery process in an attempt to cure its petition, Decade's failure to respond to Licensee's interrogatories must be viewed as just one more instance (albeit a flagrant one) of Decade's refusal to participate on a substantive level in this proceeding. Decade's pattern of behavior in this case to date effectively constitutes a failure to prosecute its case.

The fourth factor for the Board's review in determining the sanction to be imposed on Decade is "the importance of the safety or environmental concerns raised." Ironically, in the absence of a specification by Decade of the bases for its contentions, the Board is not in a position to make an independent evaluation of the import of those contentions. This irony underscores the importance of the obligation on which Decade has defaulted, which is the first factor for evaluation by the Board, discussed above.

In considering "all of the circumstances," as the Commission directed, the Board should be mindful of the Appeal Board's admonition that where, as here, a hearing is not mandatory, there is "especially strong reason" why a licensing board should "take the utmost care to satisfy itself fully" that the requirements of the Commission's regulations with

respect to the specification of contentions and bases have been met. See, e.g., Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Power Station), ALAB-305, 3 N.R.C. 8, 12 (1976); Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-183, 7 AEC 222, 226 at n.10 (1974).

Given the extreme gravity of Decade's default and its continuing egregious course of conduct in this proceeding, and given the fact that the default is the failure of Decade to provide the information required before Decade is even entitled to trigger a hearing, Licensee believes that the dismissal of Decade as a party to this proceeding -- although a severe sanction -- is clearly warranted. Indeed, Licensee has grave doubts as to the ability of any board to fashion a less severe remedy which would still "mitigate the harm caused by the failure of * * * [the] party to fulfill its obligations and bring about improved future compliance."¹¹

¹¹ At an absolute minimum, the Board should (1) require Decade immediately to plead the bases for its contentions, (2) compel Decade to respond fully to Licensee's interrogatories on an extremely expedited basis, and (3) set a date for the close of discovery in the very near future (with leave for later discovery limited to new information in the Staff's SER and environmental filings upon a showing of "good cause").

III. CONCLUSION

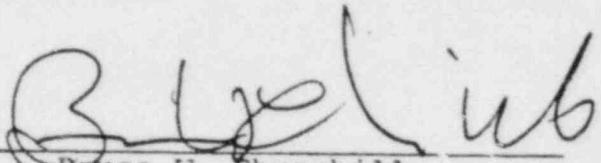
Decade's responses to Interrogatories 3-1, 3-2, 3-3, 3-4, 3-5, 3-6, 3-8, 3-10, 3-11, 3-12, 3-13, 3-15, 4-1, 4-2, 4-3, 4-6, 4-7, 4-8, 4-10, 5-1, 5-3, 5-4, 5-5, 5-6, 5-8, 5-9, 7-1, 7-3, 7-4, 7-5, 7-6 and 7-8 are insufficient for the reasons stated above, and constitute a willful failure to provide the bases for its contentions. Taken as a whole, "Decade's Answer To Licensee's First Set of Interrogatories Relative To Full Scale Sleeving" is so devoid of substance as to constitute a wholesale and flagrant failure to respond, and evidences no good faith whatsoever on the part of Decade. Coupled with Decade's failure expeditiously to avail itself of the discovery process in support of its contentions, Decade's failure to specify the bases for its contentions (particularly in response to Licensee's explicit interrogatories) is a gross dereliction of its obligations as a party to this proceeding, which -- for the further reasons specified above -- warrants the imposition of severe sanctions by the Board.

Accordingly, pursuant to the Commission's "Statement of Policy on Conduct of Licensing Proceedings," Licensee moves the Board for an order dismissing Decade as a party to this proceeding, terminating the proceeding, and remanding Licensee's application to the NRC Staff for appropriate action,

or for such other relief as the Board deems appropriate and just, given the extraordinary circumstances.¹²

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By 

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Dated: December 9, 1981

¹² See note 11, supra.

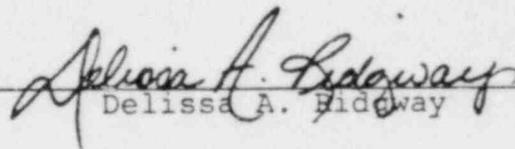
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
WISCONSIN ELECTRIC POWER COMPANY) Docket Nos. 50-266
) 50-301
(Point Beach Nuclear Plant,) (OL Amendment)
Units 1 and 2))

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Licensee's Motion For Dismissal of Intervenor Wisconsin's Environmental Decade, Inc." were served, by deposit in the U.S. Mail, first class, postage prepaid, to all those on the attached service list, except that those marked by an asterisk were served by deposit with Federal Express, this ninth day of December.


Delissa A. Bidaway

Dated: December 9, 1981

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NUCLEAR REGULATORY COMMISSION

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12-15-78



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
POWER AUTHORITY OF THE STATE
OF NEW YORK
(Greene County Nuclear Power Plant)

Docket No. 50-549
(Health and Safety)

BOARD ORDER CONCERNING DISCOVERY

On October 31, 1978, the NRC Staff filed a "Motion for Order Compelling Discovery and Permitting Supplementation of Testimony Upon Receipt of Responses." The motion was concerned with interrogatories served on October 2, 1978 to six intervenor parties. Three of the parties filed responses on November 1, 1978.^{1/} A Board Order dated November 15, 1978 granted the Staff motion as to the remaining three intervenor parties who had not yet responded.^{2/}

On November 21, 1978, Staff renewed its motion for an order compelling discovery, this time directing its attention towards the inadequacies of certain of the interrogatory responses filed on November 1, 1978. Counsel for CCSC, MHNO and CPHV responded to the renewed motion on November 29, 1978.

1/ Columbia County Survival Committee (CCSC), Shirley A. Brand and Mid-Hudson Nuclear Opponents (MHNO) and Citizens to Preserve the Hudson Valley (CPHV).
2/ Cementon Civic Association (CCA), Greene County, N. Y., et al., and Columbia County, N. Y.

G

G

I. Discovery — General

The use of the discovery process is governed by the Commission's regulations contained in 10 CFR 2.740 through 2.744. Reference is also made to the discovery process in 10 CFR 2.707 dealing with the failure of parties to comply, inter alia, with discovery orders entered by the Board, pursuant to 10 CFR 2.740.

In general, the discovery process is intended to insure that the parties to the proceeding, including Applicant and Staff, will have access to all relevant, unprivileged information prior to the hearing, and that the primary objectives of the discovery process include the more expeditious conduct of the hearing itself, the encouragement of settlement between parties and greater fairness in adjudication.^{3/}

As to permissible areas of discovery, it is clear that interrogatories seeking specification of the facts upon which a claim or contention is based are wholly proper, and that a party may be required to answer questions which attempt

^{3/} For a more complete discussion of discovery and the obligations of the parties, see Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2) LBP-75-30, Docket No. 50-471, 1 NRC 579, pp. 531-585 (June 6, 1975).

to ascertain the basis for his claim or, for example, what deficiencies or defects were claimed to exist with respect to a particular situation or cause.^{4/}

The Commission's Rules on intervention presume that the parties had specific factual bases for their contentions [see Section 2.714(a)]. Where the discovery request seeks to determine the factual basis for the contention, the intervenor is obliged to provide a complete, unevasive answer to the best of his or her ability.^{5/} An evasive or incomplete answer or response shall be treated as a failure to answer or respond. See 10 CFR Section 2.740(f)(1).

In considering the disposition of the discovery motions and objections, the Board must balance the interests and rights of the litigants to obtain information for the proper preparation of their cases, as against protecting the rights of the adversary parties against undue burden or harrassment.

^{4/} See Moore, Federal Practice, Second Edition, Section 26.56[3] and [4], at pp. 26-160 through 26-179.

^{5/} While parties must furnish whatever information is available to it, ordinarily it will not be required to make research and compilation of data not readily known to them. (See Moore, supra, §33.20 and cases cited at pp. 33-103 to 33-105.

A further consideration is the matter of scheduling. The schedule proscribed by the Board in its Order of August 1, 1978 requires that answers to discovery requests be made within 14 days of service of such requests unless there is objection. Parties were permitted 5 days from date of service to object to any discovery requests. The NRC Staff served a list of interrogatories on October 2, 1978. None of the involved parties objected to the interrogatories or responded in a timely manner.

The Board has reviewed the NRC Staff interrogatories, the responses, and the pleadings on the motions to compel. The Board considers the Staff's October 2, 1978 interrogatories to be reasonable and within the bounds of permissible discovery. See 10 CFR §2.740(b)(1). The parties are reminded and advised that the main requirements of a contention are specificity and factual basis. At the special prehearing conference dealing with motions for summary disposition of contentions, absent a showing of good cause otherwise, interrogatory responses may well serve as summaries of factual bases for contentions.

As regards the specific responses, NRC Staff contends that many failed to provide specific identification of matters requested, and that certain themes run through the responses which render them incomplete, evasive or both. Counsel for MHNO, CCSC, and CPHV argues that all interrogatories have been answered, stating that: "Discovery . . . is limited to information and documents which a party has. The respondents have already furnished these." Counsel further contends that Staff is now, in the guise of compelling discovery, wrongfully seeking to impose an additional burden on intervenors of doing original research to develop a data base. The Board's rulings on specific interrogatories follows.

II. RULINGS ON MOTIONS TO COMPEL
FURTHER RESPONSE TO SPECIFIC INTERROGATORIES

A. Columbia County Survival Committee (CCSC) and
Arthur Reuter.

1. Interrogatory G-5

Intervenor's response does little more than identify the documents used as bases for contentions. This question was asked and answered

without objection under interrogatory G-4. The thrust of G-5 was to specify deficient portions as related to each contention and to explain why a deficiency exists. If the alleged defect is that the subject was not addressed at all, then the response should indicate that. If the deficiency is other than a total lack of reference, then the deficient portions should be identified along with an explanation as to why they are deficient. Intervenor's reference to deficiencies in NRC Staff's responses to interrogatories is misplaced. If Staff's responses were deficient, intervenors could have taken appropriate action to request correction. Staff's motion to compel response to interrogatory G-5 is granted.

2. Interrogatory S5a-1

Parties are generally not required to conduct research or compile data not readily known or available to them. It is the Board's opinion that such information as requested by Staff in

this interrogatory would be an undue burden to compile if not already known to intervenors.

If individual CCSC members have made observations and gathered information relative to the contention, the individuals should be identified and any information gathered should be supplied. To this extent Staff's motion to compel response on S-5a-1 is granted.

3. Interrogatory S9-1

Intervenor's contention refers specifically to accidental radiological releases and implied in their contention is that the risk to water supplies is unacceptable. Intervenor's fail however to identify specifically the accidents which will result in such unacceptable consequences. If intervenors know which accidents will result in the consequences described in contention 9, they should say so. If not, that should also be stated. Intervenor's

reference to anticipated discharges from normal operations is misplaced. Staff motion to compel response to S-9-1 is granted.

4. Interrogatory S9-2

Intervenor's response to this interrogatory is that the contention is based on "the application of common sense to information in the PSAR, SER, and Supplement No. 1 and the inability or refusal of the NRC Staff to answer interrogatories on this issue." In the Board's view the response is incomplete. Common sense as a basis for a contention is laudable but not of much probative value without specification as to where and how it is being applied. Intervenor's statement that contention 9 is based in part on the inability or refusal of the Staff to answer interrogatories on the issue is misplaced. Interrogatories are generally based on contentions not vice-versa. If Staff did not provide satisfactory responses to interrogatories, intervenor should have sought remedy at the appropriate time. This

was not done. Staff motion to compel response to interrogatory S-9-2 is granted.

5. Interrogatory B-6-3

Intervenor's reply states that "The PSAR does not contain in any meaningful detail the information required by Section II of Appendix E to 10 CFR 50" and further stating . . . "It is all surprise, speculation and generalities." In the opinion of the Board, this response is incomplete. Intervenor should specify which of the sub-parts of Section II are not being met. Each Applicant for a construction permit is required by 10 CFR 50.34(a) to include in its PSAR a discussion of preliminary plans for coping with emergencies. Appendix E establishes minimum requirements for emergency plans and Part II of that Appendix lists the items to be included and described in the PSAR. Considering the language in Appendix E, intervenors should identify the specific requirements of Section II which are not being satisfied. Staff motion to compel response to interrogatory S-9-2 is granted.

B. Shirley Brand and Mid-Hudson Nuclear Opponents (MHNO)

1. Interrogatory G-5

Staff motion to compel response is granted for the same reasons set forth in Section II.A.1 of this Order.

2. Interrogatory 1-2 (identified as B1-2 in MHNO response)

Intervenor's answer is not responsive. This interrogatory calls for a yes or no answer to portions (a) and (b). Elaboration on the response is called for in subsequent interrogatories. Staff motion to compel a response is granted.

3. Interrogatory 1 (b)-1

If the sole basis for intervenor's assertion that highways and public transportation within the vicinity of the plant are not adequate to evacuate the LPZ is that there is no "public transportation" and the only document relied upon is a county highway map, then

Intervenors need respond no further. Staff motion to compel further response is denied. Intervenors have, however, the right and indeed the duty to augment or amplify their response if it so requires.

4. Interrogatory 1 (c) 1

Intervenor's answer is evasive. Interrogatories propounded to determine the basis for contentions is a permissible area of discovery. Intervenor's reference to the burden of proof is misplaced. Although it might well be that the burden of proof on Applicant and Staff is different from the burden on intervening parties, the burden of responding to legitimate discovery questions seeking specification of the bases for intervenor contentions is clearly on the proponent of the contention. Staff motion to compel response is granted.

5. Interrogatories 3 (d)-1 through 3 (d)-4

Each of these four interrogatories is directed toward specification of the facts upon which

intervenor's contention 3 is based. This is a permissible area of discovery. Intervenor's response is neither specific nor complete. Staff's motion to compel further response is granted.

C. Citizens to Preserve the Hudson Valley

1. Interrogatory G-5

Staff motion to compel response is granted. See II.A.1 of this Order and reasons contained therein.

2. Interrogatory SI.A-1

Although some specification in intervenor's response might be desirable, the Board feels that intervenor has defined what it means by "sufficient information." Staff motion to compel further response is denied.

3. Interrogatory SI.A-2

Intervenor's answer is non-responsive. If they know the date when Applicant requested that the size of the exclusion area be

reduced, they should provide that date. If not, they should so state. Staff motion to compel response is granted.

4. Interrogatory UI.A-1 through UI.A-3

These interrogatories are basic to the determination of intervenor's basis for unstipulated contention 1. Intervenor's answers are either not responsive or incomplete. It might well be that future Staff documents might affect intervenor's position but it is not logical that future documents are currently serving as the bases for contentions. Staff motion to compel response is granted.

5. Interrogatory SI.B.1-2

Intervenor's response is incomplete. The Board agrees with Staff's argument that mere reference to a document cannot supply the basis for an assertion. Intervenor should specify which portion or portions of the 66 page Regulatory Guide 1.59 (Revision 2 August 1977) state specifically

the bases for the assertion that the matters identified in response to interrogatory SI.B.1-1 preclude a finding that the public health and safety will not be endangered. Staff motion to compel response is granted.

6. Interrogatory SI.B.2-2

Appendix A of 10 CFR 50 contains, inter alia, 64 overall requirements for the design of nuclear power plants. Intervenor's reference to Appendix A without any further specification or explanation as to how that reference provides a basis for intervenor's assertions is not considered to be a satisfactory response. Staff motion to compel response is granted.

7. Interrogatory SI.B.3-2

The Board is of the opinion that mere reference to a 15 page section of the SER is not a satisfactory response to a request to "state specifically the bases for . . . assertions." Intervenor should identify the

specific references and explain how those references provide a basis for the assertion. Staff motion to compel response is granted.

8. Interrogatory SI.B.4-2

Identification of a multipage 20 paragraph section of Staff's SER as the specific basis for an assertion is not a satisfactory response. For the reasons given above, Staff motion to compel response is granted.

9. Interrogatory SI.B.4-3 and SI.B.4-4

Staff motion to compel response is granted. Mere reference to a document is not considered to be an adequate response.

10. Interrogatories SI.B.5-1 and SI.B.5-2

Both of these interrogatories are fundamental to the determination of the specific bases for contention I.B.5. Intervenor's reference to burden of proof is misplaced at this stage in the proceedings. Mere reference to documents is not adequate. Staff motion to compel response is granted.

11. Interrogatories SI.B.6-1 through SI.B.6-3

Intervenor's responses are too general and incomplete. Reference to burden of proof is misplaced. Intervenor should identify and describe the location of the specific equipment that will contain radio-cobalt buildup, if they know. If they do not know, they should say so. Intervenor should further specifically identify those portions of SEK §12 that they indicate identifies "PSAR deficiencies which . . . exist with regard to the ability or adequacy of plans to assure that radio-cobalt buildup will not cause 10 CFR 20 occupational exposure limits to be exceeded." Intervenor's answer to S.I.B.6-3 is non-responsive. Staff motion to compel responses is granted.

Intervenor are given 10 days from service of this Order to comply therewith.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Andrew C. Goodhope
Andrew C. Goodhope, Chairman

Dated at Bethesda, Maryland,
this 15th day of December, 1978.