

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board '81 DEC 14 P4:27

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

OFFICE OF SECRETARY
PLANNING & SERVICE
BRANCH

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



I. INTRODUCTION

By motion dated December 9, 1981, Licensee moved 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. The grounds for Licensee's December 9 motion included: Decade's refusal to specify adequate bases for its Contentions 3, 4, 5 and 7 (particularly in response to Licensee's November 10, 1981 interrogatories); Decade's reliance on the entirety of four dockets (including the instant docket, which contains this Board's finding that the contentions are without basis) as the bases for its contentions; and Decade's failure to avail itself of the discovery process to attempt to support its contentions.

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As indicated in footnote 2 to Licensee's December 9 motion, "Licensee's Second Set of Interrogatories and Request For Production of Documents To Intervenor Decade Relative To Full Scale Sleeving Program," dated November 20, 1981, were hand-served on Decade by Federal Express on November 23. In "Decade's Answer To Licensee's Second Set of Interrogatories Relative To Full Scale Sleeving" (late-filed on December 8, 1981), Decade identified for the first time concerns beyond those set forth in its Contentions 3, 4, 5 and 7, but refused to specify the bases for its newly-stated concerns. Thus, Decade's December 8 responses even more graphically evidence Decade's deliberate refusal to meet even the most fundamental obligations imposed on participants in an NRC licensing proceeding. Accordingly, Licensee amends its December 9 motion to include, as grounds for the relief there requested, Decade's December 8 interrogatory responses and Licensee's arguments herein.

II. DISCUSSION

A. Decade's Failure To Respond To Licensee's November 20 Interrogatories

"Licensee's Second Set of Interrogatories and Request For Production of Documents To Intervenor Decade Relative To Full Scale Sleeving Program" were designed to identify and elicit the bases for any and all issues which Decade proposes for

litigation, beyond the issues explicitly raised in its Contentions 3, 4, 5 and 7. Like Decade's November 25 answers to Licensee's first set of interrogatories on full scale sleeving, Decade's December 8 answers are -- taken as a whole -- so devoid of substance as to effectively constitute a complete failure to respond. Most egregious are the broad "Qualification" (which refers to the entirety of the official records in four regulatory dockets) with which Decade prefaces its December 8 responses (just as it prefaced its November 25 responses), and Decade's references to that "Qualification" as its complete response to several of Licensee's interrogatories, including the requests for the bases for Decade's concerns.

In the following discussion, Licensee sets forth each of the challenged interrogatory responses, with the associated interrogatory and Licensee's comments specific to the individual interrogatory. Licensee does not restate in full the arguments set forth in its December 9 Motion For Dismissal of Decade.

Interrogatory 2

2. State in detail the factual bases for each and every concern identified in response to Interrogatory 1, above.

Decade's Response

2. See Qualification.

In response to Interrogatory 1, Decade identified five additional concerns (beyond those expressed in Contentions 3, 4, 5 and 7) -- "the damage which may be caused to the original

tubes which have previously been plugged when (or if) the plug is removed in preparation for sleeving," "the interactive effects between measures undertaken to alleviate thermal shock or embrittlement of the reactor vessel and steam generator tube degradation," "the possibility for damage to the tube ends as part of the decontamination process used to prepare for sleeving," "the problem of leaking plugs rocking loose" in the course of a LOCA, and "the increasing numbers of detected defects in the free standing region of the steam generator tube bundle which might rupture" during the course of a LOCA. In that light, Decade's response to Interrogatory 2, which simply refers to the broad "Qualification" to its responses, is a particularly egregious refusal to specify the factual bases for its allegations, and is wholly insufficient for the reasons set forth in the general discussion of such responses in Licensee's December 9 motion.

Interrogatory 3

3. For each concern identified in your responses to Interrogatories 1 and 2 above:

(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. (a) See Qualification.

(b) Objection is made to this interrogatory. To state the name of each person known to have knowledge in this area would be oppressive and an undue burden.

(c) At the present time, we do not have plans to call any witnesses to support these concerns.

Discovery requests such as Interrogatories 3(a) and 3(b) -- which ask Decade to identify, with respect to each of the specified concerns, 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 -- are clearly proper. See 10 C.F.R. § 2.740(b)(1). Decade's reference to the broad "Qualification" to its responses in answer to Interrogatory 3(a) constitutes a deliberate refusal to identify the requested documents, and is patently insufficient, for the reasons set forth in the general discussion of such responses in Licensee's December 9 motion. Nor is Decade's objection to Interrogatory 3(b) well taken. First, as noted above, the interrogatory is clearly proper. Second, the party objecting to a discovery request has the burden of establishing, by its objection, the facts necessary to support the objection. See, e.g., Sherman Park Community Association v. Wauwatosa Realty Co., 486 F. Supp. 838, 845 (E.D. Wis. 1980); Martin v. Easton Publishing Co., 85 F.R.D. 312, 316 (E.D. Pa. 1980). Decade's bare, unsubstantiated assertion that a response to Interrogatory 3(b) "would be oppressive and an undue burden" is thus obviously inadequate. Finally, contrary

to the Board's express directive, at pages 9 and 10 of its October 13, 1981 "Memorandum and Order Concerning The Admission of A Party and Its Contentions," Decade never contacted Licensee to inform Licensee of its objection to Interrogatory 3(b) or otherwise made any "reasonable attempts to resolve differences in direct discussions" with Licensee.

Interrogatory 5

5. For each concern identified in your responses to Interrogatories 1 and 2 above, identify all documents in your possession, custody or control (including all relevant page citations) pertaining to the subject matter of that concern.

Decade's Response

5. See Qualification.

Decade's reference to the broad "Qualification" to its responses is a willful refusal to specify the requested documents, and is clearly insufficient, for the reasons set forth in the general discussion of such responses in Licensee's December 9 motion.

Further, in response to Licensee's request that Decade produce for inspection and copying the documents requested in Interrogatories 1 through 11, Decade referred simply to the "Qualification" to its responses. Again, such a response is patently insufficient, as discussed in Licensee's December 9 motion. The Commission's regulations required Decade not only to specify the documents requested by Licensee, but also to produce those documents in good faith, once identified.

B. The Procedural Context of Decade's December 8 Responses

In its December 9 Motion For Dismissal of Decade, Licensee discussed in detail the procedural context of Decade's failure to specify the bases for its contentions (particularly its refusal to do so in response to Licensee interrogatories). Licensee's December 9 motion further discussed the Commission's recent "Statement of Policy on Conduct of Licensing Proceedings," CLI-81-8, 13 N.R.C. 452 (1981), and the factors specified therein for consideration by a licensing board in determining the sanction to be imposed upon a party which fails to fulfill the obligations imposed upon it by its participation in the proceeding. The following brief comments supplement the discussion in Licensee's December 9 motion and, read with that discussion, place Decade's December 8 interrogatory responses in their proper procedural context.

The first factor to be considered by the Board in determining the sanction to be imposed on Decade is "the relative importance of the unmet obligation." As discussed in Licensee's December 9 motion, the importance of the responses to Licensee's interrogatories -- particularly the requests for the specification of the factual bases for Decade's concerns -- is self-evident. Decade's refusal to specify the bases for the concerns identified for the first time in response to Interrogatory 1 is particularly egregious since there is no record whatsoever on those concerns in this proceeding, in contrast to the issues identified in its Contentions 3, 4, 5

and 7. This fact also bears on the second factor for the Board's consideration, the "potential for harm to other parties or the orderly conduct of the proceeding"; i.e., Decade's refusal to specify information about the bases for its newly expressed concerns virtually precludes efforts by the Staff or Licensee to prepare their cases on those 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."¹ As noted in footnote 3 to Licensee's December 9 motion, counsel for Licensee emphasized to Decade that a reference to the "Qualification" to its responses in answer to many of Licensee's November 10 interrogatories was grossly insufficient.² Assuming, arguendo, that Decade's November 25 interrogatory responses were framed in total ignorance of their palpable legal insufficiency, Decade's persistence in its reference to the "Qualification" in its December 8 responses conclusively evidences Decade's bad faith and abuse of the regulatory adjudicative process. In light of the conversation

1 In Licensee's discussion of this factor at pages 38 to 39 of its December 9 motion, Licensee observed that Decade had to date given no indication of an intent to commence discovery relative to full scale sleeving. Licensee has since received "Decade's Third Discovery Progress Report," dated December 7, which still gives no indication of an intent to file discovery requests.

2 Decade acknowledges the telephone call of counsel for Licensee in "Decade's Third Discovery Progress Report."

of Licensee's counsel with Decade, the November 25 and December 8 responses could be considered a "pattern of behavior" in and of themselves. Decade's failure to contact Licensee about its objection to Interrogatory 3(b), in contravention of the Board's express order, as discussed above, is consistent with Decade's evasive and non-cooperative pattern of behavior in this proceeding.

III. CONCLUSION

Decade's responses to Interrogatories 2, 3, and 5, and its response to Licensee's request for production of documents, are insufficient for the reasons stated above, and constitute a willful failure to provide the bases (and information about the bases) for its newly-stated concerns. For the reasons discussed above, and in Licensee's December 9 motion, Decade's conduct constitutes a gross dereliction of its fundamental obligations as a party to this proceeding, and warrants the imposition of severe sanctions by the Board.

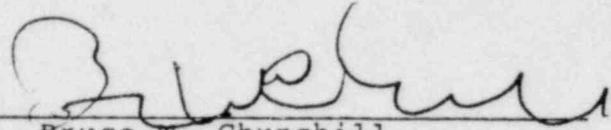
Accordingly, for the reasons advanced above and in Licensee's December 9 motion, and pursuant to the Commission's "Statement of Policy on Conduct of Licensing Proceedings," Licensee moves the Board for an order dismissing Decade as a party to this proceeding, terminating the proceeding, and remanding 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.³

Respectfully submitted,

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Dated: December 11, 1981

³ See note 11 to Licensee's December 9 motion.

December 11, 1981

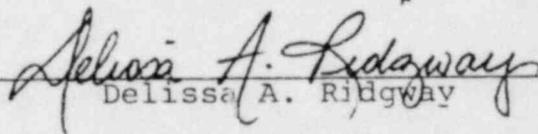
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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing
"Amendment To 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 11th
day of December.


Delissa A. Ridgway

Dated: December 11, 1981

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