February 16, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NECNP OPPOSITION TO APPLICANTS'
MOTION TO COMPEL AND REQUEST FOR PROTECTIVE ORDER

Introduction

In answering Applicants' interrogatories, NECNP made objections to general interrogatories G-2, G-2, and to specific Interrogatories XV-8, XV-9, and XXXII-11. In objecting to these interrogatories, NECNP neglected to petition the Board for a protective order pursuant to 10 CFR 2.740(c). NECNP regrets this oversight. We note that Applicants have addressed our objections in spite of our failure to apply for protective orders, and therefore have not been unduly prejudiced by our omission. We renew our objections to the interrogatories and request the Board to issue a protective order that the discovery objected to not be had.

Specific interrogatories

1. Interrogatory G-2.

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G PDR

In our Response to Applicants' Interrogatories and Request for the Production of Documents (January 21, 1983), NECNP objected to Applicants' general interrogatory G-2, which requested NECNP to describe any type of "study, calculation or analysis" upon which the answers to Applicants' interrogatories might be based.[1/] NECNP responded that this interrogatory was so broad as to "encompass particular mental and analytical processes." NECNP Response at 2. NECNP agreed to provide mathematical calculations, but declined to "attempt to describe the mental processes of its members or experts, or include any material which constitutes attorney work product." Id.

1/Applicants' Interrogatories at 2. The text of Interrogatory G-2 is as follows:

With respect to your answers to each of the specific interrogatories that follow (other than the last interrogatory in each series, relating to expert witnesses), is your answer based upon any type of study, calculation, or analysis? If so, please:

(a) Describe the nature of the study, calculation or analysis and identify any documents that discuss or describe the study, calculation or analysis.

(b) Identify the persons who performed the study, calculation or analysis.

(c) State when and where the study, calculation or analysis was performed.

(d) Describe in detail the information or data that was studied, calculated or analyzed.

(e) Describe the results of the study, calculation or analysis.

(f) Explain how such study, calculation or analysis provides a basis for your answer.

In their Motion to Compel, Applicants respond to this objection by stating that both Interrogatories G-2 and G-3 (to which NECNP also objected) repeat "almost verbatim" a set of interrogatories quoted in Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 333 n.23 (1980). Motion to Compel at 2. This citation sheds absolutely no light on the propriety of either Interrogatory G-2 or G-3, since the only issue ruled on in that case was the intervenor's objection that the large number of interrogatories (2700) propounded by Applicant constituted an "undue burden." 12 NRC at 334.

NECNP has not objected to the number of Applicants' interrogatories, but rather to their scope. We continue to assert that the questions propounded by Interrogatory G-2 are so broad and vague as to include all conversations and thought processes conducted by NECNP's attorneys and consultants. Compliance with such a request would not only be virtually impossible, as a matter of fact, but would encroach on the privileged area of the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative [including consultants] of a party concerning the proceeding," which the Board is directed to protect under 10 CFR 2.740(b)(2). Furthermore, Applicants have made no showing, as required by 2.740(b)(2), that they have a "substantial need" of any written studies, calculations, and analyses which they seek, or that they are "unable without

undue hardship to obtain the substantial equivalent of the materials by other means." Without such a showing, NRC rules clearly exclude these materials from the scope of discovery.

NECNP notes that it has identified all mathematical calculations or written analyses or studies upon which it relies, which have not been prepared in anticipation of the hearing, as required by NRC rules. Where these 'erials are prepared in anticipation of the hearing, howeve , Applicants must make a showing that they have "substantial need of the materials" and are "unable without undue hardship to obtain the substantial equivalent of the materials by other means," also as required by NRC rules. This they have not done, and they are therefore not entitled to the requested information. 10 CFR 2.740(b)(2).

2. Interrogatory G-3.

Applicants have moved to compel NECNP to answer Interrogatory G-3, which requested identification of any individuals NECNP communicated with in answering Applicants'

interrogatories.[2/] NECNP objected to the interrogatory on the grounds that it required the identification of non-witness experts consulted by NECNP for the litigation of our contentions.

NECNP based its objection on Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure, which provides that

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances

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2/ Applicants' Interrogatories and Request for Documents at 6. The text of Interrogatory G-3 is as follows:

With respect ot your answers to each of the specific interrogatories that follow (other than the last interrogatory in each series, relating to expert witnesses), is your answer based upon conversations, consultations, correspondence or any other type of communication with one or more individuals? If so, please:

(a) Identify each such individual.

(b) State the educational and professional background of each such individual, including occupation and institutional affiliates.

(c) Describe the nature of each communication with each such individual, when it occurred, and identify all other individuals involved.

(d) Describe in detail the information received from each individual and explain how it provides a basis for your answer.

(e) Identify each letter, memorandum, tape, note or other record related to each correspondence, or other communication with such individual.

> under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Rule 26(b)(4)(B) has been held to protect the identity of retained or specially employed nonwitness experts absent a showing of exceptional circumstances; and to unconditionally protect the identity of nonwitness experts who have been informally consulted. Ager v. Jane C. Stormont Hospital and Training School for Nurses, 622 F.2d 496 (10th Cir. 1980). See also In re Sinking of Barge Ranger I, 92 F.R.D. 486 (S.D. Texas 1981); Perry v. W.S. Darley & Co., 54 F.R.D. 278 (E.D. Wisc. 1971).

Applicants respond in their Motion to Compel that NRC regulations contain no provision equivalent to Rule 26(b)(4)(B), and that therefore this doctrine does not govern NRC proceedings. Motion to Compel at 2-3, citing General Electric Company (Vallecitos Nuclear Center, General Electric Test Reactor), LBP-78-33, 8 NRC 461, 465-66 (1978). In the Vallecitos case, the licensing board held that since NRC rules contain no provision analagous to Rule 26(b)(4)(B), that the general provision of Rule 2.740(b)(1), requiring disclosure of the "identity and location of persons having knowledge of any discoverable matter", called for the identification of intervenors' expert consultants.

However, the fact that NRC rules do not contain the exact replicate of Federal Rule 26 (b)(4)(B) is irrelevant. Neither rule states explicitly that the identity of non-witness

consultants is protected. Both rules, however contain a prohibition against the discovery of the content of the advice of non-witness consultants absent a special showing of exceptional circumstances under which the discovering party is "unable without undue hardship to obtain the substantial equivalent of the materials by other means. 10 CFR 2.740(b)(2), similarly in Fed. Rule 26(b)(4). This requirement of a showing of exceptional need for the content of non-witness advice has been recently held by the Tenth Circuit to be required also for the identity of those consultants. Ager v. Jane C. Stormont Hospital and Training School for Nurses, 622 F.2d 496 (10th Cir. 1980). See also In re Sinking of Barge Ranger I, 92 F.R.D. 486 (S.D. Texas 1981); Perry v. W.S. Darley & Co., 54 F.R.D. 278 (E.D. Wisc. 1971).[3/] Moreover, that "special showing" would be difficult (if not impossible) to make, as NECNP has already disclosed its contentions, their underlying rationale, and all facts upon which its position is based. Surely, applicants have available to them experts in the various relevant fields - - to even suggest that NECNP has "cornered the market" on nuclear engineers is patently

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3/ It is notable that the case supplying the basis for the Boards contrary decision in Vallecitos, supra, was found by Ager to be incorrectly decided. 622 F.2d at 503.

absurd. See, eg, Galella v. Onassis, 487 F.2d 986, 996 n.13 (2d Cir. 1973).

This distinction between discovery of witness and non-witness consultants has been uniformly recognized by the courts, and is provided for in NRC rules requiring a showing of need for the testimony of all consultants 10 CFR §2.740(b)(2). Parties clearly have a compelling need for the discovery of the identity and substance of testimony of expected witnesses, to allow the preparation of effective case-examination. That same compelling need is not present when the expert is not expected to testify, the facts of a party's position are known, and other expertise is available. Hoover v. U.S. Dept of Interior, 611 F.2d 1132, 1142 (5th Cir. 1980).

There are other reasons for protecting the identity of NECNP's non-witness consultants, which are illustrated by the court's discussion in Ager v. Jane C. Stormont Hospital, supra. In Ager, plaintiff's counsel refused to disclose the identity of experts consulted in preparation for a medical malpractice suit. The court held that parties seeking discovery must make a showing of "exceptional circumstances" to obtain the identity of non-witness experts retained or specially employed; and that there was no obligation to disclose the names of non-witness experts informally consulted. The court rejected arguments that disclosure of a consultant's identity would give the discovering party no material advantage at the expense of the opposing party's

opposition, noting that "once the identities of retained or specially employed experts are disclosed, the protective provisions of the rule concerning facts known or opinions held by such experts are subverted." Id. at 503.

> The expert may be contacted or his records obtained and information normally non-discoverable, under rule 26(b)(4)(B), revealed. Similarly, although perhaps rarer, the opponent may attempt to compel an expert retained or specially employed by an adverse party in anticipation, but whom the adverse party does not intend to call, to testify at trial. Id.

Most importantly, the court found that in the unique circumstances of a medical malpractice case, "disclosure of the identities of [medical] consultative experts would inevitably lessen the number of candid opinions available as well as the number of consultants willing to even discuss a medical malpractice claim with counsel." Id. The court agreed with plaintiff's position that

> In medical malpractice actions [perhaps] more than any other type of litigation, the limited availability of consultative experts and the widespread aversion of many health care providers to assist plaintiff's counsel require that, absent special circumstances, discovery of the identity of evaluative consultants be denied. If one assumes that access to informed opinions is desirable in both prosecuting valid claims and eliminating groundless ones, a discovery practice that would do harm to these objective should not be condoned. Id.

The circumstances surrounding consultation of experts by intervenors in nuclear power plant licensing case are strikingly similar to those which prompted the court's decision in Ager. Like medical malpractice plaintiffs, Intervenors work with a very limited pool of experts, who are reluctant to expose themselves to the time-consuming and expensive process of being deposed or called as witnesses. Other potential consultants who have industry ties are warded off by the

possibility that they will be identified in connection with intervenors. To require that NECNP identify each person with whom it has consulted in answering interrogatories or in otherwise preparing for the Seabrook licensing hearings would have a chilling effect on our ability to obtain expert advice, and prevent us from effectively presenting a fatual case in this proceeding.

For the foregoing reasons, NECNP continues to object to Interrogatory G-3 and requests the board to issue a protective order permitting NECNP not to answer. In the alternative, NECNP considers this to be such a serious issue, so deeply affecting our ability to prepare this case, that we urge the Board to certify this issue to the Appeal Board, if it decides to rule in favor of Applicants.

<u>VI-2 and VI-3</u>

Applicants fault NECNP for failing to specify which electric valve operators at Seabrook must be qualified to meet GDC 4. NECNP responded to this interrogatory that we are waiting to review Applicants' environmental qualification report, which has not yet been submitted, in order to evaluate the qualification of the electric valve operators. This evaluation includes a determination of which valves must be environmentally qualified, as the report must contain a description of the location and function of the equipment. We note that when NECNP posed an equivalent interrogatory to the NRC Staff, it responded that the interrogatory "cannot be answered prior to the Staff's environmental qualificaton

review, which awaits Applicants' submittal." Response of the NRC Staff to NECNP's First Set of Interrogatories (December 28, 1982) at 5. NECNP will rely on Applicants' environmental qualification report, and the NRC Staff's evaluation of it, to determine exactly which electric valve operators must be qualified. As indicated in our response to Applicants' interrogatories, we will supplement our answers when this information becomes available.

VI-6, VI-7, VI-8, VII-2, VII-3, VII-4, VII-5, XV-3, XVI-6, XVI-7, XX-2 through XX-4, XXIII-2, XXIV-2, XXIX-3 through XXIX-21, XXIX-24, XXIX-25, XXX-2, XXX-4, XXX-5, XXX-7, XXX-8, XXX-10, XXX-11.

Applicants have moved to compel answers to a number of interrogatories which NECNP answered by stating that we either had not obtained an expert opinion on the contention, or that our experts were still in the process of evaluating the contention. In each case, NECNP committed to supplement the answer when the information became available. No more is required of NECNP than that it "respond to the interrogatories to the extent it has information in its possession." Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2),

LBP-75-30, 1 NRC 579, 586 (1975). This NECNP has done.[4/] "To the extent that [NECNP] asserts that it has not yet retained experts, so that it cannot respond to a particular interrogatory requesting the bases for its contentions, it may so indicate." Id. Applicants have no basis for their assertion that NECNP's contentions must be dismissed where they are presently unable to fully answer Applicants' interrogatories. The Board has set no date for ultimate answers to these interrogatories. NECNP is well aware of its obligation to supply complete information on its positions before the hearing begins, and has committed to supplementing its answers to interrogatories as the information becomes available. Applicants' attempt to cast NECNP from this proceeding is premature and unfair. These motions to compel should be denied.

IX-5

NECNP has dropped Contention I.C., upon which this interrogatory was based. There is therefore no further need to dispute this question.

X-2 through X-5

4/ The holding in Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-13, 12 NRC 317, 333 n.23 (1980), cited by Applicants, is not inconsistent with the Pilgrim case and does not vitiate our position. In Susquehanna, intervenors had resisted answering any of Applicants' interrogatories on the basis that they were unduly burdensome, and the Appeal Board refused to grant intervenors the protection they sought. NECNP, on the other hand, has answered Applicants' interrogatories to the best of its ability and has committed to continue to supplement its answers.

Applicants call for the dismissal of NECNP Contention I.D.1., regarding testing of reactor vessel welds, because NECNP hs stated that Applicants have not given enough information to allow the kind of detailed evaluation of Applicants' noncompliance with NRC Reg. Guides and regulations which Applicants request. In responding to Applicants' interrogatories, NECNP stated that we were unable to fully answer the questions until we had examined Applicants' Preservice Inspection Program (PSI) for reactor vessel welds at Seabrook. Our position in consistent with that of the NRC Staff, which has stated its own inability to evaluate Applicants' compliance with Reg. Guide 1.150 until it has reviewed Applicants' PSI. Response of the NRC Staff to NECNP's First Set of Interrogatories at 22, 24. NECNP has answered Applicants' interrogatories to the best of its ability based on the general information available in the FSAR. It is ureasonable to ask for a more detailed evaluation until more specific information becomes available from the Applicants.

XIII-2 through XIII-32

Applicants have moved to compel NECNP to answer interrogatories XIII-2 through XIII-32 because NECNP did not give an unqualified answer that it would not pursue contention I.D.4. NECNP is in the process of making a determination of whether it is satisfied that Applicants meet the required standards for testing of the reactor leakage detection system. We will finalize our position within the next two weeks, and either drop the contention or promptly supplement our answers.

XV8, XV4

NECNP objected to these interrogatories on the ground that they called for identification of persons informally consulted by NECNP or discussion of attorney work product. Although we continue to hold to this principle, in this particular instance we do not continue to object to the interrogatories. Before filing Contention I.G., NECNP did not receive advice from any consultant or firm regarding the application of I & E Bulletin 82-11 to Seabrook.

XVI-4, XVI-5

NECNP regrets that it inadvertantly ommitted answers to these interrogatories. It was intended that they be included with the general answer to XVI-6 and XVI-7, which is that NECNP has not obtained expert evaluation of these questions, and will promptly supplement our responses to Applicants' interrogatories when the information becomes available. As discussed with regard to Interrogatories VI-6, VI-7, etc., supra, such an answer is acceptable under NRC rules of practice.

XXI-6

Applicants appear to be improperly using their motion to compel to apply for summary judgment on Contention II.B.l, based on NECNP's purported failure to answer the interrogatory, and upon an answer given by NECNP to Applicants' interrogatories regarding the scope of environmental

qualification at Seabrook. NECNP's response to this interrogatory was that our consultants are reviewing Chapter 17 of the FSAR, which was recently updated, and that we will supplement our answer when the information becomes available. NECNP Response to Applicants' Interrogatories at 16. This is an acceptable answer. Boston Edison Co. (Pilgrim Unit 2), LBP-75-30, 1 NRC 579, 586 (1975).

Applicants appear to find additional basis for summary judgment on Contention II.B.1 in the fact that NECNP has expressed agreement with Applicants that, if "safety related" and "important to safety" have the same meaning, then the dispute between Applicants and NECNP over the scope of Applicants' qualification effort is merely academic. The trouble is that, as NECNP has stated in its answers to Applicants' interrogatories, the NRC's environmental qualification rule defines the term "important to safety" to include a broader category of equipment than that considered "safety-related." NECNP Response to Applicants' Interrogatories (January 21, 1983) at 15. There is thus no ground for summary disposition of the issue. In any event, the scope of qualification is only one element of the deficiencies in Applicants' Quality Assurance program, and could not serve as the basis for dismissal of the entire contention.

XXXII-12

Contrary to Applicants' statement, NECNP did not "refuse" to describe the contents of its conversation with Chief Mark of the Hampton Police Department. That conversation is described in contention III.2. NECNP did object, however, to disclosing any notes taken by attorneys during that conversation, as such notes would constitute attorney work product, which is protected under 10 CFR 2.740(b)(2). NECNP requests a protective order from the Board allowing it not to divulge such notes.

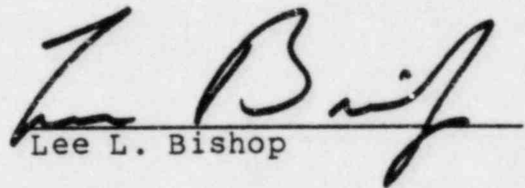
XXX-13 through XXX-25, XXXI-2, XXXII-3 through XXXII-8, XXXIII-2 through XXXIII-5, XXXIII-8, XXXIII-9, XXXIII-12 through XXXIII-20.

NECNP has answered Applicants' interrogatories regarding emergency planning to the best of its knowledge and ability. We are still in the process of discovery on these contentions, and will be able to supplement our answers when that information becomes available. At this time, the extent of our knowledge is in many cases described in the bases of our contentions, to which we referred Applicants in our answers to their interrogatories. These contentions are factually detailed and give adequate notice to Applicants of the bases for our contentions. NECNP has committed to supplement the

answers to these interrogatories as we obtain additional information. The Applicants are attempting to eject NECNP from this proceeding on the basis of some imaginary deadline for the completion of answers to interrogatories. Insofar as their Motion to Compel requests the dismissal of NECNP's contentions, it is premature and should be rejected by the Board.

Respectfully submitted

Diane Curran



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February 16, 1983

CERTIFICATE OF SERVICE

I certify that on February 16, 1983, copies of NECNP's Motion to Compel Answers by Applicants to NECNP Second Set of Interrogatories on Contentions I.D.1, I.D.4, I.F, I.I, I.L, and II.B; Motion to Compel Answers by Applicants to NECNP Third Set of Interrogatories on Contentions I.A.2, I.B.1, I.B.2, and I.C; Opposition to Applicants' Motion to Compel; and Motion for Extension of Time for filing the above pleadings, were served by first-class mail or as otherwise indicated on the following:

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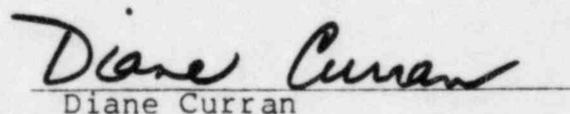
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