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October 16, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
METROPOLITAN EDISON COMPANY, ET AL.	)	Docket No. 50-289 SP
	)	(Restart-Management
(Three Mile Island Nuclear Station, Unit No. 1)	)	Remand)
	)	

LICENSEE'S MOTION TO COMPEL DISCOVERY ON
LICENSEE'S SECOND SET OF INTERROGATORIES TO UCS (TRAINING)

Pursuant to 10 C.F.R. § 2.740(f), Metropolitan Edison Company, et al. ("Licensee") hereby moves the Atomic Safety and Licensing Board to compel Intervenor Union of Concerned Scientists ("UCS") to respond in full to Interrogatories U-43 and U-44, as requested in "Licensee's Second Set of Interrogatories to UCS (Training)," dated September 12, 1984.

I. INTRODUCTION

On September 12, 1984, Licensee served UCS with its second set of interrogatories. On September 28, 1984, UCS filed its response to Licensee's discovery request. In response to Interrogatories U-43 and U-44, which are the subject of this motion, UCS stated in part that it did not have the knowledge to respond but would supplement its responses as soon as possible.

On October 9, 1984, counsel for Licensee contacted counsel for UCS and identified to him that Licensee wished to discuss

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UCS' response to the second set of interrogatories and UCS' sixth set of interrogatories and document requests, filed September 27, 1984. Licensee indicated to UCS that the purpose of such discussion would be to discuss each party's respective dissatisfactions with the other's discovery response and, hopefully, to reach a compromise between respective counsel on what Licensee would provide in response to the sixth set of interrogatories and what UCS would provide in response to Licensee's second set of interrogatories.

On October 10, 1984, Licensee counsel met with UCS counsel for the purpose of reaching a discovery agreement. Licensee in general indicated a willingness to provide information requested by UCS concerning its witnesses and the documents relied on by them in accordance with a previously agreed upon commitment, filed one day before UCS' sixth set of discovery. See Letter from Licensee's counsel to counsel for UCS, September 26, 1984. Licensee sought a similar commitment from UCS.

UCS informed Licensee that it still did not have the knowledge to respond to Interrogatories U-43 and U-44: according to counsel, UCS still did not know whom it would call as witnesses, it did not know when it would know, and it still did not know what documents it intended to introduce in the hearing through Licensee's witnesses or through prefiled testimony. However, UCS took Licensee counsel's request under advisement.

On October 11, late in the afternoon, counsel for UCS called Licensee's counsel and indicated that its position on Interrogatories U-43 and U-44 remained unchanged; moreover, counsel stated that once UCS did know what documents it would use on cross-examination of Licensee's witnesses, UCS nevertheless would not identify these documents because of the work-product doctrine.

For the reasons discussed below, Licensee contends that, in view of UCS' continuing failure voluntarily to provide any information on the witnesses and documents it intends to use or rely on in the hearing, the Board should compel UCS to respond fully to Interrogatories U-43 and U-44 as propounded.1/

II. ARGUMENT

A. Applicable Standard

It is well settled that discovery in adjudicatory proceedings is intended to insure that the parties to the proceedings will have access to all relevant information prior to the hearing, thereby promoting greater fairness in adjudication and the

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1/ Licensee notes that 10 C.F.R. § 2.740(f) requires the moving party to file its motion to compel discovery within ten days after the date of the response. Since UCS filed the response at issue on September 28, 1984, the last day for filing this motion should have been October 9, 1984 (October 8, 1984 being a holiday). As indicated above, however, on October 9, 1984, Licensee counsel contacted UCS specifically to avoid filing a motion to compel. Licensee preferred to follow a voluntary course of discovery, but, as the sequence of events outlined above indicates, UCS has forced an involuntary course. Thus, Licensee seeks the Board's permission to file this motion today.

expeditious conduct of the hearing itself. See Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station Units 1 and 2), ALAB-613, 12 N.R.C. 317 (1980). In Susquehanna, the Atomic Safety and Licensing Appeal Board discussed in greath length the discovery responsibilities of an intervenor in an adjudicatory proceeding. The Appeal Board there noted that:

> Discovery is the descriptive term for procedures available to help litigants learn the nature of an adversary's case in advance of trial. . . . An important reason for allowing discovery is to eliminate, so far as possible, the element of surprise in modern litigation. The underlying concept is to shorten the actual trial, with its attendant expense and inconvenience for all concerned, while increasing the parties' ability to develop a complete record for decisional purposes.

Susquehanna, supra at 322.

In accordance with these principles, 10 C.F.R. § 2.740b(b) requires that a party responding to a discovery request shall answer each such request separately and f[illegible]less it is objected to by the responding party. 10 C[illegible]2.740(f) further provides that an evasive or incompl[illegible]swer or response shall be treated as a failure to answer or respond. UCS's responses to Interrogatories U-43 and U-44 are evasive and incomplete. UCS therefore has failed in its duty fully to respond to Licensee's discovery requests, thereby undermining Licensee's ability to prepare and conduct its case.

B. Interrogatories U-43 and U-44

1. Interrogatory U-43 reads as follows:

Identify all persons UCS intends to call as a witness on the remanded issue of training, including individuals UCS may seek to subpoena. For each such person identified above, identify the following:

(a) the nature or substance of his testimony;

(b) his qualifications, access to information, or other reason that he is being asked to testify as to the information identified in response to subpart (a) above;

(c) his position or relationship to UCS at any time, including but not limited to any contracts, consulting arrangements, advisory positions or other relationships with UCS he has held or holds currently;

(d) all technical documents he has reviewed or will review to prepare his testimony;

(e) all persons (aside from counsel) whom he has consulted or will consult to prepare his testimony;

(f) the nature and substance of any discussions, conversations, communications, and other contacts he has had or will have with the persons identified in response to subpart (e) above;

(g) all documents he intends to rely on or use in support of any opinions, evaluations, conclusions, or recommendations he makes in his testimony;

(h) the current location and custodian of all documents identified in response to subparts (d) and (g) above.

On September 28, 1984, UCS responded as follows: "UCS does not yet know who it will call as witnesses, but will supplement its response as soon as possible. At this point, we expect to subpoena some licensed operators and senior operators. We have not yet identified who."2/ Nearly two weeks

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2/ In its September 12, 1984 response to UCS' First Set of Interrogatories, Licensee identified the witnesses it antici-

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later, on October 11, 1984, UCS counsel informed Licensee counsel that it still did not know whom it would call as witnesses or when it would know.

The statements of both September 25 and October 11 indicate either a failure or an unwillingness to understand the meaning of the interrogatory. Interrogatory U-43 asks UCS to "[i]dentify all persons UCS intends to call as a witness..." (emphasis added), not who it will call as a witness. At the meeting between counsel for UCS and Licensee on October 10, 1984, UCS counsel, in response to a question by Licensee counsel, indicated that while UCS did not know exactly whom it would call at the hearing, it was considering several people to serve as expert witnesses. Counsel also indicated that it might subpoena several Licensee employees. Licensee thus has reason to believe that UCS has an intention to use particular individuals as witnesses. Licensee seeks only to learn of this intention, until UCS finally decides which one(s) it will call at the hearing; and Licensee has a right to know of this intention pursuant to Fed. R. Civ. P. 26(b)(4)3/

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pated would testify on its behalf on training. See Licensee's Answers to Union of Concerned Scientists' First Set of Interrogatories to General Public Utilities (Training), September 12, 1984, Answer to Interrogatory 2.

3/ Rule 26(b)(4)(A)(i), which was held to apply to NRC proceedings in Carolina Power & Light Company, et al. (Shearon

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Because Interrogatory U-43 simply asks UCS to identify all persons it intends to call as witnesses, UCS' recurring response to U-43 that it does not know whom it will call as witnesses or when it will know constitutes an evasive and incomplete answer under 10 C.F.R. § 2.740(f) and thus violates 10 C.F.R. § 2.740b(b). As discussed above, the NRC regulations

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Harris Nuclear Power Plant, Units 1 and 2), LBP-83-27A, 17 N.R.C. 971, 978 (1983) and Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2), LBP-83-17, 17 N.R.C. 490, 497 (1983), states that "[a] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion" (emphasis added).

Wright and Miller state that the rule is intended to facilitate cross-examination and rebuttal of experts at the trial and is applicable in any case in which an expert witness will be used. 8 Wright and Miller, Federal Practice and Procedure: Civil § 2030 at 231 (1973). They explain that as the Advisory Committee Note points out, 26(b)(4)(A)(i) establishes by rule substantially the procedure adopted five years before by Judge Roszel Thomsen in the District of Maryland. Id., citing Knighton v. Villian & Fassio e Compagnia, 39 F.R.D. 11 (D.C. Md. 1965).

Like Licensee in this motion, Wright & Miller also note that this provision is limited to experts the other party "expects to call," a phrase used by Judge Thomsen and explained by him as follows: "The phrase 'expects to call' has been chosen rather than the term 'may call', because the latter phrase is too broad; but the phrase 'expects to call' will be interpreted broadly, to achieve the purpose of the ruling, which is to make available to each party a reasonable time before trial the facts, the opinions and the reasons for the opinions of the experts whom his opponent will call at trial, so that a party may adequately prepare for cross-examination of his opponents' experts." Wright & Miller, id., at 251-252 (emphasis added).

view an evasive or incomplete answer to an interrogatory as a failure not only to respond separately and fully, but as a failure to respond at all. Licensee notes that UCS already knows who Licensee's expert witnesses will be and in a letter filed yesterday, Licensee's counsel has identified to UCS the nature of all of its witnesses' testimony, and the people and documents they expect to rely on in formulating such testimony. Letter from Licensee's counsel to counsel for UCS, October 15, 1984.

Licensee thus believes that for the reasons stated above, the Board should compel UCS to respond without evasion or incompleteness to Interrogatory U-43, thereby enabling Licensee to begin to learn through discovery what UCS, through discovery, has already learned.

2. Interrogatory U-44 reads as follows:

> Identify and produce all documents which UCS intends to introduce in the hearing or through prefiled testimony on the remanded issue of training.

UCS made three points in its September 28, 1984, response to U-44 and reaffirmed these points in conversation with Licensee late in the afternoon on October 11, 1984: 1) UCS does not yet know what documents it intends to introduce but will supplement its response if it knows this information prior to filing of the direct testimony; 2) UCS asserts that the request intrudes on attorney work-product and zone of privacy insofar as it seeks documents to be used on cross-examination and

therefore UCS does not have to and will not disclose any such material; 3) UCS will not know what documents it will seek to introduce through cross-examination until it sees the direct testimony of Licensee and the NRC staff.

Concerning the first point, and in view of the voluminous amount of material Licensee has produced in response to discovery requests by UCS (and TMIA) concerning training, Licensee has reason to believe that, contrary to what UCS asserts, UCS does know at least a significant number of the documents it intends to introduce. If UCS is answering U-44 as evasively and incompletely as it answered U-43, pursuant to 10 C.F.R. §§ 2.740(f) and 2.740b(b), the Board should compel USC to answer the interrogatory.

Concerning the second point, if the documents UCS will use in making its case on cross-examination are work-product then, in all likelihood, the ones Licensee uses in support of its case are work-product as well. Such an all-encompassing impasse on discovery of documents, however, is not the result that Licensee desires, nor the one Licensee has chosen to pursue. In the interest of adjudicatory efficiency, Licensee prefers that both parties be able to discover documents relied on by each other in order to prepare adequately for trial, as long as this disclosure does not divulge the theories and thought-processes of counsel. Licensee has carefully considered what should be the appropriate approach to discovery of documents in

this case, and, after examining the unsettled law in the area of attorney work-product, was hopeful that Licensee and UCS had reached a reasonable compromise as of its September 21 meeting with UCS, embodied in Licensee's letter of September 26, i.e., discovering only those documents and people on which a witness or party has relied in developing his position at trial. This optimism obviously was misplaced, particularly in view of UCS' position that it will never disclose documents to be used on cross-examination.

Licensee has a second objection to UCS' blanket work-product argument. In Public Service Company of New Hampshire, et al., supra 17 N.R.C. at 495, the Licensing Board stated that judicial interpretations of Rule 26(b) indicate that where a party asserts a privilege in objecting to a discovery request, the burden is on the objecting party to establish the existence of the privilege. Furthermore, the Board noted, intervenors' mere assertion that the material it is withholding constitutes attorney work-product is insufficient to meet that burden. UCS, in other words, may not simply make a general claim of work-product protection of all its documents; it must specify precisely what documents meet the work-product test of 10 C.F.R. § 2.740(b)(2). See Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 N.R.C. 1937, 1942 (1982), where the Board stated that before it would consider a claim of privilege, it required

a "particularized claim," identifying "precisely which of the many listed documents are subject to those privileges and why that is the case for each such document." The Board thus should find that UCS, as the objecting party, has not carried its burden of establishing specifically what material meets the tests of 10 C.F.R. § 2.740(b)(2) and grant Licensee's motion to compel discovery with respect to Interrogatory U-44.

Finally, concerning the third point, Licensee makes an argument similar to the one made in reference to Interrogatory U-43: UCS may not yet know what documents it will introduce through cross-examination, but Interrogatory U-44 simply asks UCS to identify and produce the documents relied on by a witness or party that UCS intends to introduce. Licensee believes it unlikely that at this late date, UCS still has no idea what documents it intends to introduce.

III. CONCLUSION

UCS' failure to identify witnesses and its failure to identify documents on which the witnesses will rely or that UCS, e.g., through interrogation by an expert, will use to make its case on cross-examination of Licensee's witnesses are an unfortunate combination of nonresponsive discovery responses. In essence, UCS will tell Licensee nothing about its case. Licensee has produced many thousands of (legible) pages of documents for UCS' review. Licensee has endeavored to respond as expeditiously as humanly possible to UCS' numerous discovery

requests. Licensee believes that at this juncture, it is necessary for the Board to compel UCS to respond expeditiously and in full to Licensee's Interrogatories U-43 and U-44.

Respectfully submitted,

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Dated: October 16, 1984