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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
Philadelphia Electric Company)	Docket Nos. 50-352
)	50-353
(Limerick Generating Station,)	
Units 1 and 2))	

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APPLICANT'S MOTION TO COMPEL ANSWERS TO
ITS FIRST SET OF INTERROGATORIES, TO COMPEL
PRODUCTION OF WITHHELD DOCUMENTS, AND FOR
RELATED RELIEF REGARDING DESTROYED DOCUMENTS

Preliminary Statement

Pursuant to the rulings of the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board"),^{1/} Applicant served its "First Set of Interrogatories and Requests for Production of Documents to Limerick Ecology Action ["LEA"] and Friends of the Earth ["FOE"] Regarding Offsite Emergency Planning Contentions" on June 25, 1984. LEA served its answers on July 19, 1984.^{2/} After reviewing the answers, counsel for Applicant first spoke to LEA's

1/ Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-84-18, 19 NRC ____ (April 20, 1984) (slip op. at 90-91).

2/ Although its certificate of service was dated July 16, 1984, the envelopes containing the answers received by at least the Licensing Board, Applicant and NRC Staff were postmarked July 19, 1984. The answers were not in fact received by Applicant's counsel until July 23, 1984.

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representative, Miss Mulligan, on July 24, 1984, stating the need to go over the answers in some detail because the answers were in many instances incomplete or nonresponsive. Miss Mulligan stated that she would be unavailable on July 25, 1984 to discuss the answers. Accordingly, a telephone conversation was arranged for July 27, 1984, at which time Mr. Rader for the Applicant and Miss Mulligan for LEA discussed the answers. The results of those discussions were confirmed in a letter from Mr. Rader to Miss Mulligan, dated August 1, 1984 (copy attached). As noted in the letter, LEA agreed to provide some additional information, but generally declined to provide further answers to Applicant's interrogatories. LEA has declined, at this point, to make any further documents available.^{3/}

In many instances, LEA's refusal to answer interrogatories responsively or provide more specific information apparently arises from its misunderstanding of the NRC's rules regarding discovery, which permit a party to:

[O]btain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity

^{3/} At the meeting among the parties on August 1, 1984, LEA agreed to make certain news clippings available.

and location of persons having knowledge of any discoverable matter.^{4/}

Accordingly, LEA's answers that it has not decided whether it will pursue a contention, not formalized certain information or completed its investigation of a matter and that it has provided "representative" examples are all improper discovery responses. Applicant is clearly entitled to whatever discoverable information LEA possesses at this time.

Also, Applicant is entitled to answers which give LEA's specific, detailed opinions as to defects in the existing plans and procedures, including LEA's opinions as to how such defects should be resolved. The boards have consistently held that such interrogatories are a proper means to explore the bases for an intervenor's contentions.

Several of LEA's answers indicate that further information will be supplied based upon ongoing investigations and evaluations by its members and consultants. While LEA has stated it would provide such information when available,^{5/} it refuses to set forth any time. The Board should set a firm date by which all such analyses will have been completed and furnished to Applicant. Given the anticipated hearing date, it would be fair to require LEA to provide

^{4/} 10 C.F.R. §2.740(b)(1).

^{5/} At the August 1, 1984 meeting, LEA offered to inform Applicant on August 6 of this date.

such information no later than August 31, 1984 in order to permit Applicant to prepare its case for hearing.

As regards production of documents, it is evident that LEA has not complied with Applicant's request which, in effect, seeks all documents possessed by LEA, whether generated by LEA or others, relating to its emergency planning contentions. LEA has provided Applicant with only eight short documents, two of which it generated. Given the breadth of the contentions and the activities of LEA's membership in pursuing them, common sense dictates that a far greater number of documents have been generated or received by LEA. Finally, in the discussion on July 27, 1984, LEA acknowledged to Applicant, for the first time, that certain documents requested by Applicant had been destroyed by LEA in the course of responding to discovery. This constitutes a serious, flagrant violation of the NRC's rules of discovery and requires appropriate relief as described more fully below.

Argument

The basic reasons supporting Applicant's motion to compel as to particular interrogatories and its request for production of documents are contained in the August 1, 1984 letter from Applicant's counsel to LEA. For the convenience of the Board, these are outlined below with additional discussion as appropriate. Each item will be discussed seriatim.

General Interrogatories

1-2. Applicant requested LEA to identify its witnesses and the substance of their expected testimony. LEA states that it "has not yet determined which contentions will be litigated." Such an answer is clearly nonresponsive. It is irrelevant whether LEA might ultimately drop some or all of its contentions regarding offsite emergency planning. Applicant is entitled to the requested information regarding witnesses whom LEA presently intends to offer on its contentions.

Specific Interrogatories

4, 5, 8 and 21. Applicant seeks information regarding the alleged unwillingness of school teachers and staff to perform their responsibilities in the event of a radiological emergency. LEA's answers to these interrogatories state that it has not conducted a survey on this question. Clearly, Applicant has not asked LEA to conduct any such survey. Such request would be impermissible under the discovery rules prohibiting a party from requiring another to create new documents or information in answering discovery requests. There is no reason why LEA cannot answer these interrogatories based upon its contacts with school teachers and staffs apart from any organized survey. Thus,

there is no basis for LEA's refusal to provide such information, which it has acknowledged to exist.^{6/}

9, 17, 25, 27, 39 and 43. In each of these interrogatories, Applicant asked LEA to specify any change in the offsite emergency plans and/or implementing procedures which it asserts to be necessary in order to assure adequate planning for the subject of each particular interrogatory. It is entirely appropriate for Applicant to determine how LEA would resolve any planning deficiencies it has asserted in order to probe the validity of LEA's bases for its contentions. Virtually the same question arose in Callaway, where the Licensing Board granted applicant's motion to compel, ruling:

In another series of interrogatories, numbered 33, 41, 45, 58, 59, 60, 66, 77 and 90, the Applicant sought to uncover the grounds for a number of Intervenor's contentions. The questions were objected to on the basis that they call for conclusions or possible resolutions to problems that are not the responsibility of the Intervenor. In the Intervenor's view, he has only to prove the validity of a contention and not provide answers as to how emergency planning deficiencies should be resolved. The discovery process would be meaningless if it did not permit parties to probe the foundation or basis of a litigant's claim. One acceptable method for such probing is to solicit positive solutions

^{6/} By contrast, LEA agreed to check with its members and provide such information in answer to Interrogatory 20, which relates to the alleged unwillingness of school bus drivers to perform their assigned duties in transporting students.

from the litigant for deficiencies alleged to exist. This is what the Applicant has attempted to do here and the interrogatories are appropriate, as a means of determining the strengths and weaknesses of an opponent's case.^{7/}

Given LEA's allegations that plans and procedures are deficient, LEA necessarily has some opinion as to what measures must be taken to amend or supplement the plans and procedures to assure an adequate emergency response. The effectiveness and practicality of such views clearly go to the heart of the contentions and are therefore relevant to their disposition.^{8/}

16. In this interrogatory, Applicant seeks LEA's specification of all elements of training which it contends that planners must provide to school teachers, bus drivers and other staff. LEA answers that "[t]raining has not progressed to the point that LEA can answer this question in any further detail." This is a non sequitur and nonresponsive. Obviously, LEA can state its position as to what training must be provided regardless of the current status of the training program.

^{7/} Union Electric Company (Callaway Plant, Unit 1), Docket No. STN 50-483 OL, "Memorandum and Order (Applicant's Motion to Compel)" (December 9, 1982) (slip op. at 3).

^{8/} It is noted that LEA did not object to Interrogatories 11, 15 and 41, which seek the same kind of information. Either in the written answers to these interrogatories or during the conversation between Mr. Rader and Miss Mulligan on July 27, 1984, LEA agreed to provide this information.

18. This interrogatory seeks information regarding alleged defects in the plans, implementing procedures and training provisions as regards "the assignment of school bus drivers to transport students." LEA asserts that it cannot answer this question until "LEA has been informed which buses have been assigned to which schools." Again, this is a non sequitur. LEA has not identified any reason why the adequacy of assigning school bus drivers is dependent upon the assignment of particular buses to particular schools.

22. This interrogatory seeks LEA's position as to the level of nonperformance by school bus drivers in the event of a radiological emergency. LEA's assertion that it cannot answer this question until additional unmet needs have been provided is similarly nonresponsive. As with Interrogatory 16, the answer to this interrogatory is not dependent upon the status of plans. Rather, it seeks LEA's position as to what standards the plans must meet, i.e., whether and to what extent planners should anticipate that school bus drivers will abandon their duties.

35. This interrogatory seeks information as to further personnel or vehicles necessary for prompt route-alerting. After giving specific responses, LEA states in its answer that "[s]imilar responses were received from other municipalities." LEA has declined to provide Applicant with the so-called "similar responses," taking the position that the

ones given are "representative."^{9/} Obviously, Applicant is entitled to all relevant information obtainable by discovery, not merely that which LEA considers to be "representative."

38. In this contention, Applicant asked LEA to specify deficiencies in planning for three identified facilities. While LEA has indicated certain "concerns," which boil down to transportation needs, it has not identified the specific resources which LEA asserts to be necessary to evacuate those facilities. Applicant is entitled to a more specific answer providing LEA's position as to whether the plans fail to provide sufficient buses, ambulances, or other vehicles.

In general, LEA has agreed to answer unanswered interrogatories and to supplement its initial answers with updates as indicated in the letter from Applicant's counsel dated August 1, 1984. As further stated in the letter, however, LEA has declined to give Applicant any firm commitment regarding when such updates will be provided, based upon ongoing surveys or analyses being conducted by LEA and its consultants. Recognizing that additional information is always being generated in this area, Applicant nonetheless believes that in fairness LEA should be required to provide such information with reasonable dispatch. Applicant has

^{9/} At the August 1, 1984 meeting, LEA confirmed that its answer provided "examples as of the date interrogatory answers were due."

proposed to LEA a completion date of August 31, 1984. A full month should be amply sufficient for LEA to complete its discussions with cognizable officials and any evaluations currently under way.

Document Production

As the Licensing Board is well aware, and as reflected in LEA's answers, LEA's membership has been vigorously pursuing its contentions at the local level by contacts with various planning officials and support organizations. Given the range of issues and concerns it has raised and the apparent breadth of its activities, it strains credulity for LEA to assert that the eight documents attached to its answers are the only ones in its possession which are responsive to Applicant's request for production of documents. Given Applicant's instructions in answering interrogatories and the breadth of its document request,^{10/}

^{10/} The definitions and instructions to Applicant's interrogatories broadly define "intervenor" and request "all knowledge and information in intervenor's possession and/or knowledge and information in the possession of intervenor's agents, representatives, consultants, and unless privileged, attorneys." The instructions further state that when "an interrogatory requests a statement of an intervenor's assertion, contention, view or opinion, the answer shall also contain a full discussion of the factual basis for the assertion or opinion." The document request as to both specific and general interrogatories broadly covers "all documents identified in the answers above," which certainly includes documents which should have been identified, or "upon which intervenor otherwise intends to rely in the presentation of its direct case or in the cross-examination of other witnesses."

Applicant has, as a practical matter sought discovery of all documents, whether internally generated or received from other persons or entities, which relate to LEA's emergency planning contentions.^{11/} On its face, the paucity of LEA's document response demonstrates that LEA has not complied with the Applicant's request for production of documents.

Apart from LEA's evident failure to produce requested documents, LEA disclosed during the telephone conversation of July 27, 1984 that certain documents were destroyed by LEA's members during the preparation of answers to Applicant's interrogatories. The extent of this practice is unknown to Applicant. The deliberate destruction of discoverable materials is not permissible once discovery requests have been filed,^{12/} and LEA's actions in destroying discoverable documents is clearly a violation of the rules. Until the parties and the Licensing Board learn the extent of document destruction and the reasons why it was undertaken, however, it would be inappropriate for Applicant to suggest any particular sanctions against LEA or its representatives.

^{11/} Of the eight documents produced, only one was generated in part by LEA. Another was prepared by its consultant. The other six were generated by outside individuals or entities.

^{12/} See Gulf Oil Corp. v. United States Department of Energy, 663 F.2d 296 (D.C. Cir. 1981); Struthers Patent Corp. v. Nestle Co., 558 F. Supp. 747 (D.C.N.J. 1981); Litton Systems v. American Telegraph and Telephone Company, 91 F.R.D. 574 (S.D.N.Y. 1981).

On the other hand, Applicant is entitled to immediate relief which provides it with previously withheld documents and restores the status quo as regards destroyed documents to the fullest extent possible. Accordingly, the Licensing Board should, in addition to compelling LEA to answer Applicant's interrogatories as discussed above, require LEA to produce and/or protect requested documents as follows:

1. All such "documents" as requested by Applicant in connection with its various interrogatories and document request shall be compiled and furnished to Applicant or produced for inspection and copying within ten days.
2. LEA shall conduct a survey of each of its members or former members with knowledge of these matters, including any representative (e.g., Mrs. Zitzer or Mr. Elliott) or consultant, to determine whether "documents" as so defined have been destroyed, undisclosed or otherwise not produced. The survey shall state the name of each member surveyed, a description of the form and content of any such document which was destroyed or which the member knows to have been destroyed, and the date (approximate) the document was destroyed.
3. LEA shall file an affidavit which attests to the results of the survey, including a statement that (a) a good faith effort has been made to recover and produce copies of all available documents requested by Applicant, and (b) a good faith effort has been made to specify to the fullest extent possible the content of any documents which have been destroyed.
4. Under no circumstances shall any "document" as defined in

Applicant's interrogatories be destroyed (meaning physically obliterated, discarded or rendered unavailable for any other reason).^{13/}

Additionally, the Board should require LEA's representative to explain the reasons and circumstances surrounding the destruction of discoverable documents.

Conclusion

For the reasons discussed more fully above, the Licensing Board should grant Applicant's motion to compel by requiring LEA: (a) to answer interrogatories for which no answer has been given; (b) provide more complete or specific answers as appropriate; (c) supplement existing answers with updated information no later than August 31, 1984; (d) produce previously withheld documents forthwith; and (e) implement appropriate measures to restore the status quo as to destroyed documents to the fullest extent possible.

Respectfully submitted,
CONNER & WETTERHAHN, P.C.

Troy B. Conner, Jr.
Robert M. Rader

Counsel for the Applicant

August 2, 1984

^{13/} This request for relief was made known to LEA in Applicant's letter dated August 1, 1984 at pages 7 and 8.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Motion to Compel Answers to its First Set of Interrogatories, to Compel Production of Withheld Documents, and for Related Relief Regarding Destroyed Documents," dated August 2, 1984 in the captioned matter have been served upon the following by deposit in the United States mail this 2nd day of August, 1984:

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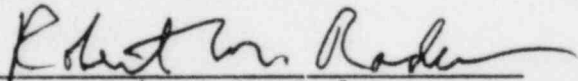
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