

DOCKETED
USNRD

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

*85 JAN 25 A10:29

Before the Atomic Safety and Licensing Board

Public Service Electric and)
Gas Company) Docket No. 50-354-OL
)
(Hope Creek Generating Station))

APPLICANTS' OBJECTION TO INTERVENOR'S NOTICE
OF DEPOSITION AND MOTION FOR A PROTECTIVE ORDER

On January 22, 1985, counsel for Applicants in the captioned proceeding received a Notice of Deposition for Harold Sonn, President, Chairman of the Board and Chief Executive Officer of Public Service Electric & Gas Company. This document purported to require Mr. Sonn to produce nine other Company employees for depositions on January 24, 25, 28, 29, and 30, 1985. Applicants object to this Notice of Deposition as being late-filed, overly broad and procedurally inadequate and move for a protective order that the depositions not be permitted.^{1/}

According to the Certificate of Service dated January 18, 1985 attached to the Notice of Deposition, it was certified that a copy of, inter alia, "Notice of Deposition"

1/ Under the Federal Rules of Civil Procedure, the deposition of an employee of a corporation who is not an officer, director or managing agent must be taken pursuant to a subpoena. Mitsui & Co. (U.S.A.) v. Puerto Rico Water Resources Authority, 93 F.R.D. 62, 65 (D. Puerto Rico 1981).

8501280380 850123
PDR ADOCK 05000354
PDR

DS03

dated January 18, 1985 was served upon Troy Conner, Jr. by "ZAP Mail."^{2/} Implied by such statement is that the material was sent in time to be received via electronic mail on the same day prior to the close of business.^{3/} However, that is not the case. The package was received after business hours by a guard in the lobby of the building, not associated with the counsel for the Applicants nor authorized in any way to accept service. Monday, January 21, 1985 was a legal holiday in the District of Columbia. Thus, the document in question was not received until Tuesday, January 22, 1985. Mr. Fryling, Associate General Solicitor for Public Service Electric & Gas Company, did not receive his copy until sometime after 10:00 A.M. on Monday, January 21, 1985.

When means other than by mail or telegraph are used, the risk of non-delivery falls on the sender and service is complete when the document is actually received. See 10 C.F.R. §2.712(d). Thus, the reasonableness of the Notice of Deposition must be judged on the basis of the January 22,

^{2/} According to advertisements, "ZAP Mail" promises to electronically transmit and deliver documents of 20 pages or less within two hours. The document in question was over twenty pages; counsel for the Public Advocate apparently did not take this into account in ensuring timely delivery.

^{3/} Mr. Thurber, counsel for the Public Advocate, had called counsel for Applicants on Friday morning to state that some unspecified notices of deposition were contemplated.

1985 date. However, whether judged by its date of transmission or receipt, the Notice is unreasonable.

Moreover, the proof of service is defective under the Commission's rules inasmuch as, if not served and signed by a counsel of record, proof of service must be by "affidavit of the person making the service" (emphasis supplied). 10 C.F.R. §2.712(e).^{4/} The proof of service was apparently not signed by an attorney of record, but by an individual signing Mr. Shapiro's name followed by the initials A.P. Thus, the proof of service is invalid.

Neither Mr. Sonn nor any of the other individuals named in the single notice of deposition was served directly by the Public Advocate as required by 10 C.F.R. §2.740a(a).^{5/} Counsel attempted to notify the individuals involved of their possible need to attend the depositions when the actual notice was received. As should be obvious to all, these individuals have other commitments on their time and it is totally unreasonable to seek to take depositions on such short notice. In particular, many were heavily involved in responding to Intervenor's voluminous third set of interrogatories and request for documents and deferred

^{4/} In addition, the Certificate of Service speaks to "notices of deposition" where only one single document entitled Notice of Deposition was sent to counsel for Applicants.

^{5/} The Notice of Deposition at 1 incorrectly refers to the applicable section as 10 C.F.R. §2.740(a).

other important work to assure that timely service was made.^{6/} Moreover, many of the named individuals are required to participate in responding to Intervenor's fourth set of interrogatories and request for production of documents which, according to Ms. Remis's letter to the Board of January 18, 1985, must be responded to by January 31, 1985. It is unreasonable for these individuals to be required to do both on such short notice. Moreover, it is unreasonable to expect Applicants' as well as Staff's counsel to be able to rearrange schedules, involving other NRC proceedings, on such short notice.

Aside from these deficiencies, the manner and timing of these depositions is prejudicial to Applicants. At the prehearing conference held on December 17, 1984, counsel for the Public Advocate indicated that he was at that time considering taking depositions.^{7/} The Board, at that time, recognized that the conclusion of discovery was approaching and required that expeditious arrangements for discovery be made.^{8/} Notwithstanding the fact that he could have pursued

^{6/} In another pleading, Intervenor's Response to Applicants' Motion for Sanctions (January 22, 1985), n.* at 5, Intervenor claims that service of the responses were not provided "in a timely fashion." In fact, the responses were delivered one day before the due date under the Commission's rules. The subject discovery was served by Intervenor by ordinary mail.

^{7/} See, for example, Tr. 385.

^{8/} Tr. 402, 407.

such depositions for the previous year since the contentions were admitted, the Public Advocate elected to wait over a month until such notices were sent out with less than two weeks remaining to the close of discovery.^{9/} As the Board pointed out in its Order of January 11, 1985 at 2-3:

We also note that the Intervenors instant interrogatories were filed on December 13, 1984, almost a year from the date (December 21, 1983) all parties were ordered to pursue discovery promptly and diligently, and shortly before all discovery is to be completed on January 31, 1985.

This lateness warrants the issuance of a protective order that discovery not be had at this late date.

The Notice of Deposition merely states that "[y]our depositions will be taken with regard to the basis for your position on these contentions. In accordance therewith, please bring to this deposition all documents upon which you rely and any other matter pertinent to the contentions which have not otherwise been provided to the Public Advocate." As the Licensing Board stated at the prehearing conference: "We don't want to have these big, sweeping kind of interrogatories with every document ever filed in regard to

^{9/} This delay in noticing depositions occurred notwithstanding the fact that by December 28, 1984, Applicants had provided a substantial number of documents and answered numerous interrogatories. In fact, Applicants had responded to Intervenor's first set of interrogatories and request for document production on February 14, 1984.

X, Y, or Z. This is too time-consuming, too voluminous. . . ."^{10/} Such request in the Notice of Deposition is entirely too vague and amounts to a general request for all documents. This blunderbuss approach in effect asks for everything that the Public Advocate had not previously requested. Such request for additional documents is overly broad and overreaching and should not be permitted.^{11/}

The Public Advocate has noticed these depositions for its offices in Trenton, New Jersey with two depositions each day without regard to their length.^{12/} Applicant objects to

^{10/} Tr. 406.

^{11/} In a telephone conversation of January 22, 1985 Mr. Thurber, counsel for the Public Advocate, recognized the generality of this request and would limit the request to all documents to which the Applicants would rely in their direct testimony which have not otherwise been provided to the Public Advocate. Such request, even as limited, is too vague. The Board contemplated sequential filing of testimony in order that Applicants be made aware of the specific matters which intervenor sought to raise in its testimony. Thus, to ask that Applicants provide all documents upon which they will rely on their testimony at this time is too general and essentially meaningless. This is particularly true in view of the number and scope of documents requested by Intervenor and already produced by Applicants.

^{12/} In the same vein, the Public Advocate states that some of these depositions may be taken concurrently. Applicant objects to this unilateral statement of the manner in which the depositions will be taken.

the location of these depositions and the timing as being unreasonable.^{13/}

The scope of the requested depositions is significantly too broad, particularly at this very late stage of the discovery process. A general deposition regarding overall knowledge of the deponents regarding the contentions perhaps would have made sense early on in the discovery process, but it does not now.^{14/} The lack of any limitation on the subject matter for each deponent, besides being inefficient, is unfair to the witnesses and not designed to elicit meaningful testimony. Mr. Thurber, counsel for Public Advocate, stated that no further definition of the specific matters on which each individual would be deposed could be

^{13/} Mr. Thurber also agreed that if depositions were ultimately taken it would be reasonable to take these depositions at the situs of the individuals involved, Artificial Island, in the case of nine of the ten individuals involved, commencing the start of normal working hours, taking depositions sequentially until at least the end of normal business hours until completed. Mr. Thurber later called back to state the Public Advocate would agree to take the depositions beginning on January 28, 1985. As discussed later, this is not agreeable to Applicants.

^{14/} Mr. Thurber stated that it relied on a form of notice of deposition utilized by Applicants for the Public Advocate early in the proceeding. What was proper at that time is not necessarily proper now considering the amount of discovery provided to Public Advocate. With regard to claimed procedural irregularities with regard to the earlier notice, these were waived by the Public Advocate when no objection was taken.

provided.^{15/} This position strains credibility, particularly when the first of the scheduled depositions was less than two days away when this statement was made. This is contrary to the Board's order at the prehearing conference that the parties discuss discovery in order to permit it to be meaningful. It certainly is incumbent upon the Public Advocate, after having seen the numerous responses to interrogatories and request for documents to be able to circumscribe the specific subject areas for each deponent.

Finally, it is noteworthy that at the December 17, 1984 prehearing conference, the Public Advocate responded to the Board's request concerning the scheduling of the Intervenor's consultants for depositions that they would not be available within the time frame set by the Board for completion of discovery. To accommodate Intervenor's consultants' schedule, the Board directed that Applicants would not be permitted to take their depositions. The same accommodation should be accorded Applicants' witnesses in

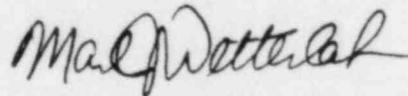
^{15/} When the matter was pursued, Mr. Thurber stated only Mr. Sonn would be questioned concerning Contention 1, IGSCC and Contention 2. It is unclear what the Public Advocate intends to gain by questioning Mr. Sonn, who is not an engineer, regarding IGSCC. All others would be questioned concerning Contention 2. Aside from this, no attempt at limitation was possible.

light of the eleventh-hour timing of the request.^{16/} If the Board permits these depositions to take place, Applicants move that the Board reconsider its decision not to allow Applicants the opportunity to depose Intervenor's consultants.

For these reasons, Applicants object to the Notice of Deposition and asks for a protective order that the depositions, as requested by the Public Advocate not be had.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.



Mark J. Wetterhahn
Counsel for the Applicants

January 23, 1985

^{16/} If the Board nevertheless permits the taking of depositions, it should limit them to two days, including examination by other parties, to be held on January 30 and 31, 1985. In view of all discovery that has been conducted, this should be sufficient for all legitimate purposes. Any earlier date would not permit preparation for the depositions, even if the subject matter of each deposition was made known by the Public Advocate.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

Public Service Electric and)
Gas Company)
) Docket No. 50-354-OL
(Hope Creek Generating)
Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Objection to Intervenor's Notice of Deposition and Motion for a Protective Order", dated January 23, 1985 in the captioned matter have been served upon the following by deposit in the United States mail on this 23rd day of January, 1985:

| | |
|---|--|
| * Marshall E. Miller, Esq. Chairman Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Washington, D.C. 20555 | Atomic Safety and Licensing Appeal Panel U.S. Nuclear Regulatory Commission Washington, D.C. 20555 |
| * Dr. Peter A. Morris Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Washington, D.C. 20555 | Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Washington, D.C. 20555 |
| **Dr. David R. Schink Texas A&M University Oceanography & Meteorology Building Room 716 College Station, TX 77840 | Docketing and Service Section Office of the Secretary U.S. Nuclear Regulatory Commission Washington, D.C. 20555 |

* Hand Delivery
**Federal Express

* Lee Scott Dewey, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Richard Fryling, Jr., Esq.
Associate General Counsel
Public Service Electric &
Gas Company
P.O. Box 570 (T5E)
Newark, NJ 07101

*** Richard E. Shapiro, Esq.
Susan C. Remis, Esq.
John P. Thurber, Esq.
State of New Jersey
Department of the Public
Advocate
CN 850
Hughes Justice Complex
Trenton, New Jersey 08625

Carol Delaney, Esq.
Deputy Attorney General
Department of Justice
State Office Building
8th Floor
820 N. French Street
Wilmington, DE 19810


Mark J. Wetterhahn

***ZAP Mail