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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

'85 SEP 30 A10:17

Before Administrative Judges:

OFFICE OF SECRETARY
DOCKETING & SERVICE

Herbert Grossman, Chairman
Dr. A. Dixon Callihan
Dr. Richard F. Cole

SERVED SEP 30 1985

In the Matter of
COMMONWEALTH EDISON COMPANY
(Braidwood Nuclear Power Station,
Units 1 and 2)

Docket Nos. 50-456-OL
50-457-OL
ASLBP No. 79-410-03 OL
September 27, 1985

MEMORANDUM AND ORDER
(Ruling on Intervenors' Motion to Compel Discovery
from Applicant and the NRC Staff)

MEMORANDUM

On September 4, 1985, Intervenors Bridget Little Rorem, et al. filed a motion to compel answers or further responses from Applicant and NRC Staff to certain interrogatories. Intervenors sought responses from Applicant with regard to Interrogatories 1-9, 17, 19, 50, 51, 52, 57, 58 and 59, and from the NRC Staff with regard to Interrogatories 17 and 57. Applicant and Staff timely filed objections and motions for protective orders, and timely opposed Intervenors' motion.

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We compel responses to all of the interrogatories except Interrogatories 58 (other than home addresses and telephone numbers) and 59, which we find to have been adequately answered.

I. INTERROGATORIES TO APPLICANT

A. Legal Conclusion and Attorney Work Product

Applicant has objected to Specific Interrogatories 1, 2, 3, 4, 7 and 8 as calling for legal conclusions and privileged attorney work product. Intervenors respond by contending that the interrogatories include mixed questions of law and fact, that the opinion questions are rooted in the facts of this case and call for either factual information or an application of legal position, opinion or contention to the facts of Braidwood quality assurance deficiencies. They further assert that responses to these interrogatories will significantly advance the conduct of the proceeding by focusing and narrowing the issues in dispute and apprising Intervenors of Applicant's and NRC Staff's cases at an early stage. Intervenors rely upon Rule 33(b) of the Federal Rules of Civil Procedure which explicitly permits interrogatories seeking such "application of law to fact".

Applicant apparently concedes such that this language in Rule 33 would be dispositive but argues that it is not contained in the NRC

regulations governing discovery and has not been adopted in any published NRC decision. Applicant's Response to Motion to Compel at 3-4.

Whether or not the language of Rule 33 of the Federal Rules of Civil Procedure has been incorporated in the NRC rules, it is well settled that discovery into an opponent's case before the NRC is as extensive in this respect as before the Federal courts. Even the cases cited by Applicant in support of its position (id. at 4), Boston Edison Co. (Pilgrim Generating Station, Unit 2), LBP-75-30, 1 NRC 579 (1975); and Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937 (1982), accept the guidance of the Federal Rules in requiring responses to interrogatories such as these, which search out the opponent's position on the matters in issue and the facts to support that position.

Nor do we recognize any request in these interrogatories for "trial preparation materials" or other "attorney work product" materials to which any privilege may attach. See Applicant's Response at 5. That the prospective answers to these interrogatories, disclosing information that the courts consistently hold to be discoverable, "will be formulated" by Applicant's counsel (ibid.) does not convert them into attorney work product. Presumably, like any other answers to interrogatories formulated by counsel, these answers will be devoid of nondiscoverable mental impressions and trial strategies.

In addition, Applicant objects to certain of these interrogatories (1, 3, 5, 6, 9 and 57) on the ground that they go beyond the scope of matters in controversy. In general, these interrogatories request information with regard to the standards applicable to the construction of Braidwood and the quality assurance program here in issue. To the extent that the interrogatories, themselves, do not limit the scope of the information requested to the standards and criteria pertaining to the subject matter areas cited in the contention, Intervenor has now limited the requested information to those subject matter areas in their motion to compel. Motion at 8. As so limited, these interrogatories are not objectionable and must be answered.

B. Home Addresses and Home Telephone Numbers of Current Employees

In Interrogatories 19, 51, 52 and 58, Intervenor requested, inter alia, the names, addresses and telephone numbers of certain employees and former employees of Applicant and its contractors. With regard to employees currently working at the Braidwood site, Applicant has refused to provide home addresses and telephone numbers. It would require Intervenor to contact these current employees on the site, presumably under the scrutiny of the employees' supervisors and fellow employees.

Applicant has offered no plausible reason why it should be permitted to inhibit Intervenor's free access to these prospective witnesses or suppliers of relevant information that may assist Intervenor in preparing their case. Applicant should release those home addresses and telephone numbers forthwith.

C. Alleged Incomprehensibility of Interrogatory 17

Applicant objects to Interrogatory 17 as incomprehensible. The interrogatory seeks a detailed description of "the circumstances and procedures, if any, under which Quality Control inspection criteria may be waived." Applicant contends that the entire interrogatory and, in particular, the phrase "inspection criteria" are vague and amorphous, and cannot be answered. It insists that Intervenor's further explanation, that the term "inspection criteria" is employed here in the same manner in which like terms are used in 10 C.F.R. Part 50, Appendix B, e.g., Criterion V, X, is unhelpful.

We have no trouble understanding the gist of the interrogatory, especially in light of Intervenor's reference to specific criteria of Appendix B which refer to "documented instructions, procedures, and drawings." If Applicant has need for further elucidation, its counsel should informally contact Intervenor's counsel for further explanation, without taking up the Board's time on this matter. If

necessary, Applicant can state its understanding of Intervenor's interrogatory in its answer to the interrogatory, which we hereby compel.

D. Scope Objections to Interrogatories 50 and 52

Interrogatory 50 refers to a statement attributed to NRC Region III Administrator James G. Keppler, questioning whether the workload at Braidwood had become unmanageable for Applicant's staff and further indicating that he raised that matter for the management to consider. The interrogatory asks whether Mr. Keppler or the NRC raised this matter with Commonwealth Edison and whether Edison otherwise identified such deficiencies. If so, it requests a description of the circumstances of Edison's response and any corrective action taken.

Similarly, with regard to possible quality assurance weaknesses or deficiencies at Braidwood, Interrogatory 52 asks whether any have been identified as being caused by management action or inaction, and whether any adverse personnel actions have been taken by Edison management because of quality assurance deficiencies or weaknesses.

Applicant first objects to Interrogatory 50 on the ground that this Board "rejected" the portion of Intervenor's proposed contention that included the referenced statement by James Keppler. However, we see no such rejection in the Board's Order of June 19, 1985. Rather,

the Order recognized the illustrative nature of the statement and its utilization for the purpose of fleshing out the basis of the contention, and admitted the surrounding assertive language of part 1 of the contention. The only portion of the proposed contention that was "rejected" was in part 2.

Applicant further argues that the interrogatories are not sufficiently limited to the subject matter of the admitted contention and, to the extent they relate to the admitted contention, would be answered in response to Interrogatories 58 and 59.

However unlimited Applicant may read these interrogatories, Intervenors here move to compel answers only "coextensive in scope with the deficiencies asserted in the quality assurance contention." Motion at 22. Intervenors further assert (ibid.): "Such a scope limitation has been agreed to by Applicant and Intervenors with respect to numerous interrogatories." With that limitation in mind, of which this Board approves, we do not see how the interrogatories can be subject to a scope objection. To the extent that they have been answered in some other form in the extensive materials submitted by Applicant in response to Interrogatories 58 and 59, we do not require Intervenors to filter out and decipher that information. Applicant should answer Interrogatories 50 and 52 in the form requested or refer to the specific portions of answers to other interrogatories containing the requested information.

E. Request for Further Responses to Interrogatories 58 and 59

Intervenors request further responses to Interrogatories 58 and 59 on the grounds that Applicant has inadequately specified documents in lieu of answers, that further formal clarification and specification should be required of those documents, and that the introduction to Applicant's answer to the interrogatories suggest that not all the facts presently known to Applicant responsive to those interrogatories have been set forth.

The Board has reviewed the answers to the interrogatories and is satisfied that the narrative responses to each subpart, together with the listings of persons involved and index of documents which reflect the answers, provide a comprehensive response to the interrogatories. We note that the listing of documents with regard to each subpart of Intervenors' contention is limited and, presumably, would be easily retrievable at the request of Intervenors. We also assume, although the language in the introduction to Applicant's answer to Interrogatories 58 and 59 is not totally unambiguous, that specific responses to certain of the requests were omitted only where specific information on these subjects was lacking. If the Board is mistaken as to this assumption or with regard to Applicant's cooperating with Intervenors in retrieving any of the referenced documents, we direct Applicant to notify us to the contrary so that we can modify our ruling.

Otherwise, we deny Intervenors' request to compel a further response to these two interrogatories.

II. INTERROGATORIES TO NRC STAFF

As Staff points out in its response to Intervenor's motion (at 3-4), discovery against the Staff is on a different footing than discovery against other parties. To compel discovery against Staff, the presiding officer must determine that the interrogatories are necessary to a proper decision in this proceeding and that the answers are not reasonably obtainable from any other source. 10 C.F.R. § 2.720(h)(2)(ii).

Interrogatories 17 and 57 seek to determine the circumstances, if any, under which quality control criteria or NRC requirements need not have been adhered to in the design and construction of Braidwood. Although the phraseology of these interrogatories is somewhat general, we assume that the information requested is limited to the Braidwood facility and to particular circumstances pertaining to that facility under which quality control criteria or NRC requirements have not been fully applied to the design and construction of Braidwood within the subject areas of the contention. As we understand it, Intervenors seek to determine in advance of hearing whether any of the criteria or requirements that they assert have not been followed, will be claimed by Staff not to be applicable to the construction of the facility. If

such claim will be made, Intervenor should be informed before the hearing by way of this discovery. If it will not be, Staff ought to be able to answer these interrogatories, within the scope of the contention as discussed by the Board herein, with a minimum of effort.

We determine that the answers to the interrogatories are necessary for a proper decision in this proceeding and, since they involve Staff's positions, cannot be obtainable from another source.

O R D E R

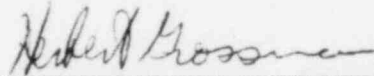
For all the foregoing reasons and based upon the entire record in this proceeding, it is, this 27th day of September, 1985

ORDERED

- (1) That Intervenors' motion to compel discovery from Applicant on Interrogatories 1-9, 17, 19, 50, 51, 52, 57, and part of 58, is granted (as limited by the discussion herein), and Applicant's motion for protective order on these interrogatories is denied;
- (2) That Intervenors' motion to compel further discovery on Interrogatories 58 (other than home addresses and telephone numbers) and 59 is denied;

- (3) That Intervenors' motion to compel discovery from Staff on Interrogatories 17 and 57, is granted (as limited by our discussion herein), and Staff's motion for protective order on these interrogatories is denied; and
- (4) That the required responses shall be filed by October 9, 1985, unless extended by the Board, on motion, or by the parties, by agreement.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD



Herbert Grossman, Chairman
ADMINISTRATIVE JUDGE

September 27, 1985
Bethesda, Maryland