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NRC PUBLIC DOCUMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of
PUBLIC SERVICE COMPANY OF OKLAHOMA,
ASSOCIATED ELECTRIC COOPERATIVE, INC.,
AND WESTERN FARMERS ELECTRIC
COOPERATIVE, INC.
(Black Fox Station, Units 1 and 2)

Docket Nos. STN 50-556
STN 50-557

NRC STAFF RESPONSE TO INTERVENOR'S MOTION
TO REOPEN DISCOVERY AND SUBPOENA FOR STAFF WITNESSES AND DOCUMENTS

BACKGROUND

By Motion dated November 3, 1978, Intervenors Citizens' Action for Safe Energy (CASE), Ilene Younghein and Lawrence Burrell, (Intervenors) requested the Licensing Board^{1/} to reopen discovery concerning "Task Action Plan-1" (TAP).^{2/} Attached to the Motion was a pleading entitled "Request for Finding Pursuant to 10 CFR §2.720(h)(2)(ii)" which asked that the Board direct specific members of the Staff to answer a list of nineteen interrogatories attached to the above-described pleadings.

The Staff opposes the motion to reopen discovery as well as the request for a Board Order for specific Staff witnesses to answer pursuant to 10 CFR §2.720(h)(2)(ii). As directed by the Licensing Board in its

^{1/} The pleadings are directed to the Appeal Board, but Staff Counsel was advised by telephone that this was an error and that the Licensing Board was intended.

^{2/} Although Intervenors refer to "Task Action Plan-1," the Staff believes this to be a misnomer developed at the hearing which refers to Staff Task Action Plans concerning generic unresolved issues. Not only do Intervenors refer to "TAP-1" but also to its "Supplement." They apparently refer to recent revision of NUREG-0371 which was attached to Staff's testimony on unresolved generic issues applicable to BFS.

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November 14, 1978 conference call, the reasons for the Staff's objection to certain interrogatories are listed below. However, as the Staff also informed the Licensing Board in the conference call, it will voluntarily produce discovery of documents and information relevant to the Staff's testimony concerning the TAP as a courtesy to Intervenors.

DISCUSSION

Lateness of TAP Material

Intervenors have requested reopened discovery on the ground that the "TAP Supplement" (Revision 2 to NUREG-0371) which was submitted with the Aycock/Crocker testimony on September 25, 1978) was "late." Apparently the Intervenors persist in interpreting the River Bend^{1/} decision to mean that only the SER must include an explanation of Staff Task Action Plans for unresolved generic issues applicable to the plant or suffer a fatal defect.^{2/}

^{1/} Gulf States Utilities Co. (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760 (1977).

^{2/} See Intervenors' September 19, 1978 Motion to Compel Further Supplementation of the NRC's SER, their oral Motion to Reconsider the Denial of the September 19, 1978 Motion (Tr. 4444), their October 5, 1978 Motion for Directed Certification and the Licensing Board's September 29 and November 3, 1978 Memoranda and Orders denying Intervenors' motions.

Aside from the fact that the Staff had no obligation to provide the "Supplement" at all (and therefore it could not be late), the Staff disagrees with the view of the River Bend decision espoused by Intervenor. The Appeal Board stated in River Bend that unresolved generic items applicable to the plant in question should preferably be addressed in the SER, but that the issues could be discussed on the record at the hearing. In any event, the SER for Black Fox Station was issued prior to the River Bend decision. While the River Bend decision clearly indicates that when applicable generic issues are not addressed in either the SER or Staff prefiled testimony, the Licensing Board may adjourn the hearing and require the Staff to prepare testimony on the generic issues, but it did not mandate a specific deadline for generic issues discussion. Accordingly, the Staff is in compliance with the River Bend decision by reason of its submission of the TAP material as testimony in this proceeding on September 25, 1978.

Subpoena of Specific Witnesses

Beyond requesting normal discovery, the Intervenor asks that the Board order, with its subpoena powers, specified Staff witnesses to respond to interrogatories submitted. This request is improper since 10 CFR §2.720(h)(2)(ii) explicitly states that while written interrogatories may be filed with the presiding officer to be answered by NRC personnel, those persons who respond shall be designated by the Executive Director of Operations.

Accordingly, the Staff will choose the persons who will respond to Intervenor's interrogatories.

Breadth of Interrogatories

A further objection to the proffered interrogatories is that they are too broad in that they request information concerning all Task Action Plans and not just those applicable to Black Fox. Therefore, while the Staff is willing to provide answers to interrogatories submitted insofar as they relate to the Staff testimony on TAP submitted September 25, 1978, it opposes Intervenor's interrogatories not relevant to the specific generic items applicable to Black Fox.^{1/}

Timeliness of Request

An additional objection to the discovery requested is its lack of timeliness. The provisions for discovery in 10 CFR §2.740 state that parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the proceeding but that no discovery shall be had after the prehearing conference held pursuant to §2.752 except upon good cause shown.

The Appeal Board noted in Illinois Power Co. (Clinton Power Station, Units 1 & 2) ALAB-340, 4 NRC 27, 33 (1976) that licensing boards have extensive

^{1/} Staff Counsel conferred by telephone with Intervenor's counsel who agreed to Staff's production of information as herein described with the proviso that if Intervenor wished further information, they would so state after review of Staff's submittals. Also, it was agreed that Staff's response to the requested discovery would be sent a few days late.

authority to control the course of a hearing and are under a mandate to insure that proceedings are conducted expeditiously consistent with development of an adequate record. Delay in the hearing is a well-recognized basis for limiting or denying requests for production of documents. 4A Moore's Federal Practice, 2d ed., par. 34.06.

In Clinton, supra, the Appeal Board described factors to be considered by the licensing boards when discovery requests are presented after hearing begins. The board must balance effects of delay against the alacrity with which the information is requested when its materiality became apparent; the particular relationship of the requested information to unresolved questions in the hearing; and the overall importance of the information to a sound decision.

The test for resolving a motion for late discovery requests was determined to be whether the documents sought are relevant to the proceedings and whether they contain materials of probative value to the Board in reaching its decision. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3) LBP-76-8, 3 NRC 199, 201(1976).

In the instant case, the Staff believes that Intervenors are not entitled to discovery as a right since Intervenors have been on notice since the River Bend decision issued (November, 1977) that the Staff is required to provide explanation of generic issues applicable to each nuclear plant proposed. The Staff's entire list of generic items has been available

publicly in NUREG-0371, Rev. 1 and NUREG-0471 since December, 1977 and June, 1978, respectively. The specific generic items applicable to Black Fox Station were identified in Staff's testimony submitted September 25, 1978 but discovery was not requested until the first day of hearing, October 10, 1978, by oral motion. The Board ordered that the motion be put in writing so that the Staff could consider the extent of discovery, not specified by the oral motion at the hearing. Therefore, the request for discovery in its entirety was not made until November 3, 1978.

In regard to the relationship between the material in question and unresolved questions at the hearing, the Staff does not believe that the required report to the Board on generic issues is in the same category for discovery purposes as contentions placed in controversy by the usual procedures in the Commission's Rules of Practice. The Staff's testimony on applicable Task Action Plans for generic items applicable to BFS is submitted because of a requirement imposed by the Appeal Board for clarification and completion of the record. It is not an "issue" in controversy among the parties.

In the Staff's view, the testimony on generic issues submitted in this case is the same as a supplement to an SER and provides no different reason for reopened discovery than would information in an SER supplement. Whatever would give good cause for late discovery in an SER supplement would apply to TAP testimony, but no more.

Discretionary Discovery

The Appeal Board in River Bend did not indicate that discovery must be reopened if Staff presented generic issues by way of testimony. Rather, the Board stated that where neither the SER nor prefiled testimony addressed generic items, the licensing board could adjourn the hearing until such testimony was prepared, and in this event:

" . . . [T]he licensing board may be confronted with the necessity to provide time for additional discovery" ^{1/}

The Board did not explain what might be considered a necessity to reopen discovery, but the qualified terms and conditions used in the footnote to this decision do not show an intent by the Appeal Board that the material on generic issues should be regarded as an issue in controversy.

Some of Intervenors' contentions are included in the list of generic issues in Staff's Task Action Plans. ^{2/} These items have either previously undergone extensive discovery or been available for discovery and therefore need not, in the Staff's view, be pursued further.

^{1/} River Bend, supra, fn. 28, p. 776 (emphasis added).

^{2/} For instance, Mark III Containment, ATWS and ECCS. Other issues dealing with Task Action Plans became Board questions. See Order Ruling on Motions For Summary Disposition dated September 8, 1978.

Although the NRC Staff objects to the requested discovery because it is late, over broad, and not required by law, to avoid protracted argument in the matter and possible hearing delays, the NRC Staff is supplying the Intervenor's answers to those questions related specifically to Black Fox and the Staff's September 25th TAP testimony.

THE STAFF'S OBJECTIONS

For the reasons listed above and for the additional reasons listed below, the specific parts of Intervenor's interrogatories to which Staff objects and does not submit answers are as follows (by agreement of Intervenor):

The directions on page one of the interrogatories concerning the method of answering the questions numbered (2) (3) (4) (5) and (6). These directions would be extremely burdensome as they entail an enormous amount of research into Staff supporting documents and are not necessary to a complete answer to questions posed.


Interrogatories No. 2 and 4 are not relevant to the case but concern a report to Congress concerning generic issues.

Interrogatories 13-17 relate to the "Reed Report" currently the subject of this Board's Subpoena Duces Tecum and G.E.'s Motion to Quash which is not as yet resolved. The remaining interrogatories will be answered voluntarily.

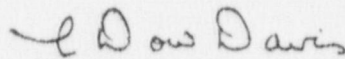
CONCLUSION

In conclusion, the Staff opposes Intervenor's argument for reopening discovery, particularly the overly broad bounds of the interrogatories. The Staff is, however, responding to Intervenor's questions which concern the Staff's written testimony. The Staff urges the Board to deny Intervenor's discovery request except for those questions which have been mooted by the Staff's voluntary response.

Respectfully submitted,



Colleen P. Woodhead
Counsel for NRC Staff



L. Dow Davis
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 24th day of November, 1978.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENOR'S MOTION TO REOPEN DISCOVERY AND SUBPOENA FOR STAFF WITNESSES AND DOCUMENTS dated November 24, 1978, in the above-captioned proceeding, have been served on the following by deposit in the United States mail, first class, this 24th day of November, 1978.

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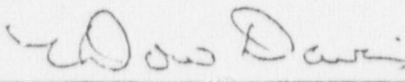
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