

Applicants filed their SPMC Interrogatories on August 31, 1988. On September 12, 1988, SAPL filed its interrogatory answers and a motion for a protective order. As discussed in detail below, SAPL's responses to several of the interrogatories were incomplete and/or evasive. Full responses should be compelled.

a. Interrogatory 2

Interrogatory 2 and its response read as follows:

"2. Please identify and produce all documents, and describe in detail all conversations not otherwise reflected in such documents, which reflect or refer to what actions any Massachusetts state or local government entity or official would, could, might, would not, could not, or might not take in the event of an actual radiological emergency at Seabrook Station."

RESPONSE:

"2) SAPL is in possession of no documents responsive to this interrogatory. The conversations SAPL has had relative to the subject matters described in this interrogatory have been with counsel to the various parties to this proceeding and are, therefore, deemed privileged. Conversations with town officials have been in the presence of their counsel and are also deemed privileged. The only other conversations outside of the above-described have been with Bill Lord, Chairman of the Board of Selectmen of the Town of Amesbury. Those conversations have generally been in the nature of poking fun at the idea that utility workers could adequately perform functions required in a local community emergency response and have revolved around the basic theme that the SPMC is not going to work to adequately protect the Town of Amesbury's citizens."

SAPL's response to Interrogatory 2 is evasive and incomplete. That Mr. Lord and SAPL find humor in Applicants'

attempt to compensate for the refusal of the Town of Amesbury to protect the health and safety of its own citizens is not responsive -- the question went to what the Town of Amesbury ("TOA") and the other towns would do, not what SAPL and TOA think of Applicants' efforts.

SAPL's only objection to responding to the question actually posed was one of privilege.¹ That objection, however, is defective, for several reasons. First, it is wholly unsubstantiated. SAPL failed to identify and list the assertedly privileged material, as requested in Applicants' Instruction 5. Thus there is no way to evaluate the legitimacy of SAPL's claim of privilege, and therefore no reason to give it any credence.

Second, SAPL's assertion that its conversations with persons possessing probative evidence are privileged simply

¹ In particular, SAPL waived any objection as to relevance or scope -- and with good reason. At least six of the contentions being litigated before this Board consist of assertions by Intervenor as to what various state and local officials would or would not, could or could not, or might or might not do in the event of a radiological emergency at Seabrook Station. See Joint Intervenor Contentions 22 (state/local officials will always reject Applicants' PARs, and the officials' own ad hoc PARs will be inadequate); 24 (delays in briefing state officials); 44A (unlawful to delegate authority to implement SPMC); 61 (responses by state/local officials under Mode 1 of SPMC); 62 (lack of preparedness of state/local officials); 63 (inadequate state/local facilities and equipment). Given the breadth and variety of these assertions by Intervenor, Interrogatory 2 is no more broad or general than is necessary to reach all the documents and conversations which would tend to prove or disprove the truth of those various assertions.

because those persons were accompanied by counsel is wrong as a matter of law. The presence of counsel as a third party to a conversation conveys no privilege. Hodges, Grant & Kaufman v. IRS, 768 F.2d 719 (5th Cir. 1985); Johnson v. United States, 542 F.2d 941 (5th Cir. 1976), cert. denied, 430 U.S. 934 (1977).

Finally, to the extent that SAPL's claim of privilege is based upon work product, SAPL has failed to carry its burden of establishing the existence of the privilege. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 495 (1983). Moreover, even if SAPL had carried its burden, Applicants could nonetheless show that Applicants' substantial need for the information overrides the privilege. 10 C.F.R. § 2.740(b)(2). Only the various Massachusetts state and local governments know what their capabilities, limitations, and intentions are. Accordingly, Applicants would suffer "undue hardship", within the meaning of 10 C.F.R. § 2.740(b)(2), if SAPL were allowed to withhold its evidence relevant to the six contentions discussed above.

In sum, Interrogatory 2 calls for identification of documents and conversations directly relevant to the six contentions that deal with what state and local officials could or would do in an actual emergency at Seabrook Station. SAPL has shown no privilege that applies, whereas Applicants

have shown a substantial need for the material. According, the Board should order that all responsive conversations be listed and described.

b. Interrogatory 6

Interrogatory 6 and its response read as follows:

"6. For every admitted SPMC contention that you submitted and do not hereby withdraw, and for every other admitted SPMC contention that you did not list in response to Interrogatory 5 above, individually for each such contention please:

- (a) State in detail all the facts underlying each assertion contained in the contention;
- (b) State the source of each such fact. If the source is the personal knowledge of one or more persons, identify the person(s). If the source is one or more documents, identify and produce the document(s);
- (c) Identify any expert witness who is to testify concerning the contention, and state the substance of the facts, opinions, and grounds for opinions to which the expert is expected to testify;
- (d) Identify any non-expert witness who is to testify concerning the contention, and state the substance of the facts to which the witness is expected to testify; and
- (e) Identify and produce any documents which reflect or refer to any type of study, calculation or analysis bearing upon the substance of the contention."

RESPONSE

- "6) (a) Insofar as SAPL knows, the facts underlying the assertions in these contentions are set forth in the bases of the contentions.
- (b) SAPL can speak with any knowledge only to the sources of the facts in the contentions SAPL drafted. Those facts were all drawn from information contained in the SPMC except for

additional facts in SAPL Contention No. 2 which were learned from Ashod N. Amirian, Esquire, the Assistant City Solicitor for the City of Haverhill, 376 Main Street, Haverhill, MA 01830.

(c) No expert witnesses have yet been chosen.

(d) No non-expert witnesses have yet been chosen.

(e) SAPL has no documents and no calculations apart from those in the contention bases."

SAPL made no objection to Interrogatory 6, which asked SAPL to state the facts underlying the assertions contained in the contentions that it intends to litigate. Having made no objection, however, SAPL should have answered fully.

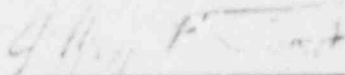
SAPL's response, that "the facts underlying the assertions contained in these contentions are set forth in the bases of the contentions", is evasive, for several reasons. First, Applicants carefully defined the term "contention", for the purposes of these interrogatories, to include the bases and sub-bases as well as the contentions themselves. SAPL's answer is thus circular.

Second, the contentions and bases contain assertions, not facts. The Intervenors (including SAPL) assert, for example, that Applicants have not identified all special facilities in the EPZ. See Joint Intervenor Contention 50, formerly MAG Contention 54. The facts underlying that assertion would be all the facilities known to SAPL that Applicants have not identified.

CONCLUSION

For the reasons stated above, answers to Interrogatories 2, and 6(a) should be compelled by the Board.

By their attorneys,



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CERTIFICATE OF SERVICE

'88 SEP 28 P6:01

I, Jeffrey P. Trout, one of the attorneys for the Applicants herein, hereby certify that on September 27, 1988, I made service of the within document by depositing copies thereof with Federal Express, prepaid, for delivery to (or, where indicated, by depositing in the United States mail, first class postage paid, addressed to):

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