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November 28, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
before the
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
PUBLIC SERVICE COMPANY OF)	Docket Nos. 50-443-OL
NEW HAMPSHIRE, et al.)	50-444-OL
(Seabrook Station, Units 1 and 2))	Off-site Emergency
)	Planning Issues
)	
)	

APPLICANTS' MOTION TO COMPEL PRODUCTION
OF DOCUMENTS BY THE MASS AG

Pursuant to 10 C.F.R. § 2.740(f), Applicants hereby move that this Board issue an order compelling the Attorney General for the Commonwealth of Massachusetts ("Mass AG") to produce the documents requested in Applicants' Second Request For Production of Documents to All Intervenors and Participating Local Governments Concerning Joint Intervenor Contentions ("Second Request").

Background

Applicants filed their Second Request on October 14, 1988. On November 2, in the course of a Status Conference requested by Mass AG, Applicants and Mass AG agreed that Mass

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AG would produce the documents requested no later than December 19, 1988. Tr. at 14804-14807. This extension was confirmed by the Board's Memorandum of November 9, 1988. On November 15, 1988, Mass AG filed Massachusetts Attorney General's Response to Applicants' Second Request For Production of Documents ("Response").¹ The Response contained several "General Objections", and also indicated that Mass AG intends to withhold certain broad categories of otherwise responsive documents.

Argument

Although the Response contains various objections and refusals to produce, it neither contains nor was accompanied by a motion for a protective order. The regulations require, however, that a party seeking to withhold documents move for a protective order. 10 C.F.R. § 2.740(f)(1) ("Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section.") Any ambiguity as to the meaning of this provision was removed by

¹ Filing the Response on November 15 was consistent with the parties' agreement that production would be extended to the 19th of December (at the latest), and indeed was essential for Mass AG to comply with the commitment made by Assistant Attorney General Traficonte that "we would make documents available to you certainly well before [December 19]". Tr. at 14807.

the Board's Memorandum of October 26, 1988, in which the Board explained that objections to discovery requests should be incorporated into a protective order motion.² Mass AG failed to make such a motion. Accordingly, as a matter of procedure, he has failed to preserve his objections, and should be compelled to produce all the documents requested by Applicants.

Even if Mass AG had properly preserved his objections, moreover, those objections are without merit, and production should be compelled.

A. As to Manner of Production

Mass AG "objects to a production of these documents at the location requested", i.e., at the Boston offices of Applicants' counsel, half a dozen blocks from Mass AG's offices. Instead Mass AG states he will "make [the documents] available for inspection at the office of the Mass AG and/or at the locations at which the documents are

² In an answer to another party's interrogatories or request for the production of documents, the answering party may object upon proper grounds in its response to any interrogatory or request and move the Board for a separate protective order upon those grounds. It must, however, plead its motion with specificity The discovering party may then respond to the motion for protective order by either answering the motion, or moving the Board for an order compelling discovery, or it may do both in one pleading.

Memorandum (Discovery Motions) at 3, 4 (October 26, 1988.)

normally kept and in the manner in which they are retained in the usual course of business." Response at 2.

Section 2.741(c) of 10 C.F.R. specifies that production of documents shall occur at "a reasonable time, place, and manner." Mass AG has made no argument, let alone the specific showing required by the Board's Memorandum of October 26, 1988, that production at Ropes & Gray would be unreasonable. To the contrary, Mass AG received an extraordinary extension of time to produce these documents on the strength of Mr. Traficonte's representations that Mass AG was working feverishly to collect, review, and organize these documents. Tr. at 14749, 14750, 14753, 14761, 14770-14771, 14773-14775. Having received all this additional time to assemble and organize these documents, it is fantastic for Mass AG to insist that Applicants must now go to the offices of eight or more state agencies and search for responsive material among all the Commonwealth's files "in the manner in which they are retained in the usual course of business" ³

³ Applicants had made even further accommodations to Mass AG, agreeing to review the material at Mass AG's offices and, for several especially large sets of documents, at the civil defense headquarters in Framingham. See Applicants' Response to Massachusetts Attorney General James M. Shannon's Motion For a Protective Order Against Certain Discovery Requests Concerning Joint Intervenor Contentions 1-63, at 3-4 (November 15, 1988). Mass AG has simply taken the extension and these further concessions, and demanded more. Since Applicants apparently cannot appease Mass AG's demands on these subject, we must oppose them in toto.

Production should be compelled in the manner requested -- at the offices of Ropes & Gray, no later than 10:00 a.m. on December 19, organized by request number.

B. As to "Privileged" Documents

Mass AG makes a general objection "to the production of any documents which would call for the disclosure of attorney-client communications or which reflect the work-product of the Department of the Attorney General or any other attorney(s)." To the extent that the objection covers "the work-product of any other attorney(s)", it fails to indicate what standing, if any, Mass AG would have to claim privilege as to the work of other lawyers.⁴ Moreover, the objection as a whole is fatally unspecific.

Mass AG does not describe what documents he asserts are privileged. With regard to work product, since Mass AG fails to identify the material he seeks to withhold, he would summarily deny Applicants their right, pursuant to 10 C.F.R. § 2.740(b)(2), to attempt to overcome any privilege shown to exist. Mass AG's objection, in short, fails to comply with specificity requirement for discovery pleadings described in the Board's Memorandum of October 26, 1988. Instead, Mass AG

⁴ "Any other attorneys", for example, would not be restricted to other Commonwealth lawyers, or even to counsel for parties in this case. The objection encompasses all documents that reflect any thought by any lawyer anywhere, anytime. The very scope of the objection confirms its invalidity.

seeks a "blank check" to withhold any and all documents that he deems, in his own unreviewed discretion, to be privileged. This demand for a "blank check" should be ignored by the Board, and Mass AG should be required to produce all responsive documents.

C. As to the Time Frame of Applicants' Requests

Applicants' Second Request asked for the following documents:

1. Any and all documents reflecting administrative and/or executive orders regarding emergency planning and/or radiological emergency response planning.
2. Any and all documents reflecting or commenting on draft and/or final policies of the Department of Public Safety, the Massachusetts Civil Defense Agency and/or the Department of Public Health regarding emergency planning and/or radiological emergency response planning.
3. Any and all documents reflecting or commenting on emergency plans, policies, guidance or implementing procedures developed by any state agency, department, commission, or authority.

Mass AG has refused to produce any relevant documents, responsive to these requests, that were dated before January 2, 1986, on the purported grounds that the "time frame" is "unduly burdensome" and seeks material that "is not relevant or reasonably calculated to lead to the discovery of admissible evidence."⁵ This objection is unfounded.

⁵ Mass AG apparently takes this January 1986 date from Applicants' prior agreement that Mass AG could limit his response to one of Applicants' earlier requests to that date.

Emergency planning for Seabrook Station has been an issue since the early 1980s. Mass AG's January 1986 cut-off would exclude most documents from the period that the Commonwealth and the six EPZ municipalities participated in emergency planning for Seabrook Station. Those documents, in turn, clearly are relevant to the contentions made by Intervenor's that emergency planning for Seabrook Station is impossible and/or inadequate. Nor has Mass AG made any showing that production of all documents back to January 1, 1980, for example, would be appreciably more burdensome than for the period from January 1986 to the present.⁶ In this respect, too, the objection fails to comply with the specificity requirement of the Board's Memorandum of October 26, 1988. Accordingly, production of all responsive documents, at least for the period during which emergency planning for Seabrook Station has taken place, should be compelled.

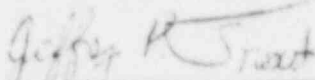
The situations are distinguishable, however, since Applicants had generated and/or already possessed most of the earlier documents that would have been responsive to that other request.

⁶ Indeed, Mr. Traficonte's most moving moment during the status conference in which Mass AG obtained its extraordinary extension of production time was when he read these requests into the record and noted, with great emotion, "and I repeat, there's no time limitation, no agency limitation, no space limitation, no kind of emergency limitation." Tr. at 14774. Having won his extension by pleading the scope of these requests, Mass AG cannot fairly be allowed now arbitrarily and unilaterally to limit that scope.

Conclusion

For the reasons stated above, an order should issue compelling Mass AG to produce all documents responsive to Applicants' Second Request, such production to occur in the manner previously requested by Applicants.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Jeffrey P. Trout, one of the attorneys for the Applicants herein, hereby certify that on November 28, 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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