

the Applicants respectfully move for leave to submit the within response.

MOTION FOR LEAVE

The "Joint Objection," though nominally in the form of a response to a motion to compel, actually raises an objection to the interrogatories in question for the first time. Because no such objection was raised by these intervenors in their filed answers, the Applicants had no basis for legal argument as to the validity of any asserted justification for the intervenors' failure to have answered. Believing that the Board might find the within argument helpful, they now move for leave to file the same.

RESPONSE TO SAPL ET AL. OBJECTIONS

The Applicants' motion to compel had two aspects. First: under the structure of the interrogatories propounded by the Applicants, each intervenor was asked if it intended to litigate, as defined, each of the admitted contentions. If the answer was an unqualified negative, then the interrogatories by their terms relieved the intervenor from responding to the balance of the interrogatories addressing that contention. In the absence of unqualified negative, however, the document then propounded a series of specific questions on the contention. In the case of these intervenors, their response to the first interrogatory was not an unqualified negative;

nevertheless, each took it upon itself to ignore the following specific questions.

The intervenors did not, however, state any objections to the specific questions, nor did they file any motion for a protective order in respect of them.

The problem with this manner of responding is that the interrogatories themselves conferred leave to ignore the balance of the questions in each set only if the responding party answered negating in whole any intention to litigate the contentions. Since no such answer was filed, the intervenors were (and are) in the same position as if the conditional permission not to respond had not been contained in the interrogatories, that is to say, as if Question 1 in each set had not been asked and the succeeding questions had been asked unconditionally. This being the case answers were and are required absent the allowance of a valid objection to the substance of the objection. The intervenors make no cognizable argument in their "Joint Motion" as to why they should be relieved of the obligation to answer these interrogatories.

As propounded, therefore, the interrogatories gave the intervenors only three choices: answer an unqualified "No" to the first question in each set, answer the specific follow-up questions, or object. The option they followed,

i.e., none of the above, was not and is not open. The motion to compel should therefore be allowed.¹

The second aspect of the motion to compel had to do with Interrogatories G-1 through G-3. These, too, were simply ignored by the intervenors who have now filed the "Joint Opposition." These intervenors state, in their present pleading, that there are no other documents (G-1) or other studies (G-2) than those mentioned elsewhere in their answers to interrogatories -- given this, they claim, their answers were complete. Such an answer would, of course, be unassailable if contained in the answers to interrogatories (under oath) but the Board should require these intervenors explicitly so to state in their answers.

Finally, as to Interrogatory G-3, these intervenors now object to the interrogatory on grounds of burdensomeness.

¹ We hasten to point out that no issue is raised as to the propriety of an intervenor deciding that it wishes to establish the points it has a position about solely through cross-examination. Neither is any issue raised about the propriety of an intervenor participating in an admitted contention of another party. Given that an intervenor has these rights, however, it is entirely fair for the Applicants to propound interrogatories to the intervenors designed to explore the points they intend to establish through cross-examination (or otherwise) on the other contentions in which they intend to participate. The only burden that the intervenors are under is the self-assumed (and readily jettisonable) burden of participating in the other parties' contentions. To argue that "[j]ustice so requires" that the intervenors be afforded the right to litigate free of the obligations of litigants is to rely upon a form of justice with which we are not familiar.

They claim, somewhat colorfully, that this interrogatory "goes beyond annoyance as described at part c of 10 CFR § 2.740 into sheer harassment." "Joint Objection" at third unnumbered page. Continuing, they assert:

"To expect that this general interrogatory should be responded to for each and every specific interrogatory is unreasonable and unduly burdensome. SAPL, South Hampton and Hampton Falls have made a good faith effort to provide information of this nature in the context of the response to the specific interrogatories where such information was relevant. To expect more would be unjust, onerous and oppressive."

Id. Notably, these intervenors have raised no other objection to this interrogatory.²

There are three defects with the burdensomeness objection that require its rejection.

First, the objection is untimely. It was not advanced within the time set by this Board for answers to interrogatories, nor was any motion for a protective order filed at that time. To the contrary, these intervenors by their own admission made their own judgment as to the

² Cf. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-17, 17 NRC 490, 495-97 (1983), recognizing the applicability of Fed. R. Civ. P. 26(b)(4) to NRC proceedings. Depending upon whom the intervenors might have consulted and whether any such person amounts to a non-testifying expert, Rule 26(b)(4) might have provided a valid basis for a party's objection to Interrogatory G-3. The objection (attorney work product), however, is a waivable one and it has been raised by the intervenors neither in their original answers nor in the pending motion for a protective order.

extent, if any, that the substance of the interrogatory would be answered and they took it upon themselves to ignore the balance -- a form of self-help remedy. However, "[f]ailure to answer or respond shall not be excused on the ground that the discovery sought is objection unless the person or party failing to answer or respond has applied for applied for a protective order pursuant to paragraph (c) of this section." 10 CFR § 2.70(f). This doesn't mean a belated motion made only after one has been caught defaulting.

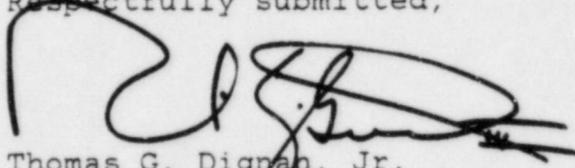
Second, a bare lament of burdensomeness is insufficient. These intervenors have neither filed any affidavits nor made any attempt at a particularized showing as to the effort that would be required to answer Interrogatory G-3 properly. In the absence of such a showing the "Joint Objection" amounts to a request that the Board speculate about the burden that answering would pose and about the resources available to each of the intervenors; the Board should decline such a request.

Finally, the objection that Interrogatory G-3 is unduly burdensome has been specifically rejected by the Appeal Board in Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 330-35 & n.23 (1980). Indeed, Interrogatory G-3 is virtually verbatim the interrogatory approved in that case as not being unduly burdensome.

CONCLUSION

For the foregoing reasons, the motions to compel should be allowed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. G. Dignan, Jr.', written over the typed name.

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Dated: June 12, 1986

CERTIFICATE OF SERVICE

I, Robert K. Gad III, one of the attorneys for the Applicants herein, hereby certify that on June 12, 1986, I made service of the within "Applicants' Response to Joint Objection to Compel and Motion for Leave to File the Same," by mailing copies thereof, postage prepaid, to:

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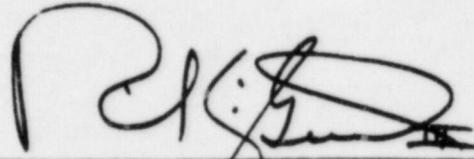
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