



State of New Jersey

Department of Environmental Protection
P.O. Box 402
Trenton, New Jersey 08625

PHILIP D. MURPHY
Governor

CATHERINE R. McCABE
Commissioner

SHEILA Y. OLIVER
Lt. Governor

DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, Petitioners in the matter docketed as, PSEG NUCLEAR LLC - SALEM NUCLEAR GENERATING STATION, Respondent-Intervenor v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent ADMINISTRATIVE ACTION ORDER ON INTERLOCUTORY REVIEW OF AN ORDER ON MOTION TO COMPEL DEPOSITIONS OAL DOCKET NO. ELU 15256-2016S AGENCY REF. NO. NJ0005622

This Order addresses a request by the New Jersey Department of Environmental Protection ("Department"), Bureau of Surface Water Permitting ("Bureau") for interlocutory review of an order issued by Administrative Law Judge John S. Kennedy ("ALJ Kennedy") on October 28, 2019 granting Petitioners' motion to compel depositions pursuant to N.J.A.C. 1:10-2(c).

BACKGROUND

This matter stems from a third-party challenge to a New Jersey Pollutant Discharge Elimination System (“NJPDES”) Permit that was issued by the Department in 2016 to PSE&G Nuclear, LLC - Salem Generating Station (“PSEG”) by Delaware Riverkeeper Network and Maya Van Rossum (“Petitioners”). The Petitioners challenge conditions in the NJPDES permit that address the use and discharge of cooling water at the facility pursuant to Section 316(a) and (b) of the Federal Clean Water Act, 33 U.S.C. § 1326(a) and (b), and accompanying federal regulations. 40 C.F.R. Parts 122 and 125. The Petitioners allege that the Department violated the Clean Water Act by improperly relying on special conditions, such as restoration, as part of the Section 316(b) compliance determination. Petitioners further challenge the Department’s decision under Section 316(a) to grant a variance of the thermal effluent limitations in the permit, claiming that the Department did not sufficiently analyze certain aspects of the thermal plume.

In proceedings before ALJ Kennedy at the Office of Administrative Law (“OAL”), Petitioners moved to compel Respondents to produce certain outstanding discovery and the depositions of three Department witnesses. Petitioners argued that good cause for the depositions existed because they have the burden of proving that the Department acted illegally or in a manner that was arbitrary and capricious, the issues are complex and technical requiring expert evidence, and depositions would expedite the disposition of the case. The Department and PSEG each opposed a finding of good cause, essentially arguing that Petitioners had not demonstrated a need for the depositions or shown that the information sought could not be obtained through less formal methods of discovery.

In his letter opinion dated October 28, 2019, ALJ Kennedy ordered that three Department witnesses appear before Petitioners for depositions. ALJ Kennedy found that Petitioners had demonstrated good cause to allow the depositions required by N.J.A.C. 1:1-10.2(c), indicating specifically that Petitioners had established that the information sought in the depositions was highly technical in nature and could not be obtained in other ways.

Claiming that ALJ Kennedy committed reversible error in granting Petitioners' motion to compel depositions, the Department sought interlocutory review of the October 28, 2019 Order. The Department argued that the Commissioner should reverse that portion of the Order granting Petitioner's motion to compel depositions because (1) Petitioners failed to show good cause, (2) the Order does not properly consider the factors mandated by N.J.A.C. 1:1-10.2, and (3) lowering the threshold of 'good cause' to any case involving a technical record will set a precedent that makes depositions routine in all permitting matters and will cause an undue burden on the Department. PSEG joined the Department's request for review.

Petitioners opposed the request for review arguing that Respondents failed to demonstrate that interlocutory review was warranted, in the interest of justice, or for good cause shown. Petitioners argued further that ALJ Kennedy's decision to grant their deposition requests was appropriate given the voluminous amount of documents produced by Respondents during paper discovery and the particularly technical nature of the issues in the matter.

On November 14, 2019, finding that good cause exists for review in advance of a final decision in this matter, I accepted review of ALJ Kennedy's October 28, 2019 order on an

interlocutory basis with respect to the depositions issue only¹. Thereafter, Petitioners submitted a letter brief in further support of ALJ Kennedy's decision, arguing that it was in his discretion and good cause for the depositions had been demonstrated².

After reviewing the papers and relevant statutes, regulations and case law, I conclude that ALJ Kennedy's October 28, 2019 order should be reversed in light of the legal principles expressed herein.

DISCUSSION

In this matter, I have exercised my discretion and accepted this Order for interlocutory review based upon questions with regard to ALJ Kennedy's application of the appropriate legal standards required to compel depositions and the asserted potential for the wide-ranging impact that ALJ Kennedy's Order could have on this and other permit challenges adjudicated at the Office of Administrative Law.

N.J.A.C. 1:1-10.1 sets forth, in relevant part, that:

- (a) The purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal. These rules are designed to achieve this purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary. ...

¹ In his October 28, 2019 Order, ALJ Kennedy denied Petitioners' request for the production of unredacted copies of pre-decisional drafts of the Draft 2015 Permit and the Final 2016 Permit but ordered the production of email documents from 2006 through 2016 which were not being withheld under the deliberative process privilege. In its request for interlocutory review, the Department requested clarification regarding these portions of the underlying Order. However, this request was denied as it did not rise to an appropriate level for interlocutory review.

² Petitioners timely submitted their letter brief on November 19, 2019. Pursuant to N.J.A.C. 1:1-1.4, "[i]n computing a period of time of less than seven days, Saturday, Sunday and legal holidays shall be excluded." The rules do not contemplate a reply to Petitioners' submission. Therefore, I have disregarded PSEG's reply dated November 21, 2019.

(c) ... Except where so proceeding would be unduly prejudicial to the party seeking discovery, discovery shall be ordered on terms least burdensome to the party from whom discovery is sought. N.J.A.C. 1:1-10.1.

Further, N.J.A.C. 1:1-10.2(c) sets forth that:

Depositions upon oral examination or written questions and physical and mental examinations are available only on motion for good cause. In deciding any such motion, the judge shall consider the policy governing discovery as stated in N.J.A.C. 1:1-10.1 and shall weigh the specific need for the deposition or examination; the extent to which the information sought cannot be obtained in other ways; the requested location and time for the deposition or examination; undue hardship; and matters of expense, privilege, trade secret or oppressiveness. N.J.A.C. 1:1-10.2(c).

As such, when considering whether good cause has been established to allow depositions in an individual case, the judge is directed to consider several factors when making his decision, which include a weighing of the specific need for depositions and the extent to which the information sought cannot be obtained in other ways.

A review of ALJ Kennedy's October 28, 2019 Order fails to provide any indication as to whether ALJ Kennedy properly weighed the need for depositions with the extent to which the information sought could be obtained in other ways. Rather, ALJ Kennedy simply concludes that, "petitioner has demonstrated 'good cause' – specifically there has been a showing that information requested is highly technical in nature and cannot be obtained in other ways." ALJ Kennedy's October 28, 2019 Order, at 3. Particularly absent is any indication as to how ALJ Kennedy determined that the information that Petitioners seek cannot be obtained in other ways.

Moreover, the record before me fails to justify a finding of "good cause." In their arguments justifying the need for depositions, Petitioners indicate that the issues involved in this

matter are of a complex and technical nature and that the Respondents have produced almost 40,000 pages of documents, including a permitting record that is approximately 25,000 pages in length. They argue that the complexity of the permitting process warrants depositions because the permit writers have “first-hand” knowledge and are in the best position to articulate what information they considered and provide the basis and credibility for their determinations. However, neither of these arguments provides any analysis as to how the information sought cannot be obtained through other, less burdensome ways, including supplemental interrogatories or requests for admissions. While Petitioners state that the depositions will help to streamline the case and increase the likelihood of an expedited resolution through summary judgment or settlement, they fail to set forth how the depositions they seek will provide them with the information that they need to accomplish these goals. Further, the record fails to show how Petitioners would be unduly prejudiced if it were to seek its discovery needs in other ways.

N.J.A.C. 1:1-10.2 makes clear that depositions are only available upon motion for good cause. It provides not only this limitation, but provides guidance as to what the ALJ should be reviewing and considering when ruling on a motion to compel those depositions. Conclusory findings that the complexity of a case establishes good cause sets a precedent to allow a petitioner in virtually any permitting case to obtain depositions. Most, if not all, of the permitting cases which come before the Office of Administrative Law are technical in nature and many involve the exchange of voluminous documentation. Further, the issue underlying permitting cases is almost always whether the Department’s action was arbitrary, capricious and/or unreasonable. Summarily allowing depositions in these cases places an undue burden on the Department and N.J.A.C. 1:1-10.1 makes clear that, “[e]xcept in circumstances in which it would

unduly prejudice the seeking party, discovery shall be ordered on terms least burdensome to the party from whom discovery is sought." N.J.A.C. 1:1-10.1. Absent a rare situation where prohibiting depositions would unduly prejudice the seeking party, alternative, less burdensome means should be exhausted.


Therefore, I am reversing ALJ Kennedy's October 28, 2019 Order in part to the extent that it allowed for depositions. If Petitioner seeks additional discovery in this matter, it should formulate and serve Respondents with supplemental interrogatories, demands for more specific answers to interrogatory responses, or requests for admissions. If, after such additional discovery methods have been exhausted, pre-hearing deposition testimony is still sought, Petitioners can then move to compel depositions, at which time ALJ Kennedy can conduct a detailed analysis in accordance with N.J.A.C. 1:10-2(c) and consistent with this Order.

CONCLUSION

I REVERSE in part the October 28, 2019 Order to the extent depositions were permitted and REMAND this matter to the Office of Administrative Law.

IT IS SO ORDERED.

DATE: 12/16/2019


Catherine R. McCabe, Commissioner
New Jersey Department of
Environmental Protection

PSE&G NUCLEAR LLC - SALEM GENERATING STATION
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
OAL DKT NO. ELU 15256-16
AGENCY REF. NO. NJ0005622

SERVICE LIST

Hon. John S. Kennedy, ALJ
Office of Administrative Law
1601 Atlantic Avenue
Atlantic City, New Jersey 08401

Kurt Schwartz, Clerk
Office of Administrative Law
33 Washington Street
Newark, NJ 07102
Kurt.Schwartz@oal.nj.gov

Jacobine Dru, DAG
N.J. Department of Law & Public Safety
Division of Law
Hughes Justice Complex
P.O. Box 093
Trenton, NJ 08625-0093
Jacobine.Dru@law.njoag.gov

Kieran A. Brown, Esq.
PSEG Services Corp.
Office of Environmental Counsel
80 Park Plaza, T5C
Newark, NJ 07102

Stuart J. Lieberman, Esq.
Lieberman & Blecher, P.C.
10 Jefferson Plaza, Suite 400
Princeton, NJ 08540
sjl@liebermanblecher.com

Michael G. Sinkevich, Esq.
Lieberman & Blecher
10 Jefferson Plaza, Suite 400

Princeton, NJ 08540
mgs@liebermanblecher.com

Deanna Kaplan Tanner, Esq.
Delaware Riverkeeper Network
925 Canal Street
Suite 3701, 7th Floor
Bristol, PA 19007
deanna@delawareriverkeeper.org

John G. Valeri, Jr., Esq.
Chiesa Shahinian & Giantomasi, PC
One Boland Drive
West Orange, NJ
jvaleri@csglaw.com