

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

| | | |
|---|---|---------------------|
| PEOPLE OF THE PEOPLE OF ILLINOIS, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | PCB No. 13 - 12 |
| |) | (Enforcement - Air) |
| NACME STEEL PROCESSING, LLC, |) | |
| a Delaware limited liability corporation, |) | |
| |) | |
| Respondent. |) | |

NOTICE OF ELECTRONIC FILING

To: See Attached Service List.

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the following, PEOPLE'S REPLY TO NACME'S RESPONSE TO PEOPLE'S MOTION TO COMPEL ANSWER AND RESPONSES TO WRITTEN DISCOVERY AND FOR PROTECTIVE ORDER AND/OR BOARD'S SUPERVISION OF DISCOVERY a true and correct copy of which is attached and hereby served upon you.

Respectfully submitted,



 Nancy J. Tikalsky
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 Office of the Illinois Attorney General
 Environmental Bureau
 69 West Washington Street, Suite 1800
 Chicago, Illinois 60602
 (312) 814-8567

Date: June 21, 2013

THIS FILING IS SUBMITTED ON RECYCLED PAPER
SERVICE LIST

Edward V. Walsh, III
ReedSmith LLP
10 South Wacker Drive
Chicago, Illinois 60606-7507

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

On June 6 and 13, 2013, the hearing officer issued orders setting this matter for status on aforesaid discovery issues. In the June 13, 2013 order, the hearing officer set the matter for a telephonic status to June 27, 2013 and cancelled a previously set telephonic status conference for June 20, 2013. Neither the June 6, 2013 nor the June 13, 2013 orders specifically address the People's Request for Leave to Reply to Nacme's Response. Therefore, in order to preserve the People's right to reply by the date set forth in its Request to Reply, the People submit its reply notwithstanding the ongoing and fruitful negotiations between the parties to resolve the remaining discovery issues.

Additionally, on June 6, 2013, the Illinois Pollution Control Board issued its decision on the People's Motion to Strike and Dismiss Nacme's Amended Affirmative Defenses. Accordingly, this Reply does not address this issue of People's Motion to Compel, as it is presently moot.

II. INTERROGATORIES

The People repeat and incorporate by reference herein its Motion to Compel, and further state that 'lettered subparts' or lists of commonly themed items in an interrogatory are not, in themselves, deemed to be each a subpart to the number limitation for Interrogatories under a liberal construction of the term 'subpart' pursuant to Illinois and federal law.

As guidance, Supreme Court rule 213, ILCS S. Ct. Rule 213, which reads similarly to Board rule 101.620 (a), provides as follows:

(c) **Number of Interrogatories.** Except as provided in subparagraph (j), a party shall not serve more than 30 interrogatories, including sub-parts, on any other party except upon agreement of the parties or leave of court granted upon a showing of good cause. A motion for leave of court to serve more than 30 interrogatories must be in writing and shall set forth the proposed interrogatories and the reasons establishing good cause for their use.

In the committee comments to the Supreme Court Rule 213, ILCS S. Ct. Rule 213, Committee Comments, the committee notes as follows:

Paragraph (c) is new. Because of widespread complaints that some attorneys engage in the practice of submitting needless, repetitious, and burdensome interrogatories, paragraph (c) limits the number of all interrogatories, regardless of when propounded, to 30 (including subparts), unless "good cause" requires a greater number.

Nonetheless, the Supreme Court Rule 213, ILCS S. Ct. Rule 2(a) Standards provides that "These rules are to be construed in accordance with the appropriate provisions of the Statute on Statutes (5 ILCS 70/0.01 *et seq.*), and in accordance with the standards stated in section 1-106 of the Code of Civil Procedure (735 ILCS 5/1-106).

Section 1.01 of the Statute of Statutes, 5 ILCS 70/1.01, provides as follows:

All general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out.

Section 1-106 of the Code of Civil Procedures, 735 ILCS 5/1-106, provides, in pertinent part, as follows:

Act to be liberally construed. This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties.

Although the People are unaware of any Illinois state case law on the subject of what constitutes a "subpart" for purposes of Rule 213(c), the following federal case law in the 7th Circuit may provide guidance to resolve this dispute.¹ In *Portis v. City of Chicago*, WL 991995, 9 (N.D.Ill., 2005), the court ruled on a similar dispute. The court noted, "*[A]n interrogatory containing subparts directed at eliciting details concerning a 'common theme' should generally be*

¹ Under the Federal Rule 33, the limit on interrogatories is 25.

considered a single question. On the other hand, an interrogatory which contains subparts that inquire into discrete areas should, in most cases, be counted as more than one interrogatory." (quoting *Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 664-665 (D.Kan.2004)). The court continued, "[A]ccording to defendants' count, the twelfth set of interrogatories alone totals 49 interrogatories counting subparts, yet by the court's count, the total is more like 12. *Defendants likely counted every subpart as a separate interrogatory, but in the court's view, most of the subparts for each of the 11 interrogatories were directed at the common theme of the particular interrogatory.* The exception was subpart (e) included in interrogatories 3, 5, 7-11 which asks for the reasons the class members were not ticketed. The court deems this an inquiry into a separate, discrete area, and counts it as a twelfth interrogatory." (*emphasis added*)

In another case involving a dispute over the limit on interrogatories, *Bell v. Woodward Governor Co.*, WL 3829134, 1 -3 (N.D.Ill.,2005), the court drew upon some guidance provided by the Advisory Committee:

The Rule's Advisory Committee did provide some guidance as to when subparts should and should not count as separate interrogatories, noting that: Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects. *However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.* See Advisory Committee Note, 146 F.R.D. 401, 675-76 (1993) (*emphasis added*).

In *Bell*, the Court went on to state:

Under the commonly cited rule announced in *Kendall v. GES Exposition Servs, Inc.*, *which also happens to be the rule recommended in Moore's Federal Practice*, *"interrogatory subparts are to be counted as one interrogatory ... if they are logically or factually subsumed within and necessarily related to the primary question."* 174 F.R.D. 684, 685 (D.Nev.1997); 7 *Moore's Federal Practice*, § 33.30[2]

(Matthew Bender 3d ed.). The court will use this rule to guide its analysis.
(*emphasis added*)

Applying a liberal construction pursuant to the Standards under the Illinois Supreme Court rules and the rationale of the federal case law for guidance, the 19 numbered Interrogatories that the State propounded upon Nacme are within the 30 Interrogatories limit allowed by the Board rule. Nacme never states specifically how many Interrogatories it believes the People have propounded on it; instead, Nacme provides various generalizations as to the basis of its calculation that the People's Interrogatories exceed the allowable limit of 30. In its 201k letter dated March 21, 2013, hereto attached as Exhibit A, Nacme provides its most specific statement stating that it regarded lists and 'lettered subparts' within a single paragraph Interrogatory as subparts. Under this logic, a person's name and that same person's address would be two (2) Interrogatories. The People would regard this as a strict interpretation rather than a liberal construction of the rule.

Furthermore, in its Response, Nacme provides only a couple of conclusory statements as examples to assist us with its count. First, Nacme states that Interrogatories 1 and 2 contain three questions but do not delineate what the three (3) questions are for each.² Accordingly, the People look to Nacme's Answer to Interrogatories 1 and 2 and note that it enumerates three (3) answers to each. *See Response Exhibit 1.* The first response for each Interrogatory 1 and 2 is a cursory response, absent the detail requested by the People and required by Board rules, to the People's request for a Nacme employees' duties, responsibilities, jobs, and job titles at Nacme; the second is another cursory response to the employees' responsibilities that relate to operational decisions; and

² The questions are nearly identical so providing specifics for one of the two interrogatories would have sufficed but Nacme fails to even provide this much in its Response.

the third is a response to the employees' knowledge of the operations at the Site and the facts alleged in the People's Complaint.

Applying a liberal construction of the meaning of 'subpart' pursuant to the Illinois Supreme Court rules and the rationale of the federal case law, the People argue that the employees' duties, responsibilities, jobs, job titles, job responsibilities that relate to operational decisions, and knowledge of the operations at the Site as it relates to employment at Nacme, are all a single interrogatory eliciting a 'common theme' related to the employees' positions at Nacme. Therefore, at the most, there are two (2) Interrogatories in each of Interrogatories 1 and 2.

The only other example Nacme provides is that Interrogatory 3 contains five (5) 'lettered subparts'. Looking to Nacme's Exhibit 1 Response, there are two (2) 'lettered subparts'. Again, applying a liberal construction pursuant to the Illinois Supreme Court rules and the rationale of the federal case law, the People contend that the request for corporate officer information and responsibilities for operational decisions as it relates to Nacme is a common theme related to the officer's position with Nacme. Therefore, at the most, there are two (2) Interrogatories for Interrogatory 3.

Finally, except for Interrogatory 4³, all the remaining interrogatories 5 through 19⁴ are based on a common theme whether or not there is a compound statement are 'lettered subparts'. See *Response Exhibit 1*. In conclusion, under a liberal construction pursuant to the Illinois Supreme Court rules and the rationale of the federal case law, the People count 24 Interrogatories.

³ 3 lettered subparts that reflect: 1. the owner's position at Nacme; 2. the type of IRS corporation it may or may not be classified as; and 3. the owner's knowledge of the facts of the People's Complaint.

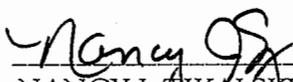
⁴ of which NACME cites Board rule 35 IAC § 101.620's number limitation as its only objections for the Interrogatories 12 through 19,

Even if we accept Nacme's conclusion that Interrogatories 1 and 2 had three (3) instead of two (2) subparts and Interrogatory 3 had five (5) subparts, it would still only add up to 29 Interrogatories.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully prays that the Hearing Officer enter an order containing the following:

- a) finding that Respondent has failed to comply with the Hearing Officer's orders dated November 23, 2012 and April 23, 2013;
- b) that Respondent be barred from filing any other pleading relating to any issue to which its refusal or failure relates and that any portion of the Respondent's pleadings relating to Respondent's overdue responses to Complainant's discovery be stricken; and
- c) the entry of an order compelling Respondent to answer the People's outstanding discovery requests;
- d) extending the date for the completion of all oral discovery, including fact and expert depositions and the time for filing its supplemental requests to admit, 60 days from the date that Respondent provides complete responses to the Complainant's interrogatories and document requests, and completes witness disclosures; and
- e) granting such other and further relief as the Hearing Officer deems appropriate and just.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney
General of the State of Illinois

By: 
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March 21, 2013

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Re: State v NACME

Dear Nancy:

By letter dated March 11, 2013 I advised you that the interrogatories you had sent to me exceeded the maximum number as provided by Board rules. (copy attached). On March 13, 2013 you called me to disagree. You argued that designations "a,b,c..." are not subparts but are for my convenience. We did not reach agreement in the call. For our part, we continue to maintain that your interrogatories far exceed 30. Even where you do not use designated subparts such as "a,b,c..." some of the interrogatories are compound. For example interrogatories 1 and 2 actually comprise 6 areas of inquiry.

You declined in our call to designate 30 interrogatories for answer, as I had offered in my earlier letter. As such, we will answer the first 30 interrogatories, subject to objections.

We are completing the process of getting information from people with knowledge to answer the interrogatories. In addition we have gathered a fair number of documents for production per your request. I anticipate having the responses and production to you sometime next week.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward V. Walsh, III".

Edward V. Walsh, III

EVW:rh