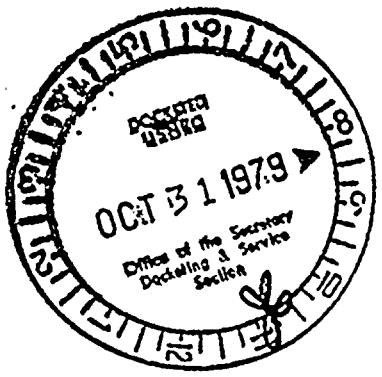
LBP-79-31

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



ATOMIC SAFETY AND LICENSING BOARD

Charles Bechhoefer, Chairman
Dr. Oscar H. Paris, Member
Glenn O. Bright, Member

In the Matter of	)	
	)	
PENNSYLVANIA POWER & LIGHT COMPANY	)	Docket Nos. 50-387
and	)	50-388
ALLEGHENY ELECTRIC COOPERATIVE, INC.	)	
	)	
(Susquehanna Steam Electric Station, Units 1 and 2)	)	

MEMORANDUM AND ORDER ON DISCOVERY MOTIONS (II)
(October 30, 1979)

A. On August 24, 1979, we issued a Memorandum and Order on Scheduling and Discovery Motions (hereinafter Discovery Memo I) in which we ruled on a host of such motions which had been filed with us by various parties to this proceeding. In general, we explained the philosophy of scheduling which we had in mind for this proceeding, the importance of discovery in preparing this case for hearing, and the types of objections which could be entertained should a party believe that discovery directed against it was burdensome, oppressive or otherwise objectionable. We also extended a number of then-outstanding deadlines for initiating discovery, responding or objecting to discovery requests, or answering requests for protective orders.

During the course of Discovery Memo I (p. 16), we further expressed our regret at the "proliferation of motions * * * [which] has undoubtedly taken time away from the parties' development of their substantive cases." We had hoped that the parties would tone down their procedural skirmishing and begin to prepare their cases for hearing.

This apparently has not happened. For, since the issuance of Discovery Memo I, we have received the following additional filings concerning or arising out of discovery:

1. In filings dated August 30, September 1 and September 10, 1979, Citizens Against Nuclear Dangers (CAND) attempted to appeal Discovery Memo I. The Appeal Board summarily dismissed the appeal on the ground that it was an interlocutory appeal precluded by the Commission's rules. ALAB-563, 10 NRC ____ (September 19, 1979). The appeal papers included several complaints relating to discovery rulings which we had issued. In opposing CAND's appeal, the Applicants took the position that such matters were more properly before this Board (see their appellate brief dated September 14, 1979) and, on September 17, they filed with us

a response to those matters. (The Staff's brief on appeal confined itself to the jurisdictional aspects of the appeal.)

2. On September 12, 1979, Susquehanna Environmental Advocates (SEA) filed a motion for an extension of time within which to respond to the Applicants' and Staff's discovery requests. SEA seeks an additional 180 days. On September 20 and October 1, 1979, the Applicants and Staff, respectively, responded. The Applicants would have granted SEA 20 days from September 12 to respond; the Staff offered an additional 14 days.

3. On September 13, 1979, the Staff wrote a letter to ECNP which explained why it was not required to, and hence would not, comply with certain discovery requests which ECNP had served upon it.

4. On September 17, 1979, ECNP filed a response to Discovery Memo I which, in effect, either took objection to or (to a much lesser extent) provided answers to the Staff's interrogatories; in that response, ECNP also generally objected to all the Applicants'

interrogatories but did not provide specific objections to any of them. On October 9, 1979, the Staff responded to the ECNP filing and, in doing so, submitted a cross-motion to dismiss ECNP (and the contentions it raised) from the proceeding. On October 13, 1979, ECNP responded to this cross-motion. On October 12, the Applicants filed their own motion to dismiss ECNP and its contentions from the proceeding. ECNP on October 22 opposed the Applicants' motion; the Staff on October 23 indicated it would not file a further response to it.[1/]

5. On September 24, 1979, ECNP moved to compel discovery of the NRC Staff. The Staff responded on October 15, 1979.

6. On September 25, the NRC Staff moved to dismiss CAND, and the contentions it raised, from the proceeding. On October 10, 1979, the Applicants supported this motion. ECNP on October 13 filed a response opposing the motion. For its part, CAND on October 9 moved for a protective order against the Staff. (The Staff on October 16 stated that

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1/ After this Order had been prepared, we received an October 25, 1979 letter from the Applicants commenting on ECNP's response. Nothing therein changes any of the conclusions which we are here reaching.

it would not further respond to the CAND motion.) Further, on October 24, CAND filed an additional response to the Applicants' and Staff's motions and sought additional relief, including the convening of a prehearing conference.

7. On October 23, 1979, the Applicants moved to dismiss SEA and its contentions from the proceeding.

What we are confronted with, in sum, are strong objections by CAND, ECNP and SEA to discovery sought by the Applicants and Staff and, for the most part, a concomitant failure to respond substantively to such discovery; and, on the other hand, attempts by the Applicants and Staff to dismiss peremptorily from this proceeding CAND, ECNP, and SEA, as well as their contentions. These filings appear to us to reflect that the discovery process is not working in this proceeding. Instead of dealing with the motions separately, we have attempted to take an overview of the situation in order to put this proceeding "back on track." We turn now to that overview.

B. In Discovery Memo I, we attempted to outline both the NRC rules governing discovery and the underlying purpose which discovery is intended to serve in an NRC licensing proceeding. We stated, inter alia (at pp. 5-6) that

> *** the purpose of discovery is to enable each party prior to hearing to become aware of the positions of each adversary party on the various issues in controversy, and the information available to adversary parties to support those positions [emphasis supplied].

We went on to observe that Commission licensing proceedings "are not to become the setting for 'trial by surprise,' and the discovery mechanism is the major means used to avoid that situation." Id. at 6. Finally, we noted that answers to discovery inquiries are important in terms of a party's ability to prepare its case for trial — and particularly so for an applicant which has the burden of proof in a proceeding of this type. Ibid. But we

also pointed out that discovery always entails some burden or expense, and that only "'undue' burden or expense — beyond that normally necessary to identify the details of a party's case and the sources of information upon which it intends to rely — would normally justify" issuance of a protective order. Id. at 7.

Finally, we outlined the type of responses which would be considered as satisfactory. And we alluded to the potential consequences to a party for failing to answer discovery requests adequately — i.e., "steps as drastic as dismissal of a contention or of a party from the proceeding." Ibid.

Each of the intervenors involved in the motions which we are considering (CAND, ECNP, and SEA) has filed some sort of response to the discovery requests of the Applicants and Staff. But few, if any, of the intervenors' responses include substantive answers to the questions asked. Viewed on their merits, most of the responses appear to be little more than the same type of generalized objections which, in Discovery Memo I, we indicated were inadequate. For that reason, we might perhaps have technical grounds to dismiss CAND, ECNP and/or SEA, including their contentions, from this proceeding. But when those intervenors' responses are viewed collectively, they convey a different message — a message that perhaps the strict construction of the discovery rules in at least this particular proceeding

is inappropriate.

For example, in its unsuccessful appeal, CAND claimed it has been denied government records and relevant documents in the Applicants' possession. It also asserted that

> *** to attempt compliance with the outlandish discovery requests of the Applicant and the NRC would have been a financial burden beyond the means of the Citizens. Also, because the Citizens would need an extraordinary amount of time to obtain most of the technical data requested, there was no reasonable possibility of responding other than objecting to the interrogatories ***.

CAND Response, dated September 10, 1979, at p. 3. CAND also explicitly objected to questions propounded by the Applicants bearing upon contentions (or portions of contentions) sponsored by other parties.

Generally the same themes pervade ECNP's responses or objections to the Applicants' and Staff's discovery requests. It complains particularly of the Staff's failure to provide it free copies of numerous documents it requested. In its September 10 discovery request, it states that "ECNP does not have the funds to purchase these documents that we have identified as important to the development of our case." As for access to documents in either the NRC Public Document Room in Washington, DC, or the local public document room in Wilkes Barre, PA, ECNP states that its authorized representatives live more than 125 miles from either source, and that "lack of access to the record constitutes a denial

of due process and prohibits a full and fair proceeding." Further, ECNP complains of "detailed and repetitive responses to unreasonable, burdensome, and unduly oppressive numbers of Interrogatories"; it claims that it must answer 2628 interrogatories from the Applicants alone and seeks an order "protecting all of these inexperienced, unfinanced, and uncounseled citizen intervenors in this case from the unjust work loads, inappropriately short deadlines, unnecessary paperwork, and injustice." ECNP Responses, dated September 17, 1979. Moreover, ECNP asserts that, just as answering 2628 interrogatories is oppressive, so too specifying why each of these interrogatories is burdensome is also oppressive. Ibid. (The Applicants claim that ECNP has overstated the number of responses requested of it.)

Finally, ECNP calls our attention to the involvement of its members and representatives in matters arising out of the March 28, 1979 accident at the Three Mile Island (TMI) facility. ECNP claims its members and representatives "directly experienced, and suffer from, the severe trauma" associated with that accident. It claims:

> The priority of responding to the calls for information, assistance, and reassurance from the victims of the TMI-2 accident must be understood by this Board as a moral imperative that has absorbed a substantial portion of these Intervenors' time and energies in the ensuing months.

Responses of ECNP Intervenors, dated September 17, 1979, at p. 5. ECNP also advises that it has been, and is, involved in the licensing proceedings for TMI-2.

For its part, SEA, in requesting a six-month extension of time within which to respond to discovery requests, characterizes the Applicants' and Staff's interrogatories as "lengthy, burdensome, [and] oppressive." It asserts that "it would take a full-time staff, including an attorney, radiation physicist and engineer, at least six (6) months to adequately answer or object to these duasonian interrogatories." And it calls attention to the fact that "SEA is a volunteer citizens organization without the necessary full time staff and resources." Finally, it states that SEA has not had access to the prehearing conference transcript outside the local public document room (a complaint which ECNP had also made).

In short, each of the intervenors claims that, in light of the meagre financial resources available to it, and as a result of the failure of the Applicants or NRC Staff to respond satisfactorily to many of the intervenors' discovery requests, it cannot meet the demands imposed upon it by the Applicants' and NRC Staff's discovery requests and by this Board through its rulings in Discovery Memo I.

C. As we suggested both earlier in this opinion and in Discovery Memo I, the type of general objection being advanced to some degree by the various intervenors would normally not be sufficient to warrant our granting relief from the discovery requests in question. We repeat our admonition in Discovery

Memo I (at p. 9) that

> *** general "evasive" objections to discovery are not acceptable. See 10 CFR §2.740(f)(1). To form the basis for a protective order, specific objections to particular inquiries must be advanced. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 583 (1975).

Furthermore, we reiterate that the relief now being sought by the Applicants and Staff — dismissal of CAND, ECNP and SEA (and all their contentions) from this proceeding — could potentially be granted in the face of the deficiencies in responses which have characterized these intervenors to date. Indeed, it may well be that some of the generalized and deficient objections being advanced by the intervenors are in fact motivated not by any burden or hardship which responding to discovery would entail but rather by a desire to delay the progress of the proceeding and, through that device, the possible operation of the facility. In that connection, we note that a number of CAND's statements, in particular, go out of their way to criticize categorically and without apparent rationality various requirements of the Commission's rules and actions of the Applicants, the Staff, and this Board taken in conformance therewith. For example, CAND states that it will

> submit concise direct testimony on [its] contentions at the public hearings — extemporaneously. This will not be impromptu speech. Rather, the Citizens

> are knowledgeable on certain topics, enough to make factual statements under oath, that can be defended under cross-examination.

CAND Response, dated September 10, 1979, at p. 2. This approach is not only inconsistent with the general thrust of NRC rules (10 CFR §2.743(b)) but with our previously expressed goal of avoiding "trial by surprise." It would make it most difficult for the Board to formulate informed questions for the witnesses and hence to be adequately prepared for hearing. Clearly it raises a question whether that Intervenor, at least, looks upon a licensing proceeding as a forum for resolving technical questions in the fairest and most comprehensive manner, or alternatively, whether it views this proceeding merely in terms of a podium for soapbox oratory. We need scarcely add that this latter approach is intolerable and will not be countenanced by this Board.

Notwithstanding the foregoing considerations, it is apparent to us that, because of the particular facts surrounding this proceeding, dismissal of any of the intervenors or their contentions at this time would not be warranted. Further, relief from some of the obligations imposed by our March 6, 1979 Special Prehearing Conference Order as modified by Discovery Memo I, is called for. But finally, <u>it is absolutely necessary</u> that the intervenors respond in a timely fashion to the discovery obligations which still remain. The particular circumstances which cause us to take this action are the following:

First, a development which occurred subsequent to our issuance of Discovery Memo I alleviates the need for the fairly expeditious discovery schedule which we previously imposed. On September 18, 1979, the Staff advised us and the parties of a delay in its issuance of the Final Environmental Statement (FES), the Safety Evaluation Report (SER) and the SER Supplement. The FES is to be delayed from late October, 1979 until late January, 1980; the SER from late March, 1980 until late August, 1980; and the SER Supplement from late July, 1980 until early January, 1981. The Staff now estimates that the earliest date for the start of the environmental hearing would be March or April, 1980, and the earliest date for the start of the health and safety hearing would be February or March, 1981. These delays suggest that a grant of further time to respond to discovery would have little or no adverse effect on the ability of any party to prepare for hearing, or for the hearing to be commenced on a timely basis.

Second, the projected delay of the SER and SER Supplement for an even greater period than the delay of the FES suggests that the scope of discovery called for in the near future might be drastically reduced. Our Special Prehearing Conference Order and Discovery Memo I imposed identical first round discovery schedules for both environmental and health and safety issues, but it now appears that the earliest date for the hearing on safety issues is more than a year in the future. Indeed, it is entirely possible that the February or March, 1981 hearing date currently

projected by the Staff will not be met. That being so, there appears to us to be no good reason for insisting on the completion of discovery on health and safety issues in the near future. To do so only exacerbates the already heavy burden which responding to discovery does indeed impose upon an intervenor.

Third, the TMI accident presents particular challenges which must be faced in this proceeding. The Susquehanna facility is about 65 air miles from TMI, and this facility's effluents, like those of TMI, are to be discharged into the Susquehanna River. Regulatory developments arising out of the TMI-2 accident will be factored into this licensing proceeding as into others; the proximity of this facility to TMI, however, makes it important that this end be achieved publicly, on the record. Our recent action admitting the SEA contention concerning the TMI accident and its consequences (Contention 19) was in part motivated by these considerations. See LBP-79-29, 10 NRC ____ (October 19, 1979). Furthermore, dismissal of any contention on technical grounds (which would likely result from our granting the Applicants' and Staff's motions to dismiss CAND, ECNP and SEA and their contentions) would be counterproductive in this regard. For these reasons, we hereby put all parties on notice that we will not dismiss any contentions from this proceeding without at least the showing (through affidavits) required by 10 CFR §2.749; further, in that circumstance we will have to be satisfied that the issue in question has been properly resolved. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2),

ALAB-443, 6 NRC 741, 752-54 (1977). (As described later, however, we shall take steps against parties which fail to respond to the discovery requirements which we are here imposing.)

Fourth, we have clearly been apprised of the tremendous burden, both financial and in terms of time, which participation in a proceeding like this entails. Despite the neutrality of the Commission's discovery rules in their application to various parties, the effect of these rules is to impose vastly varying burdens on volunteer participants, on the one hand, and Applicants or governmental participants, on the other, whose efforts are funded by ratepayers or through taxes. However, as we recognized in our Special Prehearing Conference Order, the Commission has a clear policy against providing financial assistance to intervenors in proceedings of this type. LBP-79-6, 9 NRC 291, 326 (1979). The existence of such a policy, however, does not deprive us of the authority to take steps to alleviate the financial burden of participation, to the extent consistent with our carrying out our responsibility to conduct a full and thorough inquiry into the issues raised.[2/] We believe that, consistent with these goals, modification of both the scope and timing of discovery is in order.

2/ When the Commission announced its policy of not providing financial assistance to participants in licensing proceedings, it also indicated that it would study means for reducing the procedural cost burdens of participation. Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, 4 NRC 494, 514-16 (1976). The steps we are invoking are consistent with this purpose.

Fifth, we are aware that at least one of the intervenors here — ECNP — is actively participating in other on-going licensing proceedings, including that involving TMI-2. It appears that imposition of extensive discovery obligations in the near future on ECNP, at least, would seriously compromise that party's ability to contribute to the resolution of issues not only in this proceeding but in several others. We are aware, of course, of the Appeal Board's recent declaration — made with respect to at least one of the very same persons who is representing ECNP in this proceeding — that "any individual undertaking to play an active role in several proceedings which are moving forward simultaneously is apt to find it necessary from time to time to expend extra effort to meet the prescribed schedules in each case." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), et al., ALAB-566, 10 NRC ____, ____ (October 11, 1979) (slip op., p. 8). But that does not mean that a Board cannot, or should not, take into account obligations imposed by other proceedings in establishing its own schedules. We are doing so here to the extent we believe that modification of our previously established schedules will have no effect on our ability to bring this proceeding to a timely conclusion.

Finally, several interpretations of the discovery rules advanced by the Applicants and Staff have had the effect of enormously compounding the discovery burden imposed on the intervenors. For example, the Applicants have made discovery requests

of each party requiring responses with respect to contentions, or parts of contentions, advanced by other parties. In other words, ECNP has been asked questions and has been requested to produce documents relating not only to its own contentions but also those of CAND, SEA, and Ms. Marsh, and other intervenors have been treated similarly. The justification advanced by the Applicants is that "[s]ince all Intervenors are entitled to cross-examination on all contentions at the hearing ***, answers to the Interrogatories by all Intervenors are needed for Applicant to prepare to respond to such cross-examination." Applicants' First Set of Interrogatories to Intervenor Susquehanna Environmental Advocates, dated May 25, 1979, p. 1 (similar interrogatories served on other intervenors). On the other hand, the Applicants moved for protective orders against discovery requests filed by CAND and ECNP to the extent the requests related to contentions sponsored by other parties, on the basis that our Special Prehearing Conference Order limited the participation of intervenors on contentions they did not sponsor to cross-examination and the submission of proposed findings and conclusions. See, e.g., Applicants' Objections to Certain Discovery Requests of CAND, dated June 29, 1979, at pp. 5-8 (Interrogatory/Requests 15, 17, 18); Applicants' Objections to Certain Discovery Requests of ECNP, dated June 29, 1979, at pp. 2-3 (Discovery Request 1). In Discovery Memo I, we granted the protective orders requested by the Applicants, but not on their merits. We did so because of the failure of CAND and ECNP to respond to the Applicants' objections.

Although the dichotomy which we have just portrayed may be consistent with the Rules of Practice, the result it reaches is patently unfair to the intervenors. Pursuant to our authority to issue "any order which justice requires" to protect a party from "undue burden" (10 CFR §2.740(c)), we are correcting this unfairness.

As for the Staff, the position it has taken requiring the various intervenors to go to the Washington Public Document Room, or the local Public Document Room, to view certain documents, or alternatively to purchase them, is also in accord with NRC rules. 10 CFR §§2.740(f)(3); 2.744; 2.790. But following the strict letter of those rules appears to impose unnecessary burdens on the intervenors. In our Special Prehearing Conference Order, we urged the Staff to arrange for the intervenors to be able to utilize the transcripts of this proceeding normally placed in the local Public Document Room for temporary periods away from that location. LBP-79-6, 9 NRC at 328. Apparently that result has not been achieved. The Staff has, however, arranged for an additional copy of the transcripts to be placed in the Pennsylvania State University Library. It also temporarily loaned one of its own copies to ECNP. Although we commend the Staff for these latest actions, we would urge it to continue to attempt to arrange for temporary, short-term intervenor use outside the document room of documents in the local Public Document Room. We also are urging the Staff to take certain other actions, as hereinafter described. We would hope that, consistent with NRC rules, as much effort as possible could be made to assist the intervenors in obtaining the relevant information they seek to develop their positions to the fullest possible extent.

D. In view of the foregoing, the schedule for this proceeding is hereby modified in the following respects:[3/]

1. All discovery obligations with respect to contentions to be heard at the health-and-safety hearings (Contentions 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, and 19) are hereby suspended. We will issue an order following the environmental hearings to establish a new discovery schedule for the health-and-safety issues. All parties are urged to respond to outstanding discovery requests on these health-and-safety contentions as soon as possible, but the obligation to do so is stayed. The parties are put on notice, however, that when the obligation is later reimposed, an extended time frame for responses may not be provided.

2. All parties are granted an extension of time until Friday, December 14, 1979, within which to respond to outstanding discovery requests on environmental contentions. Those contentions are as follows:

1 (health effects of the uranium fuel cycle)
2 (health effects of low-level radiation and other discharges from the facility)
3 (uranium supply)
4 (need for power)
14 (capacity factors)
16 (cooling tower discharge)
17 (transmission lines)
18 (herbicides)

3. All parties are directed, to the extent they have not already done so, to respond by December 14, 1979, to the discovery

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3/ These modifications should obviate any present need for a prehearing conference, as recently requested by CAND.

requests on the environmental contentions, except that no party need answer questions with respect to contentions, or portions of contentions, which it is not sponsoring. We recognize that the Applicants and Staff may possibly be surprised by the cross-examination of intervenors on other than their own contentions; but we are pursuaded by the circumstance that this cross-examination is mainly for our benefit, rather than that of the questioning party, and we are disinclined to impose on intervenors a heavy discovery burden to serve that purpose. Moreover, as a general principle, it is unfair to require intervenors to respond to discovery of a type which the Applicants themselves have deemed to be improper. To the extent warranted, we will grant the Applicants and Staff sufficient time at the hearing to counter claims that might be raised by the intervenors through the medium of cross-examination of witnesses appearing with respect to other parties' contentions.

4. If any intervenor fails properly to respond in a timely fashion to the discovery as outlined in paragraphs 2 and 3, it will not be permitted to present any direct testimony on that contention. (No further order of this Board to this effect will be required.) Although we may grant extensions of time for good cause shown (10 CFR §2.711), we are disinclined to grant any lengthy extensions or any extensions without a strong showing of good cause. We call attention again to the points we made in Discovery Memo I concerning proper responses: namely, that an intervenor is not required to engage in extended research to answer questions and may, if it is true, state that it has no knowledge of a given subject or that it is in the process of developing such knowledge.

5. Responses to discovery requests shall be updated as required by Commission rules (10 CFR §2.740(e)). Each party shall identify the identities, addresses, and professional qualifications, and the subject matter and the substance of the testimony of, expert witnesses expected to be called for its direct environmental case at least 60 days in advance of the commencement of the environmental hearings. Each party shall also identify the documents it intends to employ in its direct case at that same time. Additionally, each party shall identify documents upon which it intends to rely in cross-examination of any witness on environmental issues (to the extent it is aware of such documents) at least 7 days prior to the commencement of the environmental hearing.

6. Failure of an intervenor to respond as specified above will not be grounds for striking its contentions but such failure may be taken into account by us in considering motions for summary disposition of a contention. Failure to respond properly, in addition to precluding an intervenor from presenting direct testimony, may be grounds for dismissing that intervenor (as distinguished from its contentions) from the proceeding.

7. The provisions of the Special Prehearing Conference Order, as modifed by Discovery Memo I, concerning supplemental discovery requests on environmental issues remain in effect.

8. Direct testimony in writing on the environmental issues is required to be filed 21 days prior to the commencement of the environmental hearings.

9. The Staff is urged to arrange for transcripts and other documents at the local Public Document Room to be taken out of that room by intervenors, on a short-term temporary basis. In addition, ECNP has brought our attention to the fact that, in the TMI-2 proceeding, the Staff has supplied it with copies of numerous documents, and we are aware that this practice is being followed by the Staff in other cases. It appears to us that it would be equitable for the Staff to do so here. To the extent that the Staff might regard the forwarding of documents to intervenors as financial assistance, we consider it to be de minimis. In any event, where the Staff declines to produce relevant documents on the basis of their availability at a public document room, the Staff should assure that the documents are present in the local Public Document Room and not only at the Washington location. Further, where the Staff declines to produce documents in whole or in part on the ground of their local availability, the Staff is directed to assure that the documents are indeed available locally (i.e., in the Wilkes-Barre area). (With respect to ECNP discovery requests, it will be sufficient to show that particular documents are in fact available at the Pennsylvania State University library.)

IT IS SO ORDERED.

THE ATOMIC SAFETY AND LICENSING BOARD

Charles Bechhoefer, Chairman

Dated at Bethesda, Maryland,
this 30th day of October, 1979.