

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

PENNSYLVANIA POWER AND LIGHT CO.
ALLEGHENY ELECTRIC COOPERATIVE, INC.

(Susquehanna Steam Electric Station,
Units 1 and 2)

Docket Nos. 50-387
50-388

NRC STAFF'S ANSWER IN OPPOSITION TO ECNP'S PETITION
FOR COMMISSION REVIEW OF LICENSING BOARD'S PREHEARING RULINGS

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I. INTRODUCTION

1/ The Licensing Board's actions mediating the claims of the parties on these issues are set forth in the Board's "Memorandum and Order on Scheduling and Discovery Motions (I)" of August 24, 1979, "Memorandum and Order on Discovery Motions (II)" of October 30, 1979 (LBP-79-31, 10 NRC 597) and "Order Denying Requests of ECNP" of December 6, 1979.

II. BACKGROUND

In this operating license proceeding the Staff and the Applicants propounded a series of interrogatories to Intervenor ECNP.^{2/} As allowed by 10 CFR 2.740 of the Commission's Rules of Practice, these interrogatories sought information related to contentions admitted to the proceeding by the Licensing Board. ECNP answered some but failed to fully answer many of the interrogatories. Following motions by the Applicants and the Staff to compel proper answers to their interrogatories, the Licensing Board ordered ECNP to respond to the discovery requests of Applicants and the Staff within fourteen (14) days of service of its order.^{3/} Rather than providing answers or specific objections as directed, ECNP filed a response to the Licensing Board's Order which provided some answers but generally objected to most of the interrogatories.^{4/} Applicants and Staff filed motions seeking dismissal of ECNP and its contentions from the proceeding for its failure to obey the Licensing Board's discovery order. The Licensing Board declined to dismiss ECNP and its contentions from the proceeding, but granted ECNP (and the other intervenors) relief from certain of the discovery obligations imposed earlier and extended the time for intervenors to respond to December 14, 1979.^{5/}

^{2/} "NRC Staff's First Round Discovery Requests of the Environmental Coalition on Nuclear Power (ECNP)" dated May 21, 1979 and "Applicants' First Set of Interrogatories to Intervenor ECNP" dated May 25, 1979.

^{3/} "Memorandum and Order on Scheduling and Discovery Motions (I)" dated August 24, 1979. (Slip opinion at 13 and 15).

^{4/} "Responses of ECNP Intervenors to Board Memorandum and Order Compelling Intervenors to Answer Applicant and Staff Interrogatories" dated September 17, 1979.

^{5/} "Memorandum and Order on Discovery Motions (II) dated October 30, 1979," LBP-79-31, 10 NRC 597, 605-6.

However, the Licensing Board stressed the need for the intervenors to respond in a timely fashion to their remaining discovery obligations.^{6/} The Licensing Board also advised the intervenors of the potential consequences of their continued failure to fulfill their discovery obligations.^{7/}

In response to that order, ECNP filed a document asking the Board to certify to the Commission the questions that are the subject of the instant ECNP petition and again sought a protective order.^{8/} The Licensing Board denied ECNP's requests and extended the date for the intervenors' responses to their outstanding discovery obligations to January 18, 1980.^{9/}

On that date ECNP filed a document containing insufficient answers to the outstanding interrogatories.^{10/} Following receipt of this document the Applicants again moved the Licensing Board to impose sanctions on ECNP for its failure to obey the Licensing Board's discovery orders.

The Licensing Board heard oral argument on the motion and related Board questions on March 20 and 21, 1980. The Board declined to order the requested sanctions,

^{6/} Id. at 602.

^{7/} Id. at 606-7.

^{8/} "Intervenor's Response to Licensing Board Memorandum and Order of October 30, 1979" dated November 19, 1979.

^{9/} "Order Denying Requests of ECNP" dated December 6, 1979.

^{10/} "ECNP's Responses to Board's Memorandum and Order on Discovery Motions (II)" dated January 18, 1980.

granted ECNP (and other intervenors) additional relief from discovery obligations, and extended to May 1, 1980, the date for intervenors' answers to interrogatories.^{11/}

Prior to the Board's ruling, ECNP on March 15, 1980, filed the present petition for review by the Commission. In this petition ECNP makes nine requests for relief.^{12/} In eight of its requests ECNP seeks relief either from scheduling and discovery rulings made by the Licensing Board in the currently ongoing pre-hearing phase of this operating license proceeding or from the Licensing Board's refusal to certify questions related to its discovery rulings. In the ninth request ECNP appeals the Licensing Board's refusal to certify its request that a Commissioner sit as a member of the Licensing Board.

III. ARGUMENT

There is no provision in the Commission's Rules of Practice for a direct appeal to the Commission of a Licensing Board's interlocutory rulings. As here relevant, the Commission's Rules of Practice forbid appeal of the interlocutory rulings of Licensing Boards. 10 C.F.R. 2.730(f) states: "No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer."^{13/}

^{11/} "Memorandum" dated March 27, 1980.

^{12/} ECNP Petition at 3-5.

^{13/} See 10 C.F.R. 2.730(f). See Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449 (1979); Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-433, 6 NRC 469 (1977); Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-370, 5 NRC 131 (1977), and cases there cited. But see 10 C.F.R. 2.714a.

Moreover, although it is clear that the Commission has the power to undertake interlocutory review of any matter in any proceeding before any Board at any time,^{14/} the Commission has delegated to the Appeal Board the Commission's authority to review a Licensing Board's rulings and actions in the first instance.^{15/} Where no attempt has been made to obtain review by the Appeal Board, such an appeal should be dismissed for failure to exhaust remedies below.^{16/}

In appropriate circumstances attempts to obtain interlocutory review have been treated as requests that a Licensing Board be directed to certify questions for interlocutory appellate review.^{17/} However, this is not an instance where discretionary interlocutory review would be granted. As recently as November 20, 1979, the standard for directed certification of interlocutory rulings was reiterated. Puget Sound Power & Light Co.^{18/} states:

^{14/} See United States Energy Research and Development Administration, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 74-76 (1976); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516, 517 (1977), affirmed New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978). See also, Florida Power and Light Company (St. Lucie Plant, Units Nos. 1 and 2), CLI-77-15, 5 NRC 1324, 1325 (1977).

^{15/} See 10 C.F.R. 2.785(a)(1); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-56, 4 AEC 930, 931 (1972). But see: Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-79-8, 10 NRC 141, 147 (1979) for an exception not here applicable. See also: Interim Statement of Policy and Procedure, 44 Fed. Reg. 58559 (1979).

^{16/} See 10 C.F.R. 2.786(b)(4)(iii) which states: "A petition for review [by the Commission] will not be granted to the extent it relies on matters that could have been but were not raised before the Atomic Safety and Licensing Appeal Board." Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-25, 6 NRC 535, 537 (1977).

^{17/} See 10 C.F.R. 2.718(i); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478 (1975).

^{18/} Puget Sound Power and Light Company, et al. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC ___, slip op. p. 2 (1979).

Almost without exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. (Citing Public Service Company of Indiana (Marble Hill, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).)

Since Marble Hill was decided, discretionary interlocutory review has been granted only sparingly.^{19/}

A number of decisions shape the parameters of the concept of discretionary interlocutory review. Directed certification "is to be resorted to only in exceptional circumstances."^{20/} Objections to procedures for handling prehearing motions do not present a proper subject for directed certification.^{21/} Certification will not be directed to review rulings on interrogatories.^{22/} Directed certification will not be granted to review a scheduling controversy where the controversy does not bring to the fore any limitations imposed by law on the Licensing Board's jurisdiction or authority and where no "truly exceptional situation" is involved.^{23/}

^{19/} Id. at 3, n. 5.

^{20/} Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977).

^{21/} Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 625 (1976).

^{22/} Long Island Lighting and Power Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-318, 3 NRC 186 (1976).

^{23/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-295, 2 NRC 668 (1975).

ECNP correctly characterizes its requests as related to procedural aspects of the proceeding.^{24/} The rulings appealed from are interlocutory. As stated in Toledo Edison Co.: ^{25/}

The test of "finality" for appeal purposes before this agency (as in the courts) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory.

Here the scheduling and discovery rulings do not dispose of any segment of the case and do not terminate any party's right to participate. Any alleged prejudicial errors stemming from, among other things, rulings on discovery and schedules are reviewable on exceptions to the Licensing Board's initial decision at the end of the proceeding.^{26/}

Nor does the refusal of the Licensing Board to certify ECNP's request that a Commissioner sit on the Licensing Board merit review. The Commission has not elected to alter the normal makeup of the Licensing Board to include a Commissioner. ECNP's baseless allegations do not suggest that the standards for disqualification of a Board member have been met.^{27/}

^{24/} ECNP Petition at 1.

^{25/} Toledo Edison Company (Davis Besse Power Station), ALAB-300, 2 NRC 752, 758 (1975).

^{26/} See: Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244 (1974) and ALAB-302, 2 NRC 858 (1975).

^{27/} ECNP's citation of 10 C.F.R. 2.704(c) in footnote 5 at page 4 of its request indicates its awareness of the proper procedure and support required when disqualification of Licensing Board members is sought.

IV. CONCLUSION

For the reasons discussed above, ECNP's interlocutory appeal should be denied. Should the Commission nevertheless grant the appeal, the Staff requests that it be allowed the opportunity to address the merits of the individual requests for relief made by ECNP as it would be upon the grant of review by the Commission of Appeal Board decisions and actions.^{28/}

Respectfully submitted,



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Dated at Bethesda, Maryland,
this 4th day of April, 1980.

^{28/} See 10 C.F.R. 2.786(b)(6).

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