

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

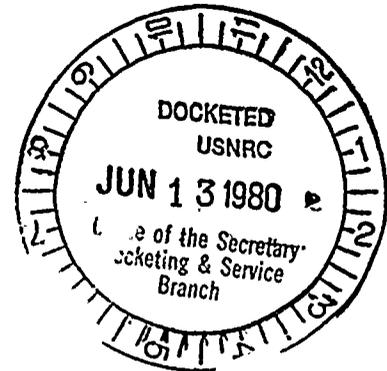
In the Matter of

PENNSYLVANIA POWER AND LIGHT COMPANY
ALLEGHENY ELECTRIC COOPERATIVE, INC.

(Susquehanna Steam Electric Station,
Units 1 and 2)

Docket Nos. 50-387
50-388

NRC STAFF'S RESPONSE TO ALAB-593



Dated at Bethesda, Maryland
this 12th day of June, 1980

James M. Cutchin, IV
Counsel for the NRC Staff

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I. INTRODUCTION

On March 15, 1980, Intervenor Environmental Coalition on Nuclear Power (ECNP) filed a "Request to the NRC Commissioners for Expedited Consideration of Actions of an Atomic Safety and Licensing Board and Other Matters" directly with the Commission. Staff and Applicants filed answers in opposition to ECNP's "Request" directly with the Commission on April 4th and April 10th, respectively.^{1/} On May 16th the Commission referred these papers to the Appeal Board for appropriate action. CLI-80-17, 11 NRC _____.

In a Memorandum and Order dated May 21, 1980, the Appeal Board observed that:

In the matter before us, directed certification is sought on allegations of extreme harassment resulting from assertedly abusive and burdensome discovery obligations imposed upon intervenor [ECNP] by the Board below at the applicant's instance.... However, ECNP filed its request for review some time ago; in the interim the Licensing Board has made additional rulings and entered other orders modifying intervenor's discovery obligations. ALAB-593, 11 NRC _____.

^{1/} NRC Staff's, "Answer in Opposition to ECNP's Petition for Commission Review of Licensing Board's Prehearing Rulings" dated April 4, 1980 and "Applicants Response to Environmental Coalition on Nuclear Power Request to the NRC Commissioners for Expedited Consideration of Actions of an Atomic Safety and Licensing Board and Other Matters" dated April 10, 1980.

Accordingly, the Appeal Board directed ECNP to provide advice on: (1) the extent to which ECNP's allegations in its March 15th "Request" have been affected by those recent Licensing Board rulings,^{2/} and (2) whether (and if so, to what extent) ECNP continues to seek the nine categories of relief it requested. Id. The Appeal Board also directed, unless ECNP withdrew its request for relief, the Applicants and the Staff to: (1) answer the first question addressed to ECNP and (2) respond to ECNP's allegations on the merits. Id.

On May 30th ECNP filed a "Response of ECNP to ALAB-593." In that filing ECNP stated that its Request 1 had been rendered moot by the passage of time and that it continues to seek the relief identified in its other requests. ECNP also stated that the Licensing Board's recent rulings have not "substantially [affected its allegations]."

ECNP's "allegations of extreme harassment resulting from assertedly abusive and burdensome discovery obligations imposed upon intervenor [ECNP] by the Board below at the applicant's instance" are general, several, occasionally repetitious, and scattered throughout its "Request." The following are believed to be fairly representative of the scope and content of these allegations:

1. The Licensing Board has required ECNP to respond to "2700 interrogatories [served] upon [ECNP]" by the Applicants.
2. "[ECNP's] requests for protective orders relative to all interrogatories and subsequently to individual interrogatories have been entirely denied."

^{2/} Those rulings are memorialized in the Licensing Board's Memoranda dated March 27 and May 8, 1980 and in the Licensing Board's "Second Prehearing Conference Order," LBP-80-13, 11 NRC _____, dated April 11, 1980.

3. The Licensing Board has "totally ignored [ECNP's] requests for clarifications as well as for reasonable protection and relief."
4. "Deadlines too short to permit adequate responses [to interrogatories] have been [imposed and] enforced on ECNP" by the Licensing Board.
5. "Requested extensions of time adequate to answer this burdensome number of interrogatories have been denied."

II. BACKGROUND

This proceeding involves applications for operating licenses. Following a Special Prehearing Conference held pursuant to 10 C.F.R. 2.751a, the Licensing Board issued its "Special Prehearing Conference Order" on March 6, 1979. LBP-79-6, 9 NRC 291. In that Order the Licensing Board established a preliminary schedule for discovery in the proceeding. Id at 327. In accordance with that schedule on May 25, 1979, Applicants served both interrogatories and a request for production of documents on ECNP.^{3/} Applicant's interrogatories relate to the

^{3/} "Applicants' First Set of Interrogatories to Intervenor Environmental Coalition on Nuclear Power" and "Applicants' First Request to Intervenor Environmental Coalition on Nuclear Power for the Production of Documents."

eighteen contentions that were admitted to the proceeding by the Licensing Board in its Order dated March 6, 1979, and with subparts are about 150 in number. The interrogatories appear to seek ECNP's bases for the contentions it raised and information ECNP has that is relevant to contentions it did not raise but can litigate. One subpart of each group of specific interrogatories refers to a group of general interrogatories which seeks: (1) identification of documents and individuals consulted and (2) descriptions of studies, research, calculations, analyses or communications with individuals that were relied upon by ECNP in the preparation of its responses to the interrogatories. One group of interrogatories seeks the identity, qualifications, and nature of the testimony of, witnesses to be called by ECNP. The document request seeks the production of documents identified or described by ECNP in its answers to the interrogatories.

On June 29, 1979, ECNP filed a document entitled "Environmental Coalition on Nuclear Power Intervenors' Answers to First Round Applicant Interrogatories." However, that document did not set forth answers to any of Applicants' interrogatories. Instead, ECNP stated a general blanket objection to all of Applicants' discovery requests and moved the Licensing Board to issue a protective order which would relieve ECNP of all responsibility to respond to those requests. On July 16, 1979 Applicants filed an answer to ECNP's motion and pursuant to 10 C.F.R. 2.740(f) moved the Licensing Board to compel discovery of ECNP.^{4/} ECNP did not answer Applicants' motion to compel discovery.

^{4/} "Applicants' Answer to 'Environmental Coalition on Nuclear Power Intervenors' Answers to First Round Applicant Interrogatories' and Motion to Compel Discovery."

On August 24, 1979, the Licensing Board issued its "Memorandum and Order on Scheduling and Discovery Motions" (Discovery Order I). In that unpublished Memorandum and Order the Licensing Board explained the forms and purposes of discovery in an NRC proceeding and noted that discovery always entails some burden and expense - a party must determine what relevant information it possesses and disclose it. The Board also explained that extensions of time for responding can be obtained for "good cause" and that relief from harassing, irrelevant, unduly burdensome or embarrassing discovery is available. Then, the Board warned of the serious consequences - including dismissal of a contention or of a party from the proceeding - that can result from failure to properly respond to discovery requests. The Board ruled that blanket non-specific objections do not provide a basis for a protective order and ordered ECNP either to respond to the Applicants' discovery requests or to provide specific objections to particular requests within fourteen days of the service of the Order.

On September 17, 1979, ECNP filed a document entitled, "Responses of ECNP Intervenors to Board Memorandum and Order Compelling Intervenors to Answer Applicant and Staff Interrogatories." Rather than providing either answers or specific objections to Applicants' interrogatories as directed, ECNP answered none of Applicants' interrogatories and again generally objected to all of them.^{5/}

^{5/} ECNP's "Responses" 14 n.2.

On October 12, 1979, Applicants moved the Licensing Board to dismiss ECNP and its contentions from the proceeding for its failure to comply with the Board's Order of August 24th.^{6/} On October 22nd, ECNP filed an answer in opposition to Applicants' motion. On October 30, 1979, the Licensing Board issued its "Memorandum and Order on Discovery Motions (II)." LBP-79-31, 10 HRC 597. The Board noted that when viewed on their merits ECNP's responses might provide technical grounds to dismiss it and its contentions from the proceeding. Id. at 600. However, it decided "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." Id. at 602. Further, it decided that relief from some of the discovery obligations previously imposed was appropriate. Id. Because the estimated earliest date for starting the radiological health and safety phase of the evidentiary hearing had slipped several months from that previously estimated, the Board suspended all discovery obligations for all parties with respect to "safety" and "mixed safety-environmental" contentions until after the environmental phase of the hearing is completed. Id. at 605. Thus, discovery obligations on all but eight contentions were suspended. The Board also relieved the Intervenors of the obligation to respond to all discovery

^{6/} "Applicants' Motion to Dismiss Environmental Coalition on Nuclear Power and Certain Contentions from this Proceeding."

on any but the contentions they are sponsoring. This resulted in ECNP's having to respond to discovery on only five contentions until after the environmental phase of the hearing is completed. In addition, the Licensing Board granted all parties an extension of time until December 14, 1979 to respond to outstanding discovery requests on environmental contentions. Id. at 606.

On November 19, 1979, ECNP filed a document entitled "Intervenors' Response to Licensing Board Memorandum and Order of October 30, 1979." ECNP did not answer Applicants' interrogatories. Instead, it sought certification to the Commission of the questions that are the subject of the instant ECNP "Request" and again sought a protective order. Applicants (and Staff^{7/}) each opposed ECNP's various requests.^{8/}

On December 6, 1979 the Licensing Board issued an "Order Denying Requests of ECNP." In that unpublished Order the Licensing Board found "ECNP's filing to be disrespectful in tone, inaccurate and misleading in content, and frivolous in all respects." Order at 2. Accordingly, the Board denied ECNP's requests in their entirety. However, in view of advice from the Staff that publication

^{7/} The history of ECNP's conduct in connection with the Staff's discovery requests is very similar to its conduct in connection with the Applicants' discovery requests.

^{8/} "Applicants' Answer to ECNP Motion for Protective Order" dated November 27, 1979 and "NRC Staff's Answer to ECNP Motions for Protective Order and Certification" dated December 5, 1979.

of the Final Environmental Statement (FES) had again been delayed, the Board extended the time for all parties to respond to discovery requests on environmental contentions from December 14, 1979 to January 18, 1980.

On January 18th, ECNP filed a document entitled "ECNP's Responses to Board's Memorandum and Order on Discovery Motions (II)." Again, ECNP failed to properly answer the outstanding interrogatories. Following receipt of ECNP's filing, the Applicants again moved the Licensing Board to impose sanctions on ECNP for its failure to obey the Board's discovery orders.^{9/}

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, granted ECNP (and other Intervenors) additional relief from discovery obligations, and extended to May 1, 1980, the due date for Intervenors' answers to interrogatories.^{10/}

Prior to the Licensing Board's ruling, ECNP on March 15th filed its present "Request."

^{9/} "Applicants' Motion to Prohibit Environmental Coalition on Nuclear Power from Participating in Litigation of Certain Contentions and Motion to Compel" dated February 4, 1980.

^{10/} "Memorandum" dated March 27, 1980 and "Second Prehearing Conference Order," LBP-80-13, 11 NRC _____, dated April 11, 1980.

III. DISCUSSION

A. Staff's Answer to Question 1 to ECNP

The recent Licensing Board rulings referred to by the Appeal Board (and the passage of time) have affected both ECNP's allegations, although not significantly, and its requests for relief. The oral argument that ECNP sought to have prohibited in its Request 1, has already taken place. The Applicants' Motions which ECNP sought to have denied in its Request 2 have been ruled on the by the Board. ECNP's participation in the proceeding was not restricted by the Licensing Board's rulings.^{11/} Thus, Request 1 is moot and Request 2 also appears to be moot. Moreover, the Licensing Board again extended the due date for ECNP's responses to its currently outstanding discovery obligations.

B. Staff's Response to ECNP's Allegations

The Staff believes that ECNP's allegations of "extreme harassment" can fairly be characterized as of three types:

1. ECNP has been required by the Licensing Board to answer an unduly burdensome number of Applicants' interrogatories.
2. ECNP has been unfairly denied protective orders against Applicant by the Licensing Board.
3. ECNP has been denied adequate time to respond to Applicants' interrogatories by the Licensing Board.

^{11/} Neither was SEA's or, in reality, CAND's participation restricted.

On May 25, 1979, Applicants served their discovery requests on ECNP. Applicants' interrogatories sought information that ECNP might possess that is relevant to contentions admitted to the proceeding and information about ECNP's witnesses. The information sought is clearly within the scope of discovery allowed under 10 C.F.R. 2.740(b)(1) which states in pertinent part that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. In a proceeding on an application for... an operating license for a ... utilization facility, discovery shall... relate only to those matters in controversy which have been identified by the Commission or the residing officer in the prehearing order entered at the conclusion of that prehearing conference [provided for in 2.751a]...

Even though the information sought by Applicants is clearly within the scope allowed, and the normal time allowed for answers or objections is 14 days,^{12/} the Licensing Board has reduced the discovery burden on ECNP, has explained why ECNP must respond or object, and has repeatedly extended the time for ECNP to respond or object. The original discovery schedule established by the Licensing Board on March 6, 1979 allowed until June 29, 1979 for responses or objections.^{13/} In its Order of August 24, 1979,^{14/} the Licensing Board, in addition to carefully and clearly explaining the discovery process and its purpose, extended the time for ECNP to respond or object to September 12, 1979. In its Order of October 30, 1979,^{15/} the Licensing

^{12/} 10 C.F.R. 2.740b(b).

^{13/} LBP-79-6, supra.

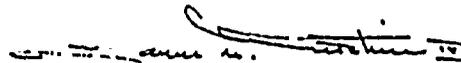
^{14/} Discovery Order(I), supra.

^{15/} Discovery Order (II), supra.

Board declined to dismiss ECNP from the proceeding, relieved ECNP of approximately 75% of its then outstanding discovery obligations and extended the time for ECNP to respond or object to the remainder to December 14, 1979. On December 6, 1979 the Licensing Board further extended the time for ECNP to respond or object to its reduced discovery obligations to January 18, 1980. In its latest rulings^{16/} the Licensing Board not only denied Applicants the sanctions against ECNP that they had requested but also extended the time for ECNP to respond or object to its outstanding discovery obligations to May 1, 1980.

Thus, ECNP has not been required by the Licensing Board to answer an unduly burdensome number of Applicants' interrogatories. However, it has not been relieved of its entire discovery burden because it has not provided a valid basis for the blanket protective orders it sought. Moreover, ECNP has been granted extension after extension of time with the result that it had from May 25, 1979 to May 1, 1980 to respond to discovery on the five environmental contentions that it is sponsoring.^{17/}

Respectfully submitted,



James M. Cutchin, IV
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of June, 1980

^{16/} LBP-80-13, *supra*.

^{17/} This pleading deals solely with the questions posed by the Appeal Board. The Staff's position regarding the Board's consideration of the ECNP "Request" under the standards for discretionary interlocutory review are set forth in "NRC Staff's Answer in Opposition to ECNP's Petition for Commission Review of Licensing Board's Prehearing Rulings," dated April 4, 1980 and filed with the Commission.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO ALAB-593", dated June 12, 1980, in the above-captioned proceeding, have been served on the following, by deposit in the United States mail, first class, or, as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of June, 1980:

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