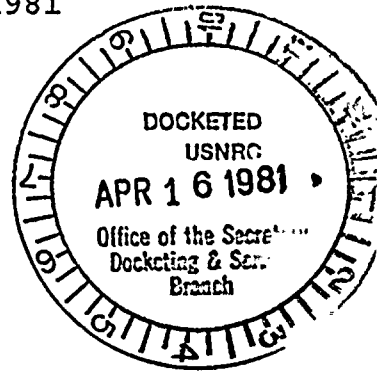


April 14, 1981

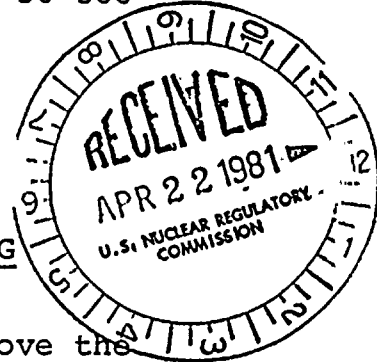
UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



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

Docket Nos. 50-387  
50-388



APPLICANTS' MOTION TO DISMISS ENVIRONMENTAL  
COALITION ON NUCLEAR POWER FROM THIS PROCEEDING

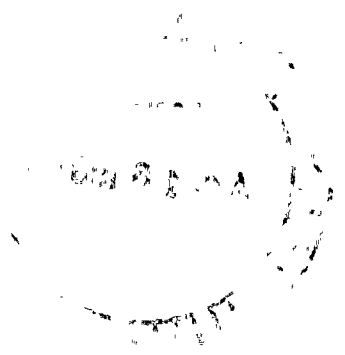
Pursuant to 10 CFR §§2.707 and 2.718, Applicants move the Licensing Board for an order dismissing intervenor Environmental Coalition on Nuclear Power ("ECNP") from this proceeding for wilful failure to comply with the discovery Orders of the Board.

On May 25, 1979, pursuant to the Special Prehearing Conference Order, see 9 NRC at 327, Applicants served interrogatories on ECNP. ECNP refused to answer them. On August 24, 1979, the Board issued an order compelling ECNP to answer Applicants' interrogatories. Memorandum and Order on Scheduling and Discovery Motions ("Discovery Memo I") (August 24, 1979) at 12. Subsequently, the Board issued a Memorandum and Order on Discovery Motions (II) ("Discovery Memo II"), LBP-79-31, 10 NRC 597

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(October 30, 1979) in which it suspended temporarily ECNP's discovery obligations on safety contentions. The schedule was to be reestablished after the hearing on environmental issues, and the Board warned that "an extended time frame for responses may not

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be provided" when the obligation to respond to discovery on safety contentions was reimposed. 10 NRC at 606.

On November 12, 1980, the Board reinstated the parties' obligation to answer discovery requests on all but one of the safety issues, fixing January 16, 1981 as the deadline. Memorandum and Order Establishing New Discovery Schedule for Safety Issues (November 12, 1980) at 6.<sup>1/</sup>

On January 15, 1981, ECNP filed its "Response on Health and Safety Interrogatories" ("Response"). ECNP's Response is a clear violation of the Order in Discovery Memo I compelling discovery to which ECNP remains subject. The Response provided no discovery, but instead repeated ECNP's familiar protestations of lack of resources and lack of time due to its participation in other proceedings,<sup>2/</sup> and leveled again charges of harassment against Applicants, even though such charges have been ruled by the Appeal Board to be without basis. ALAB-613, 12 NRC 317, 335 (1980). Even more disturbing was ECNP's intimation that it might never provide the discovery at all, stating that it "cannot guarantee

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<sup>1/</sup>Discovery on Contention 6 had to await submittal of Applicants' new emergency plan. Discovery on Contention 6 was due on February 23, 1981. See Board's Order dated January 2, 1981. ECNP's failure to answer discovery on Contention 6 is the subject of Applicants' Motion to Compel Discovery on Contention 6, dated March 3, 1981. ECNP failed to respond to this motion.

<sup>2/</sup>The Licensing Board and the Appeal Board have ruled, in this proceeding and in reference to this intervenor, that lack of time and/or resources do not excuse the failure to provide discovery answers. See, e.g., ALAB-613, 12 NRC 317, 334-35, 338-40 (1980).

that sufficient time would be available to answer these interrogatories even following completion of the environmental hearings". Response at 1. ECNP has had the discovery requests since May, 1979.

In response to ECNP's January 15, 1981 filing, the NRC Staff on January 30, 1981 filed a motion to compel ECNP to respond to the Staff's outstanding discovery requests. Applicants supported the motion in a filing dated February 12, 1981 and asked that the order compelling discovery include Applicants' interrogatories. ECNP failed to answer either submittal. On February 27, 1981, the Licensing Board directed that ECNP respond to the Staff's and Applicants' outstanding discovery requests by March 27, 1981. Memorandum and Order (Directing CAND and ECNP to Respond to Interrogatories), dated February 27, 1981, p. 4.<sup>3/</sup> That deadline has now passed with no response whatsoever from ECNP.

ECNP's attitude can no longer be attributed to lack of knowledge of its obligations as a participant in this proceeding. In Discovery Memo I, the Board discussed in detail, for the benefit of ECNP and the other intervenors, the requirements surrounding discovery in NRC proceedings. Discovery Memo I at 5-8.

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<sup>3/</sup>As indicated in its caption, the February 27, 1981 Memorandum and Order applied to both ECNP and Citizens Against Nuclear Dangers (CAND). CAND filed its answers to the discovery requests, stating that it "[does] not possess any of the discovery information sought by the NRC and the Applicants, relevant to health and safety contentions." Citizens Against Nuclear Dangers Statement on Interrogatories and Motions before the Licensing Board, dated March 27, 1981, p. 1.

The Board reminded ECNP once more of its obligations with respect to discovery in Discovery Memo II. 10 NRC at 599-601. Again, on December 6, 1979, the Board explained to ECNP that its blanket refusal to respond to proper discovery requests was "contrary to the clear intent of the NRC Rules of Practice". Order Denying Requests of ECNP (December 6, 1979), at 5. Finally, the Appeal Board issued an exhaustive analysis of the discovery in this proceeding, in which it warned ECNP that it had "a serious misconception of the nature and purpose of discovery and of its rights and responsibilities as a litigant", and proceeded to outline what these responsibilities are. ALAB-613, 12 NRC at 330-340. The Licensing Board's February 27, 1981 Memorandum and Order again addressed these same issues. ECNP was very much on notice of its obligations and has chosen to disregard them.

Several things must be clear at this point. First, Applicants' discovery requests are entirely appropriate. ALAB-613, 12 NRC at 330-335. The Appeal Board was "satisfied that the basic interrogatories relate to the matters in controversy and are not unreasonable in number". 12 NRC at 332. Second, ECNP is evidently not prepared to respond to the health and safety discovery now and "can [not] guarantee that [it] will be in a better position to answer them in the future". Response at 2. Third, the many explanations by this Board and the Appeal Board of ECNP's discovery obligations continue to be ignored. Fourth, ECNP continues to disregard the Orders of this Board and the rulings of the Appeal Board.

Applicants respectfully submit that this situation cannot go uncorrected. Not only is ECNP's recalcitrance an affront to the Board and a challenge to the NRC licensing process, but it also places Applicants at a significant and unfair disadvantage in their preparation for the hearing. With evidentiary hearings hopefully only a few months away, there is no longer the time to continue the unnecessary procedural wrangling that ECNP's discovery failures have caused. By the time that any factual responses might be forthcoming, it will be too late for Applicants to make use of the information. Yet, without such discovery, Applicants are significantly hindered in understanding ECNP's contentions, in submitting summary disposition motions, and in preparing testimony. This "catch-22" situation should not be tolerated by the Board.

The Licensing Board's February 27, 1981 Memorandum and Order proposed the imposition of certain sanctions if ECNP failed to respond. These proposals were:

1. giving weight to such failure in ruling on summary disposition motions;
2. prohibiting ECNP from presenting an affirmative case on those contentions unless ECNP identifies the names of witnesses and substance of testimony in advance of the due date for prepared testimony; and
3. prohibiting ECNP from cross-examining unless ECNP provides a detailed outline of proposed cross-examination at least 10 days before the hearing session at which that issue is to be considered.

Were this the first time that ECNP has failed to live up to its obligations, Applicants might be inclined to agree with the more lenient sanctions proposed in the February 27, 1981 Memorandum and Order. However, the sanctions proposed in the February 27, 1981 Memorandum and Order are neither strong enough nor likely to be effective. Each is subject to specific limitations. Giving weight to discovery failure in ruling on summary disposition is of little help where the discovery responses are needed to understand the contention. Restrictions on presenting an affirmative case are of little help since intervenors typically do not present affirmative cases. And the requirement for a cross-examination plan is too little and too late. Receiving such information in the middle of the hearing itself (10 days before the particular hearing session at which the issues is to be considered) would give little if any time to prepare, even if one were able to predict when a given issue would be taken up. Taken as a whole, the sanctions simply are not adequate in view of ECNP's persistent affront to the orders of the Licensing Board.

As noted above, ECNP has been repeatedly warned by this Board and the Appeal Board that it is operating under an erroneous perception of an intervenor's role and obligations in NRC proceedings and that its unjustified failure to provide discovery is sufficient ground for dismissal.<sup>4/</sup> The only appropriate response

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<sup>4/</sup> The Board's authority and sufficiency of grounds to dismiss ECNP for failing to meet discovery obligations have been set forth in Discovery Memo II. It will be recalled that Applicants moved on October 12, 1979, to have ECNP and its contentions dismissed for ECNP's unjustified refusal to respond to Applicants' (footnote continued on next page)

to ECNP's continuing disregard for these admonitions is dismissal from this proceeding. As the Licensing Board explicitly warned:

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.


Discovery Memo II, 10 NRC at 607 (original emphasis).

CONCLUSION

The Appeal Board has stated with respect to ECNP that "[s]imply as a matter of fairness, a licensing board may not waive the discovery rules for one side and not the other." ALAB-613, 12 NRC at 338-339. Allowing ECNP's wilful refusal to grant discovery on safety issues to go without sanction would constitute such a waiver and would unfairly prejudice Applicants. For these reasons, Applicants respectfully request that their motion to dismiss ECNP be granted.

Respectfully submitted,  
SHAW, PITTMAN, POTTS & TROWBRIDGE

By

  
\_\_\_\_\_  
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Dated: April 14, 1981

(footnote continued from previous page)

discovery requests. Referring to Applicants' motion, the Board noted that it could well be granted:

[W]e reiterate that the relief being sought by the Applicants and Staff -- dismissal of CAND, ECNP and SEA (and all of their contentions) from this proceeding -- could potentially be granted in the face of the deficiencies in responses which have characterized these intervenors to date.

Discovery Memo II, 10 NRC at 602.





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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Applicants' Motion to Dismiss Environmental Coalition on Nuclear Power From This Proceeding was served by deposit in the United States Mail, First Class, postage prepaid this 14th day of April, 1981, to all those on the attached Service List.

  
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Bruce W. Churchill

Dated: April 14, 1981

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