

5/4/81



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

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

(Susquehanna Steam Electric Station,)
Units 1 and 2))

Docket Nos. 50-387
50-388

NRC STAFF ANSWER IN SUPPORT OF APPLICANTS' MOTION TO
DISMISS ENVIRONMENTAL COALITION ON NUCLEAR POWER FROM THIS PROCEEDING

I. INTRODUCTION

In its "Memorandum and Order Establishing New Discovery Schedule for Safety Issues,"^{1/} the Board reinstated the duty of parties to provide responses to outstanding discovery requests on the health and safety issues admitted as contentions in this proceeding.^{2/} The Board required such responses to be filed by January 16, 1981.^{3/} The Environmental Coalition on Nuclear Power (ECNP) served its response on January 15, 1981. This response provided, in pertinent part:

^{1/} Memorandum and Order Establishing New Discovery Schedule for Safety Issues, November 12, 1980 [hereinafter referred to as Memorandum and Order].

^{2/} This Memorandum and Order reinstated the duty to respond to outstanding discovery requests for all health and safety issues except those requests which related to Applicants' emergency plan (Contention 6). Memorandum and Order at 6.

^{3/} Memorandum and Order at 6.

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[We] simply cannot in good conscience or within the limits of our capabilities and resources answer the interrogatories at this time. Nor can we guarantee that we will be in a better position to answer them in the future if we are also to be of assistance to this Board by participation in the health and safety hearing.^{4/}

As the NRC Staff (Staff) considered ECNP's justification for its failure to respond to discovery requests to be contrary both to the Commission's Rules of Practice and to the numerous Board rulings on discovery, the Staff sought an order from the Board compelling ECNP to provide full, direct, and responsive answers to the Staff's outstanding discovery requests.^{5/} On February 17, 1981, the Board issued its "Memorandum and Order (Directing CAND and ECNP to Respond to Interrogatories)," granting the Staff's motion on the ground that it had previously rejected ECNP's excuse of other more pressing obligations and ordering ECNP to respond to the Staff's outstanding interrogatories

^{4/} ECNP Intervenors' Response on Health and Safety Interrogatories, January 15, 1981, at 2.

^{5/} NRC Staff's Motion for an Order Compelling Citizens Against Nuclear Dangers and Environmental Coalition on Nuclear Power to Respond to Staff's Discovery Requests Relating to Health and Safety Issues, January 30, 1981, at 6. As noted in that motion, the specific discovery requests for which responses are still outstanding relate to Contentions 5, 7, 8, and 9. The Staff does not object to ECNP's responses to Interrogatories S-7.2, S-7.3, S-7.9, S-7.12, S-7.13, S-7.14, and S-7.15 filed by ECNP on June 29, 1979. Id. at 2.

by March 27, 1981.^{6/} ECNP has not filed any responses to the Staff's outstanding health and safety interrogatories. In response to this failure to comply with the Board's Order, Applicants have moved to dismiss ECNP from this proceeding.^{7/} The Staff supports Applicants' motion.

II. BACKGROUND

On May 21, 1979, the Staff filed discovery requests directed to ECNP^{8/} pursuant to the Licensing Board's Special Prehearing Conference

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- ^{6/} Memorandum and Order (Directing CAND and ECNP to Respond to Interrogatories), February 27, 1981 (slip opinion at 4). The Order suggested several sanctions for failure to respond; these are: (1) giving weight to failure to respond in ruling upon summary disposition motions, (2) not permitting parties who did not respond to present an affirmative case on health and safety contentions absent specific permission from the Board, and (3) requiring ECNP, as a condition of engaging in cross-examination on the issues in question, to furnish an outline of proposed cross-examination 10 days prior to commencement of the relevant evidentiary hearing session. Slip opinion at 3-4. The Board further invited "comments on these proposals" if discovery responses were not furnished. Slip opinion at 3.
- ^{7/} Applicants' Motion to Dismiss Environmental Coalition on Nuclear Power from this Proceeding, April 14, 1981.
- ^{8/} NRC Staff's First Round Discovery Requests of the Environmental Coalition on Nuclear Power (ECNP), May 21, 1979. On May 25, 1979, ECNP filed its first round discovery requests on the Staff. Environmental Coalition on Nuclear Power (ECNP) First Round Discovery Requests to NRC Staff, Applicant, and Commonwealth, May 25, 1979. This document requests that the Staff supply ECNP with more than 50 documents, such as NUREG reports and national laboratory studies, and that the Staff respond to several interrogatories. As noted in several Staff letters to ECNP and as affirmed by the Appeal Board in Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317 (1980), discovery against the Staff is on a different (continued on next page)

Order of March 6, 1979.^{9/} On June 29, 1979, ECNP filed its answers to the Staff's discovery requests.^{10/} In response to these answers, the Staff filed a motion for an order compelling ECNP to properly respond to the Staff's interrogatories.^{11/} In that motion, the Staff objected to most of ECNP's responses as incomplete, evasive, and unresponsive. The Staff did not, however, object to ECNP's responses to Interrogatories S-7.2, S-7.3, S-7.9, S-7.12, S-7.13,

8/ (continued)

footing than against the other parties to a proceeding. With limited exceptions, Commission regulations make Staff documents that are relevant to licensing proceedings routinely available in the NRC Public Document Room. 10 CFR §2.790(a). As this reasonably discloses the basis for the Staff's position, there is less need for formal discovery against the Staff. Accordingly, the Rules of Practice limit documentary discovery against the Staff to items not reasonably obtainable from other sources (10 CFR §2.744) and allow interrogatories addressed to the Staff only when that information is necessary to a proper decision in the case and not obtainable elsewhere (10 CFR §2.720(h)(2)(ii). *Id.* at 323. In an Order on October 30, 1979, the Board acknowledged that the Staff had responded to ECNP's discovery requests by making documents available in the public document rooms. Nevertheless, the Board urged the Staff to give ECNP documents when possible. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-31, 10 NRC 597, 605 (1979). Accordingly, the Staff forwarded extra copies of sixteen documents to ECNP on November 15, 1979 and of five additional documents on November 26, 1979.

9/ Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-6, 9 NRC 291 (1979).

10/ Environmental Coalition on Nuclear Power Answers to First Round NRC Staff Interrogatories, June 29, 1979. This document contains responses to discovery requests concerning Contentions 5, 7, 8 and 9, the health and safety contentions at issue here.

11/ NRC Staff's Motion for an Order Compelling Environmental Coalition on Nuclear Power to Properly Respond to the Staff's Interrogatories, July 13, 1979.

S-7.14, and S-7.15.^{12/} The Board granted the Staff's motion and directed ECNP to file more adequate responses within fourteen days of the date of service of its Order.^{13/}

In its Order, the Board made several key points. First, it noted the purpose of discovery:

In short, 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. Inquiries concerning the genesis of a party's case and the witnesses (if any) it intends to use to establish that case are thus commonplace and very much in order. Commission proceedings are not to become the setting for "trial by surprise," and the discovery mechanism is the major means used to avoid that situation. Answers to discovery inquiries are important in terms of a party's ability to prepare its case for trial -- particularly so in the case of an applicant which has the burden of proof in a proceeding of this type.^{14/}

Next, it described the effects of failure to respond adequately to discovery requests:

A party seeking discovery may file a motion to compel discovery where responses to discovery requests are not filed or are incomplete. 10 CFR §2.740(f). Failure to respond adequately to discovery requests (in the absence of obtaining a protective order) may have serious consequences, in terms of its effect on the adjudication and the rights of other parties. Therefore, we will expect parties to use every reasonable effort to comply with discovery requests. If the time limits imposed on discovery are too severe, a party may ask us for relief which, for "good cause" shown, may be granted. 10 CFR §2.711. Failure to answer discovery requests adequately is a

^{12/} Id. at 12-13

^{13/} Memorandum and Order on Scheduling and Discovery Motions, August 24, 1979 (slip opinion at 15-16).

^{14/} Id. at 5.

sufficient ground for us to take steps as drastic as dismissal of a contention or of a party from the proceeding. See 10 CFR §§2.707, 2.718. 15/

Finally, it stated that fairness demanded that those who had been granted discovery should provide discovery.^{16/} While the Board noted that failure to answer discovery requests adequately is a sufficient ground for the Board to dismiss a contention or a party from a proceeding, it apparently declined to take such action because the intervenors were participating in the proceeding without benefit of counsel.^{17/}

In response to the Board's Order, ECNP filed a document purporting to be additional answers to the Staff's interrogatories on September 17, 1979.^{18/} In reality, the document was a motion for a protective order and only pages 15 through 17 supposedly answered the Staff's discovery requests.^{19/} ECNP neither adequately responded to the Staff's discovery requests nor provided specific objections to particular discovery requests sufficient to justify issuance of a protective order.^{20/} Thus,

15/ Id. at 10.

16/ Id. The Board quoted Offshore Power Systems (Manufacturing License For Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 817 (1975), for the proposition that "[a] party may not insist upon his right to ask questions of other parties, while at the same time disclaiming any obligation to respond to questions from those other parties."

17/ Id. at 5 and 7.

18/ Responses of ECNP Intervenors to Board Memorandum and Order Compelling Intervenors to Answer Applicant and Staff Interrogatories, September 17, 1979.

19/ NRC Staff's Answer in Opposition to ECNP's Motion for a Protective Order and Cross Motion to Dismiss ECNP from this Proceeding, October 9, 1979.

20/ Id. at 10-11.

the Staff urged dismissal of ECNP from the proceeding if it did not, within 14 days, comply with the Board's Order of August 24, 1979.^{21/}

In response to this and other motions, the Board issued its Memorandum and Order on Discovery Motions (II).^{22/} In this Order, the Board held that ECNP's responses to the Staff's discovery requests were inadequate.^{23/} It did not dismiss ECNP from the proceeding, however, on the ground that trial preparation and timely commencement of the hearing would not be adversely affected by a grant of additional time to ECNP to adequately answer due to Staff information that its publication of the FES and SER would take longer than originally anticipated.^{24/} The Board, thus, suspended all discovery obligations pertaining to the health and safety contentions and granted an extension of time for responding to outstanding discovery requests on the environmental contentions.^{25/} Despite its conclusion that no prejudice

21/ Id.

22/ Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-31, 10 NRC 597 (1979).

23/ Id. at 600. The Board further noted that failure to respond adequately to discovery would make it difficult for the Board to formulate informed questions for the witnesses and hence to be adequately prepared for hearing. Id. at 602.

24/ Id.

25/ Id. at 605-06.

would result from this extension, the Board did reiterate that dismissal could properly be granted for failure to respond adequately.^{26/}

Despite the Board's significant curtailment of its discovery obligations, ECNP's response to the Board Order contained ten pages of complaint about the Board's "unswerving bias and total inability to conduct a fair hearing"^{27/} and requested that several questions be certified to the Appeal Board.^{28/} Among these was the question of whether ECNP had to answer the particular discovery requests at issue.^{29/}

An Order denying the requests of ECNP was issued by the Board on December 6, 1979.^{30/} That Order found "ECNP's filing to be disrespectful in tone, inaccurate and misleading in content, and frivolous in all respects" and thus denied ECNP's requests in their entirety.^{31/} That same Order, however, again extended the time for all

^{26/} The Board further noted that "some of the general and deficient objections being advanced by the Intervenor[s] [could be] 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 proceeding." Id. at 602.

^{27/} Intervenor[s]' Response to Licensing Board Memorandum and Order of October 30, 1979, November 19, 1979 at 6.

^{28/} Id. at 11-13.

^{29/} Id. at 11.

^{30/} Order Denying Requests of ECNP, December 6, 1979.

^{31/} Id. at 2.

parties to respond to discovery requests on environmental contentions due to the Staff's advice that publication of the FES would be delayed.^{32/}

Following a motion by Applicants to limit ECNP's participation in the litigation of those environmental contentions which ECNP had sponsored in addition to several other motions, the Board issued its Second Prehearing Conference Order.^{33/} That Order again explicitly recognized the inadequacy of the answers provided by ECNP^{34/} but again declined to penalize ECNP for its failure.^{35/} The Board's decision rested in part on ECNP's promise at the prehearing conference to supplement its answers^{36/} and in part on the Staff's advice that issuance of the FES had again been delayed.^{37/} Significantly, the Board emphasized that ECNP did provide answers to some interrogatories and, in any event, had not outrightly refused to answer any interrogatories.^{38/}

^{32/} Id.

^{33/} Second Prehearing Conference Order, April 11, 1980.

^{34/} Id. at 10.

^{35/} Id. at 2.

^{36/} Id.

^{37/} Id. at 10.

^{38/} Id. at 9. In response to the Board's express instructions in its Memorandum of March 27, 1980, ECNP filed two documents purporting to supply the additional responses required by the Board. ECNP Intervenors' Additional Responses to Applicant and Staff Interrogatories as Directed by the Board Memorandum of March 27, 1980, May 1, 1980 and ECNP Supplement to Additional Responses to (continued on next page)

Not until November 12, 1980 were the parties again reminded of their discovery obligations.^{39/} Then, the Board gave the parties until January 16, 1981 to respond to outstanding discovery requests on all health and safety contentions but emergency planning.^{40/} In response to that Order, as noted above, ECNP not only refused to answer those outstanding requests but also stated that it could not guarantee that it would answer them in the future.^{41/} ECNP then failed to respond to a subsequent Board Order compelling its responses to these discovery requests despite the Board's suggestion of various sanctions.^{42/}

38/(continued from previous page)

Interrogatories, May 20, 1980. Again, these answers are evasive and unresponsive. For example, the Board ordered ECNP to answer the Staff's interrogatories S-1.1 to S-1.11, using the DES assessment as a basis for its answers. If ECNP had not developed particularized information, the Board directed it to provide at least a generalized basis for the contention. Memorandum at 2. In its response, ECNP ignored the Board's reference to particularized information and instead noted the Board's direction to provide a generalized basis. It then stated that it was reiterating its earlier response, a response which had already been found inadequate by the Board. ECNP Intervenors' Additional Responses at 3.

39/ Memorandum and Order Establishing New Discovery Schedule for Safety Issues, November 12, 1980.

40/ Id. at 6.

41/ ECNP Intervenors' Response on Health and Safety Interrogatories, January 15, 1981 at 2.

42/ Memorandum and Order (Directing CAND and ECNP to Respond to Interrogatories), February 27, 1981 at 3. Specifically, the Board stated: "We are here putting them on notice that, if they do not provide substantive answers to the Staff's and Applicants' interrogatories by the date specified herein [March 27, 1981], we propose to impose the following sanctions on their further participation with respect to the particular contentions involved. (If answers are not furnished, we invite comments on these proposals.)"

III. DISCUSSION

First, the Staff notes that the Board's previous discovery orders declined to dismiss ECNP from this proceeding for one of three reasons: (1) that ECNP did not understand the need to comply with discovery because it was not represented by counsel,^{43/} (2) that a grant of additional time for ECNP to respond to discovery would not adversely affect trial preparation and commencement of the hearing because the Staff had delayed issuance of the FES and SER,^{44/} and (3) that ECNP had not refused to answer the interrogatories.^{45/} None of these rationales applies to the present situation. ECNP has been more than adequately informed of the purpose of discovery and of the reasons for complying with it.^{46/} The Staff has issued its SER.^{47/} As the Board has always tied the commencement of the hearing to issuance of Staff documents,^{48/} both trial preparation and commencement of the hearing will be adversely affected both by additional time wasted in continued efforts to receive discovery responses from ECNP and by time wasted in trying to guess what specific ECNP concerns are encompassed by the contentions so that

^{43/} Memorandum and Order on Scheduling and Discovery Motions, August 24, 1979 at 5.

^{44/} Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-31, 10 NRC 597, 602 (1979).

^{45/} Second Prehearing Conference Order, April 11, 1980 at 9.

^{46/} See notes 14-17 and accompanying text.

^{47/} This document was served on all the parties to this proceeding on April 21, 1981.

^{48/} Memorandum and Order on Scheduling and Discovery Motions, August 24, 1979 at 2.

the Staff can adequately address them at the hearing. Finally, ECNP has now flatly refused to answer health and safety discovery requests. To an even greater degree than the provision of evasive and unresponsive answers, this failure openly flouts the Rules of Practice governing the course of this proceeding and the Board's Orders. The Board should act to penalize this behavior.

Second, the Staff notes that the sanctions suggested by the Board in its Order of February 27, 1981^{48/} do not appear to have produced their intended results. Instead of encouraging ECNP to respond to discovery and/or to provide specific objections to individual discovery requests, these penalties apparently persuaded ECNP that the consequences of inaction did not outweigh the benefits of inaction. Specifically, the Board's suggested sanctions are (1) the giving of weight to failure to respond to discovery when the Board rules on summary disposition motions, (2) the requirement that parties failing to respond get specific permission from the Board in order to put on an affirmative case, and (3) the requirement that such parties furnish a detailed outline of proposed cross-examination as a condition precedent to conducting cross-examination.^{49/}

The Staff suggests that the reasons underlying ECNP's failure to respond may be as follows. With regard to the first proposed sanction, ECNP may realize that the legal burden imposed on a movant for summary disposition is fairly substantial. A movant must show that there is no genuine issue of material fact.^{50/}

^{48/} Memorandum and Order (Directing CAND and ECNP to Respond to Interrogatories), February 27, 1981.

^{49/} Id. at 3-4.

^{50/} Adickes v. Kress & Co., 389 U.S. 144, 157 (1970); Cleveland Electric Illuminating Co. (Perry, Units 1 and 2), ALAB-433, 6 NRC 741, 752-54 (1977).

When contentions are as broadly worded as those admitted to this proceeding, it is difficult for a movant to determine precisely which particular issues are challenged and thus which facts need to be established.^{51/} Accordingly, ECNP may have surmised that "giving weight" to its failure to respond will affect a Board's decision only after a movant has met the difficult burden of establishing that no genuine issue of material fact is raised by the general contentions at issue here. Presumably, ECNP will not be directly penalized as ECNP has not filed any motions for summary disposition during the two years this proceeding has been underway. The Staff further notes that this sanction provides the Staff with relief only to the extent that the Staff moves for summary disposition. Otherwise, failure to respond to the Staff's interrogatories is not penalized at all.

With regard to the second proposed sanction, the Staff notes that it is more lenient than a similar sanction imposed on ECNP for failure to provide adequate responses to discovery requests on environmental contentions.^{52/} In its Memorandum and Order on Discovery Motions (II), the Board provided that if "any intervenor fails properly to respond in a timely fashion [to the environmental discovery requests which were the subject of that Board Order] it will not be permitted to present any direct testimony

^{51/} See e.g., Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1975).

^{52/} Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-31, 10 NRC 597 (1979).

on that contention. (No further order of this Board to this effect will be required.)^{53/} Thus, when ECNP provided inadequate and unresponsive answers to the environmental discovery requests, the Board directed that ECNP could not put on an affirmative case with regard to those contentions. Yet, when ECNP failed to provide any of the required health and safety answers, the Board merely suggested that ECNP would have to get specific permission from the Board to put on an affirmative case, permission which would be granted if the names of witnesses, the substance of their testimony, and identification of relevant documents were furnished to the Board and other parties before the hearing.^{54/} The Staff believes that, given ECNP's failure to respond, it is inappropriate to impose a penalty more lenient than that imposed for its action, however inadequate. At a minimum, the penalty should equal that imposed for inadequate action. Logically, the penalty should be greater in order to match the act. To that end, the Staff notes that a denial of the right to put on an affirmative case penalizes ECNP only to the extent that ECNP intends to put on an affirmative case. To date, there has been no suggestion that ECNP so intends. In fact, the evidence suggests the contrary.^{55/}

^{53/} Id. at 606.

^{54/} Memorandum and Order (Directing CAND and ECNP to Respond to Interrogatories), February 27, 1981 at 4.

^{55/} See e.g., NRC Staff's Motion for an Order Compelling Environmental Coalition on Nuclear Power to Properly Respond to the Staff's Interrogatories, July 13, 1979.

With regard to the third proposed sanction, the Staff questions whether the requirement that ECNP provide an outline of its cross-examination 10 days prior to commencement of the pertinent evidentiary hearing is truly a sanction. In its first Order on discovery, the Board noted that a party may not insist upon its right to ask for discovery while refusing to answer discovery requests propounded on it by other parties.^{56/} The Appeal Board further instructed ECNP that parties to licensing proceedings have both legal rights and responsibilities.^{57/} To permit ECNP to engage in cross-examination which is the exercise of a significant legal right after its failure to fulfill its concomitant legal duties would amount to no penalty at all.

IV. CONCLUSION

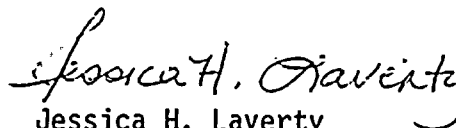
Given the Board's repeated assertions that failure to answer discovery requests is sufficient to warrant dismissal of a party from this proceeding and given the inapplicability of any of the rationales earlier used by the Board in support of its decisions not to dismiss ECNP, the Staff concludes that dismissal of ECNP from this proceeding is an appropriate penalty for ECNP's latest failure to comply with a Board Order. This penalty is appropriate because any sanction less than

^{56/} Memorandum and Order on Scheduling and Discovery Motions, August 24, 1979 at 6.

^{57/} Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 340 (1980).

dismissal would indirectly reward ECNP for its action. Unlike every other party to this proceeding, ECNP would have successfully ignored its duties as a party but reaped the benefits of participation, i.e., the exercise of significant legal rights such as cross-examination. Furthermore, in light of ECNP's repeated failures to comply with Board Orders over a two-year period, it is unreasonable to expect that, if not dismissed from this proceeding, ECNP would now undertake its duties as a party responsibly. Finally, ECNP's discovery responses to date do not evidence its desire to contribute to a record which will better enable the resolution of complex, technical issues.^{58/} In fact, the Staff notes that the Board earlier concluded, after reviewing one of ECNP's discovery responses, that such a review "must inevitably lead to a belief that ECNP's participation in this proceeding is purely obstructionist and not designed or intended to achieve answers to the questions it has raised."^{59/} In sum, then, the Staff recommends that the Board, pursuant to 10 CFR §§2.707 and 2.718, issue an order dismissing ECNP from this proceeding.

Respectfully submitted,


Jessica H. Laverty
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 4th day of May, 1981

^{58/} The Staff has attached all of ECNP's discovery responses for the Board's convenience.

^{59/} Order Denying Requests of ECNP, December 6, 1979.

