

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL 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' RESPONSE TO ALAB-593

Introduction. On May 16, 1980, the Commission referred to the Appeal Board for appropriate action a filing by intervenor Environmental Coalition on Nuclear Power ("ECNP") entitled "Request to the NRC Commissioners for Expedited Consideration of Actions of an Atomic Safety and Licensing Board and Other Matters" ("Request"). CLI-80-17, 11 NRC _____ (1980). In response to the Commission's referral, the Appeal Board issued a Memorandum and Order on May 21, 1980, ALAB-593, 11 NRC _____ (1980), in which the Appeal Board ordered ECNP to inform the Board (1) the extent to which the allegations in the Request have been affected by more recent Licensing Board rulings in the proceeding and (2) whether, and to what extent, ECNP continues to seek the relief sought in the Request. Slip opinion at 4. Unless ECNP withdrew its request for relief, Applicants and Staff were in turn instructed: (1) to answer the first question posed by the Board to ECNP, and (2) to respond to ECNP's allegations on the merits. Id.

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On May 30, 1980, ECNP responded to ALAB-593 stating, with respect to the first question, that "[t]here has been no substantial changes [sic] made by the Licensing Board rulings cited in ALAB-593." Response of ECNP to ALAB-593 at 1. With respect to the second question, ECNP stated that its first request for relief is now moot, but "ECNP continues to seek relief in the remaining eight requests, plus the four on page 14 of the ECNP Request of March 15, 1980...[and] also continues to request the relief sought at p. 15 of its Request, namely that ECNP and other intervenors affected...[be granted] six months additional time for unimpeded preparation." Id. at 2.

In view of ECNP's response to ALAB-593, it is Applicants' turn to respond to the Appeal Board's Order. Before doing so, however, a brief review of the procedural background of this matter is appropriate.

Background. The Susquehanna operating license proceeding commenced on August 8, 1978, with the publication of the notice of hearing. ECNP, an experienced intervenor in NRC proceedings, ^{1/} filed a petition to intervene on September 5, 1978, and on January 15, 1979,

^{1/} ECNP has described its experience as follows in an April 3, 1980 submittal in the Three Mile Island, Unit 1 Restart proceeding:

"These [ENCP] intervenors have been active, and effective, parties to Nuclear Regulatory Commission, as well as Atomic Energy Commission proceedings since 1972. ECNP has participated in license proceedings for Three Mile Island, Units 1 and 2; Peach Bottom, Units 2 and 3; Fulton, Units 1 and 2; Limerick, Units 1 and 2; Newbold Island, Units 1 and 2; and Susquehanna, Units 1 and 2; ECNP has participated in the Commission's Generic Rulemaking proceedings on GESMO, Table S-3, ECCS, and the current Reassessment of Confidence in Radioactive Waste Disposal.

ECNP has also recently petitioned for a hearing on the proposed changes in Technical Specifications for Three Mile Island, Unit 2.

submitted an amended petition including ten contentions, some with eight or more subparts. Following a January 29-31, 1979 special prehearing conference, the Licensing Board admitted 18 contentions, many with multiple subparts, and established a schedule for the proceeding which called for interrogatories to be submitted on May 25, 1979 and responses on June 29, 1979. See Special Prehearing Conference Order, LBP-79-6, 9 NRC 291 (March 6, 1979).

On May 25, 1979, Applicants filed identical sets of interrogatories with each of the four intervenors in this proceeding. Each set consisted of about 150 specific interrogatories covering the 18 contentions, and a series of general interrogatories intended to elicit the basis for answers to specific interrogatories. (For example, if the answer to a specific interrogatory was based on a document, a general interrogatory asked that the document be identified.) On the same date, ECNP filed its discovery requests on Applicants and other parties. ^{2/} On June 29, 1979 Applicants provided responses to ECNP's discovery, including written answers and copies of a number of documents. In addition, Applicants made available for ECNP's inspection many thousands of pages of internal company files and documents. ^{3/}

ECNP did not answer Applicants' discovery but rather sought a protective order from the Licensing Board. On August 24, 1979, the Licensing Board in its Memorandum and Order on Scheduling

^{2/} ECNP's statement on page 1 of its Response to ALAB-593 that it "still ha[s] not had time yet to prepare [its] own interrogatories for the Staff or Applicant" is inaccurate. See Environmental Coalition on Nuclear Power (ECNP) First Round Discovery Requests to NRC Staff, Applicant, and Commonwealth, dated May 25, 1979. Although not in the form of interrogatories, the discovery sought by ECNP required preparation of affidavits and written answers and explanations.

^{3/} During the eleven and one-half months that the materials have been available, ECNP has not reviewed or examined any of these files and documents.

and Discovery Motions, denied ECNP's request for a protective order, granted Applicants' motion to compel answers to their discovery requests, and directed ECNP to file answers to interrogatories or a particularized motion for protective order within 14 days. On September 17, 1979, ECNP responded by asking the Licensing Board to postpone ECNP's obligation to respond to discovery until September 15, 1980, and observed that ECNP's time had been absorbed by "responding to calls for information, assistance and assurance from victims of the TMI-2 accident". In light of ECNP's failure to comply with the Licensing Board's August 24, 1979 Order, Applicants moved to dismiss ECNP.^{4/} A similar motion was filed by the Staff. ECNP's October 22, 1979 answer to the motion objected to "the enormity and viciousness of the Applicants' demands."^{5/}

The Licensing Board then issued its October 30, 1979 Memorandum and Order on Discovery Motions ("Discovery Memo II"), LBP-79-31, 10 NRC 597, in which is stated that "it is absolutely necessary that the intervenors respond in a timely fashion to the discovery obligations which still remain". 10 NRC at 602 (original emphasis). The Board then extended until December 14, 1979, the time for ECNP to file answers, suspended discovery on safety issues, and ruled that an intervenor need only respond to interrogatories

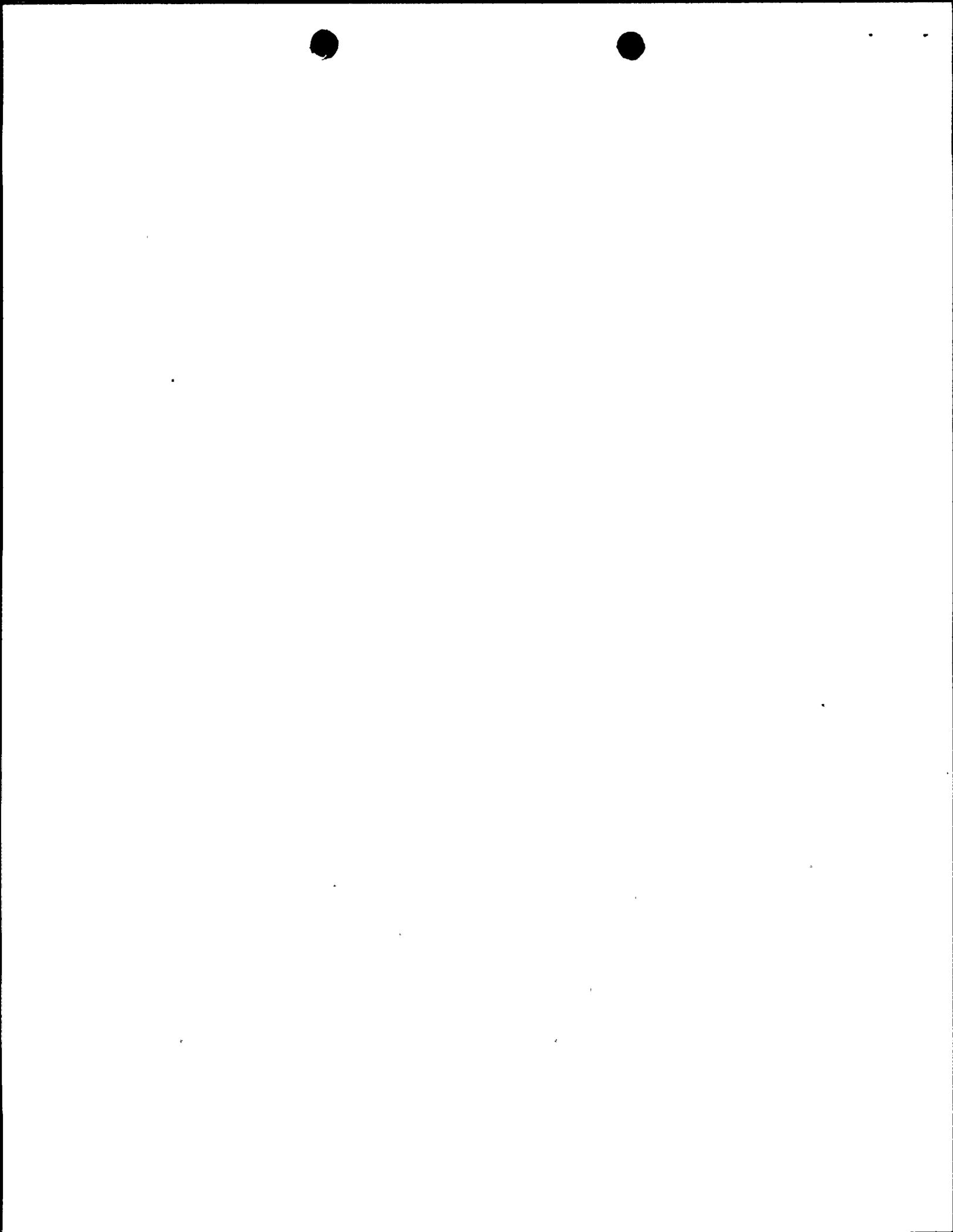
4/ In their motion, Applicants stated that they would not object to a further extension of about two weeks to permit ECNP to answer Applicants' interrogatories.

5/ This characterization may be compared with the response to the same discovery request by another intervenor, Colleen Marsh, et al., a group with no prior NRC experience, which filed 20 pages of long-hand answers to Applicants' interrogatories. Applicants have reviewed these answers, found them responsive and have sought no additional discovery from this group.

on contentions which it sponsored. The effect of the latter two rulings was to reduce from 18 to 5 the number of contentions on which ECNP was obligated to answer interrogatories, and to reduce the number of interrogatories for which answers had to be provided by ECNP from about 150 to about 50.

ECNP's response to the October 30 Order, filed on November 19, 1979, was to continue its refusal to provide answers, to request another protective order, and to ask that the Licensing Board be disbanded "for gross incompetence". ECNP Response to Discovery Memo II, at 12. On December 6, 1979, the Licensing Board issued another order noting that ECNP's filing was "disrespectful in tone, inaccurate and misleading in content and frivolous in all respects", Order at 2, but nonetheless extending the time for ECNP's discovery responses to January 18, 1980.

On January 18, 1980, ECNP filed its first substantive response to Applicants' May 25, 1979 discovery, by providing answers to interrogatories on two of its five contentions. In view of the lack of adequate responses to the remaining interrogatories, and in keeping with the Licensing Board's admonition in Discovery Memo II that failure of an intervenor to respond properly to the pending discovery requests "may be grounds for dismissing that intervenor...from the proceeding", LBP-79-31, supra, 10 NRC at 606 (original emphasis), Applicants on February 4, 1980 filed a motion to limit ECNP's participation in the evidentiary hearing as to those contentions on which ECNP did not file adequate discovery responses. ECNP's February 19, 1980 response to this motion among other things stated that its ability to respond was affected by the "press of many other obligations."



ECNP's Request was filed with the Commission on March 15, 1980, only five days before the March 20-21, 1980 prehearing conference. As will be further discussed below, the discovery relief sought by ECNP in the Request was largely granted by the Licensing Board at the prehearing conference. The Licensing Board denied Applicants' motion to limit ECNP's participation in the proceeding and, while once again holding some of the answers to interrogatories provided by ECNP to be inadequate, extended once more the time for ECNP to file additional discovery responses to May 1, 1980, ten months after the date on which responses were initially due. Second Prehearing Conference Order, LBP-80-13, 11 NRC _____ (1980), slip opinion at 10. ^{6/}

Response to Board Question. The Appeal Board asked in ALAB-593 whether the Licensing Board rulings and orders at and since the March 20-21, 1980 prehearing conference have "substantially alleviated, if not mooted, intervenor's complaints." Slip opinion at 3-4. From the preceding background discussion, it is obvious that the answer is yes. In its March 15, 1980 Request to the Commission, ECNP asked relief from the "excessively large number of discovery requests" served on it by Applicants, and sought denial of Applicants' motion to restrict ECNP from participation at the hearing on the contentions for which it had failed to provide discovery responses. At the March 20-21, 1980 prehearing conference, the Licensing Board granted precisely the relief asked by ECNP in its Request, for it denied Applicants'

^{6/} The Licensing Board granted still another extension of time, to May 23, 1980, for ECNP to file an answer to one of the Applicants' interrogatories. See Licensing Board Memorandum dated May 8, 1980. No such answer has been filed to date.

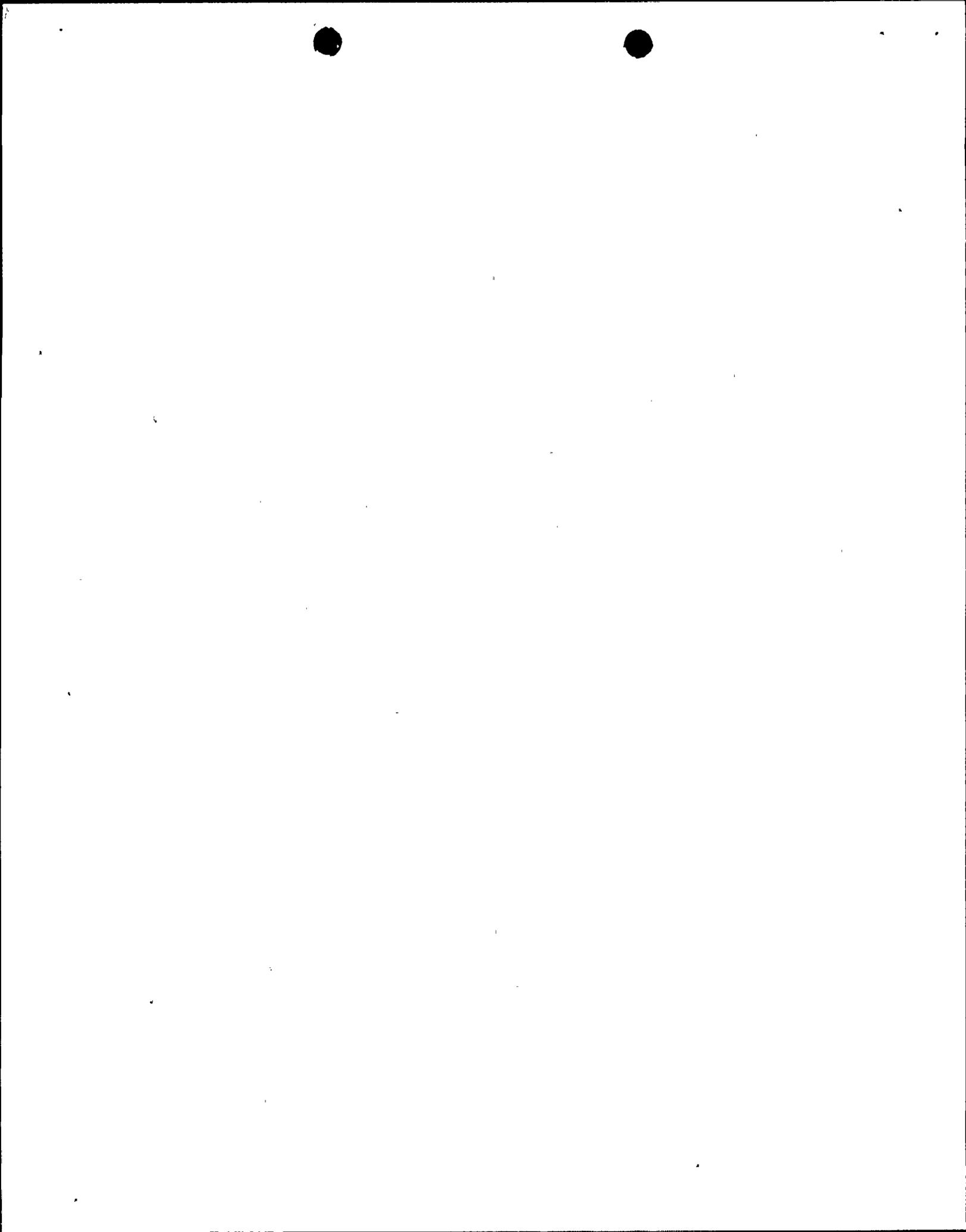
motion, ruled that ECNP needed to provide no further answers with respect to some of the interrogatories at issue, and extended ECNP's time to respond to the few remaining interrogatories by another 40 days. See Licensing Board's Memorandum dated March 27, 1980 and Second Prehearing Conference Order dated April 11, 1980.

The relief granted to ECNP by the Licensing Board is more than sufficient to remedy all of ECNP's complaints and therefore ECNP's Request should be dismissed as moot. ^{7/}

The Merits. The history of this proceeding shows, without need for further amplification, that there is an absolute lack of factual or legal basis for the relief sought in the Request. The Licensing Board has been remarkably lenient in imposing on ECNP the responsibilities which are associated with participation in NRC proceedings. No fair reading of the record in this proceeding can even suggest that the Licensing Board's actions

either (a) threaten[] the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affect[] the basic structure of the proceeding in a pervasive or unusual manner.

^{7/} ECNP's Request asks the Commission to take a number of measures that go well beyond the discovery dispute between ECNP and the Applicants and Staff. Thus, ECNP seeks to have an investigation conducted "of the abuses of discovery that are being tested by its Staff as well as the Applicant in this proceeding, and an investigation of the extent to which such procedural abuses are occurring in other NRC proceedings." The Request also seeks to have all discovery matters suspended, the licensing proceeding suspended "entirely and indefinitely", the Licensing Board reconstituted with a Commissioner as one of its members, and the Commission to answer four "questions" posed by ECNP. Clearly, such remedies are unnecessary to resolve the instant controversy and have been mooted by the Licensing Board action. Moreover, as shown in the discussion of the merits of the Request, there is no basis for the relief sought by ECNP.



Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588 (April 1, 1980) (slip op. at 8-9). To the contrary, as discussed above, the Licensing Board's orders of August 24, 1979, October 30, 1979, December 6, 1979 and March 27, 1980 have significantly reduced the magnitude of ECNP's discovery obligations and have substantially extended the time schedules. Thus, ECNP's requests for relief from the Licensing Board's rulings on discovery are without merit. ^{8/}

As for ECNP's ninth request, i.e., that the Licensing Board be reconstituted to include a Commissioner, such an action would be unprecedented and clearly unnecessary. The proceeding has been underway for almost two years. To remove one of the members of the Licensing Board would serve little purpose except delay the proceeding. To the extent that ECNP's request is based on its unsubstantiated allegations concerning conduct by the Licensing Board, ECNP is aware of the procedures which should be followed in seeking the disqualification of Licensing Board Members. ^{9/} ECNP has not sought to comply with those procedures.

^{8/} Of the nine items included in the Request, the first one is conceded by ECNP to be moot and the second one was fully granted by the Licensing Board at the March 20-21, 1980 prehearing conference. The third, fourth and sixth items ask the Commission to respond to certain "questions" relating to the parties' discovery rights. The Commission has chosen not to take up ECNP's "questions" and has given no instruction to the Appeal Board to consider them. Even if these questions are appropriately before the Appeal Board, answering them is unnecessary to granting or denying the relief sought by ECNP. Moreover, mere examination of the questions will show that they are argumentative in nature and present no meritorious legal issues that can be resolved by the Appeal Board. See ECNP's Request at 14.

^{9/} See, ECNP's citation at 10 C.F.R. §2.704(c) at p. 4, n.5 of the Request.

Finally, we address ECNP's eighth request, which asks for a suspension of the licensing proceedings

until such time as the Applicant has completed all proposed construction changes and the NRC Staff has completed its review thereof and has completed its required documents (e.g., SER), with sufficient time for meaningful perusal by the Intervenor.

Request at 5. This request is totally inconsistent with Commission regulations, practice and decisions. See, e.g., Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928 (1974). Nor does it make sense to stop the hearing on environmental issues because safety review is not complete. ^{9/}

^{9/} ECNP also asks for suspension of the proceedings on items 5 and 7 of the Request. The fifth item seeks such a halt until the "abuses of discovery" committed by Applicants and Staff have been subjected to "an intensive review by the Commissioners". The seventh item seeks suspension of "all matters relating to discovery pending clear definition by the Commission of what constitutes an 'acceptable' or 'adequate' response to interrogatories..." The Request also asks the Commissioners to direct the Licensing Board "to grant these Intervenor and others similarly affected a full six months of preparation time plus discovery with no other obligations..." Request at 15, emphasis in original. Suspension of proceedings (even if it were an appropriate remedy) would do nothing to advance resolution of the issues presented by this operating license application, and would only serve to delay progress of the proceeding, a result against which ECNP has been warned by the Licensing Board herein (see LBP-79-31, supra, 10 NRC at 602,604). Similar requests by ECNP or its legal representatives in other proceedings have been rejected by the Licensing Boards and the Appeal Board. See, Memorandum and Order on Licensee's Motion to Compel Discovery of ECNP, Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), Docket No. 50-289 (Restart), April 11, 1980, slip opinion at 4-5; Philadelphia Electric Company, et al. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-566, 10 NRC 527, 530 (1979); and see Order, dated May 28, 1980, in the same proceeding, slip opinion at 2.

ECNP has shown no reason why the truly extraordinary relief it seeks is warranted. The discovery obligations placed on ECNP in this case are neither unfair nor more demanding than those permitted by the Rules of Practice and borne, as a matter of common practice, by all parties to contested proceedings. The Licensing Board has alleviated considerably ECNP's discovery burden. Under these circumstances, the Request presents no meritorious pleas for relief and should be rejected in its entirety.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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Dated: June 13, 1980

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicant's" Response to ALAB-593" were served by deposit in the U.S. Mail, first class, postage prepaid, this 13th day of June, 1980, to all those on the attached Service List.

Matias F. Travieso-Diaz
Matias F. Travieso-Diaz

Dated: June 13, 1980

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