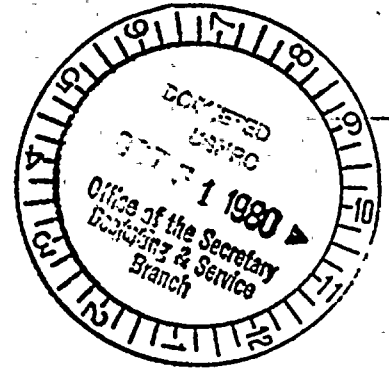


UNITED STATES OF AMERICA  
NUCLEAR-REGULATORY-COMMISSION

BEFORE THE COMMISSION



In the Matter

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

(Susquehanna Steam Electric Station,  
Units 1 and 2)

Docket Nos. 50-387  
50-388

10-30-80

NRC STAFF'S ANSWER IN OPPOSITION TO ECNP'S  
PETITION FOR COMMISSION REVIEW OF ALAB-613

Jessica H. Laverty  
Counsel for NRC Staff

October 30, 1980

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NUCLEAR REGULATORY COMMISSION

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ECNP'S PETITION FOR COMMISSION REVIEW OF ALAB-613

I. INTRODUCTION

On October 14, 1980, Intervenor Environmental Coalition on Nuclear Power (ECNP) filed a "Petition for Review of ALAB-613 by the NRC Commissioners." In ALAB-613,<sup>1/</sup> the Appeal Board considered ECNP's allegations that the Applicants and the NRC Staff had abused the discovery procedures in order to block ECNP's effective participation in the captioned operating license proceeding. ECNP further alleged that the Licensing Board had assisted the Applicants' and the Staff's achievement of this end. The Appeal Board concluded that ECNP's complaints were not substantiated by the record and denied the relief sought by ECNP. In its petition, ECNP has asked that the Commission review and reverse the Appeal Board's decision. For the reasons set forth below, the Staff opposes the petition for review.

<sup>1/</sup> Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC \_\_\_\_ (September 23, 1980).

## II. BACKGROUND

In May 1979, the NRC Staff and the Applicants filed their First Round Discovery Requests on ECNP.<sup>2/</sup> Although ECNP answered some questions, it failed to fully answer many others. ECNP's continued refusal to properly answer interrogatories rested on its general objections that the interrogatories were excessive in number and required a detailed response in an extremely limited period of time.<sup>3/</sup> ECNP's continued failure to respond resulted in the filing of several motions by the Staff and the Applicants to compel proper answers and/or to dismiss ECNP from the proceeding for failure to make discovery. In response to these motions, the Licensing Board reduced the number of interrogatories required to be answered by ECNP and extended the time period within which ECNP had to answer while declining to dismiss ECNP and its contentions from the proceeding. A complete and sequential description of this procedural activity is set out in the Appeal Board's decision.<sup>4/</sup>

On March 15, 1980, ECNP filed a petition for review of the Licensing Board's prehearing rulings by the Commission.<sup>5/</sup> In that petition, ECNP made nine

<sup>2/</sup> "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.

<sup>3/</sup> "Petition for Review of ALAB-613 by the NRC Commissioners" dated October 14, 1980. (ECNP Petition).

<sup>4/</sup> Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC \_\_\_\_ (September 23, 1980). (Slip opinion at 11 through 20).

<sup>5/</sup> "Request to the NRC Commissioners for Expedited Consideration of Actions of an Atomic Safety and Licensing Board and Other Matters" dated March 14, 1980.

requests for relief, eight of which sought relief from scheduling and discovery rulings and one of which sought relief from the Licensing Board's refusal to certify ECNP's request that a Commissioner sit as a member of the Licensing Board.

In its May 16, 1980 Order, the Commission refused ECNP's request for Commission involvement in the issuance of discovery protective orders, for disqualification and reconstitution of the Licensing Board, and for other similar relief.<sup>6/</sup> This refusal was based on the Commission's statement that at that stage of the proceeding, Commission involvement was unwarranted unless exceptional circumstances were present. Finding no such circumstances, the Commission referred the matter to the Appeal Board for appropriate action.<sup>7/</sup>

While noting that a Licensing Board's interlocutory rulings can be reviewed by an appeal board only if exceptional and important issues are raised and that questions about the proper scope of discovery normally do not raise such issues, the Appeal Board decided to review the Licensing Board's rulings because ECNP's allegations, if substantiated, would call into question the integrity of Commission licensing proceedings.<sup>8/</sup> In its decision, the Appeal Board addressed what it perceived to be the three major themes of

<sup>6/</sup> Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), CLI-80-17, 11 NRC 678 (1980).

<sup>7/</sup> Id. at 679.

<sup>8/</sup> Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC \_\_\_\_ (September 23, 1980). (Slip opinion at 3-4).

ECNP's petition for review. These involved (1) the "excessively large" number of interrogatories served upon ECNP, (2) the Licensing Board's failure to protect ECNP from that "abuse" of the discovery process, and (3) ECNP's belief that, as a "public-interest" litigant, it was unfairly disadvantaged by the Commission's discovery rules.<sup>9/</sup> The Appeal Board found that ECNP's contentions put in issue a substantial number of significant matters and that the corresponding interrogatories appropriately reflected the number and complexity of the issues raised. The Board thus found that the number of interrogatories did not constitute an abuse of the discovery process and that the Licensing Board correctly rejected ECNP's attempts to avoid answering any of the Applicants' interrogatories.<sup>10/</sup> Further, the Appeal Board noted that the Licensing Board, by its sympathetic rulings which had substantially eased ECNP's discovery burden, had not permitted the abuse of ECNP's rights.<sup>11/</sup> Finally, the Appeal Board observed that ECNP believed that the Commission's discovery rules disadvantaged it because the rules place an equal burden on all parties in responding to discovery requests. The Appeal Board stated that simply as a matter of fairness, a Licensing Board may not waive the discovery rules for one side and not for the other.<sup>12/</sup> Thus, on the basis of the above conclusions, the Appeal Board denied the relief requested by ECNP.<sup>13/</sup>

<sup>9/</sup> Id. at 21.

<sup>10/</sup> Id. at 31.

<sup>11/</sup> Id. at 38.

<sup>12/</sup> Id.

<sup>13/</sup> Id. at 42.

### III. ARGUMENT

#### A. Commission Review of ALAB-613 Should Not Be Granted

##### 1. Section 2.786(b)(1) of the Commission's Rules of Practice Precludes this Appeal

ECNP's petition for Commission review of ALAB-613 states that it is filed pursuant to 10 C.F.R. § 2.786.<sup>14/</sup> Section 2.786(b)(1) provides for Commission review of an Appeal Board decision—~~other than a~~ decision or action on referral or certification under § 2.718(i) or § 2.730(f).<sup>15/</sup> As noted earlier at page 3, the decision in ALAB-613 was rendered after referral from the Commission for appropriate action.<sup>15/</sup> As the Appeal Board noted, the Rules of Practice gave it discretionary authority to review "interrogatory rulings." They decided to exercise their certification jurisdiction, therefore rendering the decision in ALAB-613 under section 2.718(i).<sup>16/</sup> Thus, the Commission's Rules of Practice expressly preclude ECNP's request for review.

##### 2. Section 2.730(f) of the Commission's Rules of Practice Precludes Interlocutory Appeals of Licensing Board Rulings to the Commission

When this matter first went to the Commission, ECNP labelled its petition as an emergency request and specifically disclaimed its interlocutory nature.<sup>17/</sup> In its order, however, the Commission implicitly recognized the interlocutory nature of ECNP's appeal by citing 10 CFR 2.730(f) and referred it to the

<sup>14/</sup> ECNP Petition at 1.

<sup>15/</sup> Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), CLI-80-17, 11 NRC 678, 679 (1980).

<sup>16/</sup> Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC \_\_\_\_\_. (Slip opinion at 3 through 4).

<sup>17/</sup> "Request to the NRC Commissioners for Expedited Consideration of Actions of an Atomic Safety and Licensing Board and Other Matters" dated March 14, 1980 at 1 n. 1.

Appeal Board for appropriate action under 10 C.F.R. § 2.785. Section 2.730(f) expressly prohibits the taking of an interlocutory appeal to the Commission from a ruling of the presiding officer but does permit a presiding officer to certify such a question if necessary to prevent detriment to the public interest or unusual delay or expense. The mere fact that the Appeal Board reviewed the Licensing Board's rulings on discovery and scheduling and affirmed their propriety does not change their nature. Such rulings continue to be interlocutory because they neither dispose of any segment of the case nor terminate the right of any party to participate.<sup>18/</sup> The instant petition is an interlocutory appeal and should not be entertained by the Commission.

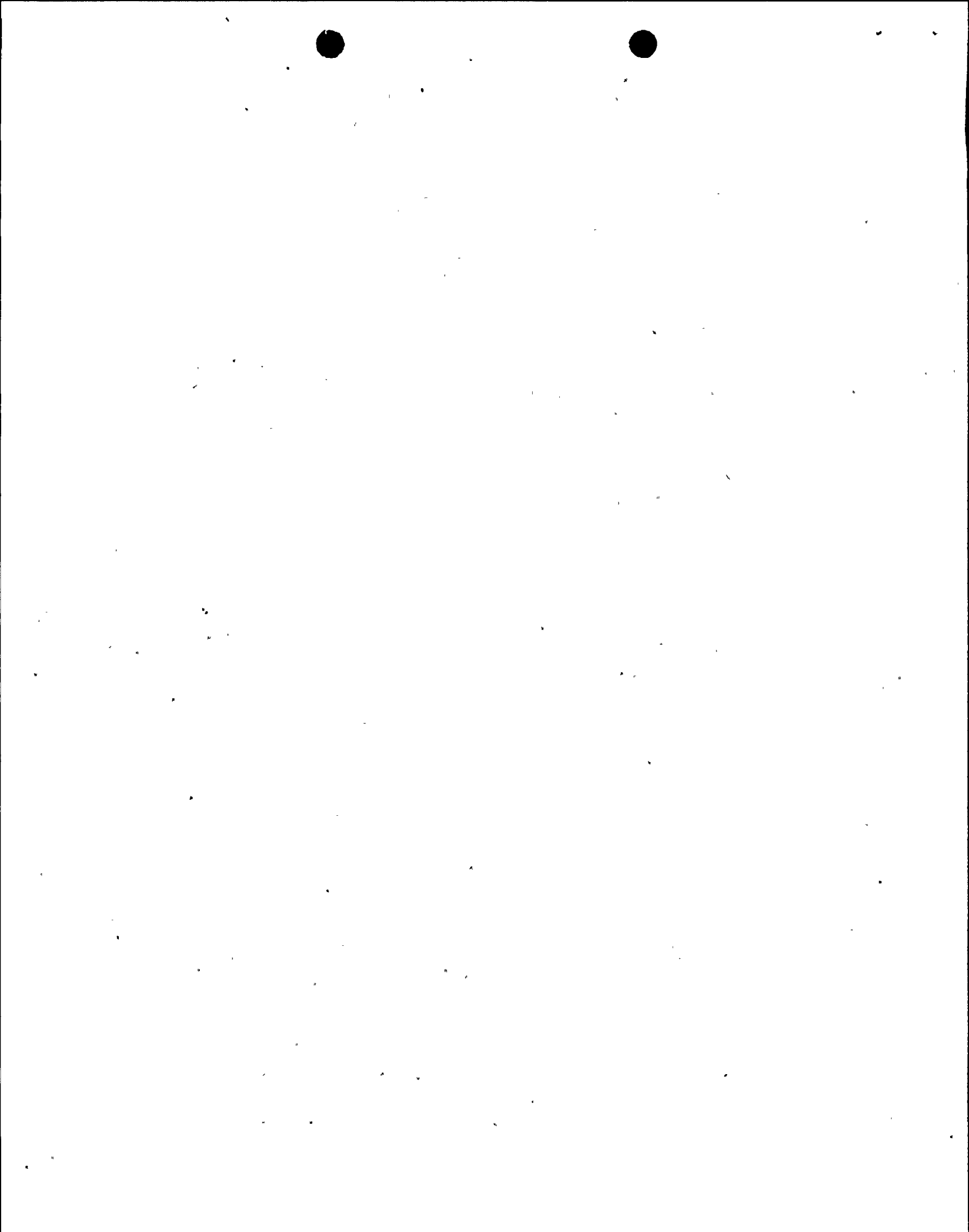
3. No New Circumstances Shown Warranting Commission Reversal of its Earlier Decision not to Involve Itself

While the Commission on its own could undertake to review this matter,<sup>19/</sup> when earlier presented with the same underlying question the Commission found no exceptional circumstances warranting its involvement.<sup>20/</sup> ECNP does not allege any new circumstances in this matter relative to those alleged in its March 15, 1980 petition to the Commission. Thus, the situation remains the same but for the passage of time and the rendering of an Appeal Board decision which found no error in the Licensing Board's discovery rulings.

<sup>18/</sup> Toledo Edison Company (Davis Besse Power Station), ALAB-300, 2 NRC 752, 758 (1975).

<sup>19/</sup> 10 C.F.R. § 2.786(a). 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).

<sup>20/</sup> Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), CLI-80-17, 11 NRC 678, 679 (1980).





Under the standard enunciated earlier in this case, there is no basis for Commission review of ALAB-613.

4. ECNP's Petition Does Not Raise a Legal, Factual, or Policy Issue of Sufficient Importance Warranting Commission Review

Finally, even if one assumed that ECNP's petition were permitted by 10 CFR § 2.786 and that the appeals were not interlocutory in nature, ECNP's petition would still fail to meet the relevant standard. Section 2.786(b)(1) states that a party may file a petition for review with the Commission on the ground that the decision or action is erroneous with respect to an important question of fact, law, or policy. Section 2.786(b)(4)(i) states that a petition for review of matters of law or policy will not ordinarily be granted unless it appears the case involves, among other things, an important procedural issue. ECNP claims that it has raised such an issue.<sup>21/</sup> Essentially, the issue raised is whether an intervenor should shoulder a discovery burden equal to that of the other parties to a licensing proceeding.

The policy reasons underlying the Commission's discovery rules are of long standing and have been considered and extensively discussed in prior agency decisions.<sup>22/</sup> The rationale for those discovery rules was discussed at

<sup>21/</sup> Moreover, if this petition was assumed to raise an important question of fact, section 2.786(b)(4)(ii) states that a petition for review of matters of fact will not be granted unless it appears the Appeal Board has decided a factual issue in a clearly erroneous manner contrary to the licensing board's resolution of the same issue. 10 CFR § 2.786(b)(4)(ii). Both the Licensing and Appeal Boards resolved the issue in question here consistently and thus Commission review should be denied.

<sup>22/</sup> Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579 (1975); Commonwealth Edison Co. (Zion Station, Units 1 & 2), ALAB-196, 7 AEC 457 (1974).

length by the Appeal Board in ALAB-613. As expressed in the Appeal Board's decision, they are (1) the belief that a litigant should not be able to make serious allegations against another party without having to reveal the basis for the allegations and (2) the fact that because contentions merely provide general notice of the issues various discovery devices need to be used to narrow the contentions so that the evidence produced at the hearing relates only to those matters which are actually controverted.<sup>23/</sup> Thus, the Rules of Practice impose equal burdens on all parties in the interests of fairness and efficiency. The decision below demonstrates the proper application of established discovery rules and does not raise an issue of important legal, factual, or policy matters warranting Commission review. ECNP's petition for review does not demonstrate otherwise and should be denied.

B. Other Matters Raised in ECNP's Petition Do Not Warrant Commission Review or Request Relief Which Should Be Denied

In its petition for review, ECNP also requested that the Commission (1) clarify the term "undue burden" as it is used in 10 C.F.R. 2.740(c), (2) clearly define what constitutes an "acceptable" or "adequate" response to interrogatories, (3) include a Commissioner on a reconstituted Licensing Board, (4) suspend further proceedings until the Final Safety Analysis Report has been completed and ENCP has had adequate time to review it, and (5) provide adequate intervenor funding. All of these requests but the fifth were raised previously in ECNP's petition for Commission review of March 14, 1980.<sup>24/</sup>

<sup>23/</sup> Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC \_\_\_\_ (September 23, 1980) (Slip opinion at 40 and 30).

<sup>24/</sup> "Request to the NRC Commissioners for Expedited Consideration of Actions of an Atomic Safety and Licensing Board and Other Matters" dated March 14, 1980 at 5.

With respect to ECNP's requests for Commission definitions, the Staff notes at the outset that definition of what constitutes "undue burden" or "acceptable/adequate" involves factual determinations. Practically speaking, it would be difficult for the Commission to develop generic definitions as what may constitute "undue burden" or "acceptable/adequate" in one case may not in another case. In this case, what constitutes "undue burden" or "acceptable/adequate" was essentially defined by the original Licensing Board rulings which were affirmed by the Appeal Board in their entirety. Thus, because both the Licensing and Appeal Boards were consistent in this regard, there is no reason for the Commission to involve itself in these questions.

ECNP's request that the Licensing Board be reconstituted so that a Commissioner sits on it is an extraordinary request which was considered by the Commission at the time it referred the matter to the Appeal Board. At that time, the Commission determined there was no need to involve itself. ECNP presents no additional reasons in its most recent petition for Commission involvement at this time.

The Final Safety Analysis Report is continuously amended. Therefore, there is no reason to stay the proceeding until it is completed. There is no prejudice to ECNP in proceeding with those parts that have already been completed. Again, this question was raised earlier. ECNP has given no additional reasons for the Commission to do more than it did the first time.

The question of funding intervenor participation in licensing proceedings has been raised previously before the Commission and it has declined to

grant funds to intervenors. Metropolitan Edison Co. (Three Mile Island Station, Unit No. 1), CLI-80-19, 11 NRC 700 (1980); Financial Assistance to Participants in Commission Proceedings, 4 NRC 494 (1976). In the fiscal 1981 appropriation act, Congress expressly prohibited the use of funds appropriated under that act to pay the expenses of parties intervening in licensing proceedings.<sup>25/</sup> Accordingly, ECNP's request for funding should be denied.

#### IV. CONCLUSION

For the reasons stated above, the Staff urges that Commission review of ALAB-613 should not be granted. Further, the Staff urges that the Commission find that with regard to the other matters raised in ECNP's petition, either the matter is not appropriate for Commission involvement or that the relief requested is not warranted and should be denied.

Respectfully submitted,

*Jessica H. Laverty*  
Jessica H. Laverty  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 30th day of October, 1980

<sup>25/</sup> Pub. L. No. 96-367, 94 Stat. 1331 (1980). Section 502 in relevant part states:

"None of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act."

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

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with §2.713(a), 10 CFR Part 2, the following information is provided:

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*Jessica H. Laverty*  
\_\_\_\_\_  
Jessica H. Laverty  
Counsel for NRC Staff

Dated at Bethesda, Maryland  
this 29th day of October, 1980

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

(Susquehanna Steam Electric Station,  
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Docket Nos. 50-387  
50-388

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER IN OPPOSITION TO ECNP'S PETITION FOR COMMISSION REVIEW OF ALAB-613" and "NOTICE OF APPEARANCE" for Jessica H. Laverty, both 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 30th day of October, 1980:

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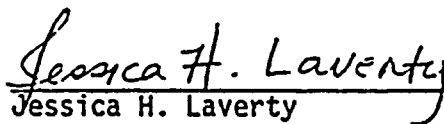
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