

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket No. 50-344
PORTLAND GENERAL ELECTRIC COMPANY, <u>ET AL.</u>)	(Control Building)
)	
(Trojan Nuclear Plant))	



MOTION TO DISMISS NINA BELL/CONSOLIDATED INTERVENORS
FROM PROCEEDING OR FOR OTHER SANCTIONS FOR FAILURE
TO COMPLY WITH LICENSING BOARD'S ORDER ON DISCOVERY

I. Introduction and Background

On May 15, 1979, the NRC Staff (Staff) filed its "Second Set of Interrogatories on Phase II to Consolidated Intervenor^s" in the captioned proceeding.^{1/} These interrogatories, totalling four in number, were directed to Nina Bell and Consolidated Intervenor^s (Intervenor) and related to certain contentions submitted by Intervenor for Phase II of this proceeding. They were duly served on Intervenor^{2/} by deposit in the United States mail, first class, on May 15, 1979. No objections to the interrogatories or motions for protective order pursuant to 10 CFR §2.740(f) and (c) respectively were filed by Intervenor.

On June 14, 1979, 10 days after Intervenor's responses were due to be submitted, the Staff filed a motion in which it requested the Licensing Board to compel Intervenor to respond to the Staff's interrogatories since no responses had been received at that time. On June 15, 1979, the Board, pursuant to 10 CFR §2.740, issued the requested order directing Intervenor to file promptly,

^{1/} A copy of these interrogatories is attached.

^{2/} Copies of the interrogatories were served by mail on Nina Bell, C. Gail Parson and David B. McCoy who have collectively been designated Consolidated Intervenor^s. See attached certificate of service. To date, Nina Bell has acted as the representative and spokesperson for Consolidated Intervenor^s in this proceeding.

full, direct and responsive answers to the Staff's interrogatories. As of July 12, 1979, no responses have been received by the Staff. Since Intervenor has failed to submit responses to the Staff's interrogatories in the 27 days which have elapsed since the issuance of the Licensing Board's Order, Intervenor is in default of the direct and explicit order of the Board. In view of this and as set forth more fully below, the Staff respectfully requests, pursuant to 10 CFR §2.707, that Intervenor be dismissed as a party to this proceeding or that other sanctions be imposed.

II. Basis for Staff's Motion to Dismiss Intervenor or for Other Sanctions for Intervenor's Failure to Comply with Licensing Board's Order Compelling Discovery and With Legitimate Discovery Requests

A. Dismissal of Intervenor from Proceeding

10 CFR §2.707 provides, in part, that

[o]n failure of a party ... to comply with any discovery order entered by the presiding officer pursuant to §2.740, the Commission or the presiding officer may make such orders in regard to the failure as are just, including, among others, the following:

- (a) Without further notice, find the facts as to matters regarding which the order was made in accordance with the claim of the party obtaining the order, and enter such order as may be appropriate; or
- (b) Proceed without further notice to take proof on the issues specified. (footnote omitted).

While Section 2.707 lists several actions which may be taken by the presiding officer when a party fails to comply with a discovery order, that listing, by its own terms, is not all-inclusive. Apart from the sanctions explicitly set forth in Section 2.707, that regulation also empowers the presiding officer to dismiss a party from a proceeding for that party's failure to comply with a direct order of the Licensing Board compelling discovery. Northern States

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Power Company et al. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1301 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 817 (1975); Public Service Electric & Gas Company (Atlantic Nuclear Generating Station, Units 1&2), LBP-75-62, 2 NRC 702, 705-06 (1975).

In the instant proceeding, Intervenor has wholly failed, without excuse or justification, to comply with the Licensing Board's Order of June 15, 1979 which directed Intervenor to promptly provide full, direct and responsive answers to the Staff's interrogatories of May 15, 1979. Intervenor's action in this regard is not an isolated incident but is part of a pattern which has persisted since the early parts of Phase I of this proceeding.^{3/} The Licensing Board, having perceived this pattern, instructed Intervenor at the Pre-hearing Conference on March 29, 1979 as to the manner in which discovery requests were to be promptly, fully, directly and responsively answered.^{4/} The

^{3/} In Phase I, the Staff initially filed interrogatories directed to Intervenor on August 10, 1978. Because Intervenor's answers, postmarked August 31, 1978, were argumentative and unresponsive, the Staff filed a motion to compel responsive answers on September 14, 1978. This motion was granted by the Licensing Board's "Order Regarding Responses to Interrogatories and Consolidation" of September 21, 1979 (pp.8-9). Intervenor failed to file any responses pursuant to this Licensing Board Order and, in essence, totally ignored the Order.

In Phase II, the Staff filed its first set of interrogatories directed to Intervenor on March 9, 1979. Because many of Intervenor's answers, filed April 15, 1979, were either argumentative or unresponsive or both and because essentially no useful information was provided in the responses, the Staff filed a motion to compel responsive answers on May 15, 1979. That motion has not yet been acted upon by the Licensing Board.

Intervenor's responses to the discovery requests of other parties also appear to have been less than adequate. For example, the Licensee has found it necessary to seek orders compelling Intervenor to provide responsive answers in motions filed by the Licensee on March 23, 1979 (motion granted in Licensing Board's "Prehearing Conference (Phase II) Order" of April 12, 1979), and June 4, 1979 (motion granted in Licensing Board's "Order Vacating Hearing Schedule" of June 5, 1979).

^{4/} See Tr. 3128-30, 3134-35, 3191.

Board also forewarned all parties as to its inclination to take decisive action if requested to do so with regard to a party's failure to comply with discovery orders.^{5/} Accordingly, Intervenor has had ample notice of the need for prompt, full, direct and responsive answers to discovery requests and of the potential consequences if the required responses to discovery are not forthcoming.

The Staff's interrogatories of May 15, 1979, which are the subject of the Board's June 15, 1979 Order compelling responses and which have not yet been answered by Intervenor, as well as many of the Staff's interrogatories of March 9, 1979, which are the subject of a pending Staff motion to compel responsive answers,^{6/} seek information with regard to Intervenor's contentions and the bases for such contentions. This information is necessary so that the Staff may fully understand Intervenor's concerns and the bases for those concerns and fully evaluate the proposed Control Building modifications in light of them. The Staff's discovery requests were not unreasonable but were formulated only in an attempt to gain an understanding of the affirmative but unsupported and conclusory allegations which Intervenor itself has made in its own contentions. Despite the fact that the Staff has filed detailed interrogatories with regard to each of Intervenor's contentions which are pertinent to Phase II of this proceeding, little or no information as to the bases for contentions or specific concerns of Intervenor has been provided.^{7/}

^{5/} See Tr. 3063, 3134.

^{6/} See fn. 3 supra.

^{7/} The Staff's interrogatories of March 9, 1979 were directed to each of Intervenor's admitted contentions (Consolidated Intervenor's contentions 2(a), (c), (d), 3, 4/12, 5, 7, 11, 17, and 20) as well as the security-related contention (Consolidated Intervenor's contention 1) as to which the Staff must prepare and submit an evaluation. Intervenor's responses of April 15, 1979 indicated that additional information would be required (FOOTNOTE CONTINUED ON NEXT PAGE)

"To permit a party to make skeletal contentions, keep the bases for them secret then require other parties to meet any conceivable thrust at the hearing would be patently unfair, and inconsistent with a sound record." Tyrone supra, 5 NRC at 1301.

Parties to NRC proceedings must perform their procedural duties in accordance with the Commission's Rules of Practice and must do so diligently and in a timely fashion. Offshore Power Systems supra, 2 NRC at 815. While intervenors not represented by counsel may be treated liberally with regard to minor lapses or inadvertent deviations from the technical requirements of the rules, they are not free to ignore their obligations. It is a basic rule of any adjudicatory proceeding that a party cannot, at one and the same time, claim entitlement to all the rights of a party while failing to perform the duties of a party, including the obligation to respond to legitimate discovery requests. Offshore Power Systems supra, 2 NRC at 815-17. In the instant proceeding, Intervenor has been fully apprised of its duties with regard to discovery directed to it. Intervenor has ignored those duties both in the responses to discovery which it has submitted and in its outright failure to respond despite being ordered to do so.

^{7/} (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

before responses to certain interrogatories related to contentions 1 and 11 could be filed. The answers to other interrogatories related to contentions 1, 2, 3, 11, and 20 were unresponsive and are the subject of the Staff's motion to compel responsive answers of May 15, 1979. Additional interrogatories on contentions 1, 4/12 and 11 were filed by the Staff on May 15, 1979 in order to clarify the original responses to interrogatories on these contentions. Intervenor has not submitted answers to these additional interrogatories despite the Licensing Board's Order of June 15, 1979 directing Intervenor to respond promptly and fully. In summary, the bulk of the information provided to date as to Intervenor's contentions is either incomplete, confusing or so general and lacking in specificity or supporting factual bases as to be meaningless. Other information on contentions and their bases requested by the Staff simply has not been provided.

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In view of Intervenor's failure to fulfill its obligations with regard to discovery despite ample opportunity to do so and in view of the substantial prejudice that such failure may cause to those parties, including the Staff, who must fully address and confront Intervenor's unsupported but admitted contentions, dismissal of Intervenor is both just and warranted. Accordingly, the Staff's request that Intervenor be dismissed as a party to this proceeding should be granted.

B. Alternate Sanctions

Although it is the Staff's position that dismissal of Intervenor is warranted here, the sanctions imposed on Intervenor for its failure to fulfill its duties with regard to discovery are a matter of Licensing Board discretion based on the applicable facts. In the event that the Licensing Board determines that the Staff's request for dismissal of Intervenor should not be granted, it is the Staff's view that, at a minimum, alternate sanctions should be imposed which compensate, as far as possible, for Intervenor's unjustifiable failure to comply with discovery requests and orders. In this vein, the Staff requests that, at a minimum, alternate sanctions be imposed on Intervenor with regard to the Staff's interrogatories of May 15, 1979 as to which Intervenor is in default of the Licensing Board's Order of June 15, 1979 directing the prompt filing of responsive answers, and with regard to those Staff interrogatories of March 9, 1979 which are the subject of the Staff's May 15, 1979 motion to compel responsive answers now pending before the Licensing Board.

The Staff's interrogatories of May 15, 1979 were directed to Intervenor's contentions 1 (on security during the modifications), 4 (on the effect of the "extensive removal of structures" on the ability of operators to safely operate), and 11 (on the adequacy of the assessment of drilling effects). Intervenor is in direct default of the Board's order requiring prompt and responsive

answers to these interrogatories. Consequently, substantial sanctions with regard to the contentions addressed by these interrogatories are warranted under 10 CFR §2.707. The Staff, therefore, requests that, in the event Intervenor is not dismissed from the proceeding,

- (1) Intervenor's contentions 1, 4 and 11 be dismissed as issues in controversy in this proceeding,^{8/} or
- (2) if the Licensing Board determines that Intervenor's contentions 1, 4, and/or 11 merit retention as issues in this proceeding, that Intervenor be precluded from participating (either through the presentation of direct evidence or through cross-examination) in the litigation of such issues.

In addition, Intervenor should be directed to provide detailed, full, responsive answers to those Staff interrogatories of March 9, 1979 which are the subject of the Staff's May 15, 1979 motion to compel now pending before the Licensing Board. The Staff respectfully requests that Intervenor be required to respond to these interrogatories within one week of the date of issuance of any Licensing Board order compelling responses so that such responses may be appropriately

^{8/} Intervenor's contention 1 has not been admitted as an explicit issue in this proceeding. Rather, the Staff has been directed to evaluate security matters as they may be affected by the Control Building modifications, to prepare a summary of and conclusions on that evaluation and to attempt to arrive at a stipulation with Intervenor and with the Coalition for Safe Power (which also submitted a contention related to security) that the evaluation satisfies Intervenor's concerns with regard to security. The Staff's evaluation is to account for the matters raised by Intervenor's contention 1 (as well as those raised by the Coalition for Safe Power's security-related contention). In view of Intervenor's failure to comply with the Board's order compelling responses to the Staff's interrogatories on contention 1, the Staff requests that it be relieved of the duty of obtaining Intervenor's stipulation on the Staff's security evaluation and, in the event that security is ultimately made an issue at the hearing, that Intervenor be precluded from participating in the litigation of such issue.

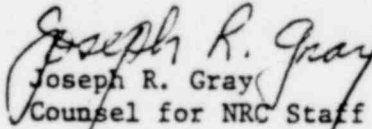
taken into account in the Staff's Safety Evaluation Report scheduled for issuance in August 1979.^{9/}

III. Conclusion and Request for Relief

Based on the foregoing, the Staff respectfully requests that Consolidated Intervenor be dismissed as parties to this proceeding. In the event that this request is denied, the Staff alternatively requests:

- (1) that Consolidate Intervenor's contentions 1, 4 and 11 be dismissed as issues in controversy in this proceeding or, if these contentions are deemed to merit retention as issues in this proceeding, that Consolidated Intervenor be precluded from participating in the litigation of such issues, and
- (2) that the Staff's May 15, 1979 motion to compel be granted and that Consolidated Intervenor be directed to provide detailed, full, responsive answers to the appropriate interrogatories encompassed by the Staff's May 15, 1979 motion^{10/} within one week of the Licensing Board's Order granting that motion.

Respectfully submitted,


Joseph R. Gray
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of July, 1979

^{9/} In the event that an order is issued granting the Staff's May 15, 1979 motion and Intervenor either fails to submit responses by the required date or submits answers that are unresponsive or do not otherwise provide, in detail, the requested information, the Staff will file a further motion seeking a dismissal of the contentions which are addressed by these interrogatories or a limitation on Intervenor's participation in the litigation of the contentions.

^{10/} If, as requested by the Staff, contentions 1, 4 and 11 are dismissed or if Consolidated Intervenor are precluded from participating in the litigation of those contentions, then only those portions of the Staff's May 15, 1979 motion to compel which deal with interrogatories on contentions other than contentions 1, 4 and 11 should be granted.