

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
SOUTH CAROLINA ELECTRIC &) Docket No. 50-395
GAS COMPANY)
(Virgil C. Summer Nuclear)
Station, Unit 1))

NRC STAFF RESPONSE TO APPLICANT'S MOTION
FOR DISMISSAL OF INTERVENOR BRETT BURSEY
AND INTERVENOR'S CONTENTIONS

INTRODUCTION

On November 29, 1979, the Applicant in the captioned proceeding filed a "Motion for Dismissal of Intervenor Brett Bursey and Intervenor's Contentions" (Motion). The Applicant's motion is grounded upon the Intervenor's alleged failure to comply with earlier discovery requests of the Applicant; with discovery orders of the Board; and with the Board's August 6, 1979 Memorandum and Order directing the parties to report to the Board their recommendations on how to proceed with a deliberate and timely consideration of issues in this matter. Specifically, the Applicant argues that the Intervenor has yet to honor his commitment at the time of his deposition before the Licensing Board on August 2-3, 1978 to "provide the parties with proper discovery information, including a statement of the substance of facts and opinions to which each witness is expected to testify, along with the grounds for each fact and opinion." Motion at 5. The Applicant also notes that its letter of September 20, 1979

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to the Intervenor expressly requesting him to furnish a summary of the proposed testimony of his prospective witnesses regarding contention A-10 has gone unanswered.^{1/}

The Applicant requests, in the alternative, that the Intervenor be required to provide the summaries of his proposed testimony on the contentions within a specified period. Should the Intervenor then fail to provide the requested information, the Applicant urges that he be barred from putting on an affirmative case.^{2/} For the reasons given below, the Staff opposes dismissal of the Intervenor but recommends that the alternative relief sought be granted.

ARGUMENT

The Intervenor's erratic performance of his responsibilities as a litigant in this proceeding is a matter of record. At one point in the proceeding both the Applicant^{3/} and Staff^{4/} were moved to compel discovery of the Intervenor. On July 13, 1978, the Board issued a Memorandum and Order granting the separate motions to compel and directing the Intervenor to appear at a deposition and pre-hearing conference conducted before the Board on August 2-3, 1978.

^{1/} The Applicant mentioned in its September 20, 1979 letter that, if the requested information was not furnished, it would seek relief "consistent with the observations" in the Board's Memorandum and Order denying its prior motion to dismiss the Intervenor, dated October 2, 1978.

^{2/} The motion cites two Licensing Board rulings wherein relief of this nature was granted. See Motion at 9 n. 2 and cases cited therein.

^{3/} Applicant's Motion to Compel Discovery, dated June 30, 1978.

^{4/} NRC Staff Response to Request for Extension of Time to Respond to Staff Interrogatories and Document Request and Motion to Compel, dated July 7, 1978.

On August 24, 1978, the Applicant filed a motion to dismiss the Intervenor on the principal grounds that the latter had failed to fulfill certain commitments made by him during his deposition of August 2-3, 1978 to supply information (primarily the identity of prospective witnesses) to the Applicant. The Staff opposed the motion.^{5/} On October 2, 1978, the Board issued a Memorandum and Order denying the Applicant's motion to dismiss the Intervenor. In this ruling, the Board registered its agreement with the Applicant that the Intervenor had not been fully responsive to discovery requests and stated its view that, while the Applicant was entitled to some relief, complete dismissal was not warranted. The Board observed that the Intervenor's contentions had raised matters which the Board had determined should be fully explored with or without the Intervenor's intervention. The Board expressed the belief that the Intervenor's continued participation as a party could assist the Board in developing a full record. Therefore, it stated that it did not perceive it to be in the public interest to dismiss the intervention entirely.

The Board, nonetheless, ruled that the Intervenor's list of witnesses supplied to date would be deemed final and that he could not use in his affirmative case nor in cross-examination any document he had failed to produce or identify in discovery without some prescribed showing. Memorandum and Order at 3. The Board then noted that the Applicant was free to move, with supporting arguments that individual contentions be dismissed or for other relief short of dismissing the entire intervention. Id at 4.

^{5/} NRC Staff Response to Applicant's Motion for Dismissal of Brett Bursey for Failure to Fulfill Requirements of Board Order Compelling Discovery, dated September 13, 1978. The Staff took the position that, while the Intervenor's failure to meet his commitments to provide the promised information was inconsistent with a party's obligations under the Commission's Rules of Practice, it did not provide adequate grounds for his dismissal in light of lesser sanctions available to remedy the effects of the Intervenor's non-production (e.g. objection to the introduction of the unproduced documents in question as affirmative evidence or for use in cross-examination). Staff Response at 3, 5.

In its present Motion, the Applicant cites two events which occurred since the Board's October 2, 1978 Memorandum and Order material to its desired relief. The first item is the Intervenor's failure to respond to the Board's August 6, 1979 Memorandum and Order on Discovery. The second item is the Intervenor's failure to answer the Applicant's letter of September 20, 1979. With regard to the first matter, the Staff considers the Intervenor's disregard of the Board's August 6, 1979 Memorandum and Order as a clear abrogation of his responsibilities as a party to this proceeding. Such disregard of a Board directive should not be countenanced. Cf. Public Service Commission of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-488, 8 NRC 187 (1978). The Staff believes that the Board should admonish the Intervenor that failure to comply with Board orders could bring dismissal or other sanctions if repeated. With regard to the second item, while the failure to answer the Applicant's letter of September 20, 1979 provides another example of Intervenor's uncooperativeness, the letter itself does not explicitly seek the range of information (namely, the summary of all proposed testimony) now complained of. In fact, some or all of the requested information may have been supplied by the Intervenor in some form or the other.^{6/}

The Staff does not believe that these events which have transpired since the Board's October 2, 1978 Memorandum and Order warrant the Intervenor's dismissal, particularly in light of the Board's apparent disinclination to order dismissal given its independent interest in certain matters in issue. At the same time, the Intervenor's continued conduct is far less than that expected of a party

^{6/} See, e.g., Intervenor Brett A. Bursley's Answers to Interrogatories of NRC Staff, served August 2, 1978.

under NRC practice. Thus, the Staff believes that the Applicant's alternative request for relief (namely, that the Intervenor be required to provide a summary of his proposed testimony) has merit. In reality, this alternative request is analogous to a motion to compel discovery. Ordinarily, such a motion would be out-of-time in this proceeding. See 10 C.F.R. §2.740(f). However, given the Board's invitation to the Applicant in its October 2, 1978 Memorandum and Order to seek further relief with regard to discovery, and the present hearing status in this proceeding, the Staff believes that no party would be unduly prejudiced if such a motion were entertained at this time. Accordingly, the Staff supports the Applicant's request that the Intervenor be required to provide the requested information, or otherwise respond to such request, within a reasonable period of time. Logically, such requirement could be in the form of an order compelling discovery pursuant to 10 C.F.R. §2.740. If the Intervenor should then be in default of such order, the Board may, pursuant to 10 C.F.R. §2.707, enter such order as may be appropriate, including, but not necessarily limited to, precluding the Intervenor from presenting an affirmative case on some or all of his contentions. In this manner, the Staff believes that this case can proceed to eventual hearing on an orderly basis with all parties fully appreciating the responsibilities they bear as parties to the proceeding.

CONCLUSION

In light of the above, the Staff opposes the Applicant's request to dismiss the Intervenor. The Staff, however, supports the Applicant's alternate request to compel discovery.

Respectfully submitted,

Steven C. Goldberg

Steven C. Goldberg
Counsel for NRC Staff

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Dated at Bethesda, Maryland
this 17th day of December, 1979.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Virgil C. Summer Nuclear Station, Unit 1)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANT'S MOTION FOR DISMISSAL OF INTERVENOR BRETT BURSEY AND INTERVENOR'S CONTENTIONS" 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 17th day of December, 1979.

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