

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	}	
PENNSYLVANIA POWER AND LIGHT CO.	}	Docket Nos. 50-387
ALLEGHENY ELECTRIC COOPERATIVE, INC.	}	50-388
(Susquehanna Steam Electric Station,	}	
Units 1 and 2)	}	

NRC STAFF'S ANSWER TO APPLICANTS' MOTION TO PROHIBIT SUSQUEHANNA ENVIRONMENTAL ADVOCATES FROM PARTICIPATING IN THE LITIGATION OF CONTENTION 1

By a filing^{1/} dated February 4, 1980 the Applicants moved the Licensing Board to prohibit Susquehanna Environmental Advocates (SEA) from participating in the litigation (including presentation of direct testimony and conducting cross-examination) of Contention 1. As grounds for their request, the Applicants cite the fact that SEA filed another inadequately supported motion for a protective order rather than stating that it had no information to provide in response to the Applicants' interrogatories on Contention 1. For the reasons set forth below the Staff supports that part of the motion which seeks to prohibit direct testimony and opposes that part of the motion which seeks to prohibit cross-examination.

Prohibiting Direct Testimony

In its Memorandum and Order on Discovery Motions II (Discovery Order II) dated October 30, 1979 (at 19) the Board emphasized that:

^{1/} Applicants' Motion to Prohibit Susquehanna Environmental Advocates from Participating in the Litigation of Contention 1, dated February 4, 1980.

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If any intervenor fails properly to respond in a timely fashion . . . it will not be permitted to present any direct testimony on that contention [emphasis in original]
(No further order of this Board to this effect will be required).

In its Order Denying Requests of ECNP dated December 6, 1979 (at 9) the Board extended to January 18, 1980 the time within which discovery requests on wholly environmental contentions (those numbered 1, 2, 3, 4, 14, 16, 17 and 18) must be answered. No further extensions of time have been granted.

On January 29, 1980 the Staff received a filing entitled "Answers to NRC Staff's First Round Discovery Requests and Motion for Protective Order of Intervenor Susquehanna Environmental Advocates (SEA)." As the Staff pointed out in its answer to the SEA motion for a protective order, the filing was not dated, the accompanying certificate of service was dated merely January 1980 and the envelope in which the filing was received was postmarked January 24, 1980.^{2/} Thus by the terms of the Licensing Board's Order SEA's responses to the Staff's discovery requests were not timely filed and SEA is automatically prohibited from presenting direct testimony on the wholly environmental contentions that it sponsored (Contentions 1, 3 and 4). For that reason alone, if for no other, the Staff believes that part of the Applicants' motion which seeks to prohibit the introduction of direct testimony by SEA, although it may be unnecessary, should be granted.

^{2/} NRC Staff's Answer in Opposition to SEA Motion for Protective Order dated February 12, 1980 at n. 1.

Prohibiting Cross-Examination

As the Applicants noted in their motion, since many intervenors seek to make their case through cross-examination rather than by introducing direct evidence, preventing the introduction of direct evidence may be no sanction at all. Motion at 3. However, we do not believe that a prohibition of cross-examination is appropriate at this time.^{3/} The ends of discovery are to prevent surprise in the course of the proceeding. Discovery Order II at 5-6, 10-11. At this stage of the proceeding when the scope of cross-examination is not known, it cannot be told if SEA should be prohibited from asking any question because it is based upon a matter that it should have revealed in discovery to prevent surprise. Thus, any efforts to bar some or all of the Intervenor's cross-examination should await the hearing, and should be made only upon a showing that the SEA's cross-examination is grounded upon information which should have been provided in response to the Staff's or Applicants' discovery requests.

Testing of evidence through cross-examination is the hallmark of the adjudicatory process. In Northern States Power Co.,^{4/} the Commission emphasized the importance of cross-examination by affirming that intervenors can cross-examine on contentions they had not raised. In this proceeding all parties need respond to discovery only on contentions they raised, and other procedure^o are provided

^{3/} As the time to respond to discovery requests on safety issues has been postponed, it appears that dismissal from the proceeding may also be too severe a sanction now. See Discovery Order II, at 6 and 10.

^{4/} Northern States Power Company (Prairie Island Nuclear Generating Plant, Units 1 and 2) CLI-75-1, 1 NRC 1 (1975).

to prevent surprise at hearing. Discovery Order II, at 15-19. It would be anomalous to say that one who had not raised a contention on which it had to respond to discovery could cross-examine on that contention, but one who did raise the contention may not cross-examine even if no element of surprise were present.^{5/} Sanctions should be tailored with the ends of the discovery rules and the purposes of cross-examination in mind. Cross-examination generally should not be prohibited on a failure to meet discovery requests.^{6/}

Moreover, no basis exists to prohibit cross-examination on Contention 1 by SEA. In answer to discovery requests, SEA said it did not have the resources to collect the information sought by the interrogatories. This makes it apparent that SEA does not presently possess the information sought. Thus without even considering whether the Board has the power to or should take action to prohibit cross-examination on a contention where an intervenor is in default in responding to discovery on that contention, the Staff does not believe there is at this time a factual basis for such a sanction here.

Conclusion

For the reasons discussed above, the Staff believes that part of the Applicants' motion which seeks to prohibit SEA from presenting direct testimony on Contention 1

^{5/} Cross-examination, as indicated in Northern States Power Co., supra, is primarily for the benefit of the trier of fact, not the examiner. See also Discovery Order II, at 19.

^{6/} Hearing time need not be wasted on contentions without foundation, for one could move for summary judgment, with supporting affidavit, to dismiss those contentions from the proceeding. See Discovery Order II, at 13 and 20. See also Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752-754 (1977).

should be granted and that part which seeks to prohibit cross-examination by SEA on Contention 1 should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James M. Cutchin, IV". The signature is written in a cursive style with a large, looping initial "J".

James M. Cutchin, IV
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 25th day of February, 1980