

02/25/80

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

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

(Susquehanna Steam Electric Station,
Units 1 and 2)

}
} Docket Nos. 50-387
} 50-388
}

NRC STAFF'S ANSWER IN SUPPORT OF APPLICANTS' MOTION
TO DISMISS CITIZENS AGAINST NUCLEAR DANGERS FROM THIS PROCEEDING

By a filing^{1/} dated February 4, 1980 the Applicants moved the Licensing Board for an order dismissing intervenor Citizens Against Nuclear Dangers (CAND) as a party for its continued failure to comply with the discovery orders of the Board.

For the reasons set forth below and in the NRC Staff's motion of September 25, 1979, the NRC Staff believes that the Applicants' motion should be granted.

CAND was admitted as an Intervenor in this proceeding by the Board's Special Prehearing Conference Order dated March 6, 1979. (LBP-79-6, 9 NRC 291). In that Order the Board also ruled on contentions and established a schedule for discovery. The Board designated May 25, 1979, as the last day for submission of first-round discovery requests and specified that responses to first-round discovery requests must be filed by June 29, 1979. 9 NRC at 327.

^{1/} Applicants' Motion to Dismiss Citizens Against Nuclear Dangers from this Proceeding dated February 4, 1980.

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The Staff's first round discovery requests of CAND were timely served by mail on May 21, 1979. They related to specific contentions which were admitted by the Board as suitable for litigation in this proceeding. The Staff requested information concerning the factual bases for CAND's contentions and the identities and addresses of persons to be called by CAND as expert witnesses. CAND also was asked to identify and produce documents to be used by it in examining and cross-examining witnesses. The Applicants also served interrogatories on CAND.

Following receipt on June 20, 1979 of a CAND document^{2/} which the Staff considered to be totally unresponsive to its legitimate discovery requests, the Staff on June 28, 1978 filed a motion^{3/} for an order compelling CAND to fully and properly respond to the Staff's discovery requests. Applicants had filed a similar motion on June 27, 1979.

In its Memorandum and Order on Scheduling and Discovery Motions I (Discovery Order I) dated August 24, 1979 the Board found (1) that CAND had failed to respond to discovery requests filed in accordance with the Commission's Rules of Practice and this Board's Order of March 6, 1979, (2) that CAND had failed to seek a protective order with regard to the discovery requests (or alternatively, if the June 16, 1979 "replies" be considered as seeking a protective order, that no valid basis for such an order had been demonstrated), and (3) that the

^{2/} Citizens Against Nuclear Dangers' Replies to the Interrogatories of the NRC Staff and the Applicants and Other Matters filed June 16, 1979.

^{3/} NRC Staff's Motion for an Order Compelling Citizens Against Nuclear Dangers to Respond to the Staff's Discovery Requests dated June 28, 1978.

June 16, 1979 "replies" constituted a failure to answer or respond under 10 CFR 2.740(f). Id. at 11. The Board granted the Staff's motion to compel discovery. Id. at 8. Moreover, the Board explained the forms and purposes of discovery in an NRC proceeding and noted that discovery always entails some burden and expense--a party must determine what information it possesses and disclose it. Commission proceedings are not to become the setting for "trial by surprise." Id. at 6. The Board also explained that extensions of time for responding can be obtained for "good cause" shown and that relief from harrassing, irrelevant, unduly burdensome or embarrassing discovery is available. Id. at 6. Finally the Board warned of the serious consequences--including dismissal of a contention or of a party from the proceeding--that can result from failure to properly respond to discovery requests. Id. at 7.

In spite of having had benefit of the Board's explanation of the purpose of the discovery process and the duty of an intervenor to disclose the bases for its contention, an extension of time in which to reply and fair warning of the possible consequences of a failure to adequately respond, CAND filed a paper^{4/} dated September 10, 1979 that, although it was timely filed, neither adequately responded to the Board's directive nor the Staff's discovery requests.

The Board had directed CAND to respond fully and properly (or, as appropriate, to file particularized, specific objections) to the Staff's discovery requests

^{4/} Citizens Against Nuclear Dangers Response to the Licensing Board Directive, Contained within Additional Briefs to the Appeal Board.

of May 21, 1979, by no later than fourteen (14) days from the service of its Order. Discovery Order I at 11.

CAND did not answer the Staff's interrogatories separately or fully. It did not submit its answer under oath or affirmation. Nor did CAND, in lieu of answering them, file particularized and specific objections to any of the interrogatories. CAND did not deal with the merits of the Staff's interrogatories. It merely labeled the interrogatories "outlandish," said it presently has no answers and made equivocal statements about its plans to obtain expert witnesses to answer them and about its plans for participating in the hearing sessions. As the Board clearly pointed out, such general "evasive" objections to discovery are not acceptable. Id. at 9.

In view of CAND's continued failure to respond to the discovery requests, notwithstanding the Board's order to do so in Discovery Order I, the Staff moved on September 25, 1979 for the dismissal of CAND and the contentions solely sponsored by it from the proceeding. On October 10, 1979, Applicants filed an answer in support of the Staff's motion.

On October 30, 1979, the Board issued its Memorandum and Order on Discovery Motions (II), LBP-79-31, 10 NRC ____ ("Discovery Order II"). There the Board observed that the responses filed by CAND and the other intervenors since Discovery Order I were "the same type of generalized objections which, in Discovery [Order] I, we indicated were inadequate." Discovery Order II, slip op. at 6. The Board warned that, given the deficiencies in the responses

of the intervenors (including CAND) to the discovery requests served by Staff and Applicants, "the relief now being sought by the Applicants and Staff - dismissal of CAND, ECNP and SEA (and all their contentions) from this proceeding - could potentially be granted..." Id. at 10.

The Board, however, was of the view that "dismissal of any of the intervenors or their contentions at this time would not be warranted." Id. at 11, emphasis added. Nevertheless, while granting the intervenors one more opportunity to comply with its previous Orders, the Board underscored that "it is absolutely necessary that the intervenors respond in a timely fashion to the discovery obligations which still remain." Id., emphasis in original. The Board suspended all discovery obligations with respect to health and safety contentions, granted an extension of time until December 14, 1979 (later extended further to January 18, 1980), for responses to outstanding discovery requests on environmental contentions, and once again directed all parties "to respond by December 14, 1979 to the discovery requests on the environmental contentions." Id. at 18-19. The Board ruled that "[i]f any intervenor fails properly to respond in a timely fashion to the discovery as outlined in paragraphs 2 and 3, it will not be permitted to present any direct testimony on that contention. (No further order of this Board to this effect will be required)." Id. at 19. Finally, the Board cautioned that "[f]ailure to respond properly, in addition to precluding an intervenor from presenting direct testimony, may be grounds for dismissing that intervenor (as distinguished from its contentions) from the proceeding (emphasis in original). Id. at 20.

On December 11, 1979, CAND filed a document entitled Citizens Against Nuclear Dangers Petition for a Government Inquiry; Replies to Discovery Order; Motions on Interrogatories Before the Atomic Safety and Licensing Board (CAND Petition), in which CAND purportedly responded to the directives of Discovery Order II. CAND again provided no responses to the outstanding interrogatories, and this time proposed that in lieu of its replying to the discovery requests, "the Board utilize its extraordinary power of subpoena and pose every applicable specific discovery question formulated by the NRC Staff and the Applicants to be answered by the appropriate qualified government official at the state and federal level who have first-hand expert knowledge of these matters in the course of their government service." CAND Petition at 5. CAND offered to "accept these expert factual responses in lieu of their own replies and as the basis for their testimony and accompanying background information." Id.

On January 4, 1980, the Board issued a Memorandum and Order Denying CAND Petition and Motions in which it found the relief requested by CAND "to be unwarranted" and denied it "in its entirety." Id. at 1. The Board noted that CAND's December 11, 1979 filing "alternatively must be considered as another deliberate attempt to avoid the obligations of discovery." Id. at 1-2, footnote omitted. The Board rejected CAND's request that government officials be subpoenaed and ruled that, even if such officials were to be called to testify by the Board, "that eventuality would still not relieve CAND of its obligation to inform the parties of the bases for its own contentions." Id. at 3, footnote omitted.

CAND's next filing, dated January 11, 1980, was a Motion for Reconsideration of Motions before the Licensing Board. In that filing, CAND still provided no answers to the outstanding interrogatories.

On January 16, 1980, the Board issued another Order (accompanied by a telegram to CAND containing essentially the same information) in which it denied CAND's motion, and reminded CAND of its discovery obligations and possible sanctions against CAND for its continued refusal to meet those obligations.

Under the procedures of this Commission it is proper to dismiss a party for failure to comply with discovery requests.^{5/} The foregoing chronology alone provides sufficient grounds for dismissing CAND from this proceeding. In view of CAND's total disregard of its responsibilities in this proceeding, any lesser sanction would be insufficient. CAND has disregarded no less than five explicit Discovery Orders of the Board without offering any valid justification. To allow a party to so ignore the Board's authority without sanction is unfair to the other parties and makes a mockery of the Commission's discovery and hearing process. CAND should be dismissed as a party to this proceeding. Thus the Staff believes that the motion to dismiss CAND should be granted.

Respectfully submitted,



James M. Cutchin, IV
Counsel for NRC Staff

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

^{5/} See: 10 C.F.R. 2.707; Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975); Public Service Electric and Gas Co. (Atlantic Nuclear Generating Station, Units 1 and 2), LBP-75-62, 2 NRC 702, 705 (1975).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO APPLICANTS' MOTION TO PROHIBIT ENVIRONMENTAL COALITION ON NUCLEAR POWER FROM PARTICIPATING IN LITIGATION OF CERTAIN CONTENTIONS", "NRC STAFF'S ANSWER TO APPLICANTS' MOTION TO PROHIBIT SUSQUEHANNA ENVIRONMENTAL ADVOCATES FROM PARTICIPATING IN THE LITIGATION OF CONTENTION 1", and "NRC STAFF'S ANSWER IN SUPPORT OF APPLICANTS' MOTION TO DISMISS CITIZENS AGAINST NUCLEAR DANGERS FROM THIS PROCEEDING" 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 25th day of February, 1980:

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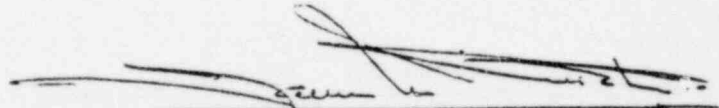
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