TIC

November 9, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	§	
	§	
HOUSTON LIGHTING & POWER COMPANY	§	Docket No. 50-466
	§	
(Allens Creek Nuclear Generating Station, Unit 1)	§	
	§	

MOTION TO DISMISS INTERVENORS
BRENDA A. McCORKLE AND
CARRO HINDERSTEIN AS
PARTIES TO THIS PROCEEDING

Applicant moves the Board, pursuant to 10 CFR §2.707, to issue an order dismissing Intervenors Brenda A. McCorkle and Carro Hinderstein ("Intervenors") as parties to this proceeding. Both Intervenors have failed to comply with orders by the the Board requiring them to furnish answers to Applicant's interrogatories.

I. BACKGROUND

In its Order Ruling upon Intervention Petitions, dated February 9, 1979, the Board admitted Intervenors Hinderstein and McCorkle as parties to this proceeding and admitted several of their contentions.*/ In subsequent

---

*/ The Board admitted Hinderstein Contention 5 and McCorkle Contentions 2 and 10.

1582 078

7912140 525

G

orders dated March 30, 1979, and April 11, 1979, the Board admitted additional contentions of these two Intervenors.*/

In March, 1979, Applicant served a first set of interrogatories on each Intervenor, and, in addition, took their depositions. The interrogatories and depositions covered those contentions which had been admitted by the Board in its Order of February 9, 1979.**/

On July 3, 1979, Applicant served a second set of interrogatories and request for production of documents on each Intervenor. These interrogatories were intended to probe the bases for contentions admitted subsequent to February, 1979, and to ask follow up questions on answers supplied to the first set of interrogatories and in the respective depositions of the parties. Neither Intervenor made a timely response to this second set of interrogatories, either by the due date of July 23, 1979, or any time thereafter. In consequence, Applicant availed itself of the remedy provided by the regulations, filing with the Board on August 7, 1979, a motion requesting an order directing each

---

*/ The Board admitted Hinderstein Contentions 3 and 9, and McCorkle Contentions 9, 14 and 17.

**/ Applicant's First Set of Interrogatories were served on Intervenors on March 13, 1979. Intervenor Hinderstein provided responses on March 26, 1979, and Intervenor McCorkle provided responses on March 28, 1979. Intervenor McCorkle's deposition was taken on March 21, 1979, and Intervenor Hinderstein's deposition was taken on March 22, 1979.

Intervenor to provide answers to Applicant's Second Set of Interrogatories addressed to each. Neither Intervenor filed a response to Applicant's Motion to Compel.

On August 27, 1979, the Board issued an order granting Applicant's motion and directing each Intervenor to provide "complete answers to Applicant's interrogatories served on these parties under date of July 3, 1979," within ten days of service of the order. In accordance with the Board's Order, responses were due from each Intervenor on September 11, 1979. After some seven weeks, Intervenor Hinderstein has simply never responded to the Board's August 27 Order.

Intervenor McCorkle did respond to the Board's August 27 Order, but her response was so deficient as to require another motion to compel. The Applicant's further motion to compel was filed on September 14, 1979. On October 5, 1979, the Board issued an order granting the motion, in part, and directed that Intervenor McCorkle respond within 14 days. The time to respond expired on October 24.*/

---

*/ On September 19, 1979, Applicant served a third set of interrogatories on Intervenor McCorkle. The answers were due on October 8. Intervenor McCorkle has neither answered them nor moved for additional time. In light of Intervenor McCorkle's past responses to orders from the Board, Applicant considered it unnecessary to file yet another motion to compel and chose instead to proceed with this motion.

II. APPLICANT HAS A RIGHT TO FULL DISCOVERY OF INTERVENORS UNDER COMMISSION REGULATIONS

The Commission's regulations as set forth in §2.714 require that contentions and their bases be set forth with reasonable specificity. From the statement of a contention "with reasonable specificity", the parties then proceed to obtain the necessary particularization of the issues through discovery. In most cases, discovery pursuant to 10 CFR §2.740 et seq. is the essential tool to "flesh out" the contention, to establish the litigable issue of fact.

Applicant's second set of interrogatories addressed respectively to Intervenor McCorkle and Intervenor Hinderstein were intended to do exactly that; that is, to "flesh out" the bases for the contentions submitted by these parties. A review of Applicant's interrogatories will demonstrate that their manifest purpose was to "pin down" the contentions of each Intervenor so as to be in a position to litigate the contentions of each at the hearing or, if appropriate, move for summary disposition.

Unless parties conscientiously fulfill their responsibilities during discovery, orderly adjudication is impossible. Applicant has the burden of proof in this proceeding (10 CFR §2.732) and unless permitted to inquire

into the bases for Intervenors' contentions, discharge of that burden may be extra difficult, if not impossible. As a licensing board recently noted:

> "To permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearings would be patently unfair, and inconsistent with a sound record."

Northern States Power Company, et al. (Tyrone Energy Park, Unit 1) LBP-77-37, 5 NRC 1298, 1300-1301 (1977).

III. THE BOARD SHOULD DISMISS INTERVENORS AS PARTIES TO THIS PROCEEDING

The Commission's regulations specifically provide the Board with authority to take appropriate action for failure to comply with discovery orders. Section 2.707 of the Commission's regulations provide in relevant part:

> "On failure of a party. . .to comply with any discovery order entered by the presiding officer pursuant to §2.740,. . .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 the 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.

When it adopted §2.707, in its present form, the Commission stated:

> "Section 2.707, Default, has been amended to provide sanctions for failure to comply with the discovery provisions, or with prehearing orders. In order to control the course of the proceeding, the presiding officer should have the necessary authority to impose appropriate sanctions on all parties who do not fulfill their responsibilities as participants."

37 Fed. Reg. 15127 (July 28, 1972) (emphasis added). Thus, it is unquestionable that the Board has all necessary authority to apply appropriate sanctions for failure to comply with the Commission's discovery rules and its own Orders of August 27 and October 5, 1979.

One of the appropriate sanctions for failure to comply with Board orders relating to discovery is dismissal from the proceeding. Thus, in the Tyrone proceeding, supra, intervenors were dismissed by the Board for failure to respond to discovery requests and defaulting on a discovery order issued by the Board under Section 2.740. 5 NRC 1298, 1300. Similarly, Licensing Boards in other cases have dismissed intervenors for refusing to comply with Board orders compelling discovery pursuant to Section 2.740. Public Service Electric and Gas Company (Atlantic Nuclear Generating Station, Units 1 & 2), LBP-75-62, 2 NRC 702, 705-706 (1975); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants) LBP-75-67, 2 NRC 813, 814-817 (1975).

Similar sanctions of dismissal are common in the Federal courts under the analogous Rule 37(b)(2) of the Federal Rules of Civil Procedure for parties who fail to comply with the discovery rules.*/ Indeed, the U. S. Supreme Court has sanctioned the dismissal of plaintiff's action for failure to comply with discovery requests. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), rehearing denied, 429 U.S. 874 (1976).

Finally, two special and important considerations are relevant to the dismissal of Intervenors Hinderstein and McCorkle. First, neither Intervenor made any attempt whatsoever to explain to the Board why she failed to respond to Applicant's interrogatories. Neither even bothered to file an answer to Applicant's Motions to Compel, and neither has explained her failure to comply with the Board's orders compelling further answers. Indeed, at this late date no excuse could suffice. Intervenors have contumaciously refused to abide by the rules of this agency and have flaunted the authority of this Board without so much as an explanation. Second, both Intervenors are attorneys (see

---

*/ Mangano v. American Radiation and Standard Sanitary Corp., 438 F.2d 1187, 1188 (3rd Cir. 1971); Fond Du Lac Plaza, Inc. v. Reid, 47 F.R.D. 221 (E.D. Wis. 1969); Shepard v. General Motors Corp., 42 F.R.D. 425 (N.D. Ill. 1967).

McCorkle Deposition, p. 3, Hinderstein Deposition, p. 3); therefore, they are held to a higher standard than a non-attorney pro se intervenor. Intervenors must be deemed to be fully cognizant of the Commission's regulations with respect to discovery and the consequences of failing to comply with the Board's discovery order.

IV. CONCLUSION

Intervenors have failed, without excuse, to comply with the Board's orders compelling answers to interrogatories. Given the facts set forth above, Commission precedent clearly indicates that both Intervenors should be dismissed from further participation in this proceeding.

Respectfully submitted,

J. Gregory Copeland

J. Gregory Copeland
C. Thomas Biddle, Jr.
Charles G. Thrash, Jr.
3000 One Shell Plaza
Houston, Texas 77002

OF COUNSEL:

BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

LOWENSTEIN, NEWMAN, REIS,
AXELRAD & TOLL
1025 Connecticut Ave., N.W.
Washington, D. C. 20036

Jack R. Newman
Robert H. Culp
1025 Connecticut Ave., N.W.
Washington, D. C. 20036

ATTORNEYS FOR APPLICANT
HOUSTON LIGHTING & POWER COMPANY

1582 085

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	§	
	§	
HOUSTON LIGHTING & POWER COMPANY	§	Docket No. 50-466
	§	
(Allens Creek Nuclear Generating Station, Unit 1)	§	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Dismiss Intervenors Brenda A. McCorkle and Carro Hinderstein as Parties to This Proceeding in the above-captioned proceeding were served on the following by deposit in the United States mail, postage prepaid, or by hand-delivery this 9th day of November, 1979.

Sheldon J. Wolfe, Esq., Chairman
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. E. Leonard Cheatum
Route 3, Box 350A
Watkinsville, Georgia 30677

Mr. Gustave A. Linenberger
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Chase R. Stephens
Docketing and Service Section
Office of the Secretary of the
Commission
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

R. Gordon Gooch, Esq.
Baker & Botts
1701 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Richard Lowerre, Esq.
Assistant Attorney General
for the State of Texas
P. O. Box 12548
Capitol Station
Austin, Texas 78711

Hon. Charles J. Dusek
Mayor, City of Wallis
P. O. Box 312
Wallis, Texas 77485

Hon. Leroy H. Grebe
County Judge, Austin County
P. O. Box 99
Bellville, Texas 77418

Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D. C. 20555

Steve Sohinki, Esq.
Staff Counsel
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

John F. Doherty
4327 Alconbury Street
Houston, Texas 77021

Robert S. Framson
Madeline Bass Framson
4822 Waynesboro Drive
Houston, Texas 77035

Carro Hinderstein
8739 Link Terrace
Houston, Texas 77025

D. Marrack
420 Mulberry Lane
Bellaire, Texas 77401

Brenda McCorkle
6140 Darnell
Houston, Texas 77074

F. H. Potthoff, III
7200 Shady Villa, #110
Houston, Texas 77055

Wayne E. Rentfro
P. O. Box 1335
Rosenberg, Texas 77471

James M. Scott, Jr.
8302 Albacore
Houston, Texas 77074

Bryan L. Baker
1118 Montrose
Houston, Texas 77019

Dorothy F. Carrick
Box 409, Wagon Rd. Rfd. #1
Wallis, Texas 77485

Carolina Conn
1414 Scenic Ridge
Houston, Texas 77043

Elinore P. Cumings
Route 1, Box 138V
Rosenberg, Texas 77471

Stephen A. Doggett, Esq.
P. O. Box 592
Rosenberg, Texas 77471

Robin Griffith
1034 Sally Ann
Rosenberg, Texas 77471

Leotis Johnston
1407 Scenic Ridge
Houston, Texas 77043

Rosemary N. Lemmer
11423 Oak Spring
Houston, Texas 77043

Kathryn Otto
Route 2, Box 62L
Richmond, Texas 77469

Frances Pavlovic
111 Datonia
Bellaire, Texas 77401

Charles Perez
1014 Montrose
Houston, Texas 77019

William Schuessler
5810 Darnell
Houston, Texas 77074

Patricia L. Strelein
Route 2, Box 395C
Richmond, Texas

Glen Van Slyke
1739 Marshall
Houston, Texas 77098

Donald D. Weaver
P. O. Drawer V
Simonton, Texas 77476

Connie Wilson
11427 Oak Spring
Houston, Texas 77043

J. Gregory Copeland

J. Gregory Copeland

1582 088