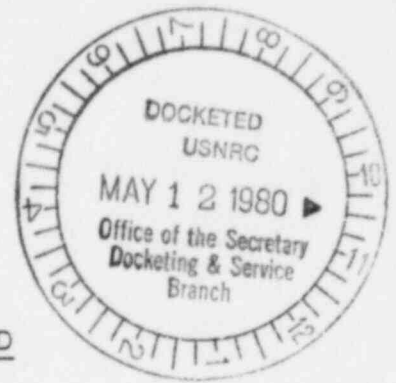


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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of )  
METROPOLITAN EDISON COMPANY ) Docket No. 50-289  
(Three Mile Island Nuclear ) (Restart)  
Station, Unit No. 1) )

LICENSEE'S MOTION FOR SANCTIONS AGAINST  
ENVIRONMENTAL COALITION ON NUCLEAR POWER

The background of Licensee's discovery efforts from Environmental Coalition on Nuclear Power ("ECNP") is succinctly stated in the Board's Memorandum and Order on Licensee's Motion to Compel Discovery of ECNP (April 11, 1980):

Licensee served interrogatories upon intervenor Environmental Coalition on Nuclear Power (ECNP) on January 18, 1980. Responses would have been due on February 6, but the board granted to all parties an extension until March 17 to respond to discovery requests. ECNP filed neither objections nor responses to licensee's interrogatories. Licensee moves to compel discovery by motion of March 24. ECNP responded to licensee's motion on April 3. [Slip op. at 1.]

After finding that each of Licensee's interrogatories to ECNP is "relevant to the proceeding and \* \* \* appear[s] reasonably calculated to lead to the discovery of admissible evidence" (slip op.

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at 2), the Board directed ECNP to respond to Licensee's interrogatories, as modified by the Board,<sup>1/</sup> within ten days following the service of its Order (slip op. at 5). Accordingly, ECNP's time for response lapsed on April 28, 1980. To date, Licensee has received no response from ECNP to its first set of interrogatories. Licensee's counsel contacted ECNP's representative on Thursday, May 8, 1980, and received no indication that any response would be forthcoming.

Pursuant to Section 2.707 of the Commission's Rules of Practice, 10 C.F.R. § 2.707, Licensee moves the Board for an order dismissing ECNP as a party to this proceeding. In relevant part, Section 2.707 states:

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 Section 2.707 in its present form, the Commission stated (37 Fed. Reg. 15127 (July 28, 1972)):

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<sup>1/</sup> In its discretion, and for the purpose of easing ECNP's burden in responding to Licensee's interrogatories, the Board modified certain requests so that ECNP need only identify persons and documents containing information which is asserted by ECNP to support its contentions (slip op. at 3-4). Licensee does not object to such a modification.

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. [Emphasis added.]

This provision clearly authorizes the Board to impose sanctions against an intervenor who fails to comply with the Commission's discovery rules and the Board's orders, including the authority to dismiss an intervenor as a party to the proceeding. Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 N.R.C. 1298 (1977); Offshore Power Systems (Manufacturing Licensee for Floating Nuclear Power Plants), LBP-75-67, 2 N.R.C. 813 (1975); Public Service Electric & Gas Co. (Atlantic Nuclear Generating Station, Units 1 and 2), LBP-75-62, 2 N.R.C. 702 (1975).<sup>2/</sup> Similar sanctions are common in the federal courts under the analogous Rule 37(b)(2) of Federal Rules of Civil Procedure for recalcitrant or unresponsive parties who fail to comply with discovery orders.<sup>3/</sup>

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<sup>2/</sup> See also Duke Power Co. (Amendment to Materials License SNM-1773), Docket No. 70-2623, "Order Dismissing Carolina Action as an Intervening Party" (May 23, 1979); Ohio Edison Co. (Erie Nuclear Plant, Units 1 and 2), Docket Nos. STN-50-580, 50-581, "Order to Show Cause Relative to Dismissal" (March 12, 1979).

Copies of these unpublished licensing board orders are attached hereto as Appendix A.

<sup>3/</sup> In National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976), the Supreme Court explained the reasons for imposing the sanction of dismissal as follows:

But here, as in other areas of the law, the most

In determining whether a party should be dismissed for failure to respond to discovery orders, factors that have been considered include the nature of the party's contentions, the discovery requests directed to the party, the potential of the party for making a contribution to the proceeding, and the requirements for a fair hearing. Tyrone, supra, 5 N.R.C. at 1300. In the instant case, all of these factors require dismissal of ECNP.

First, with but one exception,<sup>4/</sup> the contentions of ECNP,

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3/ -- continued --

severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. \* \* \* [If dismissal were not upheld in this case,] other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.

See also Independent Investor Protective League v. Touche Ross & Co., 607 F.2d 530 (2d Cir. 1978); Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971); Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976).

4/ ECNP Contention No. 5 relates to the cumulative impact of radiation exposure. This is the same area raised by TMIA Contention Nos. 1 and 2. In a filing dated May 5, 1980, TMIA has moved to withdraw its Contention Nos. 1 and 2. This fact, however, provides no reason for not dismissing ECNP as a party to this proceeding.

ECNP Contention No. 5 was accepted by the Board for purposes of discovery only. See First Special Prehearing Conference Order (December 18, 1979) at 41. The Board there noted that ECNP Contention No. 5 "is intertwined with bases and argument", and therefore directed that "the contention \* \* \* be redrafted in the course of discovery curing the defect. Tr. 674-77." Id. This, of course, has not been done. ECNP has sought no discovery of

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while arguably raising issues important to this proceeding, do not address areas not otherwise raised by other intervenors in the proceeding or by the Commission's August 9, 1979 Order and Notice of Hearing.<sup>5/</sup> Thus, dismissal of ECNP is not likely to preclude

4/ -- continued --

Licensee related to Contention No. 5 and has not responded to Licensee's interrogatories in this area. One of those interrogatories that has been ignored by ECNP -- Interrogatory No. 5-4 -- inquired as to the date on which ECNP would serve its revised Contention No. 5.

In addition to Contention No. 5, ECNP Contention No. 16 raised issues relating to radioactive emissions from normal operation of TMI-1. This contention was rejected (*id.* at 43), but ECNP was given the opportunity to adopt TMIA Contention Nos. 1 and 2. Due to the failure of ECNP to respond to Licensee's interrogatories (see Interrogatory Nos. 16-1 and 16-20), Licensee does not now know whether ECNP intends to so adopt TMIA Contention Nos. 1 and 2.

5/ The following table lists the ECNP admitted contentions and the corresponding contentions of other intervenors which raise similar issues:

<u>ECNP Contention</u>	<u>General Subject Matter</u>	<u>Other Intervenor Contentions</u>
1(a)	Plant Computer	Sholly 13
1(b)	Transient Sensitivity	Sholly 6
1(c)	Control Room Signals	UCS 9
1(d)	Range of Monitoring Instruments	Sholly 5
1(e)	SBLOCA Analysis	UCS 8; Sholly 7
1(f)	Safety Grade Equipment	UCS 12,* 14*
1(g)	Water Level and Steam formation Detectors; High Point Vents	UCS 7; ANGRY 5(b)
1(h)	Containment Isolation	Sholly 1
1(i)	Control Room Design	Sholly 15; ANGRY 5(c)
2	Emergency Planning	Sholly 8; ANGRY I-III; Newberry 3; Aamodt 4, 5
3	Management Capability	TMIA 5; Sholly 14; ANGRY 4; CEA 8
4	Alternative Accident Sequences	Sholly 17
5	Cumulative Impact of Radiation	See footnote 4
6	Psychological Stress	PANE 1, 2; Newberry 1, 2; TMIA 3; Sholly 12; Aamodt 9; CEA 4
7	ECCS	UCS 10*
14	Accident Analysis	UCS 13*
16	Normal Radioactive Emissions	See footnote 4*
19	Unit Separation	Sholly 10; TMIA 7; Aamodt 8; CEA 5-7

-- continued --



a full and open airing of the matters raised by its intervention petition.

Second, as already noted, Licensee's discovery requests to ECNP are for the purpose of ascertaining the bases for the contentions and to shape them as issues appropriate for litigation. Even if ECNP were to fully respond at this late date, Licensee's hearing preparation would be severely delayed. The very basic information sought by the interrogatories should have been in Licensee's possession almost two months ago.

Third, to date, ECNP has not demonstrated a potential for making a contribution to this proceeding. It is true that ECNP and its representatives have participated in past Commission licensing proceedings -- and have assisted in the development of the record. However, in this proceeding ECNP's participation has been very limited. ECNP has filed no discovery of Licensee, and, so far as Licensee is aware, has made no use of Licensee's Discovery Reading Room. In part this is attributable both to the numerous other proceedings that ECNP is a party to and the distance of ECNP's primary representatives from the TMI site.<sup>6/</sup> Licensee

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<sup>5/</sup> -- continued --

\*ECNP contention rejected, but ECNP given the opportunity to adopt the contention of another party. Due to the failure of ECNP to respond to Licensee's interrogatories (see Interrogatory Nos. 1(f)-1, 1(f)-6, 7-1, 14-1, 16-1 and 16-20), Licensee does not now know whether ECNP plans to so adopt the contention of other parties.

<sup>6/</sup> See, e.g., Tr. 883-84, 886, 1561, 1641, 1646-49 and ECNP Intervenor's Answer to the Board's Memorandum and Order of January 9, 1980 (January 24, 1980); ECNP Response to Suspended Licensee's Motion to Compel Discovery Upon ECNP (April 3, 1980).

makes these observations, not to disparage the capabilities of ECNP, but only to reflect upon the realities of the situation. Given ECNP's participation to date and its other commitments, there is little assurance that ECNP will in the future make a substantial contribution to this proceeding.

Fourth, as previously indicated, ECNP's default already has substantially injured Licensee's hearing preparation. While the Commission's Rules of Practice require a threshold showing of specificity and bases for admission of a contention as an issue in a proceeding, that showing is far short of the necessary information to permit an efficient adjudication of the issues raised by the contentions. It is for this reason that the Commission's Rules of Practice permit a licensee to address inquiries, substantially without limitation, to intervenors about the bases and other support for their contentions. Consistent with the broad scope of discovery available to Licensee, this Board has indicated that various contentions would need to be refined after discovery had been conducted.<sup>7/</sup> Obviously, such an exercise by ECNP, who neither has conducted any discovery of its own nor responded to Licensee's discovery, would be a futile gesture at this point in the proceeding.

Moreover, ECNP is not an uninformed intervenor unfamiliar with the Commission's Rules of Practice. ECNP and its representatives have participated in numerous Commission proceedings. They are fully knowledgeable of the responsibilities and obligations of

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<sup>7/</sup> E.g., First Special Prehearing Conference Order (December 18, 1979) at 9-10.

an intervenor, including an intervenor's obligation to respond in a timely manner to discovery requests. In addition, both during prehearing conferences and in written orders, this Board has stressed time and again that intervenors simply cannot ignore deadlines; that to ignore such deadlines would be at the risk of the intervenor.<sup>8/</sup>

To ignore ECNP's default would be to countenance that party's flaunting of the Commission's Rules of Practice and this Board's discovery orders. Licensee respectfully requests that the Board dismiss ECNP as a party to this proceeding.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: 

George F. Trowbridge  
Robert E. Zahler

Dated: May 9, 1980

8/

E.g., Tr. 168, 525; Memorandum and Order Ruling on Intervenor's Requests for Extension of Time to File Revised Emergency Planning Contentions (January 8, 1980).



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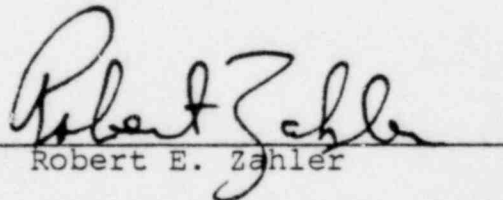
UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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METROPOLITAN EDISON COMPANY	)	Docket No. 50-289
	)	(Restart)
(Three Mile Island Nuclear	)	
Station, Unit No. 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Licensee's Motion for Sanctions Against Environmental Coalition on Nuclear Power", were served upon those persons on the attached Service List by deposit in the United States mail, postage prepaid, this 9th day of May, 1980.

  
Robert E. Zahler

Dated: May 9, 1980

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
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APPENDIX A

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )

DUKE POWER COMPANY )

(Amendment to Materials License )  
S.M-1773 for Oconee Nuclear Station )  
Spent Fuel Transportation and )  
Storage at McGuire Nuclear Station) )

Docket No. 70-2623

ORDER DISMISSING CAROLINA ACTION AS AN  
INTERVENING PARTY  
(May 23, 1979)



Our Order dated February 23, 1979 was issued pursuant to the provisions of 10 CFR §2.751a, and required Intervenor Carolina Action as well as other parties "to proceed expeditiously with discovery." Carolina Action has failed to comply.

On March 16, 1979, interrogatories were served by the Applicant, and answers were due April 4. Despite letters requesting responses, none has been provided by Carolina Action, nor has it otherwise participated in this proceeding. It thus appears that this Intervenor does not intend to assist in developing a sound record in this proceeding, nor to make a valuable contribution to our decision-making process. Accordingly, the Applicant's motion to dismiss is granted and Carolina Action is dismissed as an intervening party or an active participant in this proceeding (10 CFR §2.707).

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

*Marshall E. Miller*  
Marshall E. Miller, Chairman

Dated at Bethesda, Maryland  
this 23rd day of May 1979.

Dupe  
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Docket Nos. STN 50-580  
50-581

Dupe  
7904060495

Intervenors Evelyn Stebbins and the Coalition For Safe Electric Power are dismissed from this proceeding under 10 CFR 2.707 ten (10) days from the date of this Order unless good cause is established prior to that date.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

Elizabeth S. Bowers  
Elizabeth S. Bowers, Chairman

Dated at Bethesda, Maryland  
This 12th day of March 1979.