



1981 "Memorandum and Order" (hereafter "Order") concerning discovery<sup>2/</sup> and 2) striking from this proceeding Contentions 2, 7 and 8<sup>3/</sup>.

Ordinarily, the NRC Staff does not express an opinion on discovery matters or motions to which it is not a party. However, the Staff believes that in certain circumstances it is appropriate to express its views on discovery matters, particularly, where, as here, the severe sanction of striking contentions is sought.

Although CFUR has failed to comply fully with the Licensing Board's April 13, 1981 Order, the Staff believes that the Licensing Board should not grant Applicants' Motion to Strike. While NRC case law interpreting

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2/ In the Licensing Board's Order, supra, which consists of two parts, the Licensing Board granted Applicants' September 30, 1980, motions to compel responsive answers to Applicants' first set of interrogatories and to require supplementation of CFUR's responses to those interrogatories. In part (1), the Licensing Board ordered that CFUR "file complete responses by April 30, 1981" to sixty interrogatories and in part (2) ordered that CFUR "supplement its responses ... as soon as the information requested is developed or obtained" with respect to forty-four interrogatories. Order, supra, at 13-14.

Pursuant to an extension of time until May 8, 1981, CFUR filed on that date its "Supplement to Answers to Applicants' First Set of Interrogatories to CFUR and Requests to Produce" (hereafter "CFUR's Supplement"). CFUR's Supplement is directed to part (1) of the Licensing Board's Order, requiring CFUR to file "complete" responses to a number of the interrogatories in Applicants' first set of interrogatories.

3/ The Licensing Board consolidated the intervenors for certain contentions, with CFUR being appointed "lead intervenor" for consolidated Contention 4 and, as sole sponsor of Contentions 1, 2, 3, 7, 8 and 9, for those contentions as well. See the Licensing Board's "Memorandum and Order" of December 31, 1980. The Licensing Board provided that the lead party-intervenor for a particular contention is lead for all purposes, which would include discovery. Id.

The interrogatories covered by the Licensing Board's April 13, 1981 Order are directed to CFUR's Contentions 2, 7 and 8.

10 CFR §§ 2.707 and 2.718 does not preclude the relief sought by Applicants, the better practice would be for the Licensing Board to consider imposing lesser sanctions against CFUR limiting its participation in this proceeding with respect to those contentions to which any inadequately answered or unanswered discovery requests are directed. For the reasons set forth below, imposition of the severe sanction of striking Contentions 2, 7 and 8 is not appropriate.

#### DISCUSSION

According to Applicants, the Licensing Board should, pursuant to 10 CFR § 2.707, find CFUR in "default" of the Licensing Board's Order compelling "complete" answers to sixty of the Applicants' first set of interrogatories directed to Contentions 2, 7 and 8. In view of such "default", Applicants urge the Licensing Board to strike these contentions. As discussed more fully below, the Staff agrees that CFUR has not fully complied with the Licensing Board's Order. However, the Staff believes that the Licensing Board should consider imposing lesser sanctions than the severe sanction of striking Contentions 2, 7 and 8.

##### A. CFUR Has Not Fully Completed With The Licensing Board's Order

The Licensing Board's Order compelled CFUR to provide "complete responses" to a total of sixty of the interrogatories in Applicants' first set of interrogatories. In that Order, the Licensing Board stated that with respect to forty-four other interrogatories directed at those same

contentions, CFUR should supplement its answers "as soon as the information requested is developed or obtained." Order, at 14. With respect to Contention 2, the Licensing Board ordered CFUR to provide "complete" answers to twenty-six interrogatories. CFUR's Supplement contains answers to all twenty-six of those interrogatories, but Applicants contend that fifteen of those answers are not responsive to the interrogatories in question and to the Licensing Board's Order. Concerning Contention 7, the Licensing Board's Order covered twenty-one interrogatories. According to Applicants, fourteen of CFUR's answers fail to provide the information sought by the interrogatories which the Licensing Board ordered CFUR to provide. In so far as Contention 8 is concerned, the Licensing Board ordered CFUR to provide responsive answers to thirteen interrogatories. Applicants contend that CFUR's answer to those interrogatories that CFUR "was unable to proceed further at this time with responses..." (CFUR's Supplement, at 8) fails to comply with the Licensing Board's Order.

To determine whether or not CFUR's Supplement complies with the Licensing Board Order the Staff has reviewed all of the interrogatories which are covered in part (1) of the Licensing Board's Order, part (1) of the Licensing Board's Order and the answers in CFUR's Supplement which CFUR filed in response to the Licensing Board's Order. The Staff essentially agrees with Applicants' assessment of CFUR's answers to those interrogatories. However, concerning CFUR's answers to the twenty-six interrogatories directed at Contention 2, the Staff believes that twelve

of those answers, and not fifteen answers, as Applicants maintain, fail to comply with the Licensing Board's Order.<sup>4/</sup>

It is thus evident that CFUR has not fully complied with part (1) of the Licensing Board's Order regarding Applicants' interrogatories related to Contentions 2, 7 and 8. In this regard, CFUR's Supplement, supra, contains answers to some but not all of the sixty interrogatories covered in part (1) of that Order, in which the Licensing Board ordered CFUR to file "complete" responses to those interrogatories. In part (2) of the Order, the Licensing Board ordered CFUR to supplement its responses to a number of other interrogatories "as soon as the information requested

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<sup>4/</sup> In particular, the Staff does not agree with Applicants' assessment of CFUR's answers to Interrogatories 30, 32 and 33. Interrogatory 30 asks what CFUR contends Applicants must do to demonstrate that certain reports and computer codes have been "suitably verified and formally accepted." The Licensing Board's Order determined that the Applicants are entitled to such information. In CFUR's Supplement, CFUR's answer to Interrogatory 30 referred to its answers to Interrogatories 24 and 27, in which CFUR states what it maintains Applicants must do to demonstrate that certain reports and computer codes have been "suitably verified and formally accepted." Although CFUR's answer to this interrogatory may not be entirely satisfactory, in the Staff's view, CFUR has arguably complied with the Licensing Board's Order concerning this interrogatory. Interrogatory 32 seeks the basis for CFUR's answer to a previous interrogatory. CFUR's "supplemental" answer to Interrogatory 32 refers to its "supplemental" answers to Interrogatories 26 and 29. In CFUR's "supplemental" answers to Interrogatories 26 and 29, CFUR cites, as basis, the experiments at the "LOFT Facility", some "IEEE Standards" and certain sections of 10 CFR Part 50. In the Staff's view, these answers minimally satisfy the Licensing Board's directive that as "basis", CFUR state "particular technical information ... or regulatory or statutory requirements..." Licensing Board's Order at 5. In Interrogatory 33, Applicants seek to discover the particular "conclusions" based upon the computer codes (challenged by CFUR in Contention 2) which CFUR claims are "invalid." The Licensing Board determined that the Applicants are entitled to a "clear, direct answer to Interrogatory 33." Licensing Board's Order, at 9. CFUR's answer refers to the conclusions it maintains are invalid and thus arguably satisfies the Licensing Board's directive.

is developed or obtained." Order at 14. Although CFUR has not yet supplemented its answers to the interrogatories covered in part (2) of the Licensing Board's Order, CFUR is not required to do so until "the information requested is developed or obtained." Id. Thus, it cannot be concluded that CFUR has failed to comply with part (2) of the Licensing Board's Order.

B. The Licensing Board Should Not Impose the Severe Sanction of Striking Contentions 2, 7 and 8

Applicants, citing 10 CFR § 2.707 and "applicable NRC and Federal case law," assert that:

"... the appropriate sanction in this instance is to strike Contentions 2, 7 and 8 from consideration in this proceeding." Applicants' Motion to Strike, at 10.

The Staff agrees with Applicants that CFUR has not fully complied with the Licensing Board's Order concerning Applicants' discovery requests related to Contentions 2, 7 and 8. The Staff does not, however, agree with Applicants that the Licensing Board should impose the severe sanction of striking Contentions 2, 7 and 8.

The provisions of 10 CFR § 2.707 confer broad authority upon the presiding officer of the licensing board. 10 CFR § 2.707, "Default", states that:

On failure of a party to file an answer or pleading within the time prescribed in this part or as specified in the notice of hearing or pleading ... or to comply with any discovery order entered by the presiding officer pursuant to § 2.740, the Commission or 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.

In addition to the sanctions specified in 10 CFR § 2.707, NRC case law makes it clear that 10 CFR § 2.707 empowers the presiding officer to dismiss a party or one or more of its contentions from a proceeding for that party's failure to comply with a direct order of the licensing board compelling discovery.<sup>5/</sup> Pennsylvania Power and Light Company, Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), Atomic Safety and Licensing Board Memorandum and Order on Pending Motions, May 20, 1981 (Slip Opinion, at 26-31) Northern States Power Company, et al. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1301 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 817 (1975); Public Service Electric & Gas Company (Atlantic Nuclear Generating Station, Units 1 & 2), LBP-75-62, 2 NRC 702, 705-706 (1975).

The NRC cases cited by Applicants (Atlantic, Floating Nuclear Plants, and Tyrone, supra) all involve situations where a licensing board dismissed intervenors because they had flagrantly disregarded the legitimate discovery requests of the other parties and the licensing board's orders compelling responses to those discovery requests. For example, in Floating Nuclear Plants, supra, intervenor's counsel advised the applicant that "it had made a firm decision that it would not proceed with discovery." Id. 2 NRC 813, at 815. Similarly, in Atlantic, supra, an intervenor refused to answer any questions substantively on the basis that it could not proceed without

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<sup>5/</sup> In addition, under 10 CFR § 2.718, the presiding officer in NRC adjudicatory proceedings has the duty "to conduct a fair and impartial hearing according to law, to take appropriate action to . . . maintain order" and "to regulate the course of the hearing and the conduct of the participants".

legal counsel. Id. 2 NRC 702, at 705. Although Applicants here assert that "CFUR stands in much the same position as did the intervenors who were dismissed in Tyrone" (Applicants' Motion to Strike at 15), in Tyrone, supra, the dismissed intervenors had completely ignored all Staff discovery requests and either had ignored all of applicants' discovery requests or had answered such requests inadequately. Moreover, all of the dismissed intervenors had ignored all licensing board orders regarding discovery requests. Significantly, however, the licensing board did not initially grant the applicants' motion to dismiss the intervenors. Rather:

"The Board was reluctant to dismiss the intervenors without providing them with an additional opportunity to present their views and to submit to the Board's control over the proceeding."  
Id. 5 NRC 1298, at 1299.

Accordingly, the licensing board issued an order directing each recalcitrant intervenor to answer certain questions regarding its desire to remain a party to the proceeding and to comply with the licensing board's orders compelling responses to discovery requests. It was only after the intervenors ignored that licensing board order that the licensing board dismissed the intervenors.

There is no doubt that CFUR has failed to fully comply with the Applicants' discovery requests and with part (1) of the Licensing Board's Order compelling responsive answers to a number of interrogatories in Applicants' first set of interrogatories.<sup>6/</sup> However, contrary to Applicant's assertion,

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<sup>6/</sup> The Staff has also found that CFUR's answers to certain of the Staff's First Set of Interrogatories (See "NRC Staff First Set of Interrogatories To, And Request For The Production of Documents From, Intervenor CFUR," January 19, 1981) are not responsive to those interrogatories. Accordingly, on March 31, 1981, the Staff filed "NRC Staff's Motion to Compel Responsive Answers to Certain Staff Interrogatories To Intervenor CFUR of January 19, 1981." This motion is pending before the Licensing Board.



CFUR does not stand "in much the same position" as the intervenors who were dismissed in Tyrone or in the other cases cited by Applicants in Applicants' Motion to Strike. Unlike those intervenors, CFUR has not refused to answer any of the other parties' discovery requests or to even respond to the Licensing Board's Order compelling "complete answers" to those discovery requests. Further, in contrast to those intervenors, CFUR has assumed a significant participational role in this proceeding, which is a factor which the Licensing Board must weigh in its consideration of Applicants' Motion to Strike. Tyrone, supra. cf. Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-358, 4 NRC 558 (1976). In this regard, while the Staff will not list the numerous pleadings filed by CFUR in this proceeding, CFUR has generally responded to the other parties' motions and to the Licensing Board's Orders. In addition, CFUR has participated in discovery by filing discovery requests of Applicants, some of which relate to the contentions which are the subject of Applicants' Motion to Strike.<sup>7/</sup>

In addition, in part (2) of the Licensing Board's Order, it ruled that CFUR was not required to supplement its previous answers to a number of interrogatories in Applicants' first set of interrogatories relating to the same contentions which Applicants seek to strike, until such time "as the information requested is developed or obtained." Licensing Board's Order, at 14. It would be anomalous to suggest that the Licensing Board should strike Contentions 2, 7 and 8 at this time because certain interrogatories

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<sup>7/</sup> See for example, "CFUR's Third Set of Interrogatories to Applicant [sic] and Requests to Produce," April 15, 1981, which relate to Contention 7.

relating to those contentions have not been completely answered, when at the same time, the Licensing Board, in its Order, allowed CFUR further time to supplement its answers to certain other interrogatories relating to those same contentions. Because any supplemental answers to the interrogatories covered in part (2) of the Licensing Board's Order may yield additional information regarding Contentions 2, 7 and 8, it is not clear at this time that CFUR's failure to comply fully with Part (1) of the Licensing Board's Order will completely hamper the ability of the other parties to present evidence regarding Contentions 2, 7 and 8.

The Staff does not disagree with Applicants' conclusion that "Federal courts have ordered dismissal of a party's case for default under the provisions of Rule 37(b) of the Federal Rules of Civil Procedure for failure to respond to discovery requests or orders compelling discovery."<sup>8/</sup> Applicants' Motion to Strike at 11. The cases cited by

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<sup>8/</sup> As Applicants point out, Rule 37(b) provides that if a party fails to obey an order to provide or permit discovery, the Court may enter an order "dismissing the action or proceeding or any part thereof." Applicants' Motion to Strike, at 11, quoting Fed. R. Civ. P. 37.

According to Applicants:

The NRC rules of Practice concerning discovery, 10 C.F.R. §2.740, are based on Federal Rules 26 and 37, see Statement of Considerations, 37 Fed. Reg. 15127-28 (July 28, 1972), and are to be afforded the "broad, liberal interpretation" given the Federal Rules. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 461 (1974)... Applicants' Motion to Strike, fn. 4, at 11.

Although the Staff essentially agrees with the above statement, the Staff would note that the Statement of Consideration cited above merely provides that 10 CFR § 2.740, relating to "discovery - scope of discovery, protective orders, and motions to compel discovery ... adapts Rule 27 and 37 of the Federal Rules of Civil Procedure to Commission proceedings." See Statement of Consideration. 37 Fed. Reg. 15127-28 (July 28, 1972).

Applicants<sup>9/</sup> represent no more than decisions in which no abuse of discretion was found where a court dismissed a party or its case on the ground that the party had failed to comply with discovery orders. As the court in Mertens v. Hummel, supra, noted however:

"The Federal Rules of Civil Procedure allow the court to enter an order dismissing the action as a sanction where 'a party fails to obey an order or permit discovery'. F.R.Civ.P. 37(b)(2)(c)..." (Emphasis added) Id., 587 F.2d 862, at 864.

The Federal Rules of Civil Procedure clearly do not require that an order dismissing an action be entered in such circumstances. In the Supreme Court decision cited by Applicants, National Hockey League v. Metropolitan Hockey Club, supra, the court recognized

"the severity of outright dismissal as a sanction for failure to comply with a discovery order." Id. 427 U.S. 639, at 642.

The Court held that:

Under the circumstances of this case, we hold that the District Judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondents "flagrant bad faith" and their counsel's "callous disregard" of their responsibilities ... (Emphasis added). Id., at 643.

It is thus evident that in interpreting Rule 37 of the Federal Rules of Civil Procedure, the Supreme Court considers dismissal of a party (or implicitly, part of its case) to be "an extreme sanction," which should not necessarily be imposed in all cases in which there is a failure to

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<sup>9/</sup> See National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 640 (1976); Mertens v. Hummel, 587 F.2d 862 (7th Cir. 1978); Kelley v. United States, 338 F.2d 328 (1st Cir. 1964).

comply with a discovery order.<sup>10/</sup> The Staff believes that neither the case law interpreting Rule 37 nor NRC case law requires the imposition of a sanction as severe as striking Contentions 2, 7 and 8.

The Staff's position is not inconsistent with either the Statement of Consideration concerning the Licensing Board's authority to dismiss under 10 CFR § 2.707 or with the recent policy statement issued by the Commission, "Statement of Policy On Conduct of Licensing Proceedings," May 20, 1981, (hereafter "Statement of Policy"), both of which are cited by Applicants. The Statement of Consideration merely provides that:

2. 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). Statement of Consideration, 37 Fed. Reg. 15127-28 (July 28, 1972).

In the Statement of Policy, the Commission noted that:

A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, or dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. Statement of Policy, at 3.

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Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance. Id., at 4.

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<sup>10/</sup> Also see Laclede Gas Co. v. G.W. Warnecke Corp., 604 F.2d 561 (8th Cir., 1979), where the court noted that "the sanction [of dismissal] is obviously more severe than other available sanctions permitted by Rule 37 and is therefore appropriate only under limited circumstances." Id., at 565.

In the Staff's view, the Licensing Board should consider imposing the following lesser sanctions "to mitigate the harm" caused by CFUR's failure to fulfill its discovery obligations relating to Contentions 2, 7 and 8:<sup>11/</sup> 1) Because of CFUR's failure to respond to all the interrogatories covered by the Licensing Board's Order of April 13, 1981, CFUR must get specific permission from the Licensing Board in order to present an affirmative case regarding Contentions 2, 7 and 8.<sup>12/</sup> Such permission

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<sup>11/</sup> As the Appeal Board has noted, discovery is designed to help litigants learn the nature of an adversary's case in advance of trial. Pennsylvania Power & Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 2 NRC 317 at 338-339 (1980). "In modern administrative and legal practice, pretrial discovery is liberally granted to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately for a more expeditious hearing." Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-78-20, 7 NRC 1038, 1040 (1978). A party's failure to comply with discovery requests relating to contentions can hamper the ability of the other parties to present evidence regarding contentions. Where a party does not comply with discovery requests, the party improperly frustrates the other parties' legitimate efforts to present affirmative evidence on contentions and to prepare for cross-examination. Tyrone, supra. As the Licensing Board in Tyrone, supra, observed, "to permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record". Id., 5 NRC at 1301.

Imposition of sanctions against a party for failure to fulfill its discovery obligations and to comply with Licensing Board orders is designed not only "to mitigate the harm" caused by such failure but also to "bring about improved future compliance." Statement of Policy, at 4. The offending party is thus put on notice that a price will have to be paid for disregarding Licensing Board orders and such knowledge will encourage future compliance with Licensing Board orders.

<sup>12/</sup> See Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), Memorandum and Order (Directing CAND and ECNP to Respond to Interrogatories), February 27, 1981.

should be granted only if both the names of witnesses and the substance of their testimony, and identification of relevant documents is furnished to the Licensing Board and the other parties sufficiently in advance of the date on which prepared testimony would otherwise be due so that Applicants and Staff may take witnesses' depositions and examine the documents in question,<sup>13/</sup> and 2) CFUR must furnish to the Licensing Board and parties a detailed outline of proposed cross-examination including documents to be relied on, no less than ten (10) days prior to the commencement of the evidentiary hearing session in which the particular issue is to be considered, as a condition precedent to conducting cross-examination related to Contentions 2, 7 and 8.<sup>14/</sup> It is the Staff's view that, in lieu of striking Contentions 2, 7 and 8, the above sanctions could be imposed to compensate, as far as possible, for CFUR's failure to comply with all of Applicants' interrogatories and discovery requests and with the Licensing Board's Order<sup>15/</sup> regarding those discovery requests.

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<sup>13/</sup> Id.

<sup>14/</sup> Id.

<sup>15/</sup> As the Commission recently noted, sanctions such as these are available to licensing boards "when a party fails to meet its [discovery] obligations." Statement of Policy, supra, at 4.

CFUR should be aware that while "a spectrum of sanctions from minor to severe is available to boards," Id., "in severe cases," these sanctions include dismissal of a party or one or more of its contentions from the proceeding. Id.

CONCLUSION

Based on the foregoing, the Staff respectfully requests that the Licensing Board 1) deny Applicants' Motion to Strike and 2) consider imposing the sanctions outlined in Section B against CFUR because of CFUR's failure to fully comply with the Licensing Board's Order of April 13, 1981.

Respectfully submitted,

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Dated at Bethesda, Maryland  
this 12th day of June, 1981

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
TEXAS UTILITIES GENERATING COMPANY, ET AL. ) Docket No. 50-445  
(Comanche Peak Steam Electric Station, ) 50-446  
Units 1 and 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF ANSWER TO APPLICANTS' MOTION TO STRIKE CFUR CONTENTIONS FOR DEFAULT" 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, by deposit in the Nuclear Regulatory Commission's internal mail system, this 15th day of June, 1981:

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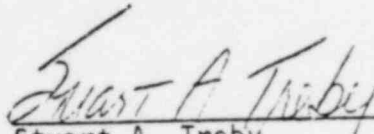
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