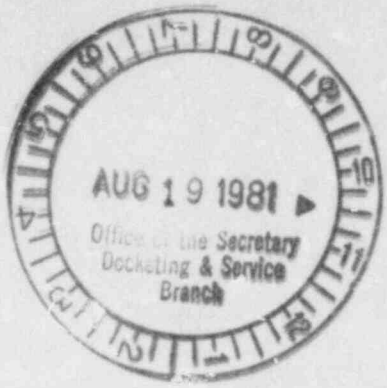


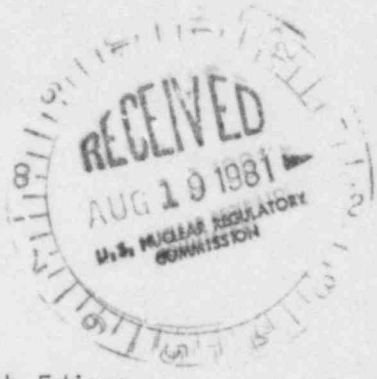
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Marshall E. Miller, Chairman
Dr. Richard F. Cole
Dr. Dixon Callihan

SERVED AUG 19 1981

In the Matter of COMMONWEALTH EDISON COMPANY (Byron Station, Units 1 and 2)	Docket Nos. STN 50-454-OL STN 50-455-OL August 18, 1981



MEMORANDUM AND ORDER

I.

Pursuant to leave previously granted, the Commonwealth Edison Company (Applicant) on February 13, 1981, filed its petition for reconsideration of the Board's Memorandum and Order entered December 19, 1980.[1/] That Order ruled upon the admissibility of the revised contentions filed by the Rockford League of Women Voters (League). The Staff's response to the petition, essentially supporting the request for reconsideration, was filed March 3, 1981. The League filed its memorandum in opposition to the petition on April 13, 1981.

The first ground relied upon by the Applicant for reconsideration is the renewed argument that the revised contentions are untimely because they are greatly expanded in number beyond the original 13 contentions filed by

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[1/] LBP-80-30, 12 NRC 683 (1980).

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the League. The original Order had pointed out that the revised contentions were not untimely because the Board, acting as an Intervention Board at the special prehearing conference, found standing and at least one viable contention to be set forth in the League's petition.[2/] All parties were then requested to confer and negotiate regarding contentions, but the Board did not limit the Intervenors (not then represented by counsel) to the number or scope of the proffered contentions.[3/]

The Applicant's petition asserts that evidently "the Board felt that the revised contentions were not untimely since Intervenor had not been represented by counsel at the special prehearing conference" (p. 4). That is not correct. The Board noted that the Intervenors were not represented by counsel, but it did not hold that this fact tolled the period when contentions could be amended. Rather, the Board acting as an "intervention board" or a "petitions board" which found a viable intervention petition in an operating license proceeding, then requested the parties to confer and negotiate regarding contentions.

The differences between an intervention board and a hearing board are well recognized in NRC practice. The Appeal Board has thus described these differences:

> "In virtually all NRC proceedings in which a hearing is not mandatory but rather is dependent upon a successful intervention petition being filed in response to the published notice of opportunity for hearing, an 'intervention' licensing board is especially established for the sole

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[2/] Id., at 690.

[3/] Id.

> purpose of passing upon such petitions as may have been filed. If that board denies each and every petition placed before it, absent appellate reversal no further adjudicatory action need be taken. Should, however, at least one petition be granted in whole or in part, thus giving rise to the necessity for adjudication of the merits of the issues presented therein, a discrete licensing board is then established to perform that function.... The second or 'hearing' board may or may not have the same composition as the 'intervention' board which preceded it. This determination is made by the Chairman of the Licensing Board Panel when and if the occasion arises and will depend upon, among other things, his appraisal of the continuing availability of the members of the 'intervention' board.... In the totality of circumstances, we think the settled division of jurisdiction between 'intervention' and 'hearing' boards to be as sensible as it is venerable and therefore reject out-of-hand the applicant's claim to the contrary." (Emphasis in original; footnotes omitted).[4/]

The leading case in establishing the appropriate functions of a petition or intervention board is Grand Gulf, wherein it was stated:

> "a board need not pass upon all contentions to resolve the question of whether intervention will be permitted, for it is sufficient for intervention purposes that one contention has been validly presented. The questions as to whether other contentions shall be allowed, and whether, ultimately, any contentions previously allowed can be disposed of by summary procedures, can be dealt with through further proceedings, and need not be considered in ruling upon intervention, fn. 2... Having reached those conclusions, the Licensing Board properly acted on the petition without abiding the event of future rulings on other contentions which the Board believed to require further elaboration." fn. 2 — "In an operating license proceeding...the question of whether the intervention petition should be granted is often considered by a licensing board especially established for that purpose and, if the petition is granted, a discrete licensing board is then established to conduct all further aspects of the proceeding."[5/]

[4/] Pacific Gas and Electric Company (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175, 1177-78 (1977).

[5/] Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 (1973).

In the instant operating license proceeding, the Board at the August 21-22, 1979, special prehearing conference was following the "venerable" practice of acting as an intervention board reviewing petitions for a hearing. At the very beginning of the special prehearing conference, the parties were told that "its function is to determine whether or not there should be an evidentiary hearing in this proceeding."[6/] The Chairman further stated:

> "This proceeding is upon application for an operating license, and the Intervention Board or Petitions Board, which is what this board is, must pass upon the sufficiency of the petitions, both to show interest and standing, and then further at the prehearing conference to establish whether or not there is one or more viable contentions. If so, then a notice of hearing would be published and a licensing board would then be established. I mention this so there won't be any confusion as to the nature and function of this special prehearing conference."[7/]

The fact that this Intervention Board was only attempting to determine whether there was at least one viable contention in order to trigger an evidentiary hearing in an operating license proceeding, was stated repeatedly.[8/] It was eventually conceded by both the Staff and the Applicant that there were one or more viable contentions, and that therefore an evidentiary hearing should be held.[9/]

[6/] Transcript of Special Prehearing Conference held in Rockford, Illinois August 21-22, 1979 (Tr.), at 5.

[7/] Tr. 5.

[8/] Tr. 9, 13, 15-16, 18, 25-38, 53-54.

[9/] Tr. 25.

The Staff at one point suggested that the Board did not need to review all of the contentions at that time, nor "come out with a prehearing order stating what the contentions are."[10/] Rather, the parties could confer with each other after the special prehearing conference to arrive at "contentions which can be litigable during the course of a proceeding... These intervenors, for the most part, have been cooperating, and Mr. Goddard and I have come out to Illinois on several occasions to work with them in an effort to reduce the contentions. Not to reduce them in number, but reduce them to the point of clarity and specificity within the guidelines of the Commission's rules...."[11/] (Emphasis supplied)

The Staff further recommended that after the parties had negotiated, they could submit a report on contentions to the Board, which could then either issue a special prehearing order or call another conference.[12/] The applicant also indicated its willingness to proceed in this fashion.[13/]

The Board then accepted these recommendations, and directed the parties to confer on contentions. There were no limitations placed on the scope, number or pedigree of contentions that might be submitted to the Board in the future, to establish the litigable issues in this OL proceeding.[14/]

[10/] Tr. 26.

[11/] Id.

[12/] Tr. 27-28, 110.

[13/] Tr. 30, 42.

[14/] Tr. 36-38, 42, 44.

In fact, the Intervenors were expressly told that "You are not being coerced in any way or pressured by this board or any board to agree or not to agree to the formulation of your contentions, removal of them or expansion of them. You are perfectly free. Sit down and talk."[15/] (Emphasis supplied)

In this state of the record, it would be manifestly unfair to hold that the revised contentions were late or untimely. Clearly the Intervenors were granted an extension of time to confer and negotiate regarding the framing of their contentions, without time or subject limitations. If the Intervenors had been represented by counsel, it is possible that a formal request for a time extension would have been made. But it should be noted that counsel for the Applicant and the Staff did not make any requests for time or subject limitations. On the contrary, it was suggested that no prehearing order setting forth contentions was then necessary, and that further conferences among the parties might serve to provide more clarity and specificity to the contentions, but "not to reduce them in number."[16/]

The Board also followed the Staff's suggestion that a prehearing order stating the contentions need not be entered at that time.[17/] In fact, no special prehearing order was entered at that time, as is usually done pursuant to the provisions of 10 CFR §2.751a. The reason for deferring an order on contentions was that the Board concurred in the suggestions

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[15/] Tr. 40.

[16/] Tr. 26.

[17/] Id.

of the parties that further conferences and negotiations be undertaken by them regarding the framing of contentions. This Board action amounted to the granting of additional time to file contentions after conferences among the parties. The fact that some of the parties may now be disappointed because more rather than fewer contentions were ultimately filed, does not justify us in rewriting history or proceeding unfairly.

The second ground urged for reconsideration concerns the original Order's admission of contentions regarding unresolved generic safety issues.[18/] We adhere to our ruling that as a pleading matter, these contentions adequately plead the bases for such allegations (10 CFR §2.714). It is sufficient for an intervenor at the pleading stage merely to state his reasons (i.e., the basis) for contentions,[19/] and he is not required to plead evidence or to establish that the assertions are well-founded in fact.[20/]

The Applicant is entitled to obtain discovery concerning the bases of these contentions, since a good deal of information is already available to the League from the FSAR and other documents. The League must furnish such information promptly, and it cannot delay until the SER or other documents are filed. The factual or evidentiary bases for such contentions

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[18/] 12 NRC at 694-96.

[19/] Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980).

[20/] Mississippi Power and Light Company (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973); Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54 (1979).

may in part reflect such later information, but discovery may precede such filings, subject to later supplementation.

The third ground asserted for reconsideration concerns the admission of contentions relating to compliance with Staff Regulatory Guides.[21/] These objections, as in the original Order, are governed by the same reasons discussed under unresolved safety issues. Without attempting to become involved in the merits of these assertions, we note that the League argues that "if an Applicant chooses not to comply with a Regulatory Guide, we ought to know whether what it plans is sufficient." Its supporting footnote 8 states:

> "A review of the Byron FSAR Appendix A indicates that according to Edison's own assessment, Byron does not comply, or complies only in part, with over 20% of the relevant Division 1 Regulatory Guides; that as to a further 23%, the most Edison is willing to offer is a 'commitment' that at some unsepcified future point, Byron will comply with the 'intent' of the Guide; and that Edison disagrees, or has 'qualifications', or reservations, or interpretations of its own, with over 20% of the pertinent Guides." (Emphasis supplied) (Memorandum of Intervenor Rockford League of Women Voters In Opposition to Petition for Reconsideration, p. 11.)

The Petition for Reconsideration will be denied.

II.

The original Order entered December 19, 1980 directed that discovery should commence immediately upon all issues included in the admitted contentions. All parties are directed to proceed expeditiously with discovery

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[21/] 12 NRC at 696-97.

and other trial preparation. The Staff's documents are expected to be issued in accordance with the following schedule:

Draft Environmental Statement	January, 1982
Final Environmental Statement	June, 1982
Safety Evaluation Report	April, 1982
Supplemental Safety Evaluation Report	May, 1982

As an aid to the parties in conducting discovery fairly and expeditiously, we incorporate herein by reference the following provisions from a recently entered Memorandum and Order in Texas Utilities Generating Company, et al. (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-22, 14 NRC __, Slip Opinion pp. 8-11:

> "The following Commission statement regarding the purposes of and reasonable limitations upon discovery, is brought to the attention of all parties to this proceeding:
>
> "Board Management of Discovery
>
> "The purpose of discovery is to expedite hearings by the disclosure of information in the possession of the parties which is relevant to the subject matter involved in the proceeding so that issues may be narrowed, stipulated, or eliminated and so that evidence to be presented at hearing can be stipulated or otherwise limited to that which is relevant. The Commission is concerned that the number of interrogatories served in some cases may place an undue burden on the parties, particularly the NRC staff, and may, as a consequence, delay the start of the hearing without reducing the scope or the length of the hearing.
>
> "The Commission believes that the benefits now obtained by the use of interrogatories could generally be obtained by using a smaller number of better focused interrogatories and is considering a proposed rule which would limit the number of interrogatories a party could file, absent a ruling by the Board that a greater number of interrogatories is justified. Pending a Commission decision on the proposed rule, the boards are reminded that they may limit the number of interrogatories in accordance with the Commission's rules.

> "Accordingly, the boards should manage and supervise all discovery, including not only the initial discovery directly following admission of contentions, but also any discovery conducted thereafter. The Commission again endorses the policy of voluntary discovery, and encourages the boards, in consultation with the parties, to establish time frames for the completion of both voluntary and involuntary discovery. Each individual board shall determine the method by which it supervises the discovery process. Possible methods include, but are not limited to, written reports from the parties, telephone calls, and status report conferences on the record. In virtually all instances, individual boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted." (Statement of Policy on Conduct of Licensing Proceedings, May 20, 1981, pp. 5-6.)

The large number of motions and disputes relating to interrogatories and discovery lead the Board to conclude that the matter has almost gotten out of hand. It is similar to the "farrago of motions, objections and rulings" described by the Appeal Board in Pennsylvania Power and Light Company, et al. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 337 (1980). Such a blizzard of paper reflects a lack of understanding that discovery is intended by our rules of practice to be conducted by the parties, usually without Board involvement. Those rules, like their judicial counterparts, "attempt to minimize involvement by the trial board." (Id., at 322.)

To clarify and expedite further discovery in this proceeding, the Board adopts the following measures:

1. All parties are directed to confer directly with each other regarding alleged deficiencies in discovery before resorting to motions involving the Board. To

this end, voluntary discovery and disclosure are highly encouraged. All motions involving discovery controversies shall describe fully the direct efforts of the parties to resolve such disputes themselves.

2. We reaffirm a rule previously adopted, requiring that pursuant to the provisions of 10 CFR §2.740(e)(3), all interrogatories filed by any party to this proceeding, past or future, shall be deemed to be continuing in nature, and the party to whom they are addressed shall be under a continuing duty to supplement the responses as necessary to keep them currently accurate.

3. Objections to interrogatories or document requests shall be set forth in an appropriate motion for protective order, accompanied by points and authorities sufficient to enable the Board to rule immediately upon receipt of the opposing party's answer to be filed within ten (10) days (10 CFR §§2.718, 2.730, 2.740, 2.740b, 2.741).

4. All filings scheduled by the Board shall be physically lodged with the Board and parties on or before the due date, not merely mailed on that date. Expedited or following day delivery shall be employed when necessary.

5. The sheer number, volume and complexity of interrogatories should be substantially reduced. Boiler plate formulas involving unnecessary and redundant details

should be avoided. The Board will consider limiting the number of interrogatories in accordance with the Commission's suggestion above, to achieve a smaller number of better focused interrogatories.

6. A failure to furnish requested information based upon a claim of awaiting further discovery is unresponsive unless precise information is given as to the nature and status of pending discovery, and a specification of the relevancy of such facts to the requested information.

7. All discovery shall be expedited to the maximum extent reasonably possible, to accommodate an accelerated hearing schedule that will be issued shortly.

8. A party who files a motion shall not have a right to reply to an answer in opposition thereto, unless prior leave is obtained from the presiding officer (10 CFR §2.730(c)). Such leave will be granted sparingly, and then only upon a strong showing of good cause.

9. The parties are reminded that interrogatories are not the sole discovery method established by our Rules of Practice (10 CFR §§2.740-2.742). A well-timed deposition can often accomplish more than six months of back-and-forth fencing over interrogatories and answers.

The following comments by the Appeal Board in Susquehanna, supra, may also be of assistance:

> "General objections, such as the objection that the interrogatories will require the party to conduct research and compile data, or that they are unreasonably burdensome, oppressive, or vexatious, or that they seek information that is as easily available to the interrogating as to the interrogated party, or that they would cause annoyance, expense, and oppression to the objection party without serving any purpose relevant to the action, or that they are duplicative of material already discovered through depositions, or that they are irrelevant and immaterial, or that they call for opinions and conclusions, are insufficient.[22/]

III.

The Applicant filed a motion on July 30, 1981 to compel the League to answer interrogatories directed to it on July 8, 1981. Responses to these discovery requests were alleged to be due by July 27, 1981. Objections to those interrogatories were filed by the League on August 5, and a response to the motion to compel discovery was filed by it on August 7, 1981.

The League's objections based largely upon the argument that the four interrogatories are permature, are denied. While more information may be available when the SER is filed, there is presently available a large amount of documentary and other information. The movant is entitled to full and responsive answers based upon the presently known status of these matters, and to additional information when it becomes available.

[22/] 12 NRC at 323.

The League's response to the motion to compel discovery is likewise overruled. The involvement of a party's lawyers in litigation or other professional business does not excuse noncompliance with nor extend deadlines for compliance with our rules of practice. The League's response is also a bit too casual about the length of time available for trial preparations leading to the commencement of evidentiary hearings. A schedule will be issued soon by the Board. However, a large number of somewhat complex contentions have been filed by the League, and the Applicant is not required to delay discovery or trial preparation.

The last point relied on by the League's response concerns the request for consultation on discovery between or among the parties. This request is covered by paragraph 1 of the discovery rules set forth supra. The parties will be allowed a reasonable period of time to confer. However, responsive answers shall be filed to these and other interrogatories promptly, and discovery shall be conducted expeditiously.

The Applicant also filed a motion on July 30, 1981 to compel DAARE and SAFE to answer interrogatories served upon them July 8, 1981. It was alleged that responses were due by July 27, 1981.

As of this date, DAARE and SAFE have neither answered nor objected to these interrogatories. Accordingly, they are ordered to file responsive answers forthwith.

ORDER

For all the foregoing reasons and based upon a consideration of the entire record, it is this 18th day of August, 1981

ORDERED

(1) That the Applicant's petition for reconsideration of the Memorandum and Order entered December 19, 1980, is denied.

(2) That discovery shall proceed expeditiously in accordance with the guidelines set forth in Section II, supra, and the Commission's Rules of Practice.

(3) That the Applicant's motion to compel discovery by the League is granted, subject to a prompt conference between the parties.

(4) That the Applicant's motion to compel discovery by DAARE and SAFE is granted, and those Intervenors are directed to file responsive answers to interrogatories forthwith.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE