

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

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In the Matter of

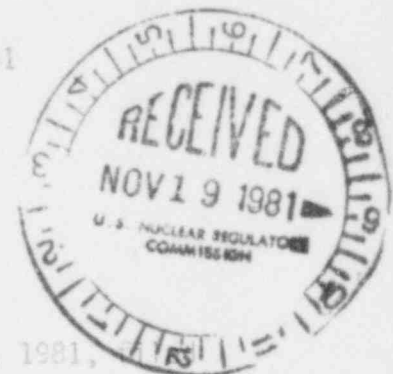
COMMONWEALTH EDISON COMPANY

(Byron Nuclear Power Station,
Units 1 and 2)

Docket Nos. 50-454-OL
50-455-OL

October 27, 1981

MEMORANDUM AND ORDER



The Commonwealth Edison Company (Applicant) on October 2, 1981, a motion for the entry of an order imposing sanctions on the Intervenor Rockford League of Women Voters (League) for its continuing failure or refusal to answer interrogatories. A response to this motion was filed by the League October 13, 1982. The League also filed a motion for sanctions against the Applicant on the same date. The Applicant's opposition to the latter motion was filed October 22, 1981. The Staff has indicated that it does not intend to take a position with respect to these motions. For the reasons set forth infra, the Applicant's motion for sanctions will be granted, and the League's motion will be denied.

The League filed its revised contentions on March 10, 1980, consisting of 146 numbered contentions. Many of these contentions were vigorously opposed by the Applicant and the Staff, but the pleading rules were liberally construed by the Board and 114 contentions were admitted as pleading issues.^{1/}

^{1/}Memorandum and Order entered December 19, 1980, LBP-80-30, 12 NRC 683.

counsel for the League (Myron M. Cherry, Esq.) was engaged full-time, and his partner (Peter Flynn, Esq.) virtually full-time, in a discovery and pretrial schedule in connection with a preliminary injunction hearing in a circuit court in Illinois. The League's attorneys also opined that "the great burden of time and expense entailed in attempting to respond to those Interrogatories at this juncture is grossly disproportionate to the minimal benefit (if any) which might be gleaned from responses...." (Response of League, p. 2). It further stated that counsel should have an opportunity for consultation with opposing counsel to resolve differences concerning discovery (Id., p. 3).

The Board considered the League's objections to these interrogatories, and it entered an Order on August 18, 1981 that expressly overruled such objections, and rejected counsel's excuses for failing to file timely discovery responses.^{9/} That Order provided:

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

"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 and other trial preparation." (Footnotes omitted) (Ibid., Slip Opinion at pp. 7-8)

^{9/} LBP-81-30-A, 14 NRC ____ (1981).

Our Order of August 18 further stated:

"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." (*Ibid.*, Slip Opinion at pp. 10-11)

The League's prematurity argument and its excuses for ignoring interrogatories because its attorneys were busy, were dealt with as follows:

"The League's objection based largely upon the argument that the four interrogatories are premature, 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.

"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." (*Ibid.*, Slip Opinion at pp. 13-14)

It was therefore ordered that:

"The Applicant's motion to compel discovery by the League is granted, subject to a prompt conference between the parties."
(Slip Opinion, p. 15, par. 3)

Following entry of the Board's specific directives in its Order of August 18, the League neither requested nor furnished any discovery in this proceeding. However, counsel for the Applicant pursuant to our directives contacted the League's counsel by telephone on August 25, 1981 concerning interrogatory answers. Similar conversations took place on September 3, September 10 and September 15, 1981, but no responses to Applicant's interrogatories were furnished by the League.

Letters from Applicant's counsel to the League's counsel, dated September 4, 1981 and September 16, 1981, are attached to this Order marked Exhibits A and B, respectively, and are incorporated herein by reference. These letters and the transactions which they reflect clearly establish that the League by its counsel has willfully failed and refused to obey the Board's Order of August 18, 1981. Such conduct will not be permitted.

The Board has examined the response filed by the League on October 13, 1981 to the Applicant's motion for sanctions, together with attached Exhibits A-D. We find nothing in these discursive documents to excuse or condone the League's total failure to provide responsive answers to interrogatories. The disputes between counsel concerning depositions and other discovery, as shown by the League's Exhibits A, C and D, do not relate to the instant NRC proceeding. As they show on their face, they involve some pending Illinois

Under all of the circumstances shown in this proceeding, the Board finds that the League should have all of its contentions stricken, and it should be dismissed as an Intervening party (10 CFR §§2.707, 2.718, 2.740).

The motion for sanctions filed by the League on October 13, 1981, is devoid of merit and borders on the frivolous. Such motion will be denied.

ORDER

For all the foregoing reasons and based upon a consideration of the entire record, it is this 27th day of October, 1981

ORDERED

(1) That the Applicant's motion for sanctions is granted, and the Intervenor Rockford League of Women Voters is dismissed as a party.

(2) The Rockford League of Women Voter's motion for sanctions against the Applicant is denied.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Marshall E. Miller

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

