UNITED STATES OF AMERICA
UCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

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In the Matter of

COMPANY

(Byron Nuclea: Power Station,

Docket Nos. 50-454-0L 50-455-0L

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.

Memorandum and Order entered December 19, 1980, LBP-80-30, 12 NRC 683.

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However, it was specifically stated that "Of course, all admitted contentions are subject to motions for summary disposition after the cor letion of discovery, if 'there is no genuine issue to be heard." And our Order further wovided that "discovery shall commence forthwith upon all issues included in the admitted contentions."

The Applicant served written interrogatories on the League on July 8, 1981. These interrogatories inquired into the factual bases for the contentions, any evidentiary support for them, and the identity of witnesses and the substance of their expected testimony. 4/ The use of interrogatories such as

^{2/&}lt;sub>Ibid., at 696.</sub>

^{3/151}d., at 698.

^{4&}quot;Interrogatories: 1. With respect to each Contention advanced by the League which has been admitted by the Atomic Safety and Licensing Board in the above-ceptioned proceeding, list the following:

a. A concise statement of the facts supporting each Contention together with references to the specific sources and documents and portions thereof which have been or will be relied upon to establish such facts:

the identity of each person expected is be called as a witness at the hearing;

the subject matter on which the witness is expected to testify;

d. the substance of the witness's testimony.

^{2.} With respect to each witness identified in the League's response to Interrogatory 1 above, identify each document which the witness will rely upon in whole or in part in the preparation of his testimony or in the development of his position.

With respect to each witness identified in the League's response to Interrogatory I above, identify the witness's qualifications to testify on the subject matter on which the witness will testify.

^{4.} Identify all persons who participated in the preparation of the answers, or any portion thereof, to these Interrogatories."

these has been approved by the Appeal Board as a common and reasonable method of discovering the evidentiary and factual bases for contentions. This is especially true where intervenors have filed a very large number of contentions.

The Appeal Board in <u>Susquehanna</u> held that "it is not proper for a party to ignore a discovery request," and quoted with approval the <u>Licensing</u>
Board's statement that:

The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the position of the intervenors, discharging that burden may be impossible. 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."

Answers to the Applicant's interrogatories were due under our rules by July 27, 1981 (10 GFR 52.740(b)). No answers were filed by that date, so on July 30, 1931 the Applicant filed a motion to compel discover by the League. On August 5, 1981, the League by one of its attorneys filed object ons to these interrogatories, which in substance argued that they were "premature" Largave no factual or other bases for the contentions.

On August 7, 1981, the League's attorneys filed a response to the Applicant's motion to compel discovery. This response asserted that lead

^{5/}Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 MRC 317, 333-35, 340 (1980).

^{6/1}bid., at 322.

^{1/} Ibid., at 338.

Peter Flyan, Esq., of the firm of Cherry and Flynn, Chicago, Illinois.

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 interrogaturies, 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. That Or in provided:

"It is sufficient for an intervenor at the pleading stage merely to state his reasons (i.e., the basis) for contentions, 127 and he is not required to plead evidence or to establish that the assertions are well-founded in fact. 207 The Applicant is entitled to obtain discovery concerning the bases of these contents as, 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. 7-2)

^{2/}LBP-81-30-A, 14 NRC (1901).

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 an directly with each other regarding alleged uniciencies 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 those matters, as I to additional information when it becomes available.

"The Larque'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 rancompliance with nor extend deadlines for compliance with our rules of practice. The League's response is also a bit too casual about the leigth of time available for trial preparations leading to the commendement of evidentiary hearings. A schedule will be issued soon by the Board. However, a large number of sepundat 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)

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 into accordance. 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 ittached 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 Ostober 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

Commerce Commission proceeding. The Board does not intend to become involved in some colleteral litigation which is not shown to be relevant to this proceeding. As the Exhibits show, copies of the letters reflecting some disputes between counsel were all mailed to "Ms. Manda Kamphius, Hearing Examiner." None was copied to this Board, and properly so.

The league's response also describes at length the circuit court litigation referred to <u>supra</u>, as well as the vacations and personal problems of some of counsel's partners. Our Order of August 18, 1981 made it clear that the involvement of counsel in other litigation or business would not excuse noncompliance with our rules of practice. The lengthy period of the League's deliberate failure and refusal to obey our orders and provide discovery, makes this attempted excuse unacceptable.

A large portion of the League's response is devoted to a wholly irrelevant telephone conference held between the Board and all of the parties except counsel for the league on October 2, 1°91. At the time the conference call was arranged, the Board was informed that Nr. Cherry as well as all other counsel or parties had agreed to participate. Nr. Cherry now says that "events overtook" him after he or his office was informed that a conference call would be made. 10/ There was also apparently some confusion whether the call referred to Midland or Byron, but in any event counsel's schedule would have prevented his participation. Counsel then objects "strenuously" to a so-called "ex parte" conference call. 11/

^{10/}Response of League, Exhibit B (Letter from Mr. Cherry to the Chairman of the Board, dated October 5, 1981).

^{11/} Id.

This whole prolix objection to the conference call is a nonissue which in ac way exculpates the League or its counsel from derelictions of duty concerning discovery. Fortunately, the Board requested that the telephone conference be covered by a court reporter, which was complied with. The transcript of the conference shows that Applicant's counsel informed the Board that Mr. Cherry had been contacted directly regarding the call (Tr. 5-6). Nevertheless, the Board did not go into the merits of the Applicant's complaints about the League's failure to answer interrogatories, but directed that a written motion be filed promptly because the scheduled dates are important in this proceeding (Tr. 23). We add that Mr. Cherry's nonparticipation in the conference does not render it ex parts. He apparently had some notice in advance of the call. One party cannot exercise a veto by absenting himself from conferences with the Board, whether because he and his office are too busy or for some other reason. No unilateral definition of ex parts encompasses such a result.

It is unnecessary to comment upon the League's deprecatory language regularly the schedule in this proceeding. Such pejorative comments as "hurry up and wait" (Response, p. 6), or criticizing the November 1, 1981 cutoff date for discovery (p. 4, m. 1), or false insinuations of "the instability of arbitrary cutoffs applicable in effect only to the Intervenors" (p. 6), do not merit a serious response. The dilatory conduct of the League and its counsel is the issue, and such "red herring" factics will not obscure that issue from consideration.

The facts discussed <u>supra</u> establish that the League and its counsel have deliberately and willfully refused to comply with the Board's Order of August 18, 1981, and have not answered interrogatories or furnished ordered discovery for a long period of time. The nature of the pretexts and excuses differed for such noncompliance demonstrate that such conduct is not an isolated incident, but rather is part of a pattern of behavior which seriously impedes our proceedings and impairs the integrity of our orders. Sanctions are therefore appropriate both to give all parties due process in this proceeding, and to deter similar conduct by other parties in the future.

The Commission has indicated that the presiding officer has the necessary authority to 'impose appropriate sanctions on all parties who do not i. Ifill their responsibilities as participants." 12/ In a recent policy statement, the Commission has discussed the spectrum of sanctions available to licensing boards to assist in the management of proceedings, including the dismissal of a party. 13/ Unjustified refusals or failures to comply with discovery orders have resulted in the dismissal of parties or contentions. 14/

Commission's Statement of Consideration, 37 Fed. Reg. 15127-28 (July 28, 1972).

^{13/&}quot;Statement of colicy on Conduct of Licensing Proceedings", May 20, 1981, CLI-81-8, 13 NRC 452.

^{14/}Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 322, 339 (1980). See Metropolitan Edison Company (Three Mile Island Station, Unit No. 1), UBP-80-17, 11 NRC 893 (1980); Northern States Fower Company, et al. (Tyron 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 and 2), LBP-75-62, 2 NRC 702, 705-6 (1975). See also National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 640 (1976); Mertens v. Munuel, 587 F.2d 262 (7th Cir. 1978); Kelley v. United States, 338 F.2d 328 (1st Cir. 1964).

Under all of the circumstances shown in this proceeding, the Board finds that the League should have a., of its contentions stricken, and it should be dismissed as an Inc. rvening 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

CROERED

- (1) That the Applicant's motion for sanctions is granted, and the Intervenor Rockford League of Homen Voters is dismissed as a party.
- (2) The Rockford League of Homen Voter's motion for sanctions against the Applicant is denied.

FOR THE ATOMIC SAFETY AND LICENSING BOARD

Marshall E. Miller, Chairman

ISHAM, LINCOLN & BEALE

ONE FIRST NATIONAL PLAZA FORTY-SECOND FLOOR CHICAGO, ILLINOIS 60603

TELEPHONE 312-850-7500 TELEX 2-5268

September 4, 1981

WASHINGTON DIFFICE HIZO CONNECTICU. - HEAVE IN W SHIPE 285 WASHINGTON D C 20020 202-033-0230

BY MESSENGER

Peter Flynn, Esq. Cherry & Flynn One IBM Plaza Suite 4501 Chicago, Illinois 60611

Re: In the matter of Commonwealth Edison Company (Byron L. tion, Units 1 and 2), Docket Nos. STN 50-454-OL, STN 50-455-OL.

Dear Mr. Flynn:

O: August 25, we spoke briefly with regard to the Licensing Board's order of August 18 requesting that the parties discuss the League's response to Commonwealth Edison Company's interrogatories. At the time, you indicated that you were reviewing the League's contentions for purposes of determining in what time period you expected to be in a position to answer the interrogatories. You also stated you would advise me before the end of the week, that is, before / ngust 28, as to an expected date for your responses. At the time, I suggested the possibility of some consulidation of contentions, inasmuch as the contentions now admitted by the Board contain a significant level of duplication and overlap. Yesterday, we spoke again to discuss discovery. You indicated that your review of the contentions still continues and you are not yet in a position to state when answers to interrogatories can be expected. You also indicated that you agreed with me that some consolidation of issues might be possible. Inasmuch as we are meeting on Thursday, September 10, to resolve discovery differencer in a parallel case now pending before the Illinois Commerc Commission, it was agreed we would raise the question of respt. .s to discovery in the NRC licensing case at the same time.

I would hope that by the September 10 meeting you will have made some progress toward responding to our interrogatories, as you have now had them since July 8, 1981. I enclose

Peter Flynn, Esq. Page Two September 4, 1981

herewith a proposed method of consolidating contentions. I would ask that you review these to the extent that time remits and be prepared, if possible, to discuss the enclosed proposal at our meeting on September 10.

Sincerely,

PMM/js Enclosure Paul M. Murphy One of the Attorneys for Commonwealth Edison Company

cc: Steven C. Goldberg, Esq.

September 16, 1981

Ar. Myron Cherry Cherry & Flynn Che ISH Plaza Suite 4501 Chicago, Illinois 50611

> Re: Commonwealth Dison Company (Bryon Station, Units 1 and 2) Douket Nos. 50-454 and 50-455

Dear Mr. Cherry:

The state of the s

This is to confirm our conversation of yesterday regarding punding distary initiated by Commonwealth Edison Company and directed at the Rockford Loague of Women Voters and at DAATE/SAFE. As , we recall, on July 3, 1931, Edison directed interrogatories to be answered by the League and by DAARE/SAFE. On August 18, 1981, the Licensing Boatd entered an Order directing DAARE, SAFE to enswer the interrogatories forthwith, and directing Edison and the League to consult regarding responses to discovery.

I spoke to your partner on August 25 and September 3, and with you on September 10th and yesterday in an effort to obtain a date certain for answers to our interrogatories, as there did not appear to be say other matter to discuss in view of the Board's overruling your objections. Yesterday you agreed to provide answers on behalf of the League and on behalf of BAARE/SAFE by October 1, 1981. This tate is by no means satisfactory, given that the interrogatories were served on you on July 8, 1981, and that the Dicensing Board overruled your objections to the Interrogatories on August 18, 1981. However, in view of your representation made on September 10, 1981 that as of that date no hing had been done towards answering the interrogatories, if does not now seem that an earlier date is achievable. We look forward to receipt of answers on behalf of the League and DAARE/SAFE by October 1, 1981.

Sincurely,

Paul H. Hurphy Attorneys for Commonwealth Edison Company

PMM/meb cc: Inti - Service List

EXHIBTS B