

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

April 15, 1980

SECY-A-80-53

CONSENT CALENDAR ITEM
ADJUDICATORY

For: The Commission

From: James A. Fitzgerald
Assistant General Counsel

Subject: PROPOSED RESPONSE TO MOTION FILED WITH THE
COMMISSION

Facility: Susquehanna Steam Electric Station, Units 1
and 2

Purpose: - To resolve a pending interlocutory motion
filed with the Commission.

Discussion: The Environmental Coalition on Nuclear Power
(ECNP), an intervenor in the Susquehanna
operating license proceeding, submitted a
series of procedural requests to the Com-
mission (Attachment 1). ECNP requests ex-
pedited consideration on several general
issues: (1) that the Commission order the
Licensing Board to enter appropriate pro-
tective orders to limit staff and applicant
discovery and to deny imposition of any
sanctions against ECNP for failure to respond
to discovery;*/ (2) that the Commission
provide advisory views on the scope of and
sanctions for discovery; (3) disqualify the
entire licensing board for "gross incom-
petence" and reconstitute the Board to
include a Commissioner; and (4) investigate
alleged improprieties in the conduct of this
hearing. The staff and applicant have
availed themselves of the opportunity to
respond provided by 10 CFR 2.730 (Attach-
ments 3 and 4).

*/

Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions 5
FOIA- 92-436

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p/4

In its opposition to the ECNP motion, the staff urges that the motion is improperly filed before the Commission and that it should be denied. The staff argues that no basis exists for circumventing the NRC regulation that states that "[n]o interlocutory appeal may be taken to the Commission from a ruling of the presiding officer." 10 CFR 2.730(f). As the Commission's delegate, the Appeal Board is the proper forum within which to entertain the ECNP motion, and it may grant all appropriate relief. 10 CFR 2.785, 2.704, 2.788. That Board may also consider whether a basis has been presented for discretionary interlocutory review. Puget Sound Power and Light Co. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC 693, 695 n.5 (1979). See Staff Response at 6, 7. The applicant adopts the staff's legal position and sets out in greater detail the factual background of the current dispute.

[We believe that

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Recommendation:

James A. Fitzgerald
 James A. Fitzgerald
 Assistant General Counsel

Attachments:

1. Request, 3/17/80, ECNP to
Comm.
2. Board Memorandum Opinion (3/27/80)
3. Staff Reply
4. Applicant's Reply
5. Proposed Order

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Tuesday, April 29, 1980.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT April 22, 1980, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of May 5, 1980. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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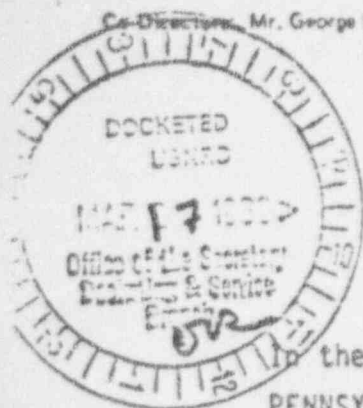
ATTACHMENT

ENVIRONMENTAL COALITION ON NUCLEAR POWER

relean

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Dr. Judith Johnsrud—443 Orlando Avenue, State College, Pa. 16801 814-237-3900



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

To the NRC Commissioners

In the Matter of)
PENNSYLVANIA POWER & LIGHT COMPANY)
and)
ALLEGHENY ELECTRIC COOPERATIVE, INC.)
(Susquehanna Steam Electric Station)
Units 1 and 2)

Docket 50-387-88

REQUEST TO THE NRC COMMISSIONERS FOR EXPEDITED CONSIDERATION
OF ACTIONS OF AN ATOMIC SAFETY AND LICENSING BOARD AND OTHER MATTERS

Pursuant to Chapter 1, Section 1 of the Atomic Energy Act of 1954, as amended, and absent any provision of 10 CFR 2, NRC Rules of Practice, that governs¹ this emergency communication, the Environmental Coalition on Nuclear Power (ECNP) Intervenors submit the following requests for immediate consideration and action by the Commissioners. These requests relate to procedural aspects of the above-captioned matter.

The ECNP Intervenors' contentions in this proceeding are not addressed herein, in accordance with the provisions of 10 CFR 2.780 concerning ex parte communications.

The procedural matter in which Petitioners seek immediate relief concerns the limits of discovery and the Board's decision-making process as it has been applied to discovery in this proceeding. When, as here, the parties have grossly unequal resources, we must ask the question: Are the more

¹ECNP can find, in particular, no wording in 10 CFR 2.780 that would appear to prohibit this request as being an ex parte communication. Copies of this Request are being served for the record on all parties to the proceeding. Nor is this emergency request an interlocutory appeal from a particular ruling of a presiding officer in the context of 10 CFR 2.730(f).

powerful, well-financed parties to be allowed and abetted by the Board to overwhelm another party by the imposition of excessively large numbers of discovery requests, arbitrary rejections of good faith responses, and other continuing demands upon an "underdog" party causing paralysis, exhaustion, and total defeat of the good faith efforts of citizen participants to build a meaningful record on issues of public health and safety and environmental effects?

In this instance, Applicants served some 2700 interrogatories upon these Intervenor. Intervenor were denied a protective order by the Board, whereas the Applicant was granted an order protecting it from responding to the bulk of Intervenor's few discovery requests (Board Memo and Order, August 24, 1979). There have followed months of procedural motions requiring detailed written responses, Board directives that have totally ignored the Intervenor's requests for clarifications as well as for reasonable protection and relief, delays occasioned by NRC Staff and Applicant failures to meet schedules of their devising, and acquiescence by the Board to virtually every demand by Applicant and Staff and denial of virtually every request by the various Intervenor. Intervenor have been frustrated in their legitimate modest discovery requests. Deadlines too short to permit adequate responses have been enforced for Intervenor, whereas Staff and Applicant's delays are accepted without question by the Board. Slowly and surely effective public-interest participation is being bled to death by procedural maneuvers of the Applicant, Staff, and Board. Intervenor now are called upon to argue why they should not be prohibited both from presenting direct evidence and from cross-examination of the witnesses that other parties will be allowed to present on the Intervenor's contentions.² The sole reason for these punitive "sanctions" which the Applicant and the Staff have asked the Board to approve is that the Applicant and the Staff have arbitrarily rejected as "inadequate" or "deficient" the Intervenor's timely good faith responses to the excessively large numbers of interrogatories served by the Applicant and those of the Staff.

²Board Memoranda on Prehearing Conference, dated February 22 and 26, 1980.

Petitioner's Request:

1. Petitioner ECNP asks the NRC Commissioners to direct their Atomic Safety and Licensing Board in the captioned proceeding to omit from the scheduled March 20, 1980, Prehearing Conference oral argument on Applicant's motions to restrict participation of Susquehanna Environmental Advocates (SEA) and ECNP and to dismiss Citizens Against Nuclear Dangers (CAND).

2. Petitioner ECNP asks the Commissioners to deny, and/or direct the Board to deny, without additional filings, the Applicant's Motions to restrict SEA and ECNP participation in, and to dismiss CAND from, this proceeding and Staff's recommendation to restrict ECNP's participation.

3. ECNP asks the Commissioners to direct the Board to certify to the Commissioners the four questions asked by ECNP in its November 19, 1979, filing,³ a request that Board denied⁴.

- (A) Does the NRC Staff or the Applicant have the right to create excessive demands for discovery (under Part 2.740) of an Intervenor of such a magnitude that the Intervenor is rendered incapable of further participation in that or any other NRC Proceeding?
- (B) Is it an appropriate remedy for this Licensing Board to deny the Intervenor in this proceeding the right to present witnesses simply because these Intervenor have been inundated and paralyzed by the excessive, unreasonable, meritless, and unjustifiable demands of the NRC Staff and Applicant?
- (C) Should not the entire Licensing Board in this proceeding be disbanded for gross incompetence, for its continuing refusal to address the objections by the various intervenors to oppressive discovery demands, and for the continuing refusal

³See "Intervenors' Response to Licensing Board Memorandum and Order of October 30, 1979," pp. 11-13.

⁴Board "Order Denying Requests of ECNP," December, 1979, p. 2.

of this Licensing Board to even attempt to conduct a fair hearing under Part 2.718 of the Commission's rules?

- (D) As a result of the abuse of the purpose of discovery by the NRC Staff and Applicant in this proceeding, which abuse has been not only condoned, but also aided and abetted by this Licensing Board, should not this Licensing Board be reconstituted so as to include one of the NRC Commissioners who, in the past, has expressed concern about the conduct and quality of NRC licensing proceedings?

4. These Intervenors--beleaguered in the extreme by their treatment at the hands of this Applicant, the Suspended Licensee in TMI-1 and II, the NRC Staff and Licensing Boards, in vigorous protest against the chain of events described in the Background section below, and in order to assist the Commission in avoiding the setting of a procedural precedent that will destroy altogether any remaining pretext of fairness to the public in the NRC licensing process--respectfully ask the Commissioners to respond themselves to these questions, with or without certification from the Board.⁵

5. In view of recent press reports of studies by this Applicant that indicated extensive further delay in completion of these reactors and large additional construction expenses that may require additional review of the plant,⁶ the ECNP Intervenors ask the Commissioners to take the unusual step of ordering a halt in this licensing proceeding pending an intensive review by the Commissioners, with independent consultants, of the abuses of discovery that are being tested by its Staff as well as the Applicant in this proceeding, and an investigation of the extent to which such procedural abuses are occurring in other NRC proceedings. Such a review is a vital part of the Commissioners' overall procedural review and reorganization

⁵ Authority for this request for Direction by the Commissioners to Certify resides in 10 CFR 2.718(i). Petitioners also cite 10 CFR 2.704(c) with respect to disqualification.

⁶ The [Harrisburg] Patriot, "Berwick Area Nuclear Plant Changes Mullied," February 22, 1980; "Nuclear Power: More Delays Feared in Berwick N-Plant Start-Up," March 10, 1980.

growing out of recommendations of the Kemeny and Rogovin Reports.⁷

6. Petitioner asks the Commission to clarify what constitutes "undue burden" of discovery for citizen intervenors, as the term is used in 10 CFR 2.740(c) on protective orders, and what is the total impact of large numbers of discovery demands, and of vague, unfocused open-ended interrogatories upon an impoverished intervenor's ability to respond adequately.⁸

7. ECNP Petitioner asks that the Commission direct the Board to suspend all matters relating to discovery pending clear definition by the Commission of what constitutes an "acceptable" or "adequate" response to interrogatories beyond and more specific than those guidelines provided by the Board, and complied with by these Intervenors.

8. ECNP Petitioner asks the Commission to suspend entirely and indefinitely this license proceeding for Susquehanna 1 and 2 until such time as the Applicant has completed all proposed construction changes and the NRC Staff has completed its review thereof and has completed its required documents (e.g. SER), with sufficient time for meaningful perusal by the Intervenors.

9. When, and if, this proceeding is to be resumed, the ECNP Intervenors ask that any future Board include a Commissioner as an actively participating member to assure a fair proceeding--another request made early in this proceeding with certification of the request denied by the Board.

⁷As described by Commissioner Bradford, Seventh Annual National Engineer Week Energy Conference, Knoxville, Tennessee, February 21, 1980, p. 2-3

⁸For example, it would take an autobiography to answer questions that require an intervenor to identify all documents and individuals consulted in the formulation of the assumptions behind the basis of a contention.

Background:

The Operating License proceeding for Susquehanna I and 2 was initiated by the Applicant late in the summer of 1978, prior to the accident at Three Mile Island, Unit 2. ECNP, and three other parties, filed timely petitions to intervene, formulated contentions and argued their merits for acceptance in an initial prehearing conference in January, 1979. The Board's Special Prehearing Conference Order of March 6, 1979, consolidated and reworded various contentions; its issuance set forth the Discovery schedule. On March 28, 1979, the accident at Three Mile Island, Unit 2 (TMI), began and is still in progress. The ECNP representatives are the only public-interest litigants in that reactor's still-incomplete Operating License proceeding, as well as participants in three other TMI-related NRC proceedings initiated since the accident began.

The major portion of the ECNP Intervenor's Discovery requests to the NRC Staff were never honored. Staff Counsel James M. Cutchin IV chose to inform Intervenor's that NRC policy of not funding public-interest intervenors precluded supplying documents to those parties. The Applicant was granted a protective order by the Board, thereby depriving these Intervenor's of a substantial portion of their moderate Discovery requests upon the Applicant (See NRC Staff letter to Dr. Johnsrud, June 27, 1979, and Board Memorandum and Order on Scheduling and Discovery Motions, August 24, 1979).

The ECNP Intervenor's, by contrast, were served fewer than 100 Interrogatories from the Staff but fully 2700 by the Applicant upon ECNP's mere dozen contentions. The ECNP Intervenor's timely and in good faith responded to the Staff's questions despite Staff's refusal to supply the documents requested and needed in order to answer more fully. These Intervenor's sought a protective order from the Board under 10 CFR 2.740(c) on the legitimate grounds that the number of questions served by the Applicant was excessively burdensome, oppressive, and unduly expensive for unfunded citizens, who represent the public's interest, who lack staff, research facilities, even secretarial help. Furthermore, the stringent time limits for response to this burdensome number of requests rendered full compliance literally impossible, particularly in view of the voluntary nature of the participation of the ECNP Intervenor's representatives, who have many additional demands and obligations upon their time wholly unrelated to Susquehanna. Since March 28, 1979, foremost among these additional obligations has been response to the continuing needs of our organization's members and the citizens of Pennsylvania who have been

adversely affected by the ongoing TMI accident.

The ECNP Intervenor's have followed the Commission's prescribed methods of petitioning for relief. These efforts have been to no avail. Intervenor's requests for protective orders relative to all interrogatories and subsequently to individual interrogatories have been entirely denied. Requested extensions of time adequate to answer this burdensome number of interrogatories have been denied. The extension finally given by the Board was for only approximately one month.⁹ The Board restricted temporarily the required responses to only those numerous interrogatories pertaining to environmental contentions but in no way reduced the number of Applicant interrogatories relating to ECNP's own contentions. Postponement of Intervenor's responses to safety contentions rested on the inability of the NRC Staff, in the post-TMI period, to complete the Safety Evaluation Report according to the schedule set by Staff and Applicant.

It should be noted here that ECNP Intervenor's, by contrast with this enormous Discovery burden placed upon them, asked of the NRC Staff a mere handful of questions, lacking the time to prepare properly focused interrogatories of either Staff or Applicant as a direct result of the extraordinary discovery demands of the NRC Staff and the Applicant.

Since September, ECNP's representatives' time has been almost entirely consumed, again and again, by repeated required responses to the Board, the Staff, and Applicant in Susquehanna, very nearly to the exclusion of all other obligations--including our ongoing critical participation in the still-incomplete licensing of TMI-2 (appellate review of aircraft crash and radon issues raised and carried forward by Dr. Kepford) as well as the TMI-1 Restart and NRC Generic Rulemaking proceedings to reassess confidence in the availability of radioactive waste disposal and spent fuel storage--issues which are now critical at TMI-2.

Having exhausted all of the appeal remedies provided for by the NRC's Rules of Practice, the ECNP Intervenor's did, in fact, comply fully with the

⁹ Although these Intervenor's did not plead illness or request additional response time because of illness (except added time to file a notarized affidavit to accompany discovery responses), this representative believes the record should reflect that ECNP met the discovery deadline despite my repeated debilitating bouts of flu this winter.

Board's October 30 and December 6, 1979, Orders. On January 18, 1980, ECNP filed timely responses within our limited abilities to research and answer the Applicant's interrogatories. By a motion dated February 4, 1980, the Applicant seeks to prohibit ECNP from participating in litigation of its contentions because the Applicant is dissatisfied with ECNP's responses to its extraordinarily large number of interrogatories. The Applicant here seeks to shift the entire burden of providing information to the Intervenor, (even asking Intervenor to identify the Applicant's own facilities), while having provided virtually no information to the Intervenor throughout this protracted discovery period. Petitioners note that 10 CFR 2.732 unambiguously states that "the applicant or proponent of an order has the burden of proof." With no basis in legal citations, the Applicant summarily rejects most of the ECNP Intervenor's responses and moves the Board to compel ECNP to reanswer those few responses the Applicant deems acceptable. Rather than denying Applicant's motion outright, this Board has scheduled oral argument on the Applicant's motion, with Staff's partial opposition and partial support.

However, the Board's Memorandum of February 26, 1980, appears to shift the purpose of oral argument. Instead of consideration of the adequacy of Intervenor's responses to discovery such that Intervenor will be permitted to litigate their own contentions, the Board now requires consideration of whether these parties now presumed to have defaulted should be given lesser participational rights on their issues than are parties which did not raise the issues in question. Thus, there is no Board decision stating that these Intervenor have defaulted, which ECNP certainly has not. by virtue of their timely and good faith responses of January 18, 1980, in which ECNP followed the guidelines provided by the Board in its August 24th and October 30th memoranda and orders on discovery. Yet Intervenor are now ordered to argue that they have defaulted but should be allowed to litigate their contentions anyway on grounds related to Prairie Island decisions from 1974-75, copies of which have not even been provided to the parties.

From September through December, one of ECNP's Legal Representatives estimates that the Intervenor had less than one full day available to devote solely to actual preparation for presentation of ECNP's cases in the Susquehanna, TMI-1 Restart, and TMI-2 proceedings. The time was eaten up with mandatory

responses relating to Discovery matters precipitated by the Susquehanna Applicant's unreasonable number of Interrogatories, Staff's refusals to respond to Discovery requests, and the Board's decision to withhold from ECNP a protective order that would have prevented this clear form of harassment of intervenors by procedural maneuver. In short, literally hundreds of hours have been consumed in fruitless paperwork, hours diverted from the deadly serious purpose with which ECNP and all other intervenors entered this proceeding.¹⁰ We ask the Commissioners to note especially the explanations of intervenor frustration contained in ECNP Intervenors' November 19, 1979, Response to Licensing Board Memorandum and Order of October 30, 1979.¹¹ Note also that this Board then denies altogether ECNP's November 19, 1979 requests for (1) a protective order; (2) clarification of which NRC Staff Discovery Interrogatories the Board was requiring ECNP to answer for yet a third time; and (3) certification of four questions to the Commissioners.

The result of these events has been a slow but certain procedural crushing and suffocation of these public-interest intervenors under an intolerable burden of hundreds of questions on each of the few issues ECNP has sought to litigate for the protection of its members and the public who will be affected by operation of Susquehanna. Rather than assisting Intervenors by provision of documents necessary for preparation of ECNP's case, the NRC Staff has not only shouldered no discernible burden whatsoever in exploring these contentions but also has refused to comply with Discovery, sending belatedly only a token few documents described as spare copies (NRC Staff letter, November 15, 1979).

¹⁰Intervenors who volunteer their efforts to make a nuclear reactor less hazardous by their participation in administrative agency regulatory proceedings do not have the luxury of a mere 40-hour work week. In fact, 70 and 80 hour work weeks are normal.

¹¹Intervenors invite the Commission to use this document as a prime example of the manner in which the NRC's practices affect public-interest participants, as a Commissioner so vividly described in "The Nuclear Option: Did It Jump or Was It Pushed?" NARUC Annual Regulatory Studies Program, East Lansing, Michigan., August 2, 1979, pp. 3-4.

Rather than showing a concern for resolving the issues raised by Intervenor, the Applicant is evidently attempting to invent new procedural Intervenor traps to prevent full adversarial investigation of these issues in controversy.

Rather than protecting due process of uncounseled citizen intervenors, the Board has thus far used its authority in ways that further the inability of the Intervenor to get on with preparation of their cases, of which the scheduling of March 20th oral argument is only the latest example.¹²

It is difficult for these Intervenor to know how they could have been much more heavily burdened and impeded by the Applicant and NRC licensing procedures so as to prevent ECNP's effective preparation for presentation of the public-interest case on their contentions of significance to the public health and safety. The very fact that the same Legal Representative, in the TMI-2 operating license proceeding, had raised and carried forward both safety and environmental issues that have not yet been resolved by the Commission or the Court is clear evidence that these Intervenor especially have made, and ought to be encouraged by NRC and assisted to further make, positive contributions to the NRC's licensing of nuclear reactors. They should not have every procedural impediment to full and effective participation placed in their way by other parties and officers in the proceeding.

This background description of the history of discovery in this proceeding is meant to clarify the facts leading to the present situation about which these Intervenor have here petitioned the Commissioners for relief.

¹² There was no consideration given to 10 CFR 2.703(b) with regard to the scheduling of March 20th oral argument. ECNP Intervenor's representatives both have long-standing obligations out of state on that date; they were not consulted about the date, as has been the courteous practice of Boards in other proceedings to which ECNP has been a party.

Discussion:

It appears that the "misconduct" for which these ECNP Intervenor may now be subject to crippling "sanctions" is in reality only two in number:

- (1) ECNP, essentially without funds, was unable to meet the demands imposed by the Applicant, Staff and Board in the Susquehanna proceeding; and
- (2) ECNP has shown in the TMI-2 Operating License proceeding how entirely inadequate, indeed farcical, the agency's licensing process really is.

The purpose of the punitive action proposed by Applicant and being given serious enough consideration by the Board to warrant its calling a special prehearing conference appears to be nothing short of rendering impotent Intervenor who have proven their competence at revealing the incompetence of Staff and Licensing Boards in other NRC proceedings. The President's Commission on the Accident at Three Mile Island (Kemeny Commission) concludes, at page 56:

With its present organization, staff, and attitudes, the NRC is unable to fulfill its responsibility for providing an acceptable level of safety for nuclear power plants.

The NRC here is certainly not improving its ability to provide an acceptable level of safety by preventing legitimate public-interest intervenors of demonstrated competence from fully engaging in the Commission's adversarial licensing process. Nor do the Staff or the Board evidence changes for the better in "organization, staff, and attitudes" by the techniques employed in this proceeding to checkmate the Intervenor.

Similarly, the NRC-commissioned Special Inquiry Group (Rogovin Report) on the TMI accident has observed

...unless fundamental changes...are made in the way commercial reactors are built, operated, and regulated in this country, similar accidents--perhaps with the potentially serious consequences to public health and safety that were only narrowly averted at Three Mile Island--are likely to recur. (emphasis in the original)

...It is, lest we forget, an inherently dangerous activity that Congress has authorized the NRC to license. (p. 92)

Over the years the nuclear industry and its regulators have identified what have been considered to be serious safety problems and recommendations whose significance has been underscored by ringing statements to the effect that unless such problems are resolved "promptly," a license should be revoked or the industry shut down. Many of these problems are still outstanding. While we do not undertake to set out deadlines, we do believe that the congressional oversight committees should hold the NRC accountable with respect to such issues. (p. 93)

In our view, if a firm commitment is not made promptly to bring about these changes, we will be exposing the public to a needlessly high level of risk. (p. 92)

We have found that there is really no existing organization within the agency that has either the responsibility for or the capability of monitoring the effectiveness of the regulatory staff and of making recommendations for actions needed to establish and maintain a safety review process of the requisite level of quality. It is a paradox that while the agency has long insisted on quality assurance programs for industry entities associated with nuclear powerplants, it has never imposed a similar requirement for its own regulatory staff or for the safety review and inspection process. With the vast amount of unsupervised discretion that exists in the process, it is not surprising that senior managers readily accept the status quo and that few, if any, have spoken out and demanded agencywide organizational reforms. The momentum for that must come from outside of the staff..

Similarly, in other fields project management on a system life cycle basis has been a way of life in directing development, testing, and operation of complex vehicles, facilities, and equipment. Yet relatively little of this systems management philosophy exists at the NRC. Instead, the NRC's role has been oriented more toward prescriptive licensing of a utility--putting a "Good Housekeeping Seal of Approval" on a proposed product--as distinguished from regulation which must include careful monitoring and control of hazards during the entire life of a facility. (SIG Report, p. 118).

Petitioners state that corrective actions, as are vigorously recommended by both the Kemeny and Rogovin studies, must begin with those in charge, namely the Commissioners. In the past, it has been the Licensing and Appeal Boards that have implemented Commission policies--the policies which have gotten us into the regulatory situation so strongly condemned above. There has been no evidence post-TMI that the Licensing Board in this proceeding has initiated the slightest change toward greater safety or any other reform to lessen that "needlessly high level of risk." Penalizing public-spirited, volunteer citizen intervenors for not having the comparatively infinite resources of the Applicant, Staff and Board only confirms the findings of the President's Commission and the NRC Special Inquiry Group. Silencing critics via procedural harrassment will not improve the quality of NRC licensing proceedings nor will it improve public safety.

In the fifty weeks since the TMI accident began, the Board in the Susquehanna proceeding has shown no capacity to undertake the reforms necessary for compliance with the Atomic Energy Act's mandate to protect the public health and safety. It is for this reason that these Petitioners have taken this appeal directly to those who have the ultimate decision-making authority. Herein lies an unparalleled opportunity for affirmative action, in the public interest by the Commissioners.

In the 1971 Calvert Cliffs decision, the Court has plainly said:

It is, moreover, unrealistic to assume that there will always be an intervenor with the information, energy and money required to challenge a staff recommendation which ignores environmental costs. NEPA establishes environmental protection as an integral part of the Atomic Energy [now Nuclear Regulatory] Commission's basic mandate. The primary responsibility for fulfilling that mandate lies with the Commission. Its responsibility is not simply to sit back, like an umpire, and resolve adversary contentions at the hearing stage. Rather, it must itself take the initiative of considering environmental values at every distinctive and comprehensive stage of the process beyond the staff's evaluation and recommendation.

Furthermore, the accompanying footnote states:

In recent years, the courts have become increasingly strict in requiring that federal agencies live up to their mandates to consider the public interest. They have become increasingly impatient with agencies which attempt to avoid or dilute their statutorily imposed role as protectors of public interest values beyond the narrow concerns of industries being regulated. (note 21)

And in York Committee for a Safe Environment, 1975, the Court states:

We note, however, that it would be unrealistic to expect public interest litigants to underwrite the expense of mounting the kind of preparation and presentation of evidence that is ordinarily required in this type of case. (note 13)

The words of the Court are clear: the obligation to conduct full and fair proceedings lies squarely with the Commission. Public-interest litigants cannot be expected by the agency to have the capabilities of the more favored parties, but neither has the agency the authority to penalize them for not having those capabilities by Board rulings that effectively exclude their active, meaningful participation in the Commission's adversarial proceedings.

Thus, rephrased, the questions posed here to these Commissioners are:

- (1) Does any party to a licensing proceeding have the unlimited right to arbitrarily demand the total, complete dedication of all of the resources in time, energy, and personnel of a second party, even to the point of denying the second party the opportunity to prepare and present its own case?
- (2) Do the Administrative Procedures Act of 1946, as amended, the Atomic Energy Act of 1954, as amended, the National Environmental Policy Act of 1969, as amended, and judicial decisions contain any provisions authorizing the proponent of an order in a licensing proceeding to totally and completely consume the resources in time, manpower, and energy of an intervenor in the proceeding for the purpose of preventing the effective participation of that intervenor in that proceeding?
- (3) Do the above laws create a hierarchy of "rights" in a licensing proceeding which permit one party to dictate the extent of participation of another party in the proceeding?
- (4) If the Applicant were to prevail in this motion, would not the precedent set allow any well-funded party to totally thwart any intervenor, simply by:
 - (a) asking a large enough number of interrogatories;
 - (b) declaring the answers are inadequate;
 - (c) demanding re-answers, until:
 - (d) the Intervenor capitulates, since the intervenor has no defenses?

Here, the Applicant proposes to bar ECNP from presenting evidence because we lacked the resources to meet some wholly unspecified standard set up, but never defined, post facto by the proponent of the licensing of Susquehanna. There is not a single legal citation in the Applicant's motion for a very good reason: there is no legal justification for prohibiting the ECNP and other Intervenor from litigation of their contentions.

A Board ruling that favored Applicant's Motion to prohibit litigation by these Intervenorers would turn Calvert Cliffs, York Committed for a Safe Environment, the Atomic Energy Act, NEPA, and the Administrative Procedures Act on their collective heads. The Motion should be denied. The Commission should so direct its Board.

Beyond denial of this Applicant's Motion, the Commission has an obligation through its Staff and Licensing Board to make whole the participation in this proceeding of these Intervenorers whose litigation preparational opportunities have been effectively foreclosed during these many months of procedural wranglings. Since the Board's August 24, 1979, Memorandum and Order on Discovery and Scheduling, these ECNP Intervenorers have been deprived of necessary discovery materials and research time for their case. The Commissioners are therefore respectfully asked to direct their Board in this proceeding to grant these Intervenorers and others similarly affected a full six months of preparation time plus discovery with no other obligations, such time to commence following whatever period of suspension of these proceedings the Commission may deem appropriate.

One last observation: this emergency communication is more repetitive, less clear, less elegantly composed and legally incisive than Petitioners wanted to file. Any deficiencies herein are a consequence of those very shortages and constraints under which we public-interest intervenors must labor. Therefore, Petitioner also requests the Commissioners to bear those shortcomings in mind in their consideration of this request for emergency action.

Respectfully submitted,

Judith H. Johnsrud

Dr. Judith H. Johnsrud
Co-Director
Environmental Coalition
on Nuclear Power
433 Orlando Avenue
State College, Pa. 16801

Dated this 14th day
of March, 1980.

CERTIFICATE OF SERVICE

I certify that copies of REQUEST TO THE NRC COMMISSIONERS FOR EXPEDITED CONSIDERATION OF ACTIONS OF AN ATOMIC SAFETY AND LICENSING BOARD AND OTHER MATTERS have been served on the following parties by deposit in the U.S. Mail, first class, postage paid, this 15th day of March, 1980.

Judith H. Johnsrud
Judith H. Johnsrud
Co-Director, ECNP

Charles Bechhoefer, Esquire
Chairman, ASLB Panel
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Washington, D.C. 20555

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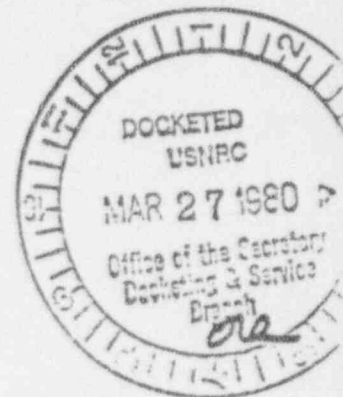
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ATTACHMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Charles Bechhoefer, Chairman
Dr. Oscar H. Paris
Glenn O. Bright



In the Matter of

PENNSYLVANIA POWER & LIGHT COMPANY
and
ALLEGHENY ELECTRIC COOPERATIVE, INC.
(Susquehanna Steam Electric Station,
Units 1 and 2)

Docket Nos. 50-387
50-388

MEMORANDUM
(March 27, 1980)

At the prehearing conference on March 20-21, 1980, the Board denied the Applicants' motions against ECNP and SEA, with the understanding that ECNP and SEA would supplement their answers to the Applicants' and Staff's interrogatories by May 1, 1980 (Tr. 552-53, 585). We indicated that we would delineate the areas in which further answers were warranted. We do so here.

1. With respect to an assessment of releases of Radon-222, within the meaning of Contention 1A, we stated that, inasmuch as the Applicants had not furnished any analysis of Radon releases other than an adoption of the figures in Table S-3 (see ER, §5.9), the answers to interrogatories on this subject previously furnished by ECNP and SEA were adequate, except that no analysis of the Staff's assessment of Radon releases, as included in the DES at

§4.5.5 (pp. 4-25 through 4-28), has yet been supplied by either ECNP or SEA (Tr. 510-511). Consistent with the supplementation requirements of 10 CFR §2.740(e), ECNP and SEA (to the extent they are able to do so) must answer the Applicants' interrogatories 1A-1 through 1A-5 and the Staff's interrogatories S-1.1 through S-1.11, using the DES assessment as a basis for answers. If particularized information has not been developed, at least a generalized basis for the contention should be provided (Tr. 513).

2. In responding to questions on Contention 1B, ECNP has identified Technetium-99 as an isotope the health effects of which it believes have not been adequately assessed. Because Table S-3 of 10 CFR §51.20 has been amended to delete any quantity figure for Tc-99 releases, we indicated that Contention 1 should be amended to transfer Tc-99 from part 1B (challenge to health effects of releases) to part 1A (challenge both to health effects and quantities released). Neither the Applicants nor Staff have provided any assessment of the releases of Tc-99; until an assessment is provided, ECNP and SEA need not indicate why the assessments of Tc-99 releases are erroneous. (If they have developed information on Tc-99, they should of course identify it, but a failure at this time to have developed such information will not be considered by us as evidence of default.) Presumably the FES will include an assessment of the quantities and health effects of Tc-99 releases. If so, discovery on that subject could then

proceed on the schedule outlined in our March 6, 1979 Prehearing Conference Order (LBP-79-6, 9 NRC 291, 327 (schedule items 6 and 7)).

3. If ECNP or SEA have as of May 1, 1980 identified any isotopes other than Rn-222 or Tc-99 the health effects of which they wish to have considered, they should identify those isotopes and answer the Applicants' interrogatories 1B-1 through 1B-4 and the Staff's interrogatories S-1.12 through S-1.15. (To the extent that ECNP's answers to the Staff's interrogatories S-1.11 through S-1.14, including the 50-year limitation, remain valid, ECNP may so state.)

4. Certain of ECNP's answers to the Applicants' interrogatories on Contention 2 were based on an incorrect assumption as to the relevance of Table S-3 to this contention (Tr. 525-26). ECNP should answer Applicants' interrogatory 2-1 using §5.2 of the Environmental Report as the source of information to be analyzed (Tr. 530-31). (ECNP may, of course, identify any errors which it believes are present in §5.2.) ECNP should also update, if possible, its answers to interrogatories 2-2 (particularly with respect to the magnitude of health effects) and 2-9. ECNP need not answer the Staff's interrogatories on Contention 2, inasmuch as they are limited to the health effects of releases not included in ECNP's original contention and ECNP has indicated it has no interest in litigating the health effects of Cs-137, Co-60, and

chlorine.

5. In response to Applicants' interrogatory 3-1, ECNP should indicate whether it accepts the fuel requirements stated in §5.7.3.1 of the ER (copies of which the Board provided to the parties at the conference) (Tr. 531-533). If it accepts that amount, no further answer is required. In response to interrogatory 3-2, ECNP, if it wishes to rely on the results of the NURE program, should indicate whether it will accept those results. ECNP should also provide more specificity in its response to interrogatory 3-3, if it can do so (see Tr. 547). In response to interrogatory 3-6, ECNP should provide the missing element of its formula, by indicating that it will accept the number for a particular date (any date is adequate) as the starting point for calculations. For interrogatory 3-7, ECNP need not perform extensive research but might wish to define a generalized basis for its claim of higher fuel prices. To the extent it has developed particularized calculations, it should furnish such information.

6. With respect to Contention 4, ECNP's answer to Applicants' interrogatory 4B-1 appears adequate if one takes into account ECNP's February 11, 1980 response to the Applicants' February 4, 1980 motion. ECNP should affirm that it wishes to include this response as part of its answer. In response to interrogatory 4B-2, ECNP should indicate whether it will accept

the listing of facilities in Table 1.1-8 of the ER (a copy of which was provided to it by the Board at the prehearing conference) (Tr. 532, 533-34).

7. If any party has answered any interrogatory by stating that it has no information or that it is developing information, it must supplement those answers to reflect any new information it acquires. As but one example, ECNP has answered interrogatories on its Contention 18 in this manner. The May 1 responses should reflect new information gained as of that date.

8. The Board also declined to dismiss CAND from the proceeding but limited its contentions to those as to which it is the sole sponsor. By May 1, CAND must answer all interrogatories to the extent it has information to do so, relating to the environmental contentions it is solely sponsoring — i.e., Contentions 16 and 17 and the portion of Contention 2 concerning releases of Cesium-137, Cobalt-60, and chlorine (Tr. 706-707, 709-10).

At a later date, the Board will issue a prehearing conference order explaining the reasons for our rulings reflected above (as well as setting forth additional rulings and other matters discussed at the conference).

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Oscar H. Paris

Dr. Oscar H. Paris, Member

Charles Bechhoefer

Charles Bechhoefer, Chairman

Mr. Bright, who is recovering from surgery following an accident, did not participate in the consideration or disposition of the matters discussed in this Memorandum.

Dated at Bethesda, Maryland,
this 27th day of March, 1980.

ATTACHMENT 3

release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

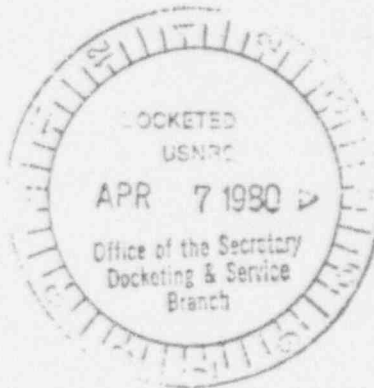
In the Matter of

PENNSYLVANIA POWER AND LIGHT CO.
ALLEGHENY ELECTRIC COOPERATIVE, INC.

(Susquehanna Steam Electric Station,
Units 1 and 2)

Docket Nos. 50-387
50-388

NRC STAFF'S ANSWER IN OPPOSITION TO ECNP'S PETITION
FOR COMMISSION REVIEW OF LICENSING BOARD'S PREHEARING RULINGS



James M. Cutchin IV
Counsel for NRC Staff

April 4, 1980

April 4, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
PENNSYLVANIA POWER AND LIGHT CO.)	Docket Nos. 50-387
ALLEGHENY ELECTRIC COOPERATIVE, INC.)	50-388
)	
(Susquehanna Steam Electric Station,)	
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NRC STAFF'S ANSWER IN OPPOSITION TO ECNP'S PETITION
FOR COMMISSION REVIEW OF LICENSING BOARD'S PREHEARING RULINGS

I. INTRODUCTION

On March 15, 1980 Intervenor Environmental Coalition on Nuclear Power (ECNP) served the NRC Staff with a document entitled "Request to the NRC Commissioners for Expedited Consideration of Actions of an Atomic Safety and Licensing Board and Other Matters." The Licensing Board's actions of which Commission review is sought are: (1) scheduling and discovery rulings made by the Licensing Board in the currently ongoing prehearing phase of this operating license proceeding, (2) the Licensing Board's refusal to certify to the Commission questions related to the Licensing Board's discovery rulings and (3) the Licensing Board's refusal to certify to the Commission ECNP's request that a Commissioner sit as a member of the Licensing Board.^{1/} For the reasons set forth below the Staff opposes the petition for review.

^{1/}The Licensing Board's actions mediating the claims of the parties on these issues are set forth in the Board's "Memorandum and Order on Scheduling and Discovery Motions (I)" of August 24, 1979, "Memorandum and Order on Discovery Motions (II)" of October 30, 1979 (LBP-79-31, 10 NRC 597) and "Order Denying Requests of ECNP" of December 6, 1979.

II. BACKGROUND

In this operating license proceeding the Staff and the Applicants propounded a series of interrogatories to Intervenor ECNP.^{2/} As allowed by 10 CFR 2.740 of the Commission's Rules of Practice, these interrogatories sought information related to contentions admitted to the proceeding by the Licensing Board. ECNP answered some but failed to fully answer many of the interrogatories. Following motions by the Applicants and the Staff to compel proper answers to their interrogatories, the Licensing Board ordered ECNP to respond to the discovery requests of Applicants and the Staff within fourteen (14) days of service of its order.^{3/} Rather than providing answers or specific objections as directed, ECNP filed a response to the Licensing Board's Order which provided some answers but generally objected to most of the interrogatories.^{4/} Applicants and Staff filed motions seeking dismissal of ECNP and its contentions from the proceeding for its failure to obey the Licensing Board's discovery order. The Licensing Board declined to dismiss ECNP and its contentions from the proceeding, but granted ECNP (and the other intervenors) relief from certain of the discovery obligations imposed earlier and extended the time for intervenors to respond to December 14, 1979.^{5/}

^{2/} "NRC Staff's First Round Discovery Requests of the Environmental Coalition on Nuclear Power (ECNP)" dated May 21, 1979 and "Applicants' First Set of Interrogatories to Intervenor ECNP" dated May 25, 1979.

^{3/} "Memorandum and Order on Scheduling and Discovery Motions (I)" dated August 24, 1979. (Slip opinion at 13 and 15).

^{4/} "Responses of ECNP Intervenors to Board Memorandum and Order Compelling Intervenors to Answer Applicant and Staff Interrogatories" dated September 17, 1979.

^{5/} "Memorandum and Order on Discovery Motions (II) dated October 30, 1979," LBP-79-31, 10 NRC 597, 605-6.

However, the Licensing Board stressed the need for the intervenors to respond in a timely fashion to their remaining discovery obligations.^{6/} The Licensing Board also advised the intervenors of the potential consequences of their continued failure to fulfill their discovery obligations.^{7/}

In response to that order, ECNP filed a document asking the Board to certify to the Commission the questions that are the subject of the instant ECNP petition and again sought a protective order.^{8/} The Licensing Board denied ECNP's requests and extended the date for the intervenors' responses to their outstanding discovery obligations to January 18, 1980.^{9/}

On that date ECNP filed a document containing insufficient answers to the outstanding interrogatories.^{10/} Following receipt of this document the Applicants again moved the Licensing Board to impose sanctions on ECNP for its failure to obey the Licensing Board's discovery orders.

The Licensing Board heard oral argument on the motion and related Board questions on March 20 and 21, 1980. The Board declined to order the requested sanctions,

^{6/} Id. at 602.

^{7/} Id. at 606-7.

^{8/} "Intervenor's Response to Licensing Board Memorandum and Order of October 30, 1979" dated November 19, 1979.

^{9/} "Order Denying Requests of ECNP" dated December 6, 1979.

^{10/} "ECNP's Responses to Board's Memorandum and Order on Discovery Motions (II)" dated January 18, 1980.

granted ECNP (and other intervenors) additional relief from discovery obligations, and extended to May 1, 1980, the date for intervenors' answers to interrogatories.^{11/}

Prior to the Board's ruling, ECNP on March 15, 1980, filed the present petition for review by the Commission. In this petition ECNP makes nine requests for relief.^{12/} In eight of its requests ECNP seeks relief either from scheduling and discovery rulings made by the Licensing Board in the currently ongoing pre-hearing phase of this operating license proceeding or from the Licensing Board's refusal to certify questions related to its discovery rulings. In the ninth request ECNP appeals the Licensing Board's refusal to certify its request that a Commissioner sit as a member of the Licensing Board.

III. ARGUMENT

There is no provision in the Commission's Rules of Practice for a direct appeal to the Commission of a Licensing Board's interlocutory rulings. As here relevant, the Commission's Rules of Practice forbid appeal of the interlocutory rulings of Licensing Boards. 10 C.F.R. 2.730(f) states: "No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer."^{13/}

^{11/} "Memorandum" dated March 27, 1980.

^{12/} ECNP Petition at 3-5.

^{13/} See 10 C.F.R. 2.730(f). See Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-563, 10 NRC 449 (1979); Duke Power Company (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-433, 6 NRC 469 (1977); Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-370, 5 NRC 131 (1977), and cases there cited. But see 10 C.F.R. 2.714a.

Moreover, although it is clear that the Commission has the power to undertake interlocutory review of any matter in any proceeding before any Board at any time,^{14/} the Commission has delegated to the Appeal Board the Commission's authority to review a Licensing Board's rulings and actions in the first instance.^{15/} Where no attempt has been made to obtain review by the Appeal Board, such an appeal should be dismissed for failure to exhaust remedies below.^{16/}

In appropriate circumstances attempts to obtain interlocutory review have been treated as requests that a Licensing Board be directed to certify questions for interlocutory appellate review.^{17/} However, this is not an instance where discretionary interlocutory review would be granted. As recently as November 20, 1979, the standard for directed certification of interlocutory rulings was reiterated. Puget Sound Power & Light Co.^{18/} states:

^{14/} See United States Energy Research and Development Administration, Project Management Corporation, Tennessee Valley Authority (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 74-76 (1976); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516, 517 (1977), affirmed New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978). See also, Florida Power and Light Company (St. Lucie Plant, Units Nos. 1 and 2), CLI-77-15, 5 NRC 1324, 1325 (1977).

^{15/} See 10 C.F.R. 2.785(a)(1); Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-56, 4 AEC 930, 931 (1972). But see: Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-79-8, 10 NRC 141, 147 (1979) for an exception not here applicable. See also: Interim Statement of Policy and Procedure, 44 Fed. Reg. 58559 (1979).

^{16/} See 10 C.F.R. 2.786(b)(4)(iii) which states: "A petition for review [by the Commission] will not be granted to the extent it relies on matters that could have been but were not raised before the Atomic Safety and Licensing Appeal Board." Cf. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-77-25, 6 NRC 535, 537 (1977).

^{17/} See 10 C.F.R. 2.718(i); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478 (1975).

^{18/} Puget Sound Power and Light Company, et al. (Skagit Nuclear Power Project, Units 1 and 2), ALAB-572, 10 NRC ___, slip op. p. 2 (1979).

Almost without exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. (Citing Public Service Company of Indiana (Marble Hill, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).)

Since Marble Hill was decided, discretionary interlocutory review has been granted only sparingly.^{19/}

A number of decisions shape the parameters of the concept of discretionary interlocutory review. Directed certification "is to be resorted to only in exceptional circumstances."^{20/} Objections to procedures for handling prehearing motions do not present a proper subject for directed certification.^{21/} Certification will not be directed to review rulings on interrogatories.^{22/} Directed certification will not be granted to review a scheduling controversy where the controversy does not bring to the fore any limitations imposed by law on the Licensing Board's jurisdiction or authority and where no "truly exceptional situation" is involved.^{23/}

^{19/} Id. at 3, n. 5.

^{20/} Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 606 (1977).

^{21/} Puerto Rico Water Resources Authority (North Coast Nuclear Plant, Unit 1), ALAB-361, 4 NRC 625 (1976).

^{22/} Long Island Lighting and Power Company (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-318, 3 NRC 186 (1976).

^{23/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-295, 2 NRC 668 (1975).

ECNP correctly characterizes its requests as related to procedural aspects of the proceeding.^{24/} The rulings appealed from are interlocutory. As stated in Toledo Edison Co.: ^{25/}

The test of "finality" for appeal purposes before this agency (as in the courts) is essentially a practical one. As a general matter, a licensing board's action is final for appellate purposes where it either disposes of at least a major segment of the case or terminates a party's right to participate; rulings which do neither are interlocutory.

Here the scheduling and discovery rulings do not dispose of any segment of the case and do not terminate any party's right to participate. Any alleged prejudicial errors stemming from, among other things, rulings on discovery and schedules are reviewable on exceptions to the Licensing Board's initial decision at the end of the proceeding.^{26/}

Nor does the refusal of the Licensing Board to certify ECNP's request that a Commissioner sit on the Licensing Board merit review. The Commission has not elected to alter the normal makeup of the Licensing Board to include a Commissioner. ECNP's baseless allegations do not suggest that the standards for disqualification of a Board member have been met.^{27/}

^{24/} ECNP Petition at 1.

^{25/} Toledo Edison Company (Davis Besse Power Station), ALAB-300, 2 NRC 752, 758 (1975).

^{26/} See: Northern Indiana Public Service Company (Bailly Generating Station, Nuclear-1), ALAB-224, 8 AEC 244 (1974) and ALAB-302, 2 NRC 858 (1975).

^{27/} ECNP's citation of 10 C.F.R. 2.704(c) in footnote 5 at page 4 of its request indicates its awareness of the proper procedure and support required when disqualification of Licensing Board members is sought.

IV. CONCLUSION

For the reasons discussed above, ECNP's interlocutory appeal should be denied. Should the Commission nevertheless grant the appeal, the Staff requests that it be allowed the opportunity to address the merits of the individual requests for relief made by ECNP as it would be upon the grant of review by the Commission of Appeal Board decisions and actions.^{28/}

Respectfully submitted,



James M. Cutchin IV
Counsel for NRC Staff

Dated at Bethesda, Maryland,
this 4th day of April, 1980.

^{28/} See 10 C.F.R. 2.786(b)(6).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

PENNSYLVANIA POWER AND LIGHT CO.
ALLEGHENY ELECTRIC COOPERATIVE, INC.

(Susquehanna Steam Electric Station,
Units 1 and 2)

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Docket Nos. 50-387
50-388

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER IN OPPOSITION TO ECNP'S PETITION FOR COMMISSION REVIEW OF LICENSING BOARD'S PREHEARING RULINGS" 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 internal mail system, this 4th day of April, 1980:

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Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, DC 20555


James M. Cutchin IV
Counsel for NRC Staff

ATTACHMENT 4

release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of)	
)	
PENNSYLVANIA POWER & LIGHT COMPANY)	Docket Nos. 50-387
and)	50-388
ALLEGHENY ELECTRIC COOPERATIVE, INC.)	
)	
(Susquehanna Steam Electric Station,)	
Units 1 and 2))	

APPLICANTS' RESPONSE TO ENVIRONMENTAL COALITION
ON NUCLEAR POWER'S "REQUEST TO THE NRC COMMISSIONERS
FOR EXPEDITED CONSIDERATION OF ACTIONS OF AN
ATOMIC SAFETY AND LICENSING BOARD AND OTHER MATTERS"

In a filing dated March 14, 1980, the Environmental Coalition on Nuclear Power (ECNP) requested that the Commissioners take certain immediate actions relating to the on-going operating license hearing involving the Susquehanna units. These actions largely concern the discovery process in the Susquehanna proceeding, but also ask the Commission to suspend the licensing proceeding and to place one of the Commissioners on the Licensing Board. Applicants respectfully request that ECNP's request be denied.

The ECNP request as it concerns discovery matters is clearly interlocutory. While the Commission has the authority to undertake interlocutory review at any time, we respectfully submit that such review ought not to be exercised in this case. We agree with, and adopt, the legal analysis of this matter

set forth in the NRC Staff's Answer to the ECNP Petition, dated April 4, 1980.

A background statement is, nonetheless, appropriate and helps to place ECNP's allegations in perspective. The Susquehanna operating license proceeding commenced on August 8, 1978, with the publication of the notice of hearing. ECNP, an experienced intervenor in NRC proceedings,^{1/} filed a petition to intervene on September 5, 1978, and on January 15, 1979, submitted an amended petition including ten contentions, some with eight or more subparts. Following a January 29-31, 1979 special prehearing conference, the Licensing Board admitted 18 contentions, many with multiple subparts, and established a schedule for the proceeding which called for

1/ECNP has described its experience as follows in an April 3, 1980 submittal in the Three Mile Island, Unit 1 Restart proceeding:

"These [ECNP] Intervenors have been active, and effective, parties to Nuclear Regulatory Commission, as well as Atomic Energy Commission proceedings since 1972. ECNP has participated in license proceedings for Three Mile Island, Units 1 and 2; Peach Bottom, Units 2 and 3; Fulton, Units 1 and 2; Limerick, Units 1 and 2; Newbold Island, Units 1 and 2; and Susquehanna, Units 1 and 2; ECNP has participated in the Commission's Generic Rulemaking proceedings on GESMO, Table S-3, ECCS, and the current Reassessment of Confidence in Radioactive Waste Disposal.

ECNP has also recently petitioned for a hearing on the proposed changes in Technical Specifications for Three Mile Island, Unit 2.

interrogatories to be submitted on May 25, 1979 and responses on June 29, 1979. See Special Prehearing Conference Order, LBP-79-6, 9 NRC 291 (March 6, 1979).

On May 25, 1979, Applicants filed interrogatories with each of the four intervenors. These consisted of about 150 specific interrogatories covering the 18 contentions, and a series of general interrogatories intended to elicit the basis for answers to specific interrogatories. (For example, if the answer to a specific interrogatory was based on a document, a general interrogatory asked that the document be identified). ECNP filed discovery requests on Applicants, and on June 29, 1979 Applicants provided responses including written answers and copies of a number of documents. In addition, Applicants made available for ECNP's inspection many thousands of pages of internal company files and documents.^{2/}

ECNP did not answer Applicants' discovery but rather sought a protective order from the Licensing Board. On August 24, 1979, the Licensing Board in its Memorandum and Order on Scheduling and Discovery Motions, denied ECNP's request for a protective order, granted Applicants' motion to compel answers to their discovery requests, and directed ECNP to file answers to interrogatories or a particularized motion for protective order within 14 days. On September 17, 1979, ECNP responded

^{2/}During the seven months that this material has been available, ECNP has not reviewed or examined it.

by asking the Licensing Board to postpone ECNP's obligation to respond to discovery until September 15, 1980, and observed that ECNP's time had been absorbed by "responding to calls for information, assistance and assurance from victims of the TMI-2 accident". In light of ECNP's failure to comply with the Licensing Board's August 24, 1979 Order, Applicants moved to dismiss ECNP.^{3/} A similar motion was filed by the Staff. ECNP's October 22, 1979 answer to the motion objected to "the enormity and viciousness of the Applicants' demands."^{4/}

The Licensing Board then issued its October 30, 1979 Memorandum and Order on Discovery Motions, LBP-79-31, 10 NRC 597, in which it stated that "it is absolutely necessary that the intervenors respond in a timely fashion to the discovery obligations which still remain". 10 NRC at 602 (original emphasis). The Board then extended until December 14, 1979, the time for ECNP to file answers, suspended discovery on safety issues, and ruled that an intervenor need only respond to interrogatories on contentions which it sponsored. The

3/In its motion, Applicants stated that they would not object to a further extension of about two weeks to permit ECNP to answer Applicants' interrogatories.

4/This characterization may be compared with the response to Applicants' discovery request by another intervenor, Colleen Marsh et al., a group with no prior NRC experience, which filed 20 pages of long-hand responses to Applicants' interrogatories. Applicants have accepted these responses and have sought no additional discovery from this group.

effect of the latter two rulings was to reduce from 18 to 5 the number of contentions on which ECNP was obligated to answer interrogatories.

ECNP's response to the October 30 Order, filed on November 19, 1979, was to continue its refusal to provide answers, request another protective order, and to ask that the Licensing Board be disbanded "for gross incompetence". ECNP Response to Discovery Memo II, at 12. On December 6, 1979, the Licensing Board issued another order noting that ECNP's filing was "disrespectful in tone, inaccurate, and misleading in content and frivolous in all respects", Order at 2, but nonetheless extending the time for ECNP's discovery responses to January 18, 1980.

On January 18, 1980, ECNP filed its first substantive response to Applicants' May 25, 1979 discovery, by providing answers to interrogatories on two of its five contentions. In view of the lack of adequate responses to the remaining interrogatories, Applicants on February 4, 1980 filed a motion to limit ECNP's participation in the evidentiary hearing as to those contentions on which ECNP did not file adequate discovery responses. ECNP's February 19, 1980 response to this motion among other things stated that its ability to respond was affected by the "press of many other obligations."

Finally, at the March 20-21, 1980 prehearing conference (as reflected in the Licensing Board's March 27, 1980 Memorandum), the Licensing Board denied Applicants' motion to limit ECNP's participation with the understanding that ECNP would file additional discovery responses by May 1, 1980, ten months after the date on which responses were initially due.

This chronology clearly demonstrates that the Licensing Board has been rather lenient in imposing on ECNP the responsibilities which are associated with participation in NRC proceedings. It also demonstrates that ECNP's filing with the Commission has not fairly characterized the nature of the discovery process in this proceeding or the Licensing Board's responses to ECNP's complaints. ECNP has not shown anything to indicate that the Licensing Board's actions

either (a) threaten[] the party adversely affected with immediate and serious irreparable harm which could not be remedied by a later appeal, or (b) affect[] the basic structure of the proceeding in a pervasive or unusual manner.

Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588 (April 1, 1980) (Slip op. at 8-9). ECNP has shown no reason why the extraordinary, interlocutory relief which it seeks is appropriate. The Licensing Board's orders of August 24, 1979, October 30, 1979, December 6, 1979, and March 27, 1980 have significantly reduced the magnitude of ECNP's discovery obligations and have substantially extended

the time schedules. ECNP's requests on this score, even if they were meritorious, are now moot.

As for ECNP's request that the Licensing Board be re-constituted to include a Commissioner, we see no merit in this suggestion. The proceeding has been underway for more than a year and a half. To remove one of the members of the Licensing Board would serve little purpose save delay of this proceeding. To the extent that ECNP's request is based on its unsubstantiated allegations concerning conduct by the Licensing Board, ECNP is aware of the procedures which should be followed in seeking the disqualification of Licensing Board members.^{5/} ECNP has not sought to comply with those procedures.

Finally, we address ECNP's request for a suspension of the licensing proceedings

until such time as the Applicant has completed all proposed construction changes and the NRC Staff has completed its review thereof and has completed its required documents (e.g., SER), with sufficient time for meaningful persual by the Intervenors.

ECNP Request to the NRC Commissioners at 5. This request is totally inconsistent with Commission regulations, practice and decisions. See, e.g. Wisconsin Electric Power Co.

^{5/}See ECNP's citation to 10 CFR §2.704(c). Request to the NRC Commissioners, at 4, fn. 5.


(Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928 (1974). Nor does it make sense to stop the hearing on environmental issues because safety review is not complete.

For all the reasons set forth above, the Commission should reject ECNP's requests.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By


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Dated: April 10, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of)	
)	
PENNSYLVANIA POWER & LIGHT COMPANY)	Docket Nos. 50-387
and)	50-388
ALLEGHENY ELECTRIC COOPERATIVE, INC.)	
)	
(Susquehanna Steam Electric Station,)	
Units 1 and 2))	

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Response to Environmental Coalition on Nuclear Power's "Request to the NRC Commissioners for Expedited Consideration of Actions of an Atomic Safety and Licensing Board and Other Matters" were served by deposit in the U. S. Mail, first class, postage prepaid, this 10th day of April, 1980, to all those on the attached Service List.


Jay E. Silberg

Dated: April 10, 1980

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

the Matter of

PENNSYLVANIA POWER & LIGHT COMPANY
and
LEGHENY ELECTRIC COOPERATIVE, INC.
Susquehanna Steam Electric Station,
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)
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