

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

ATOMIC SAFETY AND LICENSING BOARD

\*82 JUL 28 A9 32

Before Administrative Judges:  
Morton B. Margulies, Chairman  
Dr. Richard F. Cole  
Dr. Dixon Callihan

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

SERVED JUL 28 1982

In the Matter of } Docket Nos. STN 50-454 OL  
COMMONWEALTH EDISON COMPANY } STN 50-455 OL  
(Byron Station, Units 1 and 2) } July 26, 1982

MEMORANDUM AND ORDER

The Rockford League of Women Voters (League) on July 3, 1982, filed a motion for a protective order staying applicant's second round of discovery, first sought from the League in October 1981, and NRC staff's first round of discovery that initially had been served upon the League in September and October 1981. The parties had renewed their requests for discovery in June 1982, after the League was readmitted to the proceeding as an intervenor on June 17, 1982, pursuant to Appeal Board order in ALAB-678. Responses to the discovery were requested to be made in July 1982.

By the same motion the League seeks a protective order to prevent it from being adversely affected in any way by a pending motion of applicant

for summary disposition of contentions of intervenor, DAARE/SAFE or any discovery which may be pursued by the other parties, until the Licensing Board rules on which contentions the League will be permitted to litigate and a discovery and hearing schedule is set.

At the time of the filing of the League motion on July 3, 1982, there were pending before the Licensing Board motions of applicant and staff, filed June 4 and June 6, 1982, respectively, seeking summary disposition of contentions of DAARE/SAFE. DAARE/SAFE's answers to the motions were due July 15, 1982. The only ongoing matter relating to discovery not involving the League was the staff had agreed on a voluntary basis to permit two of its members to be deposed by DAARE/SAFE on July 7, 1982, pertaining to a part of a contention of the latter.

To place the subject motion of the League in perspective, it should be stated that the League's participation in the proceeding as an intervenor began in August 1979. On October 27, 1981, the League was dismissed from the proceeding by the Licensing Board for failing to provide discovery, LBP-81-52, 14 NRC 901. In ALAB-678, decided June 17, 1982 the Appeal Board found that the sanction imposed was too severe and readmitted the League (Slip op. at 34). In so doing, it limited the number of contentions the League could litigate "to the number the Licensing Board concludes it can comfortably decide on the merits without unjustifiably delaying operation of the Byron facility." The Appeal Board indicated a possible figure of fewer than 10 contentions, down from the 114 that were admitted on December 19, 1980 (Slip op. at 42 n. 37). The Appeal Board ordered intervenor to answer the interrogatories, to which it had failed to respond, no later than June 24, 1982, with the

Licensing Board to strike any contention for which an interrogatory was not fully answered. The League was to rank its contentions for the Licensing Board, which was then to limit them based upon its understanding of the time need to litigate those issues (Slip op. at 42, 43, and n.37). At the request of the League, the Appeal Board granted an extension of the time to respond to the interrogatories to July 6, 1982. On July 6, 1982 the intervenor responded to interrogatories pertaining to roughly one-third of the contentions.

The League in seeking a protective order staying discovery requested by applicant and staff in June, 1982, until such time as the Licensing Board decides which of its contentions are litigable, relies on the limited availability of its experts and the asserted burdensome nature of the discovery that is directed to most, if not all of the League's 114 initially admitted contentions, which could be reduced in number. Intervenor noted applicant and staff had objected to discovery sought by the League on a request it too had renewed in June 1982. The League had renewed interrogatories that pertained to 146 contentions intervenor initially preferred for admission. By order of July 6, 1982, the Licensing Board ruled that the League interrogatories, applied to formerly proposed contentions, many of which were eliminated and that a further reduction those admitted was possible, making the interrogatories inappropriate to the proceeding and improper.

Intervenor in its request for a protective order to prevent it from being adversely affected by applicant's pending motion for summary disposition and any related discovery, until such time as the number of contentions the League may litigate is determined, based it on the

grounds it had just readmitted into the proceeding and was faced with time constraints. Only a bare request was contained in the motion. No explanation was furnished by the League detailing how the DAARE/SAFE contentions that are the subject of the motions for summary disposition relate to the League interests and the manner in which the League could be harmed.

The only response received to the League's motion for a protective order was from the staff. It has no objection to suspending the time the intervenor is to respond to staff discovery until the litigable League contentions are formally identified. Staff acknowledges that the discovery request is directed to League contentions which may not ultimately be litigated and therefore at present would be of limited value.

Although the League's other area for a protective order only focuses on applicant's motion for summary disposition and not the staff's, the staff has provided its reasons for opposing such relief. In that the staff's motion for summary disposition of the DAARE/SAFE contentions is virtually duplicative in scope of that of applicant, the League's motion for a protective order for the effects of applicant's motion for summary disposition can only have meaning, if it were intended to also cover staff's motion. Upon that basis, it is concluded staff has standing to oppose intervenor's request for a protective order submitted as relating only to applicant's motion for summary disposition.

The staff identifies 3 League contentions it views as having possible relevance to any of the 8 admitted contentions of DAARE/SAFE and which are the subject of the motions for summary disposition. It believes that if the League were concerned that its ability to litigate certain issues in the proceeding could be jeopardized by the issuance of a summary decision on certain DAARE/SAFE contentions, it should have filed a substantive response to the parties' summary disposition motions. The staff contends the League in being readmitted as an intervenor is obligated to take the proceeding as it finds it, in accordance with ALAB-678 and that it is too late in the process to defeat summary disposition of one party's contentions, upon mere allegations of counsel for another party, that a matter somehow merits adjudication. Staff asserts that to follow any other course would improperly permit the League to unjustly benefit from the delay it has caused in the proceeding, in contravention of ALAB-678 (Slip op. at 2).

Having considered the motion of the League of July 3, 1982, along with the record in the proceeding, we conclude a protective order should be entered staying requested second round discovery of applicant and first round discovery of staff, until such time as the Licensing Board determines which of the League's contentions are litigable. Applicant did not object to intervenor's request and the staff acquiesces in it. No useful purpose would be served in requiring intervenor to undergo discovery on contentions that may not be litigated. Discovery should commence when the contentions the League can go forward with are identified.

As to the League's request for a protective order to shield it against any adverse consequences that might arise from pending motions for summary disposition of contentions of intervenor DAARE/SAFE, and related discovery, it is lacking in merit and therefore denied.

The League was party to the proceeding for more than 2 years when it was dismissed in October 1981. Its reinstatement in the proceeding by the Appeal Board on June 17, 1982 came at a time when the League could have filed answers to the motions for summary disposition in accordance with the Commission's Rules of Practice. Section 2.749(a) of Title 10, Code of Federal Regulations gives a party 20 days to answer a motion for summary disposition. At the time of its admittance, intervenor DAARE/SAFE had already obtained a postponement of the time to answer to July 15, 1982, which we further extended to July 19, 1982.

The Summary Disposition On Pleadings regulation, 10 CFR 2.749 is specifically designed to afford parties a means to resolve particular types of issues in a most expeditious manner. In that the DAARE/SAFE contentions are relatively few in number, it appears the League could well have opposed the motions, as its interest dictate, in accordance with the method set out in the regulations. Issues could be litigated concurrently making for the expeditious resolution of the questions involved. The League, at its peril, elected not to follow the procedure set forth in 10 CFR 2.749 but elected to seek special relief, by way of a protective order, which it has failed to justify.

Why the League could not meet the time requirements to answer the motions, filed under 10 CFR 2.749, being what they were, was never satisfactorily explained. Preliminarily, the League interests as they relate to the DAARE/SAFE contentions would have had to be defined before a determination could be made that the League had insufficient time to follow the procedures set forth in the Summary Disposition On Pleadings regulation. This was not done by the intervenor. Another necessary showing that would have had to be made would have been to establish the nature of the potential harm. This was not done.

The League in opting not to have its interests litigated with those of the other parties, in summary disposition, but seeking to have them treated separately and apart has selected a course that can only prolong and delay the proceeding unnecessarily. The motion is without justification, unwarranted and cannot be granted. The League's reinstatement affords it no privilege to have its conveniences met. The request for a protective order to guard intervenor against unspecified adverse action that may result from motions for summary judgment of contentions of DAARE/SAFE and related discovery, is denied.

The motion filed by the League on July 3, 1982 contained a request that the Licensing Board convene a prehearing conference at Chicago, Illinois to discuss discovery, the hearing schedule, and those contentions which the Licensing Board will ultimately permit

the League to litigate. There already had been scheduled a prehearing conference in the proceeding, to commence at 9:00 a.m. on August 18, 1982, preceding the evidentiary hearing to start that day. The scheduling was set by an order of September 9, 1981.

The Licensing Board, on July 13, 1982, circulated a request for information to the parties making inquiry as to their ability to proceed with the August 18, 1982 scheduling. A review of the responses along with the current posture of the proceeding discloses that before a hearing should commence, the contentions of DAARE/SAFE that will go to oral hearing and those of the League that it will be permitted to litigate first shall be identified. To assure all of the parties a full, fair and timely hearing the course of the proceeding must also be planned. The prehearing conference, scheduled almost a year in advance, provides the opportunity to take up those matters which must be covered to advance the hearing process.

The Licensing Board will rule on the summary disposition motions filed by applicant and staff, applicable to the DAARE/SAFE contentions, at the start of the August 18, 1982 prehearing conference, or before if possible. It will also rule at the start of the prehearing conference or before on (1) the League's petition titled in part "Waiver Of Or Exceptions To Financial Qualifications Regulations", and (2) its petition titled in part "Waiver Of Or Exception To Need For Power And Alternative Energy Source Regulations 10 CFR Sections 51.23(e) and 51.53(c)". This will set the stage for the Licensing Board to identify, at the prehearing

conference in accordance with the Licensing Board's mandate in ALAB-678, the contentions the League can litigate. It is expected that all of the parties will conform to the requirements of the Appeal Board decision. Applicant's motion to strike certain contentions of the League and for other relief, based upon the ALAB-678 decision, will be ruled upon at the prehearing conference or before. The League is to rank its contentions individually as called for by the Appeal Board. It should be prepared to redraft contentions as necessary to conform to the requirements of the Licensing Board in LBP-80-30, 12 NRC 683, by which intervenor's contentions were first admitted. For example, its contentions 71 and 108 were admitted in that proceeding "subject to subsequent refinement and clarification". A consolidation of contentions will be in order.

Additional matters for resolution at the prehearing conference will be working out and setting of a discovery, prehearing motion and hearing schedule.

In that there is no way of knowing now how much time it will take to complete the planned agenda, the prehearing conference necessarily must be open ended. If not concluded by Friday, August 20, 1982, the conference will resume on Monday, August 22, 1982 and continue to a conclusion. If possible a visit to Byron Station will be made. An appropriate location will be obtained in Rockford, Illinois, to hold the prehearing conference. Rockford is a place

close to the site and convenient to those affected. The precise location will be fixed by further notice.

Another matter appropriate for resolution was raised by letter of July 16, 1982 from the League to the Licensing Board complaining of the practice that applicant engages in of providing the Licensing Board with copies of correspondence passing between it and staff pertaining to Byron Station. Intervenor considers the practice inappropriate in that the correspondence reflects unsworn, unsubstantiated representations by parties in a litigated proceeding, of which the Licensing Board is being apprised. The League does not believe the problem is cured by giving intervenor a copy, as has been done. No useful purpose would be served in discussing this matter at length. The better practice is that the procedure be discontinued, which should be effected.

Based upon the record and for good cause shown, it is hereby ORDERED:

1. The motion of the League of July 3, 1982, for a protective order staying applicant's second round of discovery and staff's first round of discovery until the Licensing Board rules upon which contentions the League will be permitted to litigate, is granted.
2. The motion of the League of July 3, 1982, for a protective order to prevent from being adversely affected in any way by pending motions for summary disposition of contentions of intervenor, DAARE/SAFE, and related discovery, is denied.

3. A prehearing conference will convene at 9:00 a.m., local time, in Rockford, Illinois on August 18, 1982, and be open ended in order to complete the described agenda. The evidentiary hearing to commence August 18, 1982 is deferred.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

*Morton B. Margulies*  
Morton B. Margulies, Chairman

ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland  
this 26th day of July, 1982.