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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Sheldon J. Wolfe, Chairman
Dr. Walter H. Jordan
Dr. Harry Foreman

SERVED OCT 19 1982

In the Matter of

LOUISIANA POWER AND LIGHT COMPANY,
(Waterford Steam Electric Station,
Unit 3)

Docket No. 50-382-0L

October 18, 1982

MEMORANDUM AND ORDER

(Re Joint Intervenors' Motion To
Dismiss For Failure To Make Discovery,
and Joint Intervenors' Request For The
Production and Copying Of Documents)

MEMORANDUM

On September 29, 1982, Joint Intervenors filed a Motion To
Dismiss For Failure To Make Discovery and a Request For The Production
And Copying Of Documents. Applicant and the Staff filed their
responses on October 6, 1982.^{1/}

1/ On October 12, 1982, the Board placed a conference call to: Bruce
Churchill, Esq., counsel for Applicant; Sherwin Turk, Esq., counsel
for NRC Staff; Brian Cassidy, Esq., counsel for FEMA; Luke Fontana,
Esq., counsel for Joint Intervenors and Gary Groesch, representa-
tive of Joint Intervenors. The parties had previously been advised
that, in order to expedite the proceedings, the Board would orally
rule on the outstanding submissions of the Applicant and the Joint
Intervenors, and that subsequently, the Board would issue a
Memorandum and Order setting forth the reasons for the rulings.
After hearing comments and further arguments, the Board made its
rulings, as set forth in the Order, infra.

[FOOTNOTE CONTINUED]

Joint Intervenors' motions were submitted after the Board had reopened the record on Contention 17/26(1)(a) and directed (a) that comments upon the adequacy of the public information brochure should be filed, and (b) that recommendations should be filed as to whether the Board should only admit the brochure and comments as exhibits, or, in addition should proceed to hear cross-examination.^{2/} The instant motions, however, do not address matters or documents related to the brochure.

A. The Motion to Dismiss

Joint Intervenors allege that materials "presently being furnished by the Applicant to the Staff and/or FEMA or materials being prepared by the Staff and or FEMA" have not been provided to the Joint Intervenors, in violation of their rights.^{3/} These materials are alleged to include: "(a) all documents evaluating evacuation procedures or establishing schedules for such evaluation; (b) all

[FOOTNOTE CONTINUED]

In a conference call on October 13, 1982, the Board corrected a ruling made on the previous day - viz., that Joint Intervenors could not file for a stay pending any appeal. On October 13th, the Board stated that, if the Joint Intervenors elected to file an interlocutory appeal with the Appeal Board (which should be filed in a timely manner), they might elect, pursuant to § 2.788, to file an application for a stay either with the Licensing Board or with the Appeal Board.

2/ See Memorandum and Order of August 17, 1982.

3/ The wording of the Motion suggests that the Joint Intervenors are only complaining about not having been provided with documents after the close of the record on May 12, 1982.

documents evaluating the siren warning system or establishing schedules for such evaluation; (c) all documents pertaining to any and all teaching methods or sessions concerning evacuation procedures including names and curriculum vitae of these individual(s) doing the instruction; (c) [sic] all standard operating procedures for the removal of individuals during a nuclear accident including but not limited to the special categories of individuals named in Joint Intervenors' contentions; (d) all documents relating to any agreements reached by Applicant with the adjacent parishes for buses or other special vehicle transportation for categories of individuals named in Joint Intervenors' contentions; and (e) all documents relating to the installation or testing of communication equipment in the Waterford facility which would interface with any and all state or local agencies." Joint Intervenors therefore move that Applicant's license application be denied.

Joint Intervenors' Motion To Dismiss is a request for the imposition of a sanction. Although the regulations do not explicitly grant us the power to impose a default judgment as a sanction, see 10 C.F.R. § 2.713(c), we believe that such a power might be implied by the general grant of power in the Commission's Rules of Practice, 10 C.F.R. § 2.718. Nevertheless, such a sanction constitutes extraordinary relief, and we note that under the Federal Rules of Civil Procedure, F.R.C.P. 37(b), pertaining to sanctions for failure to make discovery, a default judgment is only an appropriate sanction for a violation of a court's order to compel.

Here, Joint Intervenors have not alleged that either Applicant or Staff has failed to comply with a discovery request, so obviously a § 2.740(f) motion to compel would not lie. Further, Joint Intervenors do not cite, and we are unaware of, any regulation which requires the service of all Staff, Applicant, and FEMA documents. Finally, as indicated in our discussion below of Joint Intervenors' Request For Production Of Documents, while we have determined that intervenors have a right to receive correspondence,^{4/} that right is dependent on a prior request to the Licensing Board.

However, even if we were to assume that the Joint Intervenors do have an inherent right to be served these documents, their appropriate course of action upon non-receipt would have been to submit a motion to compel service. Moreover, Joint Intervenors have shown no prejudice,^{5/} and in such circumstance, we would, in our discretion, deny the extraordinary relief they seek.

^{4/} We are using the word "correspondence" as being more limited than the word "documents." Correspondence includes only documents that are transmitted between Applicant, Staff, and FEMA, and therefore excludes documents that are generated for a party's own use or any other use.

^{5/} As indicated by the statements of Applicant and Staff during our conference call of October 12th, all correspondence between Applicant and Staff has been and will continue to be placed in the local public document room. In addition, Applicant has stated that its correspondence with FEMA has been transmitted to the NRC staff and therefore has also been placed in the LPDR (Applicant's Response of October 6, 1982, at 6). Furthermore, we are ordering service of unprivileged correspondence between Staff, Applicant, and FEMA that relates to the Waterford 3 emergency plans and that has been generated after the close of the record on May 12, 1982. (See Order, infra).

B. The Request For The Production Of Documents

Joint Intervenors' Request for Documents is, on its face, more limited in its description of the contents of the desired documents than is their Motion to Dismiss. The Request for Documents does not address "materials presently being furnished by Applicant to the Staff and/or FEMA or materials being prepared by the Staff and/or FEMA," as did the Motion to Dismiss; but the Request for Documents does specify the same documents that were specified in the Motion to Dismiss. (The Request for Documents also includes a request for "all NRC documents relating to the Indian Point evacuation proceedings.") On the other hand, the Request for Documents does not, on its face, suggest that Joint Intervenors are only concerned with documents prepared after the close of the record. Nevertheless, we have read these two motions in conjunction, and have concluded that Joint Intervenors are requesting all documents relating to Waterford 3 emergency planning that have been prepared or transmitted after the close of the record.

As we stated above, there is no regulation that requires all Applicant, Staff, and FEMA documents to be served on intervenors. 10 C.F.R. § 2.740 does provide for discovery; however, that section prohibits discovery "after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer upon good cause shown." Id. (Emphasis added). Joint Intervenors have made no attempt to show good cause. Accordingly, if Joint Intervenors are basing their request on the discovery provisions of the Rules of

Practice, their request is denied as being untimely and unsupported by a showing of good cause.

It is possible that Joint Intervenors do not seek discovery, but instead seek to assert an inherent right to service of Staff, Applicant, and FEMA documents. We conclude, however, that intervenors do not have such an inherent right. All parties have an affirmative duty to keep the Board and other parties advised of significant changed circumstances. "[P]arties must inform the presiding Board and other parties of new information which is relevant and material to the matters being adjudicated." Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404, 408 (1975), citing Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623 (1973). No request by a party or the Board is necessary to trigger this obligation to serve such documents, but in our case, there has been no indication that there exist any documents effecting or showing significantly changed circumstances with respect to the matters we are adjudicating.^{6/} Where the documents do not effect or show a significant change in circumstances, we believe that intervenors have a right to obtain Staff and Applicant correspondence

^{6/} We believe that even an allegation that documents exist that significantly change circumstances would be insufficient to warrant our ordering production of documents after time for discovery has expired. Otherwise, such an allegation could be used to circumvent the prohibition against untimely discovery. Therefore, we believe that some showing would also be necessary. We need not, however, decide how great a showing an intervenor should make; in this case, Joint Intervenors have not even alleged that any of the documents they request would significantly change the circumstances of this operating license application.

(i.e. documents that are transmitted between Applicant, Staff, and FEMA)^{7/}, but that right is dependent on a prior request to the Board.^{8/}

Therefore, we conclude that Joint Intervenors, having now requested Staff's and Applicant's correspondence (to each other or to or from FEMA) relating to Waterford's emergency planning, are entitled to receive such correspondence. This entitlement does not extend,

^{7/} We recognize that FEMA is not a party to this proceeding. However, because of FEMA's role in the licensing process and its close relationship with the NRC (See Memoranda of Understanding Between FEMA and NRC, 45 Fed. Reg. 82713 (1980)), we think that an intervenor's right to obtain correspondence extends to correspondence between Staff and FEMA, or between Applicant and FEMA. Staff or Applicant can supply Joint Intervenors with this correspondence, and we need not address our order to FEMA.

We also recognize, however, that some of the correspondence between Staff and FEMA may be interagency memoranda reflecting the agencies' deliberative processes and be privileged. See 10 C.F.R. § 2.790(a)(5). Therefore, we exclude from our order privileged correspondence between Staff and FEMA.

^{8/} Our determination that a prior request is needed before Intervenors have a right to be served with all Staff and Applicant correspondence reconciles two Appeal Board decisions. In Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 334, 349, (1973), the Appeal Board held that not all Staff - Applicant correspondence need be forwarded to an intervenor, while in Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 183 (1974), the Appeal Board held that intervenors were entitled to continued service of all Staff - Applicant correspondence until judicial review was completed. The Appeal Board later characterized its decision in Vermont Yankee as addressing "intervenors' right to insist that they be personally served with all correspondence between Applicant and the Regulatory Staff." Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-184, 7 AEC 229, 237 n.9 (1974). (Emphasis added).

however, to documents that are not transmitted between the parties or a party and FEMA. Otherwise, we would be granting an unlimited and untimely discovery request in violation of 10 C.F.R. § 2.740.^{9/}

In particular, we find that Joint Intervenors' request for all documents related to the Indian Point proceedings far exceeds the scope of their right.

Furthermore, the parties need only serve Joint Intervenors with copies of the aforementioned correspondence generated after the close of the record on May 12, 1982, and the service shall continue only until the completion of judicial review or until the time for seeking judicial review has expired without such review being sought.

ORDER

In light of the foregoing discussion, it is this 18th day of October, 1982

ORDERED

1. That Joint Intervenors' Motion To Dismiss For Failure To Make Discovery is denied.

2. That Joint Intervenors' Request For Production And Copying Of Documents, which we treat as a Motion Requesting Service of Applicant's and Staff's Correspondence, is granted to the extent set forth in paragraph 3 of this Order.

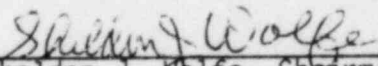
^{9/} We note that Staff has already served all Staff generated correspondence on Joint Intervenors, and is committed to continuing its practice. (See Staff's Response at 6 n.15).

3. That Applicant and Staff are to serve Joint Intervenors with copies of all unprivileged correspondence^{10/} generated between them or FEMA after the close of the record and relating to Waterford 3 emergency planning. Such service shall continue until judicial review has been completed or until the time for seeking judicial review has expired without review being sought.

4. Paragraph 3, supra, does not enlarge the scope of the reopened hearing which is defined and limited in our Memorandum and Order (Re Applicant's Response (Motion) of September 23, 1982, and Joint Intervenors' Motion (Cross-Motion) of September 29, 1982) which is also being issued on this date.

Judges Jordan and Foreman concur, but were unavailable to sign this issuance.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


Sheldon J. Wolfe, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 18th day of October, 1982.

^{10/} As indicated in the Memorandum, this entitlement does not extend to documents that are not transmitted between the Applicant, Staff, and FEMA.