

DASA Comm: - 7/11



July 23, 1982

SECY-82-312

ADJUDICATORY ISSUE
(Information)

To: The Commissioners

From: Sheldon L. Trubatch
Acting Assistant General Counsel

Subject: REVIEW OF ALAB-678 (In the Matter of
Commonwealth Edison Company)

Facility: Byron Nuclear Power Station, Units 1 & 2

Petition
For Review: None 1/

Purpose: To inform the Commission of an
interlocutory Appeal Board Decision
which, in our opinion, ~~_____~~ EX 5

1/ Interlocutory appeals to the Commission are not authorized under the Commission's rules of practice, 10 CFR 2.730(f). Accordingly, no Petitions for Review were filed.

2/ _____ EX 5

Contact:
S. Aloat, OGC
X43224

9403080039

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

9403080039 930525
PDR FOIA
GILINSK92-436 PDR

5/21

Review

Time Expires:

August 5, 1982 (as extended)

Discussion:

In ALAB-678, the Appeal Board reversed the Licensing Board's dismissal of the Rockford League of Women Voters (League) from the proceeding for discovery failures.^{3/} While recognizing that the League had taken a course of action (or inaction) inconsistent with its obligations as a party, the Appeal Board determined that the imposition of the Commission's most severe sanction of dismissal was unwarranted by the facts and based on a failure by the Licensing Board to evaluate the actions of the League in the context of similar actions by other parties. However, to ensure that the proceeding and the applicant would not be prejudiced by the League's inaction and to provide for some penalty, the Appeal Board ordered the League to determine the relative importance of its 114 admitted contentions and advised the Licensing Board to adjudicate only that number of contentions (estimated to be around 10) which could be handled "without unjustifiably delaying operation of the Byron facility." Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC _____ (1982) (Slip Op. at 41). The Appeal Board further imposed strict discovery timeframes and ordered the Licensing Board to strike any contention for which an interrogatory propounded by the

^{3/} Due to the presence of other intervenors, the matter continued to be contested despite the dismissal of the League. The other intervenors are the DeKalb Area Alliance for Responsible Energy (DAARE) and the Sennisippi Alliance for the Environment (SAFE). These intervenors are acting in concert and filed joint contentions.

applicant is not fully answered. Id. at 43.

EX. 5

Discussion:

This dispute arose over a failure by the League to respond to four "boilerplate" interrogatories propounded by the applicant on July 8, 1981.^{4/} As a result, on October 27, 1981, the Licensing Board issued an order dismissing the League and its contentions from the proceeding. In support of its action, the Board identified a pattern of conduct which encompassed (1) not initiating discovery in a timely manner, (2) not answering any interrogatories that had been outstanding since July 1981, and (3) advancing unmeritorious reasons for not complying with the Board's discovery order. Slip Op. at 36. This pattern of recalcitrance justified, in the Licensing Board's view, the imposition of the Commission's most severe sanction -- dismissal. The Board subsequently denied the League's petition for reconsideration. LBP-81-5, 15 NRC (1982). Appeal to the Appeal Board followed.

On review, the Appeal Board reversed the Licensing Board's order dismissing the League (and its contentions) from the proceeding. In doing so, the Appeal Board recognized that a Licensing Board

^{4/} For an extensive discussion of the factual background leading up to this discovery dispute, see Slip Op. at 2-20. The "boilerplate" interrogatories are set forth at Slip Op. at 4 n.4.

is entitled to a substantial degree of deference in the management and conduct of proceedings before it. Slip Op. at 22. Moreover, based on an extensive review of the facts underlying the instant dispute, the Appeal Board concurred with the Licensing Board finding that the League had engaged in a pattern of delay which culminated with a "patent violation of the Board's discovery order." Slip Op. at 32-33. However, the Appeal Board determined that the sanction chosen by the Licensing Board was not justified by the facts when taken as a whole, and not authorized in these circumstances by the principles governing the imposition of sanctions. Statement of Policy on Conduct of Licensing Proceedings. CLI-81-8, 13 NRC 452 (1981).

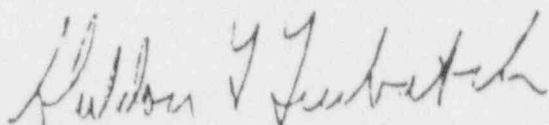
Notwithstanding its conclusion that dismissal was inappropriate, the Appeal Board felt that some serious sanction was warranted. Based on the purpose of discovery, Northern States Power Co. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977), the obligations of a party, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334-35 (1980), and a Board's duty to tailor sanctions, Statement of Policy, 13 NRC at 454, the Appeal Board chose to order the League to determine the relative importance of its contentions and advised the Licensing Board to take up only those contentions which "it can comfortably decide on the merits without unjustifiably delaying operation of the Byron facility." Slip Op. at 41. This sanction, the Appeal Board believed, avoided the appearance of "overkill" that may have resulted from the Licensing Board's concentration on the League's delay in isolation of the delay of other parties yet still ensured that

the applicant would not be penalized for the actions of the League. Moreover, the Appeal Board ordered that responsive answers be provided the applicant no later than June 24, 1982 and provided that the Licensing Board should strike "any contention for which an interrogatory is not fully answered." Slip Op. at 43.5/ The Appeal Board intimated, however, that dismissal would be appropriate should any further discovery failings characterize the actions of the League.

EX. 5

-
- 5/ On June 21, 1982, the Appeal Board reluctantly granted the League an extension to July 6, 1982 within which to answer the applicant's interrogatories (attach. 2). The applicant did not object to this extension.
- 6/ The Board's order did not itself fix the date upon which answers were to be provided. Rather, it made the date of answer a matter to be resolved by the parties. Slip Op. at 37.

Recommendation:



Sheldon L. Trubatch
Acting Assistant General Counsel

7/ On June 24, 1982, the League re-filed its original interrogatories (first served in March 1980) on the staff and the applicant. As authority for such late discovery, the League cited ALAB-678. See, Slip Op. at 42 n. 37. In separate motions filed July 1, 1982 and June 29, 1982, both the staff and the applicant opposed discovery. Each argued that discovery at this juncture, after the November 1, 1981 cut-off date, was untimely and improper and that no discovery is permitted absent a ranking of the League's contentions as required by ALAB-678 and an adoption by the Licensing Board of an appropriate number of these contentions. In an order issued July 6, 1982, the Licensing Board granted protective orders and refused to permit late discovery as to all the League's 114 admitted contentions. First, the Licensing Board concluded that by failing to undertake appropriate discovery prior to the November 1, 1981 cut-off date, the League had "effectively relinquish[ed] its right to discovery before the Board." Memorandum and Order of July 6, 1982 at 4 (attached). Second, the Licensing Board concurred with the staff and the applicant that any discovery that might be permitted was contingent upon the League's ranking of its contentions and the Board's adoption of an appropriate number of those contentions for adjudication. Id. at 6.

DISTRIBUTION:
Commissioners
OGC
OPE
OIA
SECY