UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

BEFORE ADMINISTRATIVE JUDGES
Glenn O. Bright
Dr. James H. Carpenter
James L. Kelley, Chairman

In the Matter of	Docket No. 50-400-OL 50-401-OL
CAROLINA POWER & LIGHT COMPANY AND NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY	ASLBP No. 82-468-01 OL
(Shearon Harris Nuclear Power Plant, Units 1 and 2)	January 25, 1983

MEMORANDUM
(Memorializing Conference Call of January 21, 1983)

On January 21, 1983, this Board held a conference telephone call to discuss scheduling and agenda matters for a prehearing conference. Participating in the conference call were: Charles Barth, Esq., Myron Karman, Esq., and Mr. Kadambi (the NRC Project Manager) for the NRC Staff; Thomas A. Baxter, Esq., John H. O'Neill, Esq., and Samantha Flynn, Esq., for Applicants; John D. Runkle, Esq., for CCNC; Travis Payne, Esq., for Kudzu Alliance; Dr. Richard Wilson; and Mr. Daniel F. Read for CHANGE/ELP. Ms. Slater Newman, the representative for CANP, and Mr. Wells Eddleman could not be reached.[1]

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[1] At the outset of the conference call, Mr. Payne told us that Mr. Eddleman had made arrangements to be called at work. The operator unsuccessfully attempted to reach Mr. Eddleman.

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In the conference call, we explained that a second prehearing conference would be useful to establish a comprehensive schedule for the proceeding. We also expressed concern that discovery on admitted contentions had not yet commenced, though we noted with approval that several parties have engaged in discussions to establish a discovery schedule on environmental contentions.[2]

The NRC has a policy of attempting to complete licensing proceedings before a nuclear power plant is ready to operate, consistent with time requirements for a fair hearing. Thus, the Applicants' projected fuel loading date is important to scheduling. In addition, scheduling depends largely upon the availability of certain Staff and Applicant documents. The present projected fuel loading date for Unit 1 is June 1985. The NRC Staff stated that it expected issuance of the draft environmental statement (DES) by the end of February, issuance of a "Safety Statement" by the end of January, and issuance of the Safety Evaluation Report in November. Applicants stated that North Carolina had advised them that draft emergency plans are scheduled to be available in December.

We invited the parties to submit proposed schedules for the proceeding. Such schedules would necessarily be somewhat tentative at this point because some information is not yet available. For example, we do not know yet how many emergency planning contentions there will

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[2] Ltr. from Applicants to the Board dated Janaury 14, 1983. The Board commended these parties for their cooperation.

be; therefore, we cannot project a date for the close of discovery on emergency planning. Nevertheless, proposed schedules should be as detailed as presently available information permits, including dates for major milestones. Such proposals should be served by mail on the Board and all parties by February 17, 1983.

We also advised the parties that the prehearing conference would be a useful opportunity to discuss the mechanics of discovery. While the Commission's Rules of Practice spell out the basic parameters of discovery, experience indicates that further guidance is helpful. We also stated that we would supply you with copies of the pertinent rules and with a few decisions on discovery.

The NRC Staff indicated that they were planning to file their first round of interrogatories within the next two weeks and would use the format described in the Susquehanna decision. The Staff inquired whether the Board would prefer the Staff to wait until after the prehearing conference before filing interrogatories; we responded that we would prefer that the Staff not wait, as their interrogatories would provide specific examples for discussion at the prehearing conference.[3]

We also considered a Motion for Clarification by Mr. Eddleman, dated January 15, 1983. Mr. Eddleman was concerned that we might be

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[3] The Board also advised the parties that the proposed second prehearing conference would not affect the time in which a party should respond to the Staff's interrogatories. See 10 C.F.R. §§ 2.740b, 2.710, 2.711. If a party needs more time, it should request an extension.

scheduling the "final" prehearing conference under 10 CFR 2.752, thus terminating the opportunity for discovery. We stated that this next prehearing conference would not be the final prehearing conference and would not have the effect of closing discovery.

The time and location of the proposed prehearing conference were discussed and the board set the conference for Thursday, February 24, 1983. The Board also indicated that it was willing to hold the prehearing conference in Durham, or Chapel Hill, but no specific suggestions were forthcoming. Raleigh seemed to be preferred by most of those participating in the conference call. The prehearing conference will commence at 9 a.m. at the following location:

Federal Building Post Office Court House
Conference Room No. 209
310 New Bern Avenue
Raleigh, NC 27601

The following documents are enclosed for your information:

Statement of Policy on Conduct of Licensing Proceedings

10 CFR 2.740-43

Appeal Board decisions in Susquehanna and Byron

Licensing Board decision in Pilgrim

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

James L. Kelley

James L. Kelley, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,
this 25th day of January, 1983.

Cite as 13 NRC 452 (1981) CLI-81-8

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Joseph M. Hendrie, Chairman
Victor Gilinsky
Peter A. Bradford
John F. Ahearne

In the Matter of

STATEMENT OF POLICY ON CONDUCT OF LICENSING PROCEEDINGS **May 20, 1981**

The Commission issues a policy statement providing guidance to its licensing boards on the use of tools intended to reduce the time for completing licensing proceedings while still ensuring that hearings are fair and produce full records.

I. BACKGROUND

The Commission has reviewed the docket of the Atomic Safety and Licensing Board Panel (ASLBP) and the current status of proceedings before its individual boards. In a series of public meetings, the Commission has examined at length all major elements in its licensing procedure. It is clear that a number of difficult problems face the agency as it endeavors to meet its responsibilities in the licensing area. This is especially the case with regard to staff reviews and hearings, where requested, for applications for nuclear power plant operating licenses.

Historically, NRC operating licensing reviews have been completed and the license issued by the time the nuclear plant is ready to operate. Now, for the first time the hearings on a number of operating license applications may not be concluded before construction is completed. This situation is a consequence of the Three Mile Island (TMI) accident, which required a reexamination of the entire regulatory structure. After TMI, for over a year and a half, the Commission's attention and resources were focused on plants which were already licensed to operate and on the preparation of an

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action plan which specified changes necessary for reactors as a result of the accident.

Although staff review of pending license applications was delayed during this period, utilities which had received construction permits continued to build the authorized plants. The staff is now expediting its review of the applications and an unprecedented number of hearings are scheduled in the next 24 months. Many of these proceedings concern applications for operating licenses. If these proceedings are not concluded prior to the completion of construction, the cost of such delay could reach billions of dollars. The Commission will seek to avoid or reduce such delays whenever measures are available that do not compromise the Commission's fundamental commitment to a fair and thorough hearing process.

Therefore, the Commission is issuing this policy statement on the need for the balanced and efficient conduct of all phases of the hearing process. The Commission appreciates the many difficulties faced by its boards in conducting these contentious and complex proceedings. By and large, the boards have performed very well. This document is intended to deal with problems not primarily of the boards' own making. However, the boards will play an important role in resolving such difficulties.

Individual adjudicatory boards are encouraged to expedite the hearing process by using those management methods already contained in Part 2 of the Commission's Rules and Regulations. The Commission wishes to emphasize though that, in expediting the hearings, the board should ensure that the hearings are fair, and produce a record which leads to high quality decisions that adequately protect the public health and safety and the environment.

Virtually all of the procedural devices discussed in this Statement are currently being employed by sitting boards to varying degrees. The Commission's reemphasis of the use of such tools is intended to reduce the time for completing licensing proceedings. The guidelines set forth below are not to be considered all inclusive, but rather are to be considered illustrative of the actions that can be taken by individual boards.

II. GENERAL GUIDANCE

The Commission's Rules of Practice provide the board with substantial authority to regulate hearing procedures. In the final analysis, the actions, consistent with applicable rules, which may be taken to conduct an efficient hearing are limited primarily by the good sense, judgment, and managerial skills of a presiding board which is dedicated to seeing that the process moves along at an expeditious pace, consistent with the demands of fairness.

Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance. At an early stage in the proceeding, a board should make all parties aware of the Commission's policies in this regard.

When the NRC staff is responsible for the delay of a proceeding the Chief Administrative Judge, Atomic Safety and Licensing Board Panel, should inform the Executive Director for Operations. The Executive Director for Operations will apprise the Commission in writing of significant delays and provide an explanation. This document will be served on all parties to a proceeding and the board.

III. SPECIFIC GUIDANCE

A. Time

The Commission expects licensing boards to set and adhere to reasonable schedules for proceedings. The Boards are advised to satisfy themselves that the 10 CFR 2.711 "good cause" standard for adjusting times fixed by the Board or prescribed by Part 2 has actually been met before granting an extension of time. Requests for an extension of time

should generally be in writing and should be received by the Board well before the time specified expires.

B. Consolidated Intervenors

In accordance with 10 CFR 2.715a, intervenors should be consolidated and a lead intervenor designated who has "substantially the same interest that may be affected by the proceedings and who raise[s] substantially the same questions .... " Obviously, no consolidation should be ordered that would prejudice the rights of any intervenor.

However, consonant with that condition, single, lead intervenors should be designated to present evidence, to conduct cross-examination, to submit briefs, and to propose findings of fact, conclusions of law, and argument. Where such consolidation has taken place, those functions should not be performed by other intervenors except upon a showing of prejudice to such other intervenors' interest or upon a showing to the satisfaction of the board that the record would otherwise be incomplete.

C. Negotiation

The parties should be encouraged to negotiate at all times prior to and during the hearing to resolve contentions, settle procedural disputes, and better define issues. Negotiations should be monitored by the board through written reports, prehearing conferences, and telephone conferences, but the boards should not become directly involved in the negotiations themselves.

D. Board Management of Discovery

The purpose of discovery is to expedite hearings by the disclosure of information in the possession of the parties which is relevant to the subject matter involved in the proceeding so that issues may be narrowed, stipulated, or eliminated and so that evidence to be presented at hearing can be stipulated or otherwise limited to that which is relevant. The Commission is concerned that the number of interrogatories served in some cases may place an undue burden on the parties, particularly the NRC staff, and may, as a consequence, delay the start of the hearing without reducing the scope or the length of the hearing.

The Commission believes that the benefits now obtained by the use of interrogatories could generally be obtained by using a smaller number of better focused interrogatories and is considering a proposed rule which would limit the number of interrogatories a party could file, absent a ruling

by the Board that a greater number of interrogatories is justified. Pending a Commission decision on the proposed rule, the Boards are reminded that they may limit the number of interrogatories in accordance with the Commission's rules.

Accordingly, the boards should manage and supervise all discovery, including not only the intitial discovery directly following admission of contentions, but also any discovery conducted thereafter. The Commission again endorses the policy of voluntary discovery, and encourages the boards, in consultation with the parties, to establish time frames for the completion of both voluntary and involuntary discovery. Each individual board shall determine the method by which it supervises the discovery process. Possible methods include, but are not limited to, written reports from the parties, telephone conference calls, and status report conferences on the record. In virtually all instances, individual boards should schedule an initial conference with the parties to set a general discovery schedule immediately after contentions have been admitted.

E. Settlement Conference

Licensing boards are encouraged to hold settlement conferences with the parties. Such conferences are to serve the purpose of resolving as many contentions as possible by negotiation. The conference is intended to: (a) have the parties identify those contentions no longer considered valid or important by their sponsor as a result of information generated through discovery, so that such contentions can be eliminated from the proceeding; and (b) to have the parties negotiate a resolution, wherever possible, of all or part of any contention still held valid and important. The settlement conference is not intended to replace the prehearing conferences provided by 10 CFR 2.751a and 2.752.

F. Timely Rulings on Prehearing Matters

The licensing boards should issue timely rulings on all matters. In particular, rulings should be issued on crucial or potentially dispositive issues at the earliest practicable juncture in the proceeding. Such rulings may eliminate the need to adjudicate one or more subsidiary issues. Any ruling which would affect the scope of an evidentiary presentation should be rendered well before the presentation in question. Rulings on procedural matters to regulate the course of the hearing should also be rendered early.

If a significant legal or policy question is presented on which Commission guidance is needed, a board should promptly refer or certify the matter to the Atomic Safety and Licensing Appeal Board or the Commission. A

board should exercise its best judgment to try to anticipate crucial issues which may require such guidance so that the reference or certification can be made and the response received without holding up the proceeding.

G. Summary Disposition

In exercising its authority to regulate the course of a hearing, the boards should encourage the parties to invoke the summary disposition procedure on issues where there is no genuine issue of material fact so that evidentiary hearing time is not unnecessarily devoted to such issues.

H. Trial Briefs, Prefiled Testimony Outlines and Cross-Examination Plans

All or any combination of these devices should be required at the discretion of the board to expedite the orderly presentation by each party of its case. The Commission believes that cross-examination plans, which are to be submitted to the board alone, would be of benefit in most proceedings. Each board must decide which device or devices would be most fruitful in managing or expediting its proceeding by limiting unnecessary direct oral testimony and cross-examination.

I. Combining Rebuttal and Surrebuttal Testimony

For particular, highly technical issues, boards are encouraged during rebuttal and surrebuttal to put opposing witnesses on the stand at the same time so that each witness will be able to comment immediately on an opposing witness' answer to a question. Appendix A to 10 CFR Part 2 explicitly recognizes that a board may find it helpful to take expert testimony from witnesses on a round-table basis after the receipt in evidence of prepared testimony.

J. Filing of Proposed Findings of Fact and Conclusions of Law

Parties should be expected to file proposed findings of fact and conclusions of law on issues which they have raised. The boards, in their discretion, may refuse to rule on an issue in their initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law.

K. Initial Decisions

Licensing proceedings vary greatly in the difficulty and complexity of issues to be decided, the number of such issues, and the size of the record compiled. These factors bear on the length of time it will take the boards to issue initial decisions. The Commission expects that decisions not only will continue to be fair and thorough, but also that decisions will issue as soon as practicable after the submission of proposed findings of fact and conclusions of law.

Accordingly, the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel should schedule all board assignments so that after the record has been completed individual Administrative Judges are free to write initial decisions on those applications where construction has been completed. Issuance of such decisions should take precedence over other responsibilities.

IV. CONCLUSION

This statement on adjudication is in support of the Commission's effort to complete operating license proceedings, conducted in a thorough and fair manner, before the end of construction. As we have noted, that process has not, in the past, extended beyond completion of plant construction. Because of the considerable time that the staff had to spend on developing and carrying out safety improvements at operating reactors during 1979-1980, in the wake of the Three Mile Island accident, this historical situation has been disrupted. To reestablish it on a reliable basis requires changes in the agency review and hearing process, some of which are the subject of this statement.

As a final matter, the Commission observes that in ideal circumstances operating license proceedings should not bear the burden of issues that ours do now. Improvement on this score depends on more complete agency review and decision at the construction permit stage. That in turn depends on a change in industrial practice: submittal of a more nearly complete design by the applicant at the construction permit stage. With this change operating license reviews and public proceedings could be limited essen-

tially to whether the facility in question was constructed in accordance with the detailed design approved for construction and whether significant developments after the date of the construction permit required modifications in the plant.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 20th day of May, 1981.

which is effective at the time of such ruling, provided that the terms of the ruling are incorporated in the subsequent written order.

(Sec. 102, 83 Stat. 853; 42 U.S.C. 4332; sec. 161, Pub. L. 83-703, 68 Stat. 948 (42 U.S.C. 2201); sec. 201 as amended, Pub. L. 93-438, 88 Stat. 1243, Pub. L. 94-79, 89 Stat. 413 (42 U.S.C. 5841))

[27 FR 377, Jan. 13, 1962, as amended at 28 FR 10154, Sept. 17, 1963; 37 FR 15132, July 28, 1972; 39 FR 24219, July 1, 1974; 43 FR 17802, Apr. 26, 1978; 46 FR 30331, June 8, 1981; 46 FR 58281, Dec. 1, 1981]

§ 2.731 Order of procedure.

The presiding officer or the Commission will designate the order of procedure at a hearing. The proponent of an order will ordinarily open and close.

§ 2.732 Burden of proof.

Unless otherwise ordered by the presiding officer, the applicant or the proponent of an order has the burden of proof.

§ 2.733 Examination by experts.

A party may request the presiding officer to permit a qualified individual who has scientific or technical training or experience to participate on behalf of that party in the examination and cross-examination of expert witnesses. The presiding officer may permit such individual to participate on behalf of the party in the examination and cross-examination of expert witnesses, where it would serve the purpose of furthering the conduct of the proceeding, upon finding: (a) That the individual is qualified by scientific or technical training or experience to contribute to the development of an adequate decisional record in the proceeding by the conduct of such examination or cross-examination, (b) that the individual has read any written testimony on which he intends to examine or cross-examine and any documents to be used or referred to in the course of the examination or cross-examination, and (c) that the individual has prepared himself to conduct a meaningful and expeditious examination or cross-examination. Examination or cross-examination conducted pursuant to this section shall be limited to areas within the expertise of the individual conducting the examination or cross-examination. The party on behalf of whom such examination or cross-examination is conducted and his attorney shall be responsible for the conduct of examination or cross-examination by such individuals.

[37 FR 15132, July 28, 1972]

Depositions and Written Interrogatories; Discovery; Admission; Evidence

§ 2.740 General provisions governing discovery.

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written interrogatories (§ 2.740a); written interrogatories (§ 2.740b); production of documents or things or permission to enter upon land or other property, for inspection and other purposes (§ 2.741); and requests for admission (§ 2.742).

(b) *Scope of discovery.* Unless otherwise limited by order of the presiding officer in accordance with this section, the scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery shall begin only after the prehearing conference provided for in § 2.751a and shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference. In such a proceeding, no discovery shall be had after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer

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(2) *Trial preparation materials.* A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of this case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

(c) *Protective order.* Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that, subject to the provisions of §§ 2.744 and 2.790, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (7) that studies and evaluations not be prepared. If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

(d) *Sequence and timing of discovery.* Unless the presiding officer upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the presiding officer or agreement of the parties.

(f) *Motion to compel discovery.* (1) If a deponent or party upon whom a request for production of documents or answers to interrogatories is served fails to respond or objects to the request, or any part thereof, or fails to permit inspection as requested, the deposing party or the party submitting the request may move the presiding officer, within ten (10) days after the date of the response or after failure of a party to respond to the request for an order compelling a response or in-

spection in accordance with the request. The motion shall set forth the nature of the questions or the request, the response or objection of the party upon whom the request was served, and arguments in support of the motion. For purposes of this paragraph, an evasive or incomplete answer or response shall be treated as a failure to answer or respond. Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section.

(2) In ruling on a motion made pursuant to this section, the presiding officer may make such a protective order as he is authorized to make on a motion made pursuant to paragraph (c) of this section.

(3) This section does not preclude an independent request for issuance of a subpena directed to a person not a party for production of documents and things. This section does not apply to requests for the testimony or interrogatories of the regulatory staff pursuant to § 2.720(h)(2) or production of NRC documents pursuant to § 2.744 or § 2.790, except for paragraphs (c) and (e) of this section.

(Sec. 161, Pub. L. 83-703, 68 Stat. 948 (42 U.S.C. 2201); sec. 201, as amended, Pub. L. 93-438, 88 Stat. 1243, Pub. L. 94-79, 89 Stat. 413 (42 U.S.C. 5841))

[37 FR 15133, July 28, 1972, as amended at 43 FR 17802, Apr. 26, 1978]

§ 2.740a Depositions upon oral examination and upon written interrogatories.

(a) Any party desiring to take the testimony of any party or other person by deposition on oral examination or written interrogatories shall, without leave of the Commission or the presiding officer, give reasonable notice in writing to every other party, to the person to be examined and to the presiding officer of the proposed time and place of taking the deposition; the name and address of each person to be examined, if known, or if, the name is not known, a general description sufficient to identify him or the class or group to which he belongs; the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(b) [Reserved]

(c) Within the United States, a deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Outside of the United States, a deposition may be taken before a secretary of an embassy or legation, a consul general, vice consul or consular agent of the United States, or a person authorized to administer oaths designated by the Commission.

(d) The deponent shall be sworn or shall affirm before any questions are put to him. Examination and cross-examination shall proceed as at a hearing. Each question propounded shall be recorded and the answer taken down in the words of the witness. Objections on questions of evidence shall be noted in short form without the arguments. The officer shall not decide on the competency, materiality, or relevancy of evidence but shall record the evidence subject to objection. Objections on questions of evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(e) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature unless he is ill or cannot be found or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly forward the deposition by registered mail to the Commission.

(f) Where the deposition is to be taken on written interrogatories, the party taking the deposition shall serve a copy of the interrogatories, showing each interrogatory separately and consecutively numbered, on every other party with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be taken. Within ten (10) days after service, any

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(10) days after service, any

other party may serve cross-interrogatories. The interrogatories, cross-interrogatories, and answers shall be recorded and signed, and the deposition certified, returned, and filed as in the case of a deposition on oral examination.

(g) A deposition will not become a part of the record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party, any other party may introduce any other parts. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition.

(h) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party at whose instance the deposition is taken.

(i) The witness may be accompanied, represented, and advised by legal counsel.

(j) The provisions of paragraphs (a) through (i) of this section are not applicable to NRC personnel. Testimony of NRC personnel by oral examination and written interrogatories addressed to NRC personnel are subject to the provisions of § 2.720(h).

(Sec. 161, Pub. L. 83-703, 68 Stat. 948 (42 U.S.C. 2201); sec. 201 as amended, Pub. L. 93-438, 88 Stat. 1243, Pub. L. 94-79, 89 Stat. 413 (42 U.S.C. 5841))

[27 FR 377, Jan. 13, 1962, as amended at 35 FR 19501, Dec. 23, 1970. Redesignated at 37 FR 15133, July 28, 1972, and amended at 43 FR 17802, Apr. 26, 1978]

§ 2.740b Interrogatories to parties.

(a) Any party may serve upon any other party (other than the staff)[1] written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be filed with the Secretary of the Commission and shall be served on the presiding officer and upon all parties to the proceeding.

(b) Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers shall be signed by the person making them, and the objections by the attorney making them. The party upon whom the interrogatories were served shall serve a copy of the answers and objections upon all parties to the proceeding within 14 days after service of the interrogatories, or within such shorter or longer period as the presiding officer may allow. Answers may be used in the same manner as depositions (see § 2.740a(g)).

[37 FR 1[illegible]34, July 28, 1972]

§ 2.741 Production of documents and things and entry upon land for inspection and other purposes.

(a) *Request for discovery.* Any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting on his behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are within the scope of § 2.740 and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 2.740.

(b) *Service.* The request may be served on any party without leave of the Commission or the presiding officer. Except as otherwise provided in § 2.740, the request may be served after the proceeding is set for hearing.

(c) *Contents.* The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place,

[1] Interrogatories addressed to the staff are subject to § 2.720(h)(2)(ii).

and manner of making the inspection and performing the related acts.

(d) *Response.* The party upon whom the request is served shall serve on the party submitting the request a written response within thirty (30) days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.

(e) *NRC records and documents.* The provisions of paragrapns (a) through (d) of this section do not apply to the production for inspection and copying or photographing of NRC records or documents. Production of such records or documents is subject to the provisions of §§ 2.744 and 2.790.

[37 FR 15134, July 28, 1972]

§ 2.742 Admissions.

(a) Apart from any admissions made during or as a result of a prehearing conference, at any time after his answer has been filed, a party may file a written request for the admission of the genuineness and authenticity of any relevant document described in or attached to the request, or for the admission of the truth of any specified relevant matter of fact. A copy of the document shall be delivered with the request unless a copy has already been furnished.

(b) Each requested admission shall be deemed made unless, within a time designated by the presiding officer or the Commission, and not less than ten (10) days after service of the request or such further time as may be allowed on motion, the party to whom the request is directed serves on the requesting party either (1) a sworn statement denying specifically the relevant matters of which an admission is requested or setting forth in detail the reasons why he can neither truthfully admit nor deny them, or (2) written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part. Answers on matters to which such objections are made may be deferred until the objections are determined. If written objections are made to only a part of a request, the remainder of the request shall be answered within the time designated.

(c) Admissions obtained pursuant to the procedure in this section may be used in evidence to the same extent and subject to the same objections as other admissions.

[27 FR 377, Jan. 13, 1962, as amended at 37 FR 15134, July 28, 1972]

§ 2.743 Evidence.

(a) *General.* Every party to a proceeding shall have the right to present such oral or documentary evidence and rebuttal evidence and conduct such cross-examination as may be required for full and true disclosure of the facts.

(b) *Written testimony.* The parties shall submit direct testimony of witnesses in written form, unless otherwise ordered by the presiding officer on the basis of objections presented. In any proceeding in which advance written testimony is to be used, each party shall serve copies of its propsoed written testimony on each other party at least fifteen (15) days in advance of the session of the hearing at which its testimony is to be presented. The presiding officer may permit the introduction of written testimony not so served, either with the consent of all parties present or after they have had a reasonable opportunity to examine it. Written testimony shall be incorporated in the transcript of the record as if read or, in the discretion of the presiding officer, may be offered and admitted in evidence as an exhibit. This paragraph does not apply to proceedings under Subpart B for modification, suspension, or revocation of a license.

(c) *Admissibility.* Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

(d) *Objections.* An objection to evidence shall briefly state the grounds of objection. The transcript shall include the objection, the grounds, and the ruling. Exception to an adverse

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ruling is preserved without notation on the record.

(e) *Offer of proof.* An offer of proof made in connection with an objection to a ruling of the presiding officer excluding or rejecting proffered oral testimony shall consist of a statement of the substance of the proffered evidence. If the excluded evidence is written, a copy shall be marked for identification. Rejected exhibits, adequately marked for identification, shall be retained in the record.

(f) *Exhibits.* A written exhibit will not be received in evidence unless the original and two copies are offered and a copy furnished to each party, or the parties have previously been furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence.

(g) *Proceedings involving applications.* In any proceeding involving an application, there shall be offered in evidence by the staff any report submitted by the ACRS in the proceeding in compliance with section 182b of the Act, any safety evaluation prepared by the staff and any Detailed Statement on environmental considerations prepared by the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, or his designee in the proceeding pursuant to Part 51 of this chapter.

(h) *Official record.* An official record of a government agency or entry in an official record may be evidenced by an official publication or by a copy attested by the officer having legal custody of the record and accompanied by a certificate of his custody.

(i) *Official notice.* (1) The Commission or the presiding officer may take official notice of any fact of which a court of the United States may take judicial notice or of any technical or scientific fact within the knowledge of the Commission as an expert body. Each fact officially noticed under this subparagraph shall be specified in the record with sufficient particularity to advise the parties of the matters which have been noticed or brought to the attention of the parties before final decision and each party adversely affected by the decision shall be given opportunity to controvert the fact.

(2) If a decision is stated to rest in whole or in part on official notice of a fact which the parties have not had a prior opportunity to controvert, a party may controvert the fact by exceptions to an initial decision or a petition for reconsideration of a final decision clearly and concisely setting forth the information relied upon to show the contrary.

(Sec. 161, Pub. L. 83-703, 68 Stat. 948 (42 U.S.C. 2201); sec. 201, as amended, Pub. L. 93-438, 88 Stat. 1243, Pub. L. 94-79, 89 Stat. 413 (42 U.S.C. 5841))

[27 FR 377, Jan. 13, 1962, as amended at 28 FR 10154, Sept. 17, 1963; 31 FR 4339, Mar. 12, 1966; 37 FR 15134, July 28, 1972; 39 FR 26279, July 18, 1974; 43 FR 17802, Apr. 26, 1978]

§ 2.744 Production of NRC records and documents.

(a) A request for the production of an NRC record or document not available pursuant to § 2.790 by a party to an initial licensing proceeding may be served on the Executive Director for Operations, without leave of the Commission or the presiding officer. The request shall set forth the records or documents requested, either by individual item or by category, and shall describe each item or category with reasonable particularity and shall state why that record or document is relevant to the proceeding.

(b) If the Executive Director for Operations objects to producing a requested record or document on the ground that (1) it is not relevant or (2) it is exempted from disclosure under § 2.790 and the disclosure is not necessary to a proper decision in the proceeding or the document or the information therein is reasonably obtainable from another source, he shall so advise the requesting party.

(c) If the Executive Director for Operations objects to producing a record or document, the requesting party may apply to the presiding officer, in writing, to compel production of that record or document. The application shall set forth the relevancy of the record or document to the issues in the proceeding. The application shall be processed as a motion in accordance

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Richard S. Salzman, Chairman
Dr. John H. Buck
Thomas S. Moore

In the Matter of **Docket No. 50-387**
50-388

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

September 23, 1980

Acting on the Commission's referral of an intervenor's request for relief related to the conduct of discovery in this proceeding before the Licensing Board, the Appeal Board accepts review of the matters raised but denies the relief sought on the ground that the record does not substantiate the intervenor's complaints.

RULES OF PRACTICE: DISCRETIONARY INTERLOCUTORY REVIEW

The Commission's Rules of Practice give an appeal board discretionary authority to review a licensing board's "interlocutory" rulings, *i.e.*, those disposing of less than an entire cause. 10 CFR 2.718(i), 2.730(f) and 2.785(b)(1). That authority, however, is reserved for exceptional and important issues.

intervenor until May 1, 1980, to supplement those that were not. LBP-80-13, 11 NRC 559 (1980). The Coalition filed additional answers on that date and more on May 20th; neither the applicants nor the staff touched on the adequacy of those answers in the subsequent briefs we called for in ALAB-593, *supra*, 11 NRC at 763.

III

We perceive three main themes in the Coalition's complaint: First, that the applicant unfairly asked it to answer "excessively large numbers of interrogatories"; second, that the Licensing Board failed to protect it from that "abuse" of the discovery process; and, third, that as "public-interest" litigants they were unfairly disadvantaged by the Commission's discovery rules. We discuss each in turn.

1. **The number of interrogatories.**

(a) The Rules of Practice (like the Federal Rules on which they are based) set no limit on the number of interrogatories parties may ask one another, provided that they relate to the issues in controversy. 10 CFR 2.740(b)(1). The Coalition's petition does not argue that the interrogatories it objected to are irrelevant; it complains of their number. The Coalition asserts that its "mere dozen contentions" were unfairly met with "fully 2,700" interrogatories from the applicants.[17]

The Coalition's complaint can neither be accepted nor rejected on the basis of those two figures. It is, to be sure, literally true that the Coalition submitted twelve contentions (of which the Board admitted ten). But a single contention can cover many subjects for inquiry; such is the case with the Coalition's. For example, the intervenor's first contention (rephrased and shortened by the Board) concerns the effect on human health of the uranium fuel cycle and appears in the margin below.[18] Even a cursory reading suggests ten legitimate subjects for inquiry subsumed in it; *i.e.*, (1)

[17] Coalition's "Request to the NRC Commissioners," dated March 14, 1980, at 6.

[18] "1. The quantity of radon-222 which will be released during the fuel cycle required for the Susquehanna facility had not been, but should be, adequately assessed. The radiological health effects of this radon should be estimated and these estimates factored into the cost-benefit balance for the operation of the plant.

The radiological health effects of all isotopes other than radon-222 which will be released during the fuel cycle required for the Susquehanna plant have been misrepresented and underestimated. In particular, the health effects of each long-lived isotope which will be released from the fuel cycle for Susquehanna should be reassessed. The appropriately determined effects must be factored into the cost-benefit balance for the operation of the plant." 9 NRC at 298.

The longer form of the contention as initially submitted appears in Appendix A, *infra*, at 341.

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the quantity of radon releases attributable to fabricating fuel for the plant; (2) how that quantity was assessed; (3) the health effects attributable to it; (4) how those effects influence the NEPA cost-benefit balance; (5) the other isotopes released in the fabrication process; (6) the quantities of those isotopes; (7) their health effects; (8) and (9) how and by whom those effects have been misrepresented; and (10) how those effects influence the cost-benefit balance.

The radiological health and safety contentions are similarly multi-layered. For example, the Coalition asserts the existence of "numerous design deficiencies" in the plant's nuclear steam supply system that render the facility unsafe to operate.[19] Even as rephrased and shortened by the Board for purposes of litigation, the contention has four subparts and each raises one or more serious allegations.[20]

This multiple structure typifies all the Coalition's contentions. (See Appendix A, *infra*). This is no criticism; safety questions involving nuclear power generation can have many facets. Our point is that the Coalition's references to its "mere dozen" contentions understates the number and complexity of matters it raised. Without attempting to quantify those matters precisely, it is fair to conclude that the Coalition's figure is low by at least a factor of five.

We stress again that there is nothing wrong with raising a great many issues. But the courts have long recognized that parties are entitled to discover all matters not privileged that tend to support or negate the allegations in the pleadings, or which are reasonably calculated to reveal such matters.[21] It is therefore against the number and nature of the issues

[19]See App. A, *infra*, at 345-346.

[20]"7. The nuclear steam supply system of Susquehanna 1 and 2 contains numerous generic design deficiencies, some of which may never be resolvable, and which, when reviewed together, render a picture of an unsafe unclear installation which may never be safe enough to operate. Specifically:

a. The pressure suppression containment structure may not be constructed with sufficient strength to withstand the dynamic forces realized during blowdown.

b. The cracking of stainless steel piping in BWR coolant water environments due to stress corrosion has yet to be prevented or avoided.

c. BWR core spray nozzles occasionally crack, a problem which reduces their effectiveness.

d. The ability of Susquehanna to survive anticipated transients without scram (ATWS) remains to be demonstrated. In this regard, reliance on probabilistic numbers, as 10^{-7} per year, is unwise and unsafe."

[21]Where discovery requests "are relevant directly to the issues raised by the pleadings they cannot be attacked." *Sandee Mfg. Company v. Rohm and Haas Company*, 24 FRD 53, 57 (N.D.

FOOTNOTE CONTINUED ON NEXT PAGE

actually raised, not a count of formal contentions, that the reasonableness of applicants' discovery requests must be balanced. And that number is, as noted, substantially greater than the Coalition's petition indicates.

(b) The applicants did not submit 2,700 separate interrogatories. Rather, they served a set of questions divided into sections corresponding to the contentions. The Coalition terms these the "basic" interrogatories. Coupled with them were four "general interrogatories" designed to elicit the foundation for the answers given to the basic interrogatories. The 2,700 figure is the Coalition's computation; its June 29, 1979 response to applicants' interrogatories explains the derivation of that figure: "The [Applicants'] basic questionnaire has about 150 questions and parts thereof. ...[T]he insidious nature of the problem lies in the four 'general interrogatories,' composed of a total of eighteen parts, and the Applicants ask that each of the 150 questions also be answered with respect to the eighteen 'general interrogatories.' This would require up to a total of 2,700 separate answers." (150 multiplied by 18).

(i) Turning first to the "basic" questions, it is apparent that the Coalition counted its contentions by one method and the applicants' interrogatories by another. Each contention was one unit regardless of the number of issues it raised; the interrogatories, however, were broken down into constituent parts for purposes of enumeration. The Coalition's assertion that the applicants had asked 150 "basic" interrogatories about its "mere twelve" contentions rests on this basis.

An "apples and oranges" approach of that sort is not very enlightening. A different picture emerges if one compares like and like; *e.g.*, the number of contentions against the number of basic interrogatories — 12 vs. 18, or the approximate number of issues raised by the former against the individual questions in the latter — 60 v. 150. But the fairest test is to compare the contentions themselves with the corresponding "basic" interrogatories; *i.e.*, Appendix A with Appendix D. We have done so and are satisfied that the basic interrogatories relate to the matters in controversy and are not unreasonable in number.[22] (By our count they average roughly ten per contention).

(ii) This brings us to the heart of the Coalition's dissatisfaction over the number of contentions — the four "insidious" general interrogatories

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Ill., 1959); *Browning King Company* v. *Browning King and Company*, 5 FRD 386, 387 (E.D. Pa., 1946); *accord, Kainz* v. *Anheuser-Busch, Inc.*, 15 FRD 242 (N.D. Ill., 1954); *DuBois Brewing Company* v. *United States*, 34 FRD 126, 127 (W.D. Pa., 1963).

[22]This does not mean that all 150 were flawless. We do not reach that question because the Coalition filed no specific objections to any of them.

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(reprinted in the margin below).[23] Here again, the Coalition's use of statistics is questionable. It is simply not the case that all four general interrogatories apply to each basic interrogatory, as the Coalition's total of 2,700 questions assumes. (See at p. 332, *supra*). Whether none, one, two, or all four apply depends on whether an interrogatory answer was based on (1) documents, (2) studies, (3) research, (4) private communications with others, or (5) some combination of those sources. We cannot ourselves quantify the total number of responses called for because we do not know the basis for the Coalition's assertions. But it is safe to observe that far fewer than 2,700 answers were necessary. This appears to be confirmed by the responses the Coalition finally supplied to applicants' interrogatories in its filings on January 18th, May 1st, and May 20th of this year.

The use of general interrogatories is a common discovery practice and the staff also used the technique, see Appendix C. Questions of this nature are designed to uncover the foundation for answers given to interrogatories seeking substantive information. The Rules of Practice expressly sanction discovery into the claims of an opposing party and

[23] Applicants' full set of interrogatories appears in Appendix D. The following are their four "general interrogatories."

1. Is your answer based upon one or more documents'? If so:
   a. Identify each such document on which your answer is based.
   b. Identify the information in each document on which your answer is based.
   c. Explain how such information provides a basis for your answer.
2. Is your answer based upon any type of study, calculation, or analysis? If so:
   a. Describe the nature of the study, calculation, or analysis and identify any documents which discuss or describe the study, calculation, or analysis.
   b. Who performed the study, calculation, or analysis?
   c. When and where was the study, calculation, or analysis performed?
   d. Describe in detail the information that was studied, calculated, or analyzed.
   e. What were the results of each study, calculation, or analysis?
   f. Explain how such study, calculation, or analysis provides a basis for your answer.
3. Is your answer based upon research? If so:
   a. Describe all such research and identify each document discussing or describing such research.
   b. When and where was the research conducted?
   c. By whom was the research conducted?
   d. Explain how such research provides a basis for your answer.
4. Is your answer based upon conversations, consultations, correspondence or any other type of communications with one or more individuals? If so:
   a. Identify by name and address each such individual.
   b. State the educational and professional background of each such individual, including occupation and institutional affiliations.
   c. Describe the nature of each communication with each such individual, when it occurred, and identify all other individuals involved.
   d. Describe the information received from each such individual and explain how it provides a basis for your answer.
   e. Identify each letter, memorandum, tape, note or other record related to each conversation, correspondence, or other communication with such individual.

specifically allow questions concerning such things as "the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." 10 CFR 2.740(b)(1).

We do not suggest that answering the applicants' interrogatories was a simple task. But the assertion that it "would take months of full time work" to respond[24] cannot be credited at face value. The Board below explained to the Coalition more than a year ago that:

> In responding to discovery requests, a party is not required to engage in extensive independent research. It need only reveal information in its possession or control (although it may be required to perform some investigation to determine what information it actually possesses). Assuming truthfulness of the statement, lack of knowledge is always an adequate response.[25]

Moreover, the interrogatories in large part inquired into the Coalition's own case. It is therefore not surprising that the Licensing Board gave a cool reception to a blanket refusal to answer even one of them on the grounds of "undue burden." Judicial tribunals have long recognized that the party being interrogated would have to gather such information before trial in any event; the only burden imposed is to advance that compilation to an earlier stage.[26]

The general lack of sympathy to claims of this kind stems from the nature of modern judicial and administrative litigation. "Pleadings" and "contentions" no longer describe in voluminous detail everything the parties expect to prove and how they plan to go about doing so. Rather, they provide general notice of the issues. It is left to the parties to narrow those issues through use of various discovery devices so that evidence need

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[24]The applicants' definition of "documents" is omitted; it appears in Appendix D

[25]Coalition's "Answers to First Round Applicant Interrogatories," dated June 29, 1979, at p. 2.

[26]Memorandum and Order on Scheduling and Discovery Motions (August 24, 1979) at p. 8 (unpublished).

[26]"If the interrogatories are relevant, the fact that they involve work, research and expense is not sufficient to render them objectionable [where] much of the information is in the possession or knowledge of the [parties to whom they are directed] and must be compiled in their own preparation for trial." *United States* v. *NYSCO Laboratories, Inc.*, 26 FRD 159, 161-62 (E.D.N.Y. 1960). "First, the mere fact that interrogatories are lengthy, or that the [party] will be put to some trouble and expense in preparing the requested answers is not alone sufficient to warrant the granting of a protective order. Secondly, the [party] has not made specific objections to particular interrogatories; a general request for a protective order is not sufficient." *Flood* v. *Margis*, 64 FRD 59, 61 (E.D. Wis. 1974) (citations omitted); *accord, Flour Mills of America* v. *Pace*, 75 FRD 676 (E.D. Okla. 1977); *Kainz* v. *Anheuser-Busch, Inc.*, 15 FRD 242, 252 (N.D. Ill. 1954); Wright and Miller, *Federal Practice and Procedure* (Civil — 1970 ed)., 2174 and authorities cited. See also, *Moore's Federal Practice, op. cit. supra*, p. 7.

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ey involve work, research and expense is re] much of the information is in the ey are directed] and must be compiled in *SCO Laboratories, Inc.*, 26 FRD 159, 161- rogatories are lengthy, or that the [party] ring the requested answers is not alone rder. Secondly, the [party] has not made neral request for a protective order is not is. 1974) (citations omitted); *accord, Flour* 1977); *Kainz* v. *Anheuser-Busch, Inc.*, 15 *Federal Practice and Procedure* (Civil — 's *Federal Practice, op. cit. supra*, p. 7.

be produced at the hearing only on matters actually controverted. This is why curtailing discovery tends to lengthen the trial — with a corresponding increase in expense and incovenience for all who must take part.[27]

In this case, the Coalition's pleadings put in issue a substantial number of significant matters. Applicants were aware that this intervenor and — perhaps more importantly — its representatives are not strangers to NRC proceedings.[28] The latter, though not trained lawyers or engineers, are experienced participants in Commission hearings. Both hold doctorates in scientific disciplines and they either are now or were once members of university faculties. We can find no fault in these circumstances with filing interrogatories designed to probe thoroughly the basis of the Coalition's case; it would have been imprudent not to have done so. The assertion that applicants' interrogatories were filed simply for harrassment is not well taken; they reflect the number and complexity of the issues raised, not an abuse of the discovery process.

2. **The Licensing Board's discovery rulings.**

The gravamen of the Coalition's second plaint is that the Licensing Board was not evenhanded in ruling on discovery requests. The Coalition's petition (at p. 2) alleges that the Board below "totally ignored the Intervenors' requests for clarification as well as for reasonable protection and relief," while "acquiesc[ing in] virtually every demand by Applicant and Staff and deny[ing] virtually every request by the various intervenors."

The record does not sustain those allegations. The fact that the Board did not grant the Coalition all the relief it wanted does not perforce mean that its requests were improperly ignored. For reasons we have already explained, the Board correctly rejected intervenor's attempt to avoid answering any of the applicants' interrogatories.[29] But the Board did ease substantially the Coalition's discovery burden. For example, its October 30 1979 discovery order relieved that intervenor of the need to respond to interrogatories except on its own contentions. That order also postponed all discovery on health and safety contentions until after the environmental hearings.[30] Those two steps alone reduced the Coalition's discovery obligations by two thirds, if not more. Moreover, this relief was granted not on the Coalition's initiative but the Board's. And the same order gave the Coalition another six weeks (until December 14, 1979) to answer the interrogatories.[31]

[27]See, generally, Wright and Miller, *Federal Practice and Procedure* (Civil — 1970 ed)., 2001 *et seq.*

[28]See the Coalition's September 17, 1979 Response (at p. 10) to the Order to Compel Discovery.

[29]See p. 335, supra.

[30]LBP-79-31, *supra*, 10 NRC at 604-05.

[31]*Id.* at 606.

The Coalition is no more correct in its assertion that the Board's unhesitatingly acceded to all the applicants' and staff's discovery requests. On the contrary, those parties' key demands were regularly denied. Their efforts to have the Coalition dismissed from the proceeding and its contentions disregarded because of its failure to make proper discovery were rebuffed repeatedly by the Board below.[32] Even a cursory reading of the Licensing Board's October discovery memorandum reveals its keen appreciation of a volunteer intervenor's plight.[33] If one thing stands out, it is the Board's sympathetic endeavors to assist the Coalition and the other intervenors to the limits of its authority.[34] Accordingly, though the rules called for staff documents to be made available for inspection and copying only in the Public Document Rooms, and despite the Coalition's failure to follow the rules for discovery against the staff, and notwithstanding the Commission policy then extant against financing intervenors,[35] the Board urged the staff to make "as much effort as possible...to assist the intervenors in obtaining the relevant information they seek to develop their positions to the fullest possible extent." Indeed, it went so far as to suggest ways this could be done, *e.g.*, by lending documents and transcripts to intervenor's representatives, giving them extra copies unneeded by the staff, and setting up an additional local Public Document Room in State College, Pennsylva-

[32]See, *e.g.*, LBP-79-31, *supra*, 10 NRC at 602; and the discussion in fn. 15, *supra*.

[33]For example, the Board noted that "we have clearly been apprised of the tremendous burden, both financial and in terms of time, which participation in a proceeding like this entails. Despite the neutrality of the Commission's discovery rules in their application to various parties, the effect of these rules is to impose vastly varying burdens on volunteer participant, on the one hand, and Applicants or governmental participants, on the other, whose efforts are funded by ratepayers or through taxes." 10 NRC at 605.

[34]Thus the Board wrote that "we are aware that at least one of the intervenors here — [the Coalition] — is actively participating in other on-going licensing proceedings, including that involving TMI-2. It appears that imposition of extensive discovery obligations in the near future on ECNP, at least, would seriously compromise that party's ability to contribute to the resolution of issues not only in this proceeding but in several others. We are aware, of course, of the Appeal Board's recent declaration — made with respect to at least one of the very same persons who is representing ECNP in this proceeding — that 'any individual undertaking to play an active role in several proceedings which are moving forward simultaneously is apt to find it necessary from time to time to expend extra effort to meet the prescribed schedules in each case.' *Philadelphia Electric Company* (Peach Bottom Atomic Power Station, Units 2 and 3), *et al.*, ALAB-566, 10 NRC 527, 530 (October 11, 1979). But that does not mean that a Board cannot, or should not, take into account obligations imposed by other proceedings in establishing its own schedules. We are doing so here to the extent we believe that modification of our previously established schedules will have no effect on our ability to bring this proceeding to a timely conclusion." 10 NRC at 604.

[35]See, *Financial Assistance to Participants in Commission Proceedings*, CLI-76-23, 4 NRC 494 (1976).

nia — where the Coalition's representatives reside — some 100 miles distant from the plant site.[36]

To be sure, the Board's patience was tested when the Coalition, in lieu of answering the remaining interrogatories, used the extra time allowed it for that purpose instead to file a pleading attacking the Board's integrity, complaining that it had been given only "hollow" relief, and renewing its demand to be excused from making discovery on grounds twice previously rejected.[37] The Board's reaction was firm but judicious: it pointed out errors in the intervenor's position, explained once again why the relief it sought was unwarranted, cautioned it against the use of intemperate language — and found cause to extend the Coalition's time to answer the interrogatories to January 18, 1980.[38] And when, after the Coalition finally answered some of the interrogatories, the other parties moved for sanctions on the ground that those answers were not adequate, the Board did not rush to grant that relief. Instead, it scheduled a prehearing conference in order to deal with the problem in a face-to-face meeting rather than on the papers alone. (At this point the Coalition sought to bring its complaints to the Commission). When the Board eventually ruled on those motions, it once again refrained from dismissing the Coalition or expunging its contentions, but allowed that intervenor yet more time to supplement its interrogatory answers. In the end, the Board gave the Coalition until May 1980 to answer interrogatories filed in May 1979. LBP-80-13, *supra*, 11 NRC 559.

What emerges from the farrago of motions, objections, and rulings is a different picture than the one the Coalition paints. It reveals an intervenor

[36] "As for the Staff, the position it has taken requiring the various intervenors to go to the Washington Public Document Room, or the local Public Document Room, to view certain documents, or alternatively to purchase them, is also in accord with NRC rules. 10 CFR 2.740(f)(3); 2.744; 2.790. But following the strict letter of those rules appears to impose unnecessary burdens on the intervenors. In our Special Prehearing Conference Order, we urged the Staff to arrange for the intervenors to be able to utilize the transcripts of this proceeding normally placed in the local Public Document Room for temporary periods away from that location. LBP-79-6, 9 NRC at 328. Apparently that result has not been achieved. The Staff has, however, arranged for an additional copy of the transcripts to be placed in the Pennsylvania State University Library. It also temporarily loaned one of its own copies to ECNP. Although we commend the Staff for these latest actions, we would urge it to continue to attempt to arrange for temporary, short-term intervenor use outside the document room of documents in the local Public Document Room. We also are urging the Staff to take certain other actions, as hereinafter described. We would hope that, consistent with NRC rules, as much effort as possible could be made to assist the intervenors in obtaining the relevant information they seek to develop their positions to the fullest possible extent." 10 NRC at 605.

[37] Among other things, the Coalition referred to the Board's rulings as a "hollow and empty gesture." It accused the Board of joining the applicants and staff in "creating a vicious precedent" for better-financed parties to force intervenors from the proceeding, and allowing an "inquisition-like" proceeding. Coalition Response of November 19, 1979 at pp. 7, 10.

[38] Order of December 6, 1979 (unpublished).

laboring under a serious misconception of the nature and purpose of discovery and of its rights and responsibilities as a litigant. For example, the Coalition repeatedly insisted that its rights were improperly abridged because the parties did not mail its representatives all the documents it demanded.[39] But the Commission's rules, like the corresponding Federal Rules, simply do not impose that requirement. A demand for documents is satisfied before the Commission as in court by producing them for inspection and copying.[40]

The Coalition also appears to consider discovery a means by which an applicant can shift its burden of proof to an intervenor.[41] The Licensing Board had correctly explained to the intervenor, however, that the applicant needs discovery to prepare for trial:

> The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the position of the intervenors, discharging that burden may be impossible. To permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record.[42]

In that same order the Board stressed that "[a] party may not insist upon his right to ask questions of other parties, while at the same time disclaiming any obligation to respond to questions *from* those other parties."[43]

Regrettably those lessons did not take hold, for that is what eventuated here. We have examined every one of the Licensing Board's discovery rulings carefully. The Board neither abused nor countenanced the abuse of intervenor's rights. Rather, its actions exemplify a steady, patient course designed to move the proceeding along without allowing potentially important issues either to slip by the wayside or to lose active supporters in the hearing. If the Board favored one side over the other on occasion, it was not the Coalition that had cause to complain.

3. The Coalition and the discovery rules.

The Coalition's filings evidence a belief that a "public interest" litigant with limited finances may disregard key provisions of the Rules of Practice. Simply as a matter of fairness, a licensing board may not waive the

[39] See, *e.g.*, Coalition's Response of October 13, 1979 at 3.
[40] 10 CFR 2.741, 2.744 and 2.790; Rule 34, Federal Rules of Civil Procedure.
[41] See, *e.g.*, the Coalition's "Request to the NRC Commissioners" of March 14, 1980 at 8.
[42] Memorandum and Order of August 24, 1979 (unpublished) at 6, quoting from *Northern States Power Company* (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977) (citation omitted).
[43] *Id.* at 10, quoting from *Offshore Power Systems* (Floating Nuclear Plants), LBP-75-67, 2 NRC 813, 816-17 (1975).

discovery rules for one side and not the other. To be sure, participation in Commission proceedings can be burdensome and time-consuming — as can be any complex litigation. But neither the Rules of Practice in general nor the discovery rules in particular were the root cause of the Coalition's unsatisfactory responses to legitimate discovery requests. There are other public interest litigants in this proceeding;[44] by and large they succeeded in responding after the Board explained to them what making discovery called for.

The Coalition's difficulties are of different origin. First, the organization and its representatives have undertaken to participate in *four* separate Commission evidentiary proceedings running simultaneously: the Three Mile Island Unit 1 Restart proceeding; the evidentiary proceeding on radon releases; the Three Mile Island Unit 2 cases involving aircraft crash probabilities; and this one.[45] Even experienced lawyers with ample resources behind them would be hard put to manage that load. It therefore comes as no suprise that intervenor's "lay" representaives are having difficulty doing it. Their participation has been similarly dificient in at least one other of those proceedings. Most of the Coalition's contentions were dismissed for failure to make discovery in *Metropolitan Edison Company* (Three Mile Island Station, Unit No. 1), LBP-80-17, 11 NRC 893 (1980) (Restart).

But it is not only that the Coalition has taken on more cases than it can handle. Its papers also evidence a failure to understand basic discovery tenets. A litigant may not make serious allegations against another party and then refuse to reveal whether those allegations have any basis. This, however, is what the Coalition attempted to do. For example, it responded to a motion to compel discovery with the assertion that:

> [T]he issues raised in contention are matters about which the Applicant and Staff should be well prepared already, if the license is to issue, regardless of whether or not the Intervenors can supplement their initial responses to interrogatories. In an Operating License proceeding, it is the business of the Applicant to prove it is entitled to a license. It is the responsibility of an Applicant to take whatever preparatory measures it deems appropriate to justify its claim that it should be granted a license. The Intervenors are not paid consultants of the Applicant. If this Applicant cannot prepare its case without the assistance of these Intervenors, then certainly the license should not issue.
>
> Similarly, the taxpayers have gone to great expense to provide the Commission with ample Staff resources to evaluate whether or not the Applicant is entitled to a license. The taxpayers are not paying these Intervenors to prepare the Staff for its role in this proceeding. Further, even

[44] See fn. 10, *supra*.
[45] See fn. 1, *supra*.

if the Commission were to grant these Intervenors financial assistance as requested, the role of the Intervenor in the licensing proceeding is to provide a check and balance to try to ensure that the public health and safety are protected. By no means, under any circumstances, is it the responsibility of these or any other intervenors to assist the Staff and Applicant in preparation for this proceeding.[46]

The Coalition's understanding of an intervenor's role is simply wrong. To be sure, the license applicant carries the ultimate burden of proof.[47] But intervenors also bear evidentiary responsibilities. In a ruling that has received explicit Supreme Court approval, the Commission has stressed that an intervenor must come forward with evidence "sufficient to require reasonable minds to inquire further" to insure that its contentions are explored at the hearing.[48] Obviously, interrogatories designed to discover what (if any) evidence underlies an intervenor's own contentions are not out of order. The record before us indicates that the Coalition's failure to answer them is not principally attributable to a lack of resources. Rather, its refusal to respond stemmed in larger measure from its erroneous ideas about an intervenor's role and obligations in NRC proceedings — and the fact that its representatives took on far more cases than they could reasonably handle.

In sum, the Coalition's complaints are not substantiated by the record and the relief it seeks must be *denied*.[49]

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Bishop
Secretary to the Appeal Board

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[46]Coalition Response of September 17, 1979, p. 7.

[47]*Consumers Power Company* (Midland Plant, Units 1 and 2), ALAB-283, 2 NRC 11, 17-18 (1975), *on reconsideration* ALAB-315, 3 NRC 101 (1976).

[48]*Consumers Power Company* (Midland Plant, Units 1 and 2), CLI-74-5, 7 AEC 19, 30-32 and fn. 27 (1974), *reversed sub nom. Aeschliman v. NRC*, 547 F.2d 622, 628 (D.C. Cir. 1976), *reversed and remanded sub nom. Vermont Yankee Nuclear Power Corp. v. NRC*, 435 U.S. 519, 553-54 (1978).

[49]We have not considered the Coalition's request to place a Commissioner on this Licensing Board. That relief is beyond our power, 10 CFR 2.721, and in any event is obviously a decision for the Commission itself.

On July 25th of this year the Commission amended the Rules of Practice to afford parties (other than the applicant) to licensing proceedings a hearing transcript and certain copying services without charge. 40 FR 49535. This is not the relief the Coalition seeks here.

Cite as 15 NRC 1400 (1982) ALAB-678

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Stephen F. Eilperin, Chairman
Christine N. Kohl
Dr. Reginald L. Gotchy

In the Matter of

Docket Nos. 50-454 OL
50-455 OL

COMMONWEALTH EDISON COMPANY
(Byron Nuclear Power Station, Units 1 and 2)

June 17, 1982

The Appeal Board reverses a Licensing Board decision (LBP-81-52, 14 NRC 901 (1981), *reconsideration denied*, LBP-82-5, 15 NRC 209 (1982)) that dismissed intervenor from this operating license proceeding for deliberately and willfully refusing to comply with its discovery order. The Appeal Board decides that dismissal is too severe a sanction to impose in the circumstances and replaces it with a less severe sanction.

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS (DISMISSAL)

The sanction of dismissal from an NRC licensing proceeding is to be reserved for the most severe instances of a participant's failure to meet its obligations. *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454 (1981).

LICENSING BOARDS: DISCRETION IN MANAGING PROCEEDINGS (SANCTIONS)

In selecting a sanction, licensing boards are to consider "the relative importance of the unmet obligation, its potential for harm to other parties

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or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances." Boards should attempt to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance. *Ibid.*

OPERATING LICENSE PROCEDURES: RESPONSIBILITY OF NRC STAFF

An operating license may not issue unless and until the NRC staff makes the findings specified in 10 CFR 50.57 — including the ultimate finding that such issuance "will not be inimical to * * * the health and safety of the public." As to those aspects of reactor operation not considered in an adjudicatory proceeding (if one is conducted), it is the staff's duty to insure the existence of an adequate basis for each of the requisite Section 50.57 determinations. *South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981), *affirmed sub nom. Fairfield United Action* v. *Nuclear Regulatory Commission*, No. 81-2042 (D.C. Cir., April 28, 1982).

RULES OF PRACTICE: DISCOVERY (ANSWERS TO INTERROGATORIES)

Answers to interrogatories should be complete in themselves; the interrogating party should not need to sift through documents or other materials to obtain a complete answer. 4A *Moore's Federal Practice* ¶33.25(1) at 33-129-130 (2d ed. 1981). A broad statement that the information sought by an interrogatory is to be found in a mass of documents is also insufficient. *Harlem River Consumers Coop., Inc.* v. *Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459, 463 (S.D.N.Y. 1974). Instead, a party must specify precisely which documents cited contain the desired information. *Martin* v. *Easton Publishing Co.*, 85 F.R.D. 312, 315 (E.D. Pa. 1980). See also *Nagler* v. *Admiral Corp.*, 167 F. Supp. 413 (S.D.N.Y. 1958). Where an interrogatory seeks the names of expected expert witnesses, the nature of their testimony, and the substance of their opinions, the responding party may not stop at merely identifying its experts; it must provide all the information requested. See *Bates* v. *Firestone Tire & Rubber Co.*, 83 F.R.D. 535, 538, 539 (D.C.S. 1979).

APPEARANCES

Mr. Myron M. Cherry, Chicago, Illinois (with whom Mr. Peter Flynn was on the brief), for the intervenor Rockford League of Women Voters.

Mr. Michael I. Miller, Chicago, Illinois (with whom Messrs. Paul M. Murphy and Alan P. Bielawski were on the brief), for the applicant Commonwealth Edison Company.

DECISION

The Rockford League of Women Voters (the League) has appealed from two Licensing Board decisions that dismissed the League from this operating license proceeding because of the League's willful failure to answer interrogatories as required by the Board's August 18, 1981 order (discovery order). See LBP-81-52, 14 NRC 901 (1981), *reconsideration denied*, LBP-82-5, 15 NRC 209 (1982). Because we believe the Licensing Board acted inconsistently with Nuclear Regulatory Commission policy in imposing the most severe sanction for the League's failings, we reverse and remand for further proceedings in conformity with this opinion.[1] In ordering reinstatement, we take various steps to assure that the League does not benefit from the delay it has caused in this proceeding. See *infra*, pp. 1419-1421.

I. Factual Background

While the most critical facts in this case concern the events giving rise to the Licensing Board's discovery order and the League's response (or lack of response) to it, a fuller exposition of the facts is necessary to understand our disposition of this appeal.

We begin with the Licensing Board's December 19, 1980 memorandum and order. There the Board overruled many of the objections raised by the NRC staff and Commonwealth Edison Company (Commonwealth Edison or applicant) to the League's revised contentions. LBP-80-30, 12 NRC

[1] The Commission's May 20, 1981 *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 454, provides, among other things, that the sanction of dismissal is to be reserved for the most severe instances of a participant's failure to meet its obligations. See discussion *infra*, pp. 1410-1411, 1416-1421.

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683. The Board's order admitted 114 of the League's contentions and instructed that "discovery shall commence forthwith . . . . " *Id.* at 698.[2]

Approximately two months went by and none of the parties initiated discovery.[3] Instead, on February 13, 1981 Commonwealth Edison sought reconsideration of the Board's ruling insofar as it admitted 53 particular League contentions. When the Board had not ruled on that petition by July 8, 1981, the applicant finally submitted to the League and also to the other intervenor, DAARE/SAFE, four "boilerplate" interrogatories.[4] Neither responded. Commonwealth Edison then promptly filed a motion to compel discovery.[5]

On August 5 the League filed an objection to the interrogatories. It argued that they were premature because (1) the Board had not yet ruled upon applicant's petition for reconsideration, and (2) the staff's Safety Evaluation Report (SER) had not yet issued. The League also noted that it had not settled upon what witnesses it expected to call at the hearing.[6]

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[2] The League had originally filed 13 contentions, while the other intervenors, the DeKalb Area Alliance for Responsible Energy (DAARE) and the Sinnisippi Alliance for the Environment (SAFE) had jointly filed ten. At the special prehearing conference held August 21-22, 1979, the Licensing Board urged the NRC staff, applicant, and the intervenors to attempt to formulate an agreed set of contentions. The parties were unable to agree and the League submitted its revised contentions, greatly expanded, on March 10, 1980. Close to a third of the contentions were almost a verbatim copy of those from another proceeding. The applicant and staff opposed the contentions in large measure. There the dispute rested until December 19, 1980, when the Board issued its opinion.

[3] But see *infra*, n. 22.

[4] In full, the interrogatories addressed to the League read:

1. With respect to each Contention advanced by the League which has been admitted by the Atomic Safety and Licensing Board in the above-captioned proceeding, list the following:
   a. A concise statement of the facts supporting each Contention together with references to the specific sources and documents and portions thereof which have been or will be relied upon to establish such facts;
   b. the identity of each person expected to be called as a witness at the hearing;
   c. the subject matter on which the witness is expected to testify;
   d. the substance of the witness's testimony.
2. With respect to each witness identified in the League's response to Interrogatory 1 above, identify each document which the witness will rely upon in whole or in part in the preparation of his testimony or in the development of his position.
3. With respect to each witness identified in the League's response to Interrogatory 1 above, identify the witness's qualifications to testify on the subject matter on which the witness will testify.
4. Identify all persons who participated in the preparation of the answers, or any portion thereof, to these Interrogatories.

[5] The answers to the interrogatories were due July 27, 1981. See 10 CFR 2.740b(b), 2.710. Commonwealth Edison filed its motions to compel discovery by the League and DAARE/SAFE on July 30.

[6] Objections to Commonwealth Edison's First Round of Interrogatories to Rockford League of Women Voters (August 5, 1981).

Two days later the League filed what it termed a "response" to the motion to compel discovery where it asserted further that both of the League's lawyers had been engaged virtually full-time in another case. The League also claimed that hearings in this case would not begin for at least another year and that its answers to the interrogatories at this preliminary stage would be of minimal (if any) benefit, grossly disproportionate to the time and effort entailed in formulating answers. Finally, the League argued that Commonwealth Edison had not even consulted the League in an attempt to resolve differences over the interrogatories, that local court practice would require such an effort before a motion to compel could be filed, and that the League stood ready and willing to confer with the applicant in an attempt to reach an agreement on the matter.[7]

II. The Licensing Board's Orders and the Parties' Responses

1. On August 18, 1981 the Licensing Board issued a memorandum and order that denied the applicant's petition for reconsideration of the Board's December 1980 ruling on contentions, and granted the applicant's motion to compel discovery by the League "subject to a prompt conference between the parties." LBP-81-30-A, 14 NRC 364, 374 (1981).[8]

The Board rejected the League's excuses for not answering the interrogatories. The first of these — that the interrogatories were premature because applicant's petition for reconsideration had not been ruled upon — was mooted by the Board's denial of that petition. As to the prematurity claim based upon non-availability of the SER, the Board responded:

> While more information may be available when the SER is filed, there is presently available a large amount of documentary and other information. The movant is entitled to full and responsive answers based upon the presently known status of these matters, and to additional information when it becomes available.

Id. at 373. With regard to the engagements in other proceedings of the League's counsel, the Board stated:

> The involvement of a party's lawyers in litigation or other professional business does not excuse noncompliance with nor extend deadlines for compliance with our rules of practice. The League's response is also a bit too casual about the length of time available for [trial] preparations leading to the commencement of

[7] League Response to Motion to Compel Discovery (August 7, 1981).

[8] The Board's memorandum and order also granted the applicant's motion to compel discovery by DAARE/SAFE, and directed those intervenors to file responsive answers "forthwith." 14 NRC at 374.

evidentiary hearings. A schedule will be issued soon by the Board. However, a large number of somewhat complex contentions have been filed by the League, and the Applicant is not required to delay discovery or trial preparation.

Id. at 373-74. Finally, the Board took cognizance of the League's desire for a conference with Commonwealth Edison in an effort to work out differences over the interrogatories:

> The last point relied on by the League's response concerns the request for consultation on discovery between or among the parties. This request is covered by paragraph 1 of the discovery rules set forth *supra*. The parties will be allowed a reasonable period of time to confer. However, responsive answers shall be filed to these and other interrogatories promptly, and discovery shall be conducted expeditiously.

Id. at 374.[9]

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[9] The "discovery rules" to which the Board alluded were nine measures set out earlier in its opinion to clarify and expedite further discovery. In full, they were as follows (*Id.* at 372-73):

1. All parties are directed to confer directly with each other regarding alleged deficiencies in discovery before resorting to motions involving the Board. To this end, voluntary discovery and disclosure are highly encouraged. All motions involving discovery controversies shall describe fully the direct efforts of the parties to resolve such disputes themselves.
2. We reaffirm a rule previously adopted, requiring that pursuant to the provisions of 10 CFR §2.740(e)(3), all interrogatories filed by any party to this proceeding, past or future, shall be deemed to be continuing in nature, and the party to whom they are addressed shall be under a continuing duty to supplement the responses as necessary to keep them currently accurate.
3. Objections to interrogatories or document requests shall be set forth in an appropriate motion for protective order, accompanied by points and authorities sufficient to enable the Board to rule immediately upon receipt of the opposing party's answer to be filed within ten (10) days (10 CFR §§2.718, 2.730, 2.740, 2.740b, 2.741).
4. All filings scheduled by the Board shall be physically lodged with the Board and parties on or before the due date, not merely mailed on that date. Expedited or following day delivery shall be employed when necessary.
5. The sheer number, volume and complexity of interrogatories should be substantially reduced. Boiler plate formulas involving unnecessary and redundant details should be avoided. The Board will consider limiting the number of interrogatories in accordance with the Commission's suggestion above, to achieve a smaller number of better focused interrogatories.
6. A failure to furnish requested information based upon a claim of awaiting further discovery is unresponsive unless precise information is given as to the nature and status of pending discovery, and a specification of the relevancy of such facts to the requested information.
7. All discovery shall be expedited to the maximum extent reasonably possible, to accommodate an accelerated hearing schedule that will be issued shortly.
8. A party who files a motion shall not have a right to reply to an answer in opposition thereto, unless prior leave is obtained from the presiding officer (10 CFR

(CONTINUED)

As noted above, the Board's opinion concluded by granting applicant's motion to compel discovery by the League "subject to a prompt conference between the parties." The very next day the Board issued a scheduling order that (as made more stringent on September 9, 1981) put a November 1, 1981 completion date for all discovery pending under the August 18, 1981 discovery order, "including answers to interrogatories, production of documents, and depositions."[10]

2. At this same time another proceeding involving Commonwealth Edison and the League was pending before the Illinois Commerce Commission, the agency that has the obligation under state law to pass upon the need for the Byron facility.[11] It too was in the discovery stage.[12]

On September 10 and 15, 1981 the League and Commonwealth Edison conferred about discovery in both proceedings, but focused principally on the state regulatory proceeding.[13] The upshot of the discussions was an

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§2.730(c)). Such leave will be granted sparingly, and then only upon a strong showing of good cause.

9. The parties are reminded that interrogatories are not the sole discovery method established by our Rules of Practice (10 CFR §§2.740-2.742). A well-timed deposition can often accomplish more than six months of back-and-forth fencing over interrogatories and answers.

These measures had been adopted *in toto* from a recent licensing board ruling in another proceeding in implementation of the Commission's contemporaneous guidance on board management of discovery. See *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-22, 14 NRC 150, 155-57 (1981), and *Statement of Policy, supra*, n.1, 13 NRC at 455-56.

[10] The Board's scheduling order also reflected staff information that the SER would be issued February 7, 1982. SER discovery was to begin February 8, 1982 and the hearing was (and still is) scheduled to start in August 1982.

[11] In November 1980, the League had asked the state commission to institute a proceeding to determine whether the Byron certificate of public convenience and necessity should be suspended, modified, or revoked because of the economic impact of the facility's asserted safety problems. See *Rockford League of Women Voters v. Commonwealth Edison Co.*, Ill. C.C. Docket No. 80-0760.

[12] That did not exhaust the proceedings involving the League and Commonwealth Edison. At the time it filed its request with the state commission, the League also filed a 10 CFR 2.206 request with the NRC's Director of Nuclear Reactor Regulation seeking a halt of construction at Byron and suspension of the construction permit. The 2.206 request was denied in *Commonwealth Edison Co.*(Byron Station, Units 1 and 2), DD-81-5, 13 NRC 728 (1981), *affirmed sub nom., Rockford League of Women Voters v. Nuclear Regulatory Commission*, No. 81-1772 (7th Cir., June 3, 1982).

[13] The correspondence between Mr. Paul M. Murphy for Commonwealth Edison and Messrs. Myron Cherry and Peter Flynn for the League evidencing these conversations includes, *e.g.*, letter of Paul M. Murphy to Peter Flynn (September 4, 1981), reproduced in LBP-81-52, 14 NRC at 909-10; letter of Paul M. Murphy to Myron Cherry (September 16, 1981), reproduced in *id.* at 911; letter of Myron M. Cherry to Paul M. Murphy (September 16, 1981), attached as Exhibit 21A to Commonwealth Edison's Opposition to the League's Petition for Reconsideration (November 23, 1981); letter of Paul M. Murphy to Myron Cherry (September 17, 1981), attached as Exhibit 14 to League Petition for Reconsideration of Board Orders of October 27, 1981 (November 6, 1981).

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agreement by the League to answer Commonwealth Edison's interrogatories in the NRC proceeding by October 1, and a series of agreements dealing with discovery in the state regulatory proceeding.[14] Two issues on which the parties did not agree (or at least had a different understanding of their agreement), however, concerned who would pay the fees for taking the depositions of the League's expert witnesses in the state proceeding, and whether the League's answers to Commonwealth Edison's interrogatories in the NRC proceeding were contingent upon Commonwealth Edison's discovery responses in the state proceeding.[15] The deposition fee dispute led Commonwealth Edison on September 18 to withdraw from its agreements on discovery in the state proceeding. See *infra*, p. 1415-1416. That action, according to the League's later filings, assertedly provided the ground for the League's withdrawal from its agreement to provide answers to Commonwealth Edison's interrogatories in the NRC proceeding.[16]

When October 1 passed without Commonwealth Edison having received the League's answers to the interrogatories, the applicant sought to arrange a conference call with the parties and the Licensing Board to discuss the matter. The call took place October 2 without the League's participation.[17] During the call the Licensing Board advised the applicant to put its dispute with the League over the lack of answers to its interrogatories in a written motion to which the League could then respond.

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[14] These latter understandings relative to the state proceeding included the scheduling of depositions of witnesses for late September and October, Commonwealth Edison's commitment to respond to the League's interrogatories no later than September 28 and to produce requested documents by October 5, and a tentative discovery cutoff date (the end of October), subject to resolution of outstanding items by the state hearing examiner. See letter of Myron M. Cherry to Paul M. Murphy (September 16, 1981), and letter of Paul M. Murphy to Myron Cherry (September 17, 1981), *supra*, n.13.

[15] Compare letter of Myron M. Cherry to Paul M. Murphy (September 16, 1981), *supra*, n.13 (refusing to produce expert witnesses unless Commonwealth Edison commits to paying $2,200 in expenses and fees), with letter of Paul M. Murphy to Myron Cherry (September 18, 1981), attached as Exhibit 16C to League Petition for Reconsideration of Board Orders of October 27, 1981 (November 6, 1981) (asserting previous agreement that League would produce expert witnesses Hubbard and Minor without resolving the question of who would pay their professional fees, subject to a subsequent ruling from the state regulatory hearing examiner).

[16] Letter of Paul M. Murphy to Myron Cherry (September 18, 1981), attached as Exhibit 16C to League Petition for Reconsideration of Board Orders of October 27, 1981 (November 6, 1981); League Response to Motion for Sanctions (October 13, 1981) at 1-2 (asserting that the League's answering of interrogatories in the NRC proceeding was contingent upon receipt of certain documentary and other information from Commonwealth Edison).

[17] The League and Commonwealth Edison disagree about whether the League's counsel had agreed to make himself available for the planned conference call. Compare Commonwealth Edison Motion for Sanctions (October 2, 1981) at 3-4 with League Response to Motion for Sanctions (October 13, 1981) at 3. The dispute is immaterial for our purposes. Further, a transcript of the conference call was kept and no matter of substance was decided.

That same day Commonwealth Edison filed a verified motion for sanctions seeking the dismissal of the League as a party to the Byron proceeding for "wilfully flaunt[ing]" *(sic)* the Board's August 18 order requiring prompt answers to the interrogatories.[18] In turn, the League filed a verified response that asserted that answering Commonwealth Edison's interrogatories was contingent upon receipt of certain information, and that the applicant had breached its agreement to supply that information.[19] The League further claimed — once again — that throughout August and September its counsel, Mr. Cherry, had been engaged virtually full-time in litigation in another proceeding, and that Mr. Cherry's partners were not available to assist in answering the interrogatories. The League reemphasized that given the distant hearing date (see *supra*, n.10) it did not see why the current wave of discovery could not proceed later, simultaneously with SER discovery after that document had issued. The League concluded by pointing out that it was raising serious safety and economic issues that in the public interest deserves to be litigated fully.

3. On October 27, 1981 the Licensing Board issued its memorandum and order dismissing the League as a party for "the League's total failure to provide responsive answers to interrogatories." 14 NRC at 906.[20] The Board found that interrogatories (such as those served by Commonwealth Edison) that inquired into the factual bases for contentions, their evidentiary support, the identity of witnesses and the substance of their expected testimony were a common and reasonable method of discovery. The Board went on to note that answers to the interrogatories had been due since July 27, 1981 and that the Board's August 18 discovery order had overruled the League's objections to them — the same kind of objections (other engagements of counsel and prematurity) that the League was reiterating in its response to Commonwealth Edison's motion for sanctions. *Id.* at 902-04.

Nor was the Board impressed by the League's argument that information Commonwealth Edison was to provide in the state regulatory proceeding was a pre-condition to the League's answering applicant's interrogatories in this proceeding. The Board stated:

> The disputes between counsel concerning depositions and other discovery, as shown by the League's Exhibits A, C and D, do not relate to the instant NRC proceeding. As they show on their face, they involve some pending Illinois Commerce Commission proceeding. The Board does not intend to become involved in some

[18] Commonwealth Edison Motion for Sanctions (October 2, 1981) at 4.
[19] League Response to Motion for Sanctions (October 13, 1981) at 1-2 and Exhibit C.
[20] The staff took no position on the dispute and has not participated on the appeal.

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> collateral litigation which is not shown to be relevant to this proceeding.

Id. at 906. The Board referred to two letters from Commonwealth Edison to the League that reflected a number of attempts by the applicant since the discovery order to obtain from the League a date certain by which the interrogatories would be answered, and the League's commitment, given September 15, to provide answers by October 1.[21] The Board found nothing in the League's response "to excuse or condone the League's total failure to provide responsive answers to interrogatories." *Ibid.* It concluded with the following observations (*id.* at 907-08):

> The facts . . . establish that the League and its counsel have deliberately and willfully refused to comply with the Board's Order of August 18, 1981, and have not answered interrogatories or furnished ordered discovery for a long period of time. The nature of the pretexts and excuses offered for such noncompliance demonstrate that such conduct is not an isolated incident, but rather is part of a pattern of behavior which seriously impedes our proceedings and impairs the integrity of our orders. Sanctions are therefore appropriate both to give all parties due process in this proceeding, and to deter similar conduct by other parties in the future.
>
> The Commission has indicated that the presiding officer has the necessary authority to "impose appropriate sanctions on all parties who do not fulfill their responsibilities as participants." In a recent policy statement, the Commission has discussed the spectrum of sanctions available to licensing boards to assist in the management of proceedings, including the dismissal of a party. Unjustified refusals or failures to comply with discovery orders have resulted in the dismissal of parties or contentions. Under all of the circumstances shown in this proceeding, the Board finds that the League should have all of its contentions stricken, and it should be dismissed as an Intervening party (10 CFR §§2.707, 2.718, 2.740) [footnotes omitted].

4. The League filed a detailed petition for reconsideration, and Commonwealth Edison an equally detailed response. On January 27, 1982, the Board issued its memorandum and order denying the petition for reconsideration. LBP-82-5, 15 NRC 209. The Board rejected the League's claim that it was being unfairly treated because Commonwealth Edison had not

[21] Letter of Paul M. Murphy to Peter Flynn (September 4, 1981) and letter of Paul M. Murphy to Myron Cherry (September 16, 1981), *supra*, n.13.

responded to the League's discovery requests,[22] and it again rejected as irrelevant the claimed discovery overlap with the state proceeding and the discovery disputes among counsel.[23] Next, the Board found unpersuasive the League's argument that in previous NRC cases the sanction of dismissal had not been so swiftly imposed.[24] The Board concluded by noting:

> [E]ven at this late date the League has successfully refused to provide the evidentiary bases for its admitted contentions, in spite of the clear mandates of Orders entered December 19, 1980 and August 18, 1981 .... No Board can manage discovery and conduct reasonably expeditious operating license hearings if such deliberate and willful behavior is to be tolerated [footnotes omitted].

Id. at 214-215. This appeal followed.

III. Analysis

A. General Principles

One year ago the Commission set forth the principles governing imposition of sanctions. See *Statement of Policy On Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981). This policy statement was prompted by the Commission's recognition that the licensing boards are faced with an unprecedented number of hearings, and the concern that, consistent with fairness, the hearing process should not unnecessarily delay

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[22] The League submitted interrogatories to the applicant and staff on March 12, 1980, two days after it filed 146 revised contentions. Because the admissibility of those contentions had not then been ruled upon, the interrogatories were opposed as premature under 10 CFR 2.740(b)(1). That rule provides that discovery "shall relate only to those matters in controversy" which have been identified by the presiding officer. On December 19, 1980 the Licensing Board issued its detailed order which ruled for the first time on the admissibility of the revised contentions and provided that "discovery shall commence forthwith upon all issues included in the admitted contentions." 12 NRC at 698. The Board later explained that it

> intended that provision to dispose of all pending disputes concerning discovery, both as to the scope of controverted issues and the formal commencement of discovery. Nothing remained pending or undisposed of, and it was so understood by the parties.

15 NRC at 212. Thus, the Board's December 19, 1980 order triggered the onset of discovery. The League was obliged at that time to propound its discovery requests, rather than rely on premature filings.

[23] These latter excuses, the Board said, "cannot be used to justify a pattern of conduct which flouts the Board's orders." 15 NRC at 214.

[24] Thus the Board stated: "[T]he League cannot successfully contend that it made its decisions to ignore or challenge the Board's Orders in reliance upon its belief that other boards tolerated such behavior longer. A party cannot repeatedly test a board to see how close it can come to defying orders with impunity, without running some risk of encountering sanctions." *Id.* at 214.

operation of plants that are ready and safe to operate. To help achieve that end, the Commission identified the types of actions that individual licensing boards can take to reduce the time for completing proceedings. Most pertinent to the matter at hand is the general guidance at the outset of the policy statement (*id.* at 454):

> Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For example, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing by the offending party, deny the right to cross-examine or present evidence, dismiss one or moe of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, boards should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fullfill its obligations and bring about improved future compliance. At an early stage in the proceeding, a board should make all parties aware of the Commission's policies in this regard.

It is against these principles that we must measure the League's conduct in this case. In that regard, we consider three questions: (1) what obligations did the Board's orders impose; (2) did the League fail to meet any of its obligations; and (3) if so, what sanction is appropriate? We approach these issues with full recognition that the Licensing Board is entitled to a substantial degree of deference in the management and conduct of proceedings before it. Nevertheless, as we explain below, we differ on certain points with the Board and remand the case to it for further proceedings consistent with this opinion.

B. Board Orders

1. The first of the two orders on which the Board's dismissal action was predicated — that of December 19, 1980 — can be disposed of quickly.[25] The gist of that Board memorandum was its ruling on contentions the League sought to litigate. The Board's opinion admitted the majority of the League's contentions and concluded with an order that provided "[t]hat discovery shall commence forthwith upon all issues included in the admitted contentions." 12 NRC at 698. But neither the League nor the applicant pursued *any* discovery until July 8, 1981 — almost seven months later — when Commonwealth Edison submitted its four boilerplate interrogatories to the League. To the extent the Board viewed its order as imposing an affirmative obligation on the parties to undertake any discovery — an exercise of questionable authority at best[26] — we see no meaningful distinction between Commonwealth Edison's delinquent conduct and that of the League. Thus, if the Board's dismissal action is to be justified, it must find the support elsewhere.

2. We have already described at length the Board's August 18, 1981 discovery order. See *supra*, pp. 1404-1406. That order rejected the League's grounds for not answering Commonwealth Edison's interrogatories. Taking cognizance of the desirability of a conference between the parties as a means of resolving discovery controversies, however, the Board granted the applicant's motion to compel discovery by the League, "subject to a prompt conference between the parties." 14 NRC at 374.

The League and Commonwealth Edison have rather divergent interpretations of the meaning to be attached to that Board order. The applicant's position is that the Board intended only the *timing* of the League's answers to be open for discussion at the parties' conference.[27] The

[25] In dismissing the League, the Board found that it had willfully refused to comply with the Board's order of August 18, 1981, and that the nature of the excuses offered for such noncompliance demonstrated a pattern of behavior that seriously impeded the proceeding and threatened the integrity of its orders. 14 NRC at 907. When denying the League's petition for reconsideration the Board elaborated further that the League had "refused to provide the evidentiary bases for its admitted contentions, in spite of the clear mandates of Orders entered December 19, 1980 and August 18, 1981 [footnotes omitted]." 15 NRC at 214.

[26] The Board is, of course, empowered to impose cutoff dates for completion of discovery. However, the failure of a party to conduct discovery, while obviously not a wise course of action, is a matter of voluntary choice and does not, we would think, constitute a failure to prosecute its case.

[27] App. Tr. 55-56.

League's position, seemingly, is that the only obligation imposed was for the parties to confer.[28] We agree with neither of those interpretations.

The Board's directions were given in the context of an opinion that included general discovery guidance offered "[a]s an aid to the parties in conducting discovery fairly and expeditiously." *Id.* at 370. That guidance reflected the Commission's then recent policy statement on the conduct of licensing proceedings, which seeks to minimize the use of interrogatories.[29] Along those lines, the Board specifically suggested that depositions might well be preferable to interrogatories (*id.* at 373):

> The parties are reminded that interrogatories are not the sole discovery method established by our Rules of Practice (10 CFR §§2.740-2.742). A well-timed deposition can often accomplish more than six months of back-and-forth fencing over interrogatories and answers.

A reasonable interpretation of that passage, and of the August 18 opinion as a whole, is that the Board was suggesting to the parties that they consider not only fixing a date certain for the League's answers to interrogatories, but also proceeding with depositions before pursuing the outstanding interrogatories further. This is not to say, however, that the Board's order had no force if the parties did not agree upon an acceptable sequence of discovery. The Board plainly did more than call upon the parties to confer. If the August 18 order simply ordered the parties to confer, as the League suggests, then the Board would not have ruled upon the propriety of Commonwealth Edison's interrogatories, or rejected the League's excuses, or ordered the interrogatories to be answered subject to a prompt conference between the parties. The League cannot escape the fact that the Board *did grant* Commonwealth Edison's motion to compel

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[28] Thus, counsel for the League argued before us that the Board "never ordered the interrogatories to be answered." App. Tr. 9. When pressed again, counsel stated, "Well, my obligation under the August 18th order in light of the meetings that I had with counsel was not to answer the interrogatories." App. Tr. 13.

[29] Thus the Board set out the following passage from the Commission's policy statement:

> The Commission is concerned that the number of interrogatories served in some cases may place an undue burden on the parties, particularly the NRC staff, and may, as a consequence, delay the start of the hearing without reducing the scope or the length of the hearing.
>
> The Commission believes that the benefits now obtained by the use of interrogatories could generally be obtained by using a smaller number of better focused interrogatories and is considering a proposed rule which would limit the number of interrogatories a party could file, absent a ruling by the Board that a greater number of interrogatories is justified. Pending a Commission decision on the proposed rule, the Boards are reminded that they may limit the number of interrogatories in accordance with the Commission's rules.

14 NRC at 371, quoting 13 NRC at 455-56.

answers *and* directed that "responsive answers *shall* be filed to these and other interrogatories *promptly* , and discovery *shall* be conducted *expeditiously*" *Id.* at 374 (emphasis added). If, at the conference, the League could not convince the applicant to alter its sequence of discovery, then the League had no option but to answer the interrogatories as propounded or file a motion for a protective order.[30] The League did not have the option of doing nothing.

As matters unfolded and as we discussed, *supra*, pp. 1406-1407, the parties did confer in the beginning of September. Whether an agreement was reached for the League to answer Commonwealth Edison's interrogatories by a date certain is disputed. There is also disagreement about whether Commonwealth Edison voluntarily deferred from insisting upon answers from the League until after it had furnished the League certain information. Were we obliged to resolve those disputes we would have no hesitancy in finding the League's version inherently incredible.[31]

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[30] The Board's discovery guidance also advised the parties as follows (14 NRC at 372):

> Objections to interrogatories or document requests shall be set forth in an appropriate motion for protective order, accompanied by points and authorities sufficient to enable the Board to rule immediately upon receipt of the opposing party's answer to be filed within ten (10) days (10 CFR §§2.718, 2.730, 2.740, 2.740b, 2.741).

Presumably the League could have argued that Commonwealth Edison was unreasonable in insisting upon answers to interrogatories as the first step. Alternatively, perhaps the League could have sought additional time in which to answer the interrogatories. While the Board's order had not fixed a date certain for the answers, its insistence that the parties hold their conference promptly, coupled with a scheduling order that set a November 1 cutoff date for all discovery under the August 18 order, would lead a reasonable person to understand that the League was under an obligation to answer the interrogatories very soon after the parties' conference.

[31] The applicant's version, supported by several affidavits, is that at the parties' September 10 meeting Mr. Cherry insisted that Commonwealth Edison provide information the League had requested in connection with the state regulatory proceeding before the League would answer the applicant's interrogatories in the NRC proceeding. Commonwealth Edison refused to make such an agreement and pressed Mr. Cherry for a date certain when the League would answer the pending interrogatories. Mr. Cherry refused to provide a date but promised to provide one the following week. See Affidavits of Paul M. Murphy at 4-5; Alan P. Bielawski at 3-4; Leslie A. Bowen at 4, Tom Robert Tramm at 3-4; James T. Westermeier at 3; Kenneth A. Ainger at 2; and John M. Lavin at 3, attached as Exhibits 1-3, 5-8, respectively, to Commonwealth Edison's Opposition to the League's Petition for Reconsideration (November 23, 1981).

Thereafter at a September 15 meeting between Mr. Cherry and Mr. Murphy, Commonwealth Edison's counsel (attended in part by Messrs. Miller and Bielawski for Commonwealth Edison as well), Mr. Cherry stated that he would answer the interrogatories in the NRC proceeding by October 1, 1981. Mr. Murphy followed up that discussion with a September 16 letter to Mr. Cherry specifically noting the fact that the previous day Mr. Cherry had "agreed to provide answers . . . [to Commonwealth Edison's interrogatories] by October 1, 1981." See 14 NRC at 911. Mr. Cherry made no response to that letter until after Commonwealth Edison filed its Motion for Sanctions on October 2. In sum, the applicant's

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As it turns out, however, these controversies between the parties are beside the point. For it is quite plain that whatever agreements or under-

version is that it insisted upon its right to have its interrogatories answered, that it rejected any link between NRC discovery and discovery before the state commission, and that Mr. Cherry breached his agreement to provide answers by October 1.

Mr. Cherry's version, supported by his verified pleading, is that, during repeated telephone conversations and face-to-face meetings, he and Mr. Murphy agreed that the League's answering the interrogatories would be contingent upon the receipt of certain other information from Commonwealth Edison. League Response to Motion for Sanctions (October 13, 1981) at 1-2. Mr. Cherry's pleading attached a September 16 letter from him to Mr. Murphy in which Mr. Cherry summarized the agreements reached in that regard. The letter reflects that Commonwealth Edison was to provide Mr. Cherry by September 28 answers to interrogatories the League had propounded in the state regulatory proceeding. Commonwealth Edison was also to provide the League certain documents in connection with a September 22 deposition of a Mr. Bukovski, who was a prospective witness on financial matters in the state proceeding.

At oral argument we advised Mr. Cherry that the allegedly conditional nature of the League's obligation to furnish answers to the interrogatories was not apparent from any of the documentary evidence in the case. Mr. Cherry then responded that the agreement, at least as he understood it, was an oral one, that it is "pretty hard these days to be found guilty of perjury," and that it was possible "that the lawyers had an ordinary, good faith lawyers' disagreement." App. Tr. 75-76.

We find the League's version not worthy of being credited for several reasons. First, the September 16 letter of Mr. Murphy to Mr. Cherry reflects an unconditional agreement by Mr. Cherry to answer Commonwealth Edison's interrogatories by October 1. See 14 NRC at 911. It is reasonable to believe that if Mr. Cherry considered that representation to be erroneous, he would have said as much in writing. There is no paucity of letter-writing between Messrs. Murphy and Cherry, and indeed the correspondence continued in the latter half of September on lesser issues. Especially in light of the Board's August 18 order putting the League under an obligation to answer the interrogatories promptly, it is fair to infer that so critical a "misunderstanding" on Mr. Murphy's part would have drawn swift and certain correction from Mr. Cherry.

Second, the information that Mr. Cherry claims was necessary for the League's answers to interrogatories was to be supplied by Commonwealth Edison on September 28. See League Response to Motion for Sanctions (October 13, 1981) at 1-2 and Exhibit A. Under Mr. Cherry's version of the agreement he then was to furnish the applicant answers by October 1, three days later. Yet at various times in the league's brief we are told that to answer Commonwealth Edison's interrogatories "would require *in excess of two hundred hours of work, or five normal full-time work weeks* . . . . " Brief in Support of Exceptions to Orders Dated October 27, 1981 and January 27, 1982 (March 22, 1982) at 7 (emphasis in original). See also *id.* at 18. It is not credible that the assertedly tedious five-week task could have been accomplished in three days if only Commonwealth Edison had supplied the League with information that in any event would have been of doubtful relevance. (The applicant's interrogatories asked for information bearing upon the *League's* contentions, prospective witnesses, their qualifications, and the substance and documentary support for their testimony. See *supra*, n.4.)

Third, we note that Mr. Cherry's version is without documentary support. In light of the frequency of exchanges between counsel memorializing their agreements and disagreements, we would have expected Mr. Cherry to have contemporaneous written substantiation of his "agreement" with Commonwealth Edison. Yet his own letter of September 16 clearly refers to only the state proceeding and fails to mention the critical fact of the allegedly conditional nature of the League's agreement to respond to the interrogatories.

standings counsel may have had ceased as of September 18.[32] For our purposes it is immaterial what caused this breach. What matters is that as of September 18 the parties had conferred pursuant to the Board's August 18 order and had been unable to reach any extant agreement on discovery. That state of affairs meant that the League was under an obligation, imposed by the August 18 order, either to answer the applicant's interrogatories or to move for a protective order. It did neither. The League's failure to answer Commonwealth Edison's interrogatories at that stage constituted a patent violation of the Board's discovery order.[33]

C. Sanctions

The Commission's policy statement on the conduct of licensing proceedings establishes a graduated scale of sanctions, reserving dismissal for the most severe failure of a participant to meet its obligations. In selecting a sanction the boards have been instructed to consider

> the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or a part of a pattern of behavior, the importance of the safety or environmental concerns raised by the party, and all of the circumstances. Boards should attempt to tailor sanctions to mitigate the harm caused by the failure of a party to fulfill its obligations and bring about improved future compliance.

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[32] Mr. Murphy's letter of that date to Mr. Cherry concluded as follows:

> Given that you have decided to withdraw from your previous agreement to produce the witnesses for the taking of their depositions, Edison has determined that it is appropriate to withdraw from its agreements on discovery. We intend to file with the [Illinois Commerce] Commission shortly the appropriate papers to obtain a ruling from the Commission on how, if at all, this proceeding should go forward. In the meantime, you may take this letter as notice that Edison will not voluntarily respond to any discovery originated by the League in this proceeding until such matters are resolved. Letter of Paul M. Murphy to Myron Cherry, *supra*, n.16.

[33] At oral argument Mr. Cherry conceded that "perhaps after that meeting fell down I should have moved for a protective order. I cannot give you any solid reason why I did not." App. Tr. 15. Counsel then sought to excuse his lack of action on grounds of the press of other litigation, and the fact that the Board's discovery order did not impose a date certain for the League's answers. App. Tr. 15-17.

Counsel's other engagements provide no justification, especially when the issue at hand is as serious as a failure to comply with an outstanding Board order. With regard to the absence of a date certain for answering the interrogatories, the need for prompt compliance can readily be inferred from the November 1 discovery cutoff date the Board had imposed. The absence of a date certain for answers to interrogatories may have some bearing on the question of sanctions (see *infra*, p. 1418) but does not excuse the League's total failure to respond to Commonwealth Edison's interrogatories.

13 NRC at 454. Our consideration of the factors enumerated in the policy statement leads us to conclude that the League's conduct in this case warrants a serious sanction, but not one so severe as dismissal.

1. There should be no misunderstanding: we consider the failure to comply with a board order a very serious matter indeed, injurious to the proper conduct of NRC licensing proceedings. This is especially so when the order at issue is a discovery order, for failure to comply with an order of that kind can wholly prevent a proceeding from getting off the ground. As we explained in *Pennsylvania Power and Light Co.* (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 334-35 (1980):

> "Pleadings" and "contentions" no longer describe in voluminous detail everything the parties expect to prove and how they plan to go about doing so. Rather, they provide general notice of the issues. It is left to the parties to narrow those issues through use of various discovery devices so that evidence need be produced at the hearing only on matters actually controverted. This is why curtailing discovery tends to lengthen the trial — with corresponding increase in expense and inconvenience for all who must take part [footnote omitted].

Not only does the failure to fulfill discovery obligations unnecessarily delay a proceeding, it is also manifestly unfair to the other parties. We reiterate the pointed comment of the Licensing Board in *Northern States Power Co.* (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977) (previously quoted with approval in *Susquehanna*, 12 NRC at 338):

> The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the positions of the intervenors, discharging that burden may be impossible. To permit a party to make skeletal contentions, keep the bases for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record [footnote omitted].

The League's failure to comply with the Board's discovery order in this case effectively stalled the proceeding in its tracks. The League proffered an extraordinarily large number of contentions, skeletal in outline, and refused to divulge any information whatsoever about any of the 114 contentions admitted by the Board. A board cannot move a proceeding forward, and a party cannot prepare its case, in the face of that kind of obstructionism. The League's obligation to answer Commonwealth Edison's interrogatories was an important one; a deliberate failure to meet it is worthy of serious sanction.

2. The Licensing Board thought that the League's conduct in not answering the interrogatories was part of a pattern of recalcitrance. We see a less distinct pattern, and one in which the League is not the only participant in the process that has been the cause of delay. It is principally for this reason that we differ with the Board on its choice of sanctions.

The pattern of League conduct identified by the Board encompassed (1) not initiating discovery when contentions were first admitted, (2) not answering any of the interrogatories that had been outstanding since July 1981, and (3) giving the flimsiest of reasons for not complying with the Board's discovery order. See 14 NRC at 907; 15 NRC at 214-215. We have already explained, *supra*, p. 1412, why the League's failure to initiate discovery cannot be held against it and does not provide an acceptable basis for distinguishing between the League's conduct and that of Commonwealth Edison. If the League wanted to walk into a hearing uninformed about the applicant's case, or thought it could resist a motion for summary disposition without having conducted discovery, it presumably was free to make those strategic decisions. But while one might question the usefulness of the League's participation on that basis, the League's casualness falls short of evincing a pattern of delay. After all, it is within the Board's power to impose a reasonable cutoff date for discovery. The exercise of that scheduling power (which the Board did exercise eight months thereafter on August 19, 1981) could have obviated delay in that regard.

So too we find less obvious than the Licensing Board the asserted fact that the League had not "furnished ordered discovery for a long period of time." 14 NRC at 907. We have already concluded that under the Board's discovery order the League's unequivocal obligation to answer the interrogatories was not triggered until September 18, when the parties' discovery agreements fell through. (The discovery order had not itself fixed a date certain for answers, or made the obligation to answer unconditional without regard to a conference between the parties.) In these circumstances the League's failure to answer interrogatories, while not excusable, was nevertheless not of exceptionally long duration.

While we agree with the Board that the repetitive nature of the League's excuses for failing to respond to discovery, coupled with the *total* failure to respond to any part of the interrogatories, support the finding of a pattern of delay, we are also constrained to note that the League was not the sole cause of delay. Both the applicant and the Board itself contributed in some measure. The applicant waited seven months after the Board's ruling on contentions before it initiated discovery. See *supra*, p. 1412. The Board did not issue its ruling on contentions and its denial of the applicant's petition for reconsideration of that ruling until nearly eight and

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six months, respectively, after the parties' submissions — action that can hardly be characterized as prompt.[34] In sum, we think the Board has overstated the League's delaying tactics and overlooked the fact that the League was not alone in failing to move the proceeding along.

3. The Commission's policy statement also calls upon its adjudicatory boards to consider the importance of the safety or environmental issues raised when assessing sanctions. This factor is of more importance during the later stages of a proceeding when the contentions have been fleshed out and the parties have submitted testimony. Here, where there is little but the bare contentions upon which to rely, this factor is of much lesser weight and not at all decisive. That the League pursued no discovery of its own before its dismissal hardly portends that it will make a significant contribution to the proceeding, whatever may be the abstract importance of its contentions. Similarly, the fact that fully a third of the admitted contentions were copied almost verbatim from those in another proceeding tends to show that more ink than thought went into their preparation. On the other hand, the League supported its 10 CFR 2.206 request with affidavits of expert witnesses on unresolved safety problems and quality assurance and control issues thought pertinent to the Byron facility. See *supra*, n.12. This latter effort affords some basis for believing that the League might well contribute to this proceeding, at least on a narrow group of issues.

4. Lastly, the policy statement asks the boards to consider all of the circumstances and to tailor sanctions to mitigate the harm caused by a party's failure to fulfill its obligations.

We have previously discussed our reasons for concluding that the sanction of dismissal is too severe given all the circumstances of this case. See *supra*, pp. 1416-1420. However, the League's violation of the Licensing Board's discovery order has had the effect of freezing this proceeding

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[34] The League filed revised contentions on March 10, 1980, the applicant and staff answered on April 18 and 25, respectively, and the Board issued its ruling on December 19, 1980. We recognize that the length and complexity of the contentions made ruling upon them far from simple, and we are not knowledgeable about the other matters the Board may have been working on during that time. All things considered, however, it is important to expedite rulings on contentions precisely so discovery can begin. We think a prompter ruling could have been expected.

Commonwealth Edison's petition for reconsideration was filed on February 13, 1981 and the Board's ruling issued on August 18, 1981. Responses to the petition were filed by the staff on March 3 and by the League on April 13. We do not think the Board is obliged to await responses to a petition for reconsideration before issuing a ruling unless it believes it will be helped by such responses. The typical judicial practice is that responses to petitions for reconsideration will not even be accepted for filing unless a response has been called for by the court. In any event, the four months between the League's response and the Board's ruling would likewise appear to be an inordinate amount of time for ruling on reconsideration.

at its earliest stages.[35] The applicant should not be penalized by that wrongful conduct. If the Byron plant is not to begin operation when it is ready, that should be as a result of a serious safety or environmental issue and not because the proceeding has been unjustifiably delayed by the League's failure to comply with the Licensing Board's discovery order. Therefore, consistent with the Commission's policy statement permitting dismissal of one or more of a party's contentions (13 NRC at 454), we limit the number of contentions the League can litigate to that number the Licensing Board concludes it can comfortably decide on the merits without unjustifiably delaying operation of the Byron facility.[36] This disposition, which no doubt will severely restrict the contentions the League will be entitled to press, also assures that the League must revise its broadside approach so as to concentrate on those few contentions it is best prepared to advance.[37] We believe this approach is most likely to lead to a useful examination of important safety or environmental issues.

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[35] So too, the League's laxity in ever drawing up its contentions has worked its toll. The League did not submit its revised contentions until six and one-half months after the Board's prehearing conference and four and one-half months after it had promised to submit them. See *supra*, n.2, and letter of Myron Karman to the Licensing Board (October 12, 1979), attached as Exhibit 11 to Commonwealth Edison's Opposition to the League's Petition for Reconsideration (November 23, 1981). While we recognize that the League was not represented by counsel for much of that period, the obligation to submit contentions is at bottom an obligation of the party itself, not of counsel.

[36] It is our understanding that the applicant expects the facility to be ready for fuel loading towards the end of 1983. App. Tr. 65-66. To the extent that the League has serious contentions to raise that cannot be litigated within this anticipated time frame, we repeat what we said in *South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 895-96 (1981), *affirmed sub nom. Fairfield United Action v. Nuclear Regulatory Commission*, No. 81-2042 (D.C. Cir., April 28, 1982):

> an operating license may not issue unless and until this agency makes the findings specified in 10 CFR 50.57 — including the ultimate finding that such issuance "will not be inimical to * * * the health and safety of the public". As to those aspects of reactor operation not considered in an adjudicatory proceeding (if one is conducted), it is the staff's duty to insure the existence of an adequate basis for each of the requisite Section 50.57 determinations [footnote omitted].

[37] The choice of which contentions the League may still litigate is for the League to decide in the first instance, subject to the time constraint we have identified. In other words, the League is to rank its contentions individually for the Licensing Board and the Board will then limit them based upon its understanding of the time needed to litigate those issues. (We would not be surprised if fewer than ten contentions can be timely heard, but that will be a determination for the Licensing Board to make in its informed discretion.) The Board may also modify to more acceptable form contentions such as those that were admitted subject to revision upon issuance of the staff's safety evaluation report and final environmental statement — documents that have since issued.

The Board is, of course, similarly empowered to impose stringent time limits on any discovery the League may undertake. In deciding the number of contentions the League may litigate, the Board should bear in mind the expected duration of League discovery as well as further discovery that Commonwealth Edison no doubt will undertake.

We are also aware of the fact that even at this late date the League has *totally* failed to answer Commonwealth Edison's interrogatories. At oral argument on May 13 we advised the League that if it were to be readmitted to this proceeding it could expect answers to those interrogatories to be required within less than one week from the date of our decision. See App. Tr. 27, 73. The League has had both ample time and warning to prepare answers to interrogatories that were first propounded nearly one year ago. Moreover, our restriction on the number of contentions that can be pursued has the secondary effect of easing the League's task in answering the interrogatories.[38] Therefore, the answers are to be in the hands of counsel for Commonwealth Edison *no later than June 24, 1982*. The Licensing Board is to strike any contention for which an interrogatory is not fully answered.[39]

Finally, we take cognizance of the League's concession that, if it were found to be at fault in not complying with the Board's discovery order, dismissal would be appropriate.[40] We have not enforced that concession in this opinion. But no further failings on the League's part will be tolerated.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the Appeal Board

[38] As indicated *supra*, n.4, the interrogatories are contention specific.

[39] In this regard we also want to make clear that the very general response to interrogatories alluded to by League counsel at oral argument will *not* suffice. App. Tr. 23-26. Answers should be complete in themselves; the interrogating party should not need to sift through documents or other materials to obtain a complete answer. 4A *Moore's Federal Practice* ¶33.25(1) at 33-129-130 (2d ed. 1981). A broad statement that the information sought by an interrogatory is to be found in a mass of documents is also insufficient. *Harlem River Consumers Coop., Inc.* v. *Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459, 463 (S.D.N.Y. 1974). Instead, a party must specify precisely which documents cited contain the desired information. *Martin* v. *Easton Publishing Co.*, 85 F.R.D. 312, 315 (E.D. Pa. 1980). See also *Nagler* v. *Admiral Corp.*, 167 F. Supp. 413 (S.D.N.Y. 1958). Where an interrogatory seeks the names of expected expert witnesses, the nature of their testimony, and the substance of their opinions, the responding party may not stop at merely identifying its experts; it must provide all the information requested. See *Bates* v. *Firestone Tire & Rubber Co.*, 83 F.R.D. 535, 538, 539 (D.S.C. 1979).

[40] As counsel for the League exaggeratedly put it, "If I am found to have been at fault, cut my head off." App. Tr. 71. The League, of course, argued it was not at fault. We have found to the contrary.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-75-30

ATOMIC SAFETY AND LICENSING BOARD

Max D. Paglin, Chairman
Dr. Richard F. Cole, Member
Dr. A. Dixon Callihan, Member

In the Matter of

BOSTON EDISON COMPANY, et al.

(Pilgrim Nuclear Generating Station, Unit 2)

Docket No. 50-471

June 6, 1975

Upon objections by various parties to discovery requests and motions for protective orders in construction permit proceeding, Board issues pre-hearing conference order which rules on unresolved discovery issues.

RULES OF PRACTICE: DISCOVERY

Since the Commission's rules of practice concerning discovery are based upon, and employ similar language to, the Federal Rules of Civil Procedure, guidance in construing the Commission's rules may be found in legal authorities and court decisions construing the Federal Rules.

RULES OF PRACTICE: DISCOVERY

Discovery, which is intended to insure that parties have access to all relevant unprivileged information prior to the hearing, has as its main objectives the more expeditious conduct of the hearing, the encouragement of settlement between the parties and greater fairness in adjudication.

RULES OF PRACTICE: DISCOVERY

Since discovery rules are to be interpreted broadly and liberally, inquiries thereunder are to be limited only by their reasonable relevancy to a sensible investigation.

RULES OF PRACTICE: DISCOVERY

Specification of the facts upon which a claim or contention is based is a permissible area of discovery.

The board disagrees with licensee that the subject matter of ECNP contention 1(c) is adequately covered by UCS contention 9, or that ECNP contention 1(d) is adequately covered by Sholly contention 5. Motion for sanctions, at 5, n. 5. Therefore, as a matter of board discretion and to assure an adequate evidentiary record, we retain contentions 1(c) and 1(d). Licensee should address in contention 1(c) the topic of the adequacy of Class 1E control room instrumentation following a feedwater transient and small break LOCA. In contention 1(d) the licensee should address the ranges of instrumentation in connection with contention 1(c). This specification will permit the licensee to address the contention adequately.

ECNP is not permitted to adopt UCS contentions 10, 12, 13, and 14, nor may it adopt previous TMIA contentions 1 and 2 which have now been withdrawn.

ECNP contention 17 was an emergency planning contention. It was deferred pending the filing of ECNP emergency planning contentions dated January 7, 1980. The subject matter was included in those contentions. The board should have noted *pro forma* the dismissal of ECNP contention 17 in its February 28 Fourth Special Prehearing Conference Order. We did not, but we do so now.

All other ECNP contentions are dismissed.

THE ATOMIC SAFETY AND LICENSING BOARD

Walter H. Jordan

Linda W. Little

Ivan W. Smith, Chairman

Bethesda, Maryland
June 12, 1980.

RULES OF PRACTICE: DISCOVERY

A party objecting to a request for discovery has the burden of showing plainly and specifically why the information sought should not be made available—*e.g.*, that it is privileged, not relevant, or otherwise improper, or that its production would be unduly burdensome.

RULES OF PRACTICE: DISCOVERY

Answers to interrogatories must be complete, explicit and responsive; where only limited information is available, a party is not excused from responding but must answer to the best of its ability, noting that the response reflects such limited information.

RULES OF PRACTICE: DISCOVERY

If information sought through discovery is relevant and material, a party is not excused from furnishing such information on the ground that doing so would be burdensome and expensive; however, it is within a court's (or agency's) authority and discretion to issue orders to prevent oppression and avoid undue expense.

RULES OF PRACTICE: DISCOVERY

In determining the scope of permissible discovery, a Board must balance the interests and rights of the parties in obtaining information for the proper preparation of their cases against the rights of the parties in being protected against undue harrassment or burden.

MEMORANDUM AND ORDER

Pursuant to Notices issued by the Board on April 14 and April 28, 1975, a Further Special Prehearing Conference was held in this proceeding at Boston, Massachusetts on May 5, 1975. The Conference dealt with a review of the progress of discovery, the pending objections to discovery requests, the pending motions regarding such discovery procedures, and reports from the parties as to the progress made in consultations directed by the Board for a possible resolution of the pending objections on discovery.

As a result of the aforesaid consultations, the Board was informed that a number of the then pending objections and other disputes regarding the discovery process had been resolved amongst the parties. Accordingly, the Board heard oral argument by the parties in support of, and in opposition to the

remaining motions regarding objections and requests for protective orders as listed below.[1]

The basic subject matter of the oral argument at the Prehearing Conference dealt with the following pending matters: Applicant's and Staff's Interrogatories to Massachusetts Wildlife Federation (MWF), Intervenor, and the latter's objections thereto; Applicant's Interrogatories to Daniel Ford, Intervenor, and the latter's objections thereto; Joint Interrogatories of Intervenors Commonwealth of Massachusetts and Ford to Applicant (Sets 2 and 4) and the Applicant's objections thereto and motions for protective orders.[2]

Because of the broad and pervasive nature of the discovery requests filed by the respective parties in this proceeding, as well as the nature of the objections filed thereto, it would be useful, in the resolution of the pending questions, to indicate by way of background the general procedural and substantive legal principles governing the use of the discovery process in Commission proceedings.

The use of the discovery process is governed by the Commission's regulations contained in 10 CFR 2.740-2.744. Reference is also made to the discovery process in 10 CFR 2.707 dealing with the failure of parties to comply, *inter alia*, with discovery orders entered by the Board, pursuant to Section 2.740. The Commission's regulations are based upon and drawn generally from the Federal Rules of Civil Procedure governing discovery, Rules 26 through 37, and, in the main, employ language identical with, or similar to the language of the Federal Rules upon which the process is based. Accordingly, guidance may be had from the legal authorities and court decisions construing the Federal Rules on discovery.

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[1] Although there were, as of the date of the Prehearing Conference on May 5, a considerable volume of pleadings on discovery exchanged among the parties, covering separate sets of interrogatories, objections and motions, the oral argument at the Conference dealt in the main with the following unresolved pleadings: (1) Applicant's Interrogatories to Massachusetts Wildlife Federation (Set No. 1), dated March 18, 1975, Objections by Massachusetts Wildlife Federation, dated April 1, Applicant's Memorandum Re Massachusetts Wildlife Federation Objections, dated April 25; (2) Applicant's Interrogatories to Ford (Set No. 1), dated March 18, 1975; Ford's Objections to Interrogatories, dated April 3; Ford's Answers to Interrogatories and Document Request (Set No. 1) dated April 12, 1975; Applicant's Memorandum Re Ford Objections and Answers dated April 25, 1975; (3) Staff's Interrogatories to Massachusetts Wildlife Federation (Set No. 1), dated March 18, 1975; Objections by Massachusetts Wildlife Federation, dated April 1, 1975; (4) Joint Interrogatories of Commonwealth of Massachusetts and Ford to Applicant (Set No. 2), dated April 1, 1975; Applicant's Objections and Request for Protective Order, dated April 18, 1975; (5) Joint Interrogatories (Set No. 4), dated April 16, 1975; Applicant's Objections and Request for Protective Order dated May 2, 1975; Applicant's Objections to Joint Interrogatories dated May 5, 1975; Response to Applicant's Objections filed by Commonwealth of Massachusetts and Ford dated May 12, 1975.

[2] In a number of other instances, responses to requests for discovery by the parties had not yet come due, under the prevailing schedule in the Order of March 6, 1975, by the time the Prehearing Conference was held.

In general, it has been long recognized that discovery in litigation, as well as in agency adjudication, is intended to insure that the parties to the proceeding will have access to all relevant, unprivileged information prior to the hearing, and that the primary objectives of the discovery process include the more expeditious conduct of the hearing itself, the encouragement of settlement between the parties, and greater fairness in adjudication.[3] Likewise, it has been uniformly recognized that the discovery rules are to be accorded a broad and liberal treatment so that parties may obtain the fullest possible knowledge of the issues and facts before trial, and that the inquiries are limited only by the requirement that they be reasonably relevant to a sensible investigation.[4]

However, the authorities have also held that, as a rule of necessity, there must be limitations on the concept of relevancy so as "... to keep the inquiry from going to absurd and oppressive bounds."[5]

As to the permissible areas of discovery, the authorities are clear that interrogatories seeking specification of the facts upon which a claim or contention is based are wholly proper, and that the party may be required to answer questions which attempt to ascertain the basis for his claim or, for example, what deficiencies or defects were claimed to exist with respect to a particular situation or cause.[6] In this connection, *Moore* cites cases, as noted below, which have allowed discovery of scientific, economic and medical opinions, and questions which seek a party's contention as to technical matters.

In sum, the principles behind the discovery rules were succinctly articulated by the Supreme Court of the United States in the landmark case of *Hickman* v. *Taylor*, 329 U. S. 495, 91 L.Ed 451 (1947) in the following language:

> We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case.[7] Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30 (b) and (d) and 31 (d), limitations inevitably arise when it can

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[3] See Administrative Conference Recommendation No. 21, *Discovery in Agency Adjudication*, adopted by the Administrative Conference of the United States, June 1970, 1 ACUS Reports 37; and Report of The Committee on Compliance and Enforcement Proceedings in Support of Recommendation No. 21, at 1 ACUS 577.

[4] See 4 *Moore, Federal Practice*, Section 26.55[1], p. 26-113, Note 9.

[5] See, e.g., *Porter* v. *Central Chevrolet, Inc.* (ND Ohio 1946) 7 FRD 86, cited in Moore, *supra*, at Section 26.56 [1], Note 70, p. 26-150.

[6] See *Moore*, *supra*, Section 26.56[3], at p. 26-167, and cases cited in the accompanying footnotes.

be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26 provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege. (329 U. S. at pages 507-409)

[7] One of the chief arguments against the "fishing expedition" objection is the idea that discovery is mutual—that while a party may have to disclose his case, he can at the same time tie his opponent down to a definite position. Pike and Willis, "Federal Discovery in Operation," 7 U of Chicago L Rev 297, 303.

Turning now to the problem of the objections which have been filed with regard to the subject interrogatories, the authorities hold that objections should be plain enough and specific enough so that the court can understand in what way the interrogatories are claimed to be objectionable.[7] The courts have held that general objections are insufficient, and that the burden of persuasion is on the objecting party to show that the interrogatory should not be answered—that the information called for is privileged, not relevant, or in some other way not the proper subject of an interrogatory.[8] Further, it has been held that where a heavy burden would be imposed if a party were required to answer detailed interrogatories, a segregation and analysis of a great mass of material being necessary, or where data and information must be compiled and collated, the court as an alternative may require the interrogating party to "dig out and sift the information" by an examination of the other party's files.[9]

With regard to the matter of the sufficiency of answers to interrogatories, it has been held that answers to interrogatories must be complete, explicit and responsive. The courts have held that if a party cannot furnish information and details, it may so state under oath.[10]

A further critical principle involved in the current consideration of the parties' requests for discovery and objections thereto, and motions for protective

[7] See *Moore, supra*, Section 33.27, at pp. 33-151 to 33-153.

[8] *Ibid.*

[9] See *Moore, supra*, at pp 33-157-158 citing, *inter alia*, *U. S.* v. *American Locomotive Company* (ND. Ind. 1946) 6 FRD 35.

[10] See *Bar Harbor Theater Corp.* v. *Paramount Film Distribution Corp.* (ED. N. Y. 1961. 5 *FR* Serv 2nd 32d2), a case in which the Court stated "lack of complete or partial knowledge does not excuse failure to make timely answers to interrogatories. In the absence of such knowledge, the party served with interrogatories, unless relieved by the Court, must answer to the best of his ability and if he claims lack of information sufficient to answer an interrogatory, his answer thereto should be to that effect; if he claims to have less than full information at the time his answers are due, he should answer by giving the available information and by stating that the answer reflects the limited information that he then has." (Cited in *Moore, supra*, at p. 33-140, Note 3.)

orders, concerns the assertion that the interrogatories filed would require research and compilation of data and information not readily known to the party being interrogated. The voluminous number of cases dealing with the holdings of courts in this regard are summarized and discussed in *Moore* at Section 33.20, from which the authorities distill certain general principles. As is there pointed out, the fact that to answer interrogatories might be burdensome or expensive is not a valid objection if the information is relevant and material; however, the court has authority to make orders to prevent oppression and to avoid undue expense. *Moore* states that the cases hold that "Where the burden is heavy, where a segregation and analysis of a great mass of material was necessary or where data and information must be compiled and collated, some, and perhaps the greatest share, of that burden and effort should fall on the party seeking the information."[11] In general, it seems to be the weight of the holdings that, in the sound discretion of the court, a party may be protected against interrogatories where the answers would require an excessive or oppressive amount of research or compilation of data and at a great expense, although mere general objections that the interrogatories are onerous and burdensome are not sufficient. While a party must furnish in his answer to interrogatories whatever information is available to it, ordinarily it will not be required "to make research and compilation of data not readily known to him."[12]

In a discussion of cases in *Moore, supra*, it is pointed out that objections were sustained to interrogatories where the court held that "interrogatories under Rule 33 [interrogatories directed to a party to the litigation] were never intended to compel an adversary to search and analyze more than five million documents in order to furnish the answers." (*Riss and Company* v. *Association of American Railroads* [DDC 1959] 23 FRD 211)[13]

Against the background of the foregoing discussion of the governing legal principles, the Board will attempt to dispose of the pending objections and motions concerning the discovery process in this proceeding. It will be necessary to balance the interests and rights of the litigants to obtain information for the proper preparation of their cases, as against protecting, in the interest of fairness and justice, the rights of the adversary parties against undue harrassment or burden. In the words of the Supreme Court in the *Hickman* case, "Properly to balance these competing interests is a delicate and difficult task." *Hickman* v. *Taylor, supra*, at page 497.

It would appear that the parties on both sides of the issues in this case, in their zeal of advocacy of their respective positions, have demanded of their adversaries the production of information through interrogatories which, although not wholly irrelevant, may be overly broad, too detailed to be useful,

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[11] See *Moore, supra*, cases cited at p. 33-101, Note 4.

[12] *Ibid.*, at p 33-103, Notes 10-11.

[13] Similar holdings in various cases are discussed in *Moore* at pp. 33-109 to 33-114.

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or not feasibly available to the extent and in the scope requested. Further, even if the information could be obtained through an excessive amount of research and at great expense, it appears, from the nature and scope of such interrogatories, that they would probably only yield information of such slight decisional significance and weight, and would be so remote in time and substance from the central issues in this case, as to "touch upon the irrelevant" (*Hickman*).

By the same token, the objections posed against such interrogatories must, in line with the authorities discussed above, be reasonable and specific, and may not utilize generalized "maxims" or recite legal rote. References to "the Applicant's burden of proof" as an objection, for example, are unavailing to avoid a party's obligation to respond to a proper discovery request for information in its possession.

Similarly, a refusal to respond based on a claim of awaiting further discovery, as a general objection, is not sufficient without specifying in what manner or what facts or what discovery requests are pending in that regard. In the same vein, it has been held that it is untenable to object to an interrogatory or to refuse to answer on the claim that involves "the work product of an attorney" or "the attorney-client relationship." The Supreme Court in *Hickman* stated that "A party clearly cannot refuse to answer interrogatories on the grounds that the information sought is solely within the knowledge of his attorney." *Hickman, supra*, at page 504.

It is pointed out in the annotation to the *Hickman* v. *Taylor* opinion, at 91 L.Ed. 467 that, in cases going back to 1844, the attorney-client privilege does not apply to the discovery of facts within the knowledge of the attorneys so long as those facts were not communicated or confided to him by his client, and that the privilege did not extend to information derived from other persons or sources even though the attorney acquired that information while engaging in his professional duty on behalf of his client.[14]

As has been stated, the Commission's Rules on intervention presume that the parties had specific factual bases for their contention, (See Section 2.714(a)). Where the discovery request seeks to elicit the factual basis for the contention, the intervenor cannot defend against such interrogatory by claiming that the facts are "privileged".[15] The discovery process seeks facts, and the old rule against discovery of "opinions and conclusions" has been superseded. Further, as has been indicated in the above quoted portion of the *Hickman* opinion, the "time honored cry of 'fishing expedition' can no longer suffice to preclude a party from properly inquiring into the facts underlying his opponent's case."

[14] See also *Moore, supra* at p. 26.
[15] See *Moore, supra*, at p. 26-165.

RULINGS ON PENDING MOTIONS

Applying the foregoing principles, the Board will now rule generally on the pending motions and objections to the various discovery requests. The specific rulings on the interrogatories and respective objections by the parties will be addressed and disposed of in the *Attachment* hereto.

With regard to the interrogatories by the Applicant and the Staff to the Massachusetts Wildlife Federation and the latter's objections thereto, the Board is of the view that the objections stated in the general form contained in MWF's pleadings do not constitute tenable or proper objections, and, therefore, may not be sustained. As is indicated in the specific rulings in the *Attachment* hereto, MWF is directed to respond to the interrogatories to the extent it has information in its possession, regarding the factual bases for its contentions which were admitted in the proceeding. To the extent that MWF asserts that it has not yet retained experts, so that it cannot respond to a particular interrogatory requesting the bases for its contentions, it may so indicate.[15a] In accordance with Commission procedure, at such time as the information becomes available to it, it will be required, under the provisions of Section 2.742, to supply said information to the Applicant and the Staff. As has been indicated in the discussion of authorities above, the Board does not believe that MWF has a justifiable objection when it asserts that Applicant or Staff is seeking the "work product of the attorney" or that it is seeking to impinge upon Intervenor's attorney-client relationship.

With regard to Applicant's interrogatories to Intervenor Ford and his objections thereto, the Board is of the view that the Applicant is properly seeking the information and facts being relied upon by the Intervenor in support of his contentions, and the nature of the evidence which Ford proposes to use at the hearing. The Board feels that the references by Intervenor, in response to specific interrogatories, to the pages of its petition to intervene in which is contained much argumentative and conclusory material, is not sufficient in terms of the purposes of the discovery process.[16] Ford, as a party in the proceeding, has a responsibility to specify the facts, i.e., the data, information and documents, if any, upon which he intends to rely and upon which he has relied in support of his intervention, so that the parties may be advised in advance with regard to the nature of Intervenor's case. Further, if the Intervenor is relying on certain official documents of the Commission or other Government

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[15a] See also the discussion regarding experts not yet retained in *Moore, supra*, at pages 26-50 to 26-52, and Federal Rule 26(b)(4).

[16] The Board notes that, under date of May 23, 1975, Applicant has served upon Ford Set No. 2 of Applicant's Interrogatories in which it apparently attempts, by further discovery, to elicit from Intervenor more specific responses as to the basis for Ford's contentions.

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agencies, he shall specify in particular which documents are being so relied upon. If the Intervenor cannot answer a particular inquiry on the grounds that he is still seeking information from the Applicant or the Staff by way of discovery requests, he shall specify what discovery requests are referred to and in what manner the responses to the discovery request have not yet been furnished or are insufficient at this point. To the extent the Intervenor is not in possession of the specific facts and information sought, he shall so state; generalized responses to the effect that "the information requested depends on facts within the intimate knowledge of the Applicants. . ." do not constitute a proper response by a party to a discovery request. The specific rulings contained in the *Attachment* hereto will illustrate and direct the Intervenor as to the manner in which he shall respond.

Similarly, the specific rulings will also indicate those aspects of the Applicant's interrogatories which the Board believes, as indicated in the governing case law, are too broad and pervasive, or are beyond the bounds of the contentions admitted as issues, and will designate the limitations which would represent a reasonable response. In this connection, the Board is constrained to observe that the traditional "Forms" for interrogatories found in recognized texts and handbooks used in civil litigation are not necessarily useful in administrative hearings such as the Commission's licensing proceedings. One should recognize that certain of the stylized process of civil court litigation takes on rather a strange cast if attempts are made to transfer it *in haec verba* to a hearing such as is here being conducted, with Intervenor parties appearing *pro se* and informal procedures being employed where it will expedite the process or enhance fairness. Thus, to require of the Intervenors, as does the Applicant's interrogatories, responses with the scope attempted in the section on "Definitions", seems to the Board not only somewhat unrealistic in the given circumstances, but less than practical. The Board also notes that, perhaps sardonically, the Joint Interrogatories of Commonwealth and Ford to Applicant have now copied Applicant's "Definitions" into their own document. Accordingly, the parties will be directed in the *Attachment* as to those responses which will be considered as adequate.

With regard to the joint interrogatories filed by the Commonwealth of Massachusetts and the Intervenor Ford on the Applicant, it appears, from the oral argument that certain portions of Sets 2 and 4, which have been objected to by the Applicant, need resolution by the Board.[17] (Sets 1 and 3 have apparently been resolved through consultation amongst the parties.) As to the still pending objections, the Board is of the opinion that the Applicant's objections filed against specifically named interrogatories in Sets 2 and 4 are well taken. The

[17] In this regard, the Board has also given consideration to the Memoranda on Objections to Sets 2 and 4 filed by the Applicant and the Response filed by Commonwealth and Ford, dated May 12, 1975.

joint interrogatories appear to be too broad and encompassing and should be more specifically related to the particular issues in the instant proceeding. Intervenors make no showing in their Response to Applicant's Memorandum of Objection, why such burdensome requests for all the projects engaged in by Bechtel and Combustion Engineering since their inception would be within reasonable limits for necessary proof in the subject proceeding, nor that, even if such voluminous information could be made available within the time span allowed for discovery in this proceeding, Intervenors could, in fact, make use thereof as a pretrial matter.

The Board is aware and agrees with Intervenors that the past record of licensees and their agents is germane in determining the qualifications of the Applicant to be awarded a construction permit for a new nuclear power plant. However, as the cases indicate, there must be reasonable limitations in terms of their direct bearing on the issues in this proceeding. The seeking of such a massive volume of information as is here requested, a good deal of which must, by its nature, be repetitive and duplicative, and only remotely relevant to the specific issues in the case, would constitute an undue and unnecessary burden. As the Applicant points out in its objections, to comply literally with Intervenors' request even as to individual interrogatories would involve searching through millions of pages of record data contained in voluminous files of its contractors covering many years of production. This is an inordinate and oppressive burden in terms of the reasonable needs for proof on the contentions admitted in this proceeding; and, as indicated by the Board's comments above, does not appear to come within those reasonable and sensible boundaries of discovery supported by the authorities. Accordingly, such interrogatories will not be allowed on the terms posed. Further, the requests for the records of Applicant's operating reports for Pilgrim 1 are equally available to the Intervenors from AEC files and, as indicated by the case law,[18] one party cannot compel another party to undertake the burden of preparation of the former's own case. At the most, Applicant need only make available its files on Pilgrim 1 Operating Reports for Intervenor's inspection and copying.

The cases likewise hold that interrogatories seeking legal conclusions are improper.[19] Thus, asking the Applicant which of Bechtel's and CE's acts constituted "deficiencies", as in Interrogatory No. 1 of Set 4, calls for legal conclusions as to whether those companies had violated the Commission's Regulations and Guides. Similarly, questions regarding "ultimate facts" such as "whether a party was in default" have been disallowed as calling for expression of opinion or requesting the party to provide the acts and omissions of the adverse party which it is claimed contributed to, say, an accident.[20] The

[18] See *Moore*, *supra*, p 26-165.
[19] See *Moore*, *supra*, p 26-161.
[20] See *Moore*, *supra*, p 26-162, 163.

Attachment hereto will specify the manner in which the Applicant shall respond to appropriate interrogatories in Joint Sets 2 and 4.

With regard to the Staff's Interrogatories to the parties, the discussion at the Prehearing Conference revealed that most of these matters had either been resolved or that responses were not yet due. In light of certain circumstances that developed, the Board extended the time for the parties to respond to the Staff's Interrogatories. The Board will not attempt, in this document, to rule on such matters, it being hoped that parties can, through consultation, resolve such disputes as may arise.

In the circumstances of the extensive consideration thus far given to the discovery requests both by the parties and the Board, in terms of the pleadings and the oral argument at the prehearing conference, the parties are directed to respond to the respective discovery requests in the manner directed in the *Attachment* hereto within 15 days from the date of service of this Memorandum and Order.

Dr. A. Dixon Callihan and Dr. Richard F. Cole, Members of the Board, join in this Memorandum and Order.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING BOARD

Max D. Paglin, Esq., Chairman

Dated at Bethesda, Maryland
this 6th day of June 1975.

Attachment: Specific Rulings

ATTACHMENT

I. INTRODUCTION

The principles governing the manner in which responses to interrogatories shall be made are those set forth in the Board's Memorandum, *supra*, at page 586 *et seq.* Intervenor's answers to Applicant's interrogatories may be limited, in accordance with the views expressed in the Board's Memorandum (at page 587) regarding the scope of Applicant's section on "Definitions", to information, data and documents which have played or will play a substantial role in the preparation of the Intervenor's case. The same rule will apply to Applicant's responses when the Intervenors have used similar "Definitions". In accordance with 10 CFR 2.742, in those instances where the parties do not presently have the information requested in specific interrogatories, or have not