

the document requests due on December 13, 1983. 10 C.F.R. §§ 2.740b and 2.741. CCCNH never requested additional time to respond to this discovery. Furthermore, CCCNH has not applied for a protective order, or otherwise objected to the interrogatories. CCCNH has apparently discharged its obligations in a similar manner regarding discovery posed to it by the Applicants. See "Applicants' Motion To Compel Answer To Interrogatories By Coastal Chamber Of Commerce Of New Hampshire," filed January 14, 1983. For the reasons stated below, the Staff moves this Licensing Board to direct responsive answers by CCCNH to the Staff's outstanding discovery requests within fourteen days, or alternatively, to dismiss these three contentions of CCCNH from the proceeding.

## II. DISCUSSION

Although CCCNH failed to respond to the Staff's discovery requests in a timely manner, CCCNH did participate in the Board's Conference Call of December 22, 1982. In that call, as memorialized in the Board's Memorandum and Order of January 17, 1983, p. 3, the Board ruled:

The Board considered the positions of the parties and determined that some extension of discovery was warranted. However, the Board is determined that these proceedings will progress in an orderly, efficient, and timely manner. Therefore, the Board extended discovery only until January 7, 1983, and directed that answers should be filed by January 17, 1983 (See 10 C.F.R. § 2.711), subject to the provisions of 10 C.F.R. § 2.710 on computation of time. [Emphasis Added]

Realizing that CCCNH is not represented by an attorney, the most honorific reading of the Board's Order is that it directed that all answers to outstanding discovery requests were due by January 17, 1983. It could also be reasonably argued that this ruling was only in response

to prefiled motions for an extension. As mentioned above, no such motion was filed by CCCNH. However, as a participant in the Conference Call, CCCNH was fully apprised of the Board ordered response date of January 17. Therefore, not only has CCCNH failed to discharge its discovery obligations to the Staff (as well as to Applicants), it has also failed to comply with a Board Order, from which it arguably benefitted.

10 C.F.R. § 2.740(f) provides that a party may file a motion to compel discovery after another party has failed to respond to requested interrogatories or document requests. That regulation also provides that "[f]ailure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person failing to answer . . . has applied for a protective order . . . ." Id. Clearly, then, the Board can direct CCCNH to discharge its discovery obligations by responding within fourteen days to duly filed and outstanding discovery requests.

Alternatively, allowing CCCNH the benefit of an extension it did not seek by the Board in its Conference Call and followup Order of January 17, 1983, in which parties were "directed that answers should be filed by January 17, 1983," CCCNH has also violated the Board's outstanding direction to provide answers to discovery. 10 C.F.R. § 2.707 authorizes the presiding officer to impose various sanctions on a party for its failure, among other things, to comply with a discovery order. Pursuant to 10 C.F.R. § 2.707, an intervenor can be dismissed from the proceeding for its failure to comply with discovery orders. Northern States Power Co. et al. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC

1298 (1977); Offshore Power Svstems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975); Public Service Electric & Gas Co. (Atlantic Generating Station, Units 1 & 2), LBP-75-62, 2 NRC 702 (1975).

In Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-80-17, 11 NRC 893 (1980), the licensing board did not dismiss the intervenor that failed to comply with the Board's discovery order, but dismissed many of the intervenor's contentions.<sup>1/</sup> Such a course may be appropriate here, and the Staff so moves in the alternative. It is clear from the record that CCCNH may have a continued interest in the off-site emergency planning aspects of this proceeding, but has not properly discharged its responsibilities to date as a party co-sponsoring its three admitted contentions. Dismissal of these three contentions, CCCNH 4, 5, and 7, will not necessarily mean that such contentions will not be litigated, inasmuch as the State of New Hampshire is sponsoring virtually identical contentions. However, CCCNH's position on discovery, as well as the fact that its representative in this proceeding can be very difficult to reach at times, has resulted in a substantial lack of knowledge by the Staff (and presumably the Applicant) as to the preparation of their respective cases on CCCNH's three contentions. Without knowledge as to the real concerns that CCCNH may have with respect to these contentions, both their resolution and/or their litigation becomes

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<sup>1/</sup> See also Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982).

impossible. Moreover, all indications are that CCCNH has not coordinated or even discussed the litigation of these contentions with the State.

In Three Mile Island, supra, the Licensing Board utilized a tripartite test in arriving at its decision to dismiss certain contentions of, but not dismiss the defaulting intervenor as a party. The first test used was due process to the movant. Here, the Staff, although filing discovery, has no knowledge of the position, or the technical reasons underlying the position of CCCNH. The Staff has learned nothing of CCCNH's case or position on these issues because CCCNH has refused to participate in discovery. The second consideration utilized in Three Mile Island, supra was the question of due process to the intervenor. Giving full consideration to the fact that CCCNH is not represented by counsel, it certainly had the opportunity by pleading, or at the conference call of December 13, 1983, to explain its position. As the Board in TMI stated:

Whether ECNP has willfully refuses [sic] to comply with the board's order compelling discovery, or whether it simply lacks the information needed to prepare its case, the result is nearly the same. If it has willfully disobeyed our lawful order, it is not entitled to participate on the respective issues. If, on the other hand, ECNP is ignorant of the grounds for its own contentions, and is no closer preparation for trial than it was nine months ago, it is unlikely that ECNP can make a contribution to the evidentiary record. In either event licensee is entitled to relief. The relief we grant, dismissing certain contentions, may also afford a measure of relief to ECNP by reducing the litigation burden about which it complains. (11 NRC 902-03).

Such an analogy, the Staff submits, is also relevant here.

The third test used by the Board in TMI was the question of the public interest in a complete evidentiary record. Here, since the State of New Hampshire has sponsored virtually the identical contentions, and

has participated in discovery, there will be no net loss to the public interest if the aforementioned contentions, CCCNH 4, 5, and 7, are dismissed. If CCCNH refuses to participate in the discovery phase of this proceeding, it should not be permitted to participate in the hearing phase of this proceeding, on these contentions. By retaining its party status, it should be permitted to sponsor and litigate emergency planning contentions, or late-filed contentions, provided, of course, it properly discharges its discovery obligations.

Such a sanction is factually appropriate and consistent with the Commission's Statement of Policy On Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). Relevant to this question is the general guidance at the beginning of the policy statement. The Commission stated:

In selecting a sanction, licensing boards are 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 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.  
13 NRC at 454.

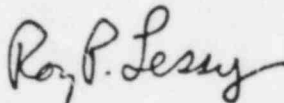
Here, by CCCNH's refusal to participate in the discovery phase of this proceeding despite a general Board direction to do so, the Staff (as well as the Applicant) is faced with the prospect of having to prefile written testimony in approximately two months on contentions in important areas (such as radioactive monitoring) without the slightest idea of the technical bases underlying CCCNH's adversary positions on these matters. Since the contentions are jointly sponsored, as explained infra, the

evidentiary record can still be developed with respect to virtually identical contentions by the State of New Hampshire, which has participated in the discovery process.

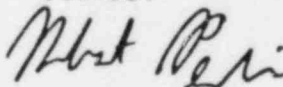
### III. CONCLUSION

For the reasons discussed above, the Staff moves that the Licensing Board direct CCCNH to respond within fourteen days to the interrogatories and document requests propounded by the Staff on November 10, 1982. Alternatively, the Staff moves the Licensing Board to dismiss CCCNH contentions 4, 5, and 7 from this proceeding.

Respectfully submitted,



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Dated at Bethesda, Maryland  
this 4th day of February, 1983

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
PUBLIC SERVICE COMPANY OF	)	Docket Nos. 50-443 OL
NEW HAMPSHIRE, <u>et al.</u>	)	50-444 OL
	)	
(Seabrook Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "MOTION OF THE NRC STAFF TO COMPEL ANSWERS TO INTERROGATORIES BY COASTAL CHAMBER OF COMMERCE OF NEW HAMPSHIRE OR IN THE ALTERNATIVE, MOTION TO DISMISS CCCNH CONTENTIONS 4, 5, AND 7" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 4th day of February, 1983:

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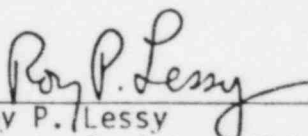
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