October 6, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
LOUISIANA POWER & LIGHT COMPANY	)	Docket No. 50-382
	)	
(Waterford Steam Electric Station, Unit 3)	)	

RESPONSE TO JOINT INTERVENORS' MOTION
TO DISMISS FOR FAILURE TO MAKE DISCOVERY AND
REQUEST FOR THE PRODUCTION AND COPYING OF DOCUMENTS

On September 29, 1982, Joint Intervenors filed two related pleadings concerning discovery of documents. The first, "Motion to Dismiss for Failure to Make Discovery," seeks to have the Licensing Board deny Applicant's license application on the ground that Applicant failed to provide Joint Intervenors with documents which Joint Intervenors believe "directly affect[ ] and [are] related to the evacuation contentions." In the alternative, Joint Intervenors ask for compliance with their second pleading, a "Request for the Production and Copying of Documents." This second pleading requests that "Applicant, Staff or FEMA" produce various documents relating to emergency evacuation planning.[1/] For the reasons discussed below, both pleadings are without merit, and should be denied by the Licensing Board.

1/ The first six items in the Document Request are similar to the six categories of documents Joint Intervenors claim in their Motion to Dismiss should have been produced by Applicant.

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I. Joint Intervenors are Attempting to Obtain Discovery Prohibited by 10 C.F.R. § 2.740(b)(1)

Joint Intervenors, by way of these pleadings, are attempting to obtain discovery some five months after the record was closed in this proceeding. Such belated discovery requests clearly are prohibited by the Commission's Rules of Practice. 10 C.F.R. § 2.740(b)(1) provides that "no discovery shall be had after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer upon good cause shown." Moreover, during the long history of this proceeding, Joint Intervenors have conducted discovery, and all discovery agreements or arrangements among the parties have been fulfilled.[2/] Because Joint Intervenors have demonstrated no good cause for this belated discovery request, the request must be denied.

Even a cursory review of the documents requested by Joint Intervenors plainly shows that the request is unsupported by any demonstration of good cause. In the Document Request, Joint Intervenors ask that the following documents be produced:

> (1) All documents evaluating evacuation procedures or establishing schedules for such evaluation.
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> (2) All documents evaluating the siren warning system or establishing schedules for such evaluation.
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> (3) All documents pertaining to any and all teaching methods or sessions concerning evacuation procedures including names and curricula [sic] vita of those individuals doing the instruction.

2/ The pleadings allege no shortcomings in Applicant's responses to Joint Intervenors' discovery requests prior to the hearing. In any event, the time to complain of inadequate discovery responses has long since passed. See 10 C.F.R. § 2.740(f).

(4) All standard operating procedures and/or implementing procedures for removal of individuals during a nuclear accident including but not limited to the special categories of individuals named in Joint Intervenors contentions.

(5) All documents relating to any agreements reached by Applicant with adjacent parishes for buses or other special vehicle transportation for categories of individuals named in Joint Intervenors contentions.

(6) All documents relating to the installation or testing of communication equipment in the Waterford facility which would interface with any and all state or local agencies. 3/

Each one of these document requests could have been made during the discovery period, well before close of the record in this proceeding. See 10 C.F.R. § 2.741 (establishing procedures for production of documents). Joint Intervenors nevertheless chose not to make these document requests in a timely manner.

Joint Intervenors cite no new facts or developments that would support such belated discovery. Indeed, Joint Intervenors' requests do not even identify a specific document or documents which they believe they have not had access to.

In sum, Joint Intervenors have had every opportunity to make their document requests prior to the § 2.752 Prehearing Conference. They were well aware of the discovery regulations, as demonstrated by the timely discovery requests which they did file, citing the Commission's discovery rules. They cannot now, in clear contravention of binding Commission regulation, seek the production of additional documents.

3/ The Document Request also seeks the production of "any and all NRC documents relating to the Indian Point evacuation proceeding." Presumably this request is addressed only to the NRC Staff.

II. Applicant Was Under No Obligation to Produce the Requested Documents Voluntarily

In their Motion to Dismiss, Joint Intervenors allege that they were not provided with "materials presently being furnished by the applicant to the Staff and/or FEMA,"[4/] and ask, therefore, that the license be denied. Joint Intervenors cite not one single NRC regulation or case in support of their extraordinary argument. Nevertheless, Applicant has reviewed the NRC regulations and cases which could be relevant, viewing Joint Intervenors' argument either as a discovery request by a party intervenor or as an assertion of an unspecified right to Applicant-Staff correspondence by an intervening party.[5/]

Viewed as a discovery request, one need look no further than to the NRC discovery regulations themselves to dispose of Joint Intervenors' argument. Indeed, Joint Intervenors apparently totally misappreciate the discovery mechanisms established by the Commission's Rules of Practice. To the extent that any intervenor desires production of any relevant documents, 10 C.F.R. § 2.741 establishes the procedures for requesting such documents. If -- as Joint Intervenors suggest -- Applicant was under a duty to identify and voluntarily produce all relevant documents, without a discovery request, the procedures established in § 2.741 for demanding production of relevant documents would be mere surplusage. Moreover, such an obligation would be

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4/ The same allegation is made for "materials being prepared by the Staff and/or FEMA for this licensing."

5/ Applicant's review has been as to Joint Intervenors' request for the documents. There is obviously no precedent for the remarkable relief -- denial of the application -- which Joint Intervenors seek.

wholly inconsistent with well established precedent requiring intervenors to frame their document requests with reasonable specificity. See, e.g., Illinois Power Co. (Clinton Power Station, Units 1 and 2), ALAB-340, 4 N.R.C. 27, 34 (1976) (blanket request for all relevant documents is obviously without merit). Intervenors thus may have been entitled to the production of relevant documents but, in turn, they were obligated to identify with reasonable specificity which of those documents they desired.[6/]

Viewed, alternatively, as a request for Applicant-NRC correspondence based on some unspecified right of an intervening party, the result is the same. In prior NRC cases, the Appeal Board has had occasion to address this question. In fact, on one occasion, it has addressed the very request Joint Intervenors now make in this proceeding and has rejected the idea that an intervening party is entitled to Applicant-NRC correspondence.

In Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 A.E.C. 331, 348-49 (1973), intervenors argued that they should have been served with six letters and one bulletin sent by the NRC Staff to the license applicant. The Appeal Board rejected the argument with the following statement:

> All of these items are representative of the normal, routine correspondence which is carried on between the staff and various segments of the reactor industry. As such, they are simply examples of the staff's carrying

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6/ An obligation to provide documents without an appropriate discovery request would shift to license applicants the burden of deciding which documents are relevant to the admitted issues at the pain of incurring sanctions should applicants be second-guessed successfully. The Commission's Rules of Practice clearly place no such burden on applicants.

> out ongoing regulatory functions it uninterruptedly performs from the inception of the licensing process to the final stages of decommissioning.
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> . . . .
>
> Intervenors further complain that the letters and bulletin had not been forwarded to them. But there is no rule that requires the forwarding of documents of this type to an intervenor. The documents were deposited in the Public Document Room, as required; and they were available to intervenors and anyone else. Indeed, intervenors assert that they became aware of the information in this manner. In sum, the failure to send the documents to intervenors invaded none of their substantial rights.

ALAB-123, 6 A.E.C. at 348-49.

There is no distinction between the facts here and the facts before the Appeal Board in Midland. All correspondence between Applicant and NRC Staff[7/] was sent to the Public Document Room, and was freely available to Joint Intervenors throughout the entire proceeding. These documents have also been placed in the local public document room established for this proceeding. That document room is located in the University of New Orleans library and is freely and conveniently accessible to Joint Intervenors. As in Midland, no substantial rights of Joint Intervenors have been invaded. Even so, if Joint Intervenors had desired to have all correspondence between Applicant and the NRC Staff on a particular subject, Joint Intervenors could easily have obtained such correspondence through the

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7/ Moreover, insofar as Joint Intervenors might assert that they are entitled to all Applicant-FEMA correspondence as well, Applicant notes that a review of Applicant to FEMA correspondence reflects that such correspondence consists entirely of very few letters of transmittal and that the transmitted documents have been provided as well to NRC and, thus, appear in the local public document room. In fact, these documents transmitted to FEMA have also been provided to Joint Intervenors.

simple expedient of filing an appropriate and timely request for production of documents in accordance with the Commission's Rules of Practice.

Two other Appeal Board opinions in prior cases merit discussion.[8/] These cases are Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 A.E.C. 159, 183 (1974) and Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), ALAB-184, 7 A.E.C. 229, 237 n.9 (1974). A close examination of these cases shows that they are not directly on point and do not place an obligation on Applicant or the NRC Staff to voluntarily serve on Joint Intervenors all correspondence between Applicant and the Staff.

In Vermont Yankee, the intervenor had been served all correspondence between the Applicant and the Staff during the course of the hearing. Intervenor asked that service of such correspondence be continued during the full term of the license. The Appeal Board held that intervenor was not entitled to such service during the term of the license. The Appeal Board, however, also concluded that the practices entered into prior to the hearing should be continued until judicial review had been completed. As stated by the Appeal Board:

> [W]e hold that the practices with respect to service of documents upon parties followed during the course of the administrative proceedings must continue unabated during the period allowed for seeking judicial review; thereafter,

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8/ In fact, the Licensing Board itself in a conference call on October 1, 1982, requested Applicant and the Staff to address the applicability of these two cases to Joint Intervenors' instant request.

> during the pendency of judicial review, those practices must continue unabated with respect to those parties who participate in the judicial review proceedings.

ALAB-179, 7 A.E.C. at 183 (emphasis added).

Nothing in Vermont Yankee deals with the scope or identification of documents license applicants are obligated to provide voluntarily during the course of the administrative proceedings; that issue was simply not before the Appeal Board.

In Shearon Harris, the intervenor argued that it should have received timely notice of a § 50.12 exemption application. The Appeal Board held that such an exemption application was a "significant development" of which the parties were entitled to prompt notice.[9/] In a footnote to its discussion, the Appeal Board made the following statement:

> We recently had occasion to discuss another aspect of the question concerning the right of the participants in an on-going administrative proceeding to personal service of "all applicant-staff correspondence relating to the facility." Vermont Yankee Nuclear Power Corporation (Vermont Yankee Station), ALAB-179, RAI-74-2 159, 183 (February 28, 1974). In that decision, we held that the intervenors' right to insist that they be personally served with all correspondence between the applicant and regulatory staff related to the exercise by the regulatory staff of its ongoing regulatory responsibility remained in existence not just until the conclusion of administrative proceedings but throughout the period during which our decision, or the Commission's, was subject to judicial review.

ALAB-184, 7 A.E.C. at 237 n.9.

9/ That is not the case in the instant proceeding. No such "significant development" has been identified or alleged in the pleadings.

In the above quoted statement, the Appeal Board refers to "intervenors' right to insist that they be personally served." The language suggests that the intervenors may have had the "right" to demand such service, but it does not suggest that applicants or the NRC Staff would be obligated to serve such correspondence voluntarily in the absence of a request by the intervenors. This is consistent with 10 C.F.R. § 2.741 which, as discussed above, gives intervenors the "right" to demand production of relevant documents, but does not impose an independent obligation to produce relevant documents absent a specific demand.

In any event, the Appeal Board's footnote in Shearon Harris refers back to its earlier Vermont Yankee decision, which discussed the continuation of prior practices engaged in by the parties in that particular proceeding. The Appeal Board in Vermont Yankee simply did not hold that such a duty of voluntary service exists in general -- nor was that issue before the Vermont Yankee Appeal Board.

It is particularly noteworthy that neither the Vermont Yankee nor the Shearon Harris Appeal Boards cite the Midland holding, decided less than a year before. In our view, this is because the Appeal Boards in Vermont Yankee and Shearon Harris did not see their decisions as inconsistent with the Midland decision. Nor do we. To be sure, had these opinions been reviewed by the Appeal Boards in Vermont Yankee or Shearon Harris as inconsistent with or overruling the Midland holding, they would have explicitly said so.

Nor does industry-wide practice suggest that Midland is understood to have been overruled by Vermont Yankee or Shearon Harris. The Vermont Yankee case, to which the Shearon Harris footnote refers, deals only with the continuation of prior practice in that particular proceeding, whatever it may be. There, the prior practice apparently was to serve the intervenor with all correspondence between the applicant and the NRC Staff. Based on a survey of six law firms actively engaged in NRC licensing proceedings, including Applicant's counsel, current practices vary widely with respect to serving applicant-Staff correspondence on intervenors, with the Vermont Yankee practice being unusual. The particular practice in a particular case generally emerges as a result of a request by the intervenor, followed by either an agreement by the applicant and/or the NRC Staff, or a licensing board order, in response to the intervenor's request. Early in the instant proceedings, Applicant agreed voluntarily to serve Joint Intervenors directly with copies of the FSAR and the Environmental Report, and all amendments or supplements thereto. This, Applicant has done, and continues to do.[10/] Thus, the practice in this proceeding was early established, and continues to be honored.

Applicant thus was under no legal obligation to serve its correspondence with the NRC Staff on Joint Intervenors. The Motion to Dismiss and the related Document Request, therefore, must be denied.

10/ Applicant has also timely served Joint Intervenors with other important, relevant documents such as the emergency preparedness plan, the siren study and the evacuation time study.

III. Joint Intervenors Are Barred By Their Untimely Conduct From Raising This Claim

Even if it could be argued that Applicant was under a duty to serve upon Joint Intervenors all correspondence with the NRC Staff and FEMA, Joint Intervenors' untimely raising of this claim bars any relief.

It is inconceivable that Joint Intervenors were not aware throughout the course of this proceeding that correspondence was taking place in the normal process of NRC's review of license applications. Joint Intervenors were served with copies of the Staff's correspondence to the Applicant, much of such correspondence consisting of replies to Applicant's correspondence to the NRC Staff or requests asking Applicant to respond to Staff inquiries. Moreover, all correspondence between Applicant and the NRC Staff was available to Joint Intervenors in the local public document room. Yet despite their knowledge of such correspondence, Joint Intervenors at no time during the proceeding requested personal service of Applicant's correspondence to the NRC Staff.[11/] Whatever Joint Intervenors' rights may have been, they surrendered those rights when they deliberately chose not to assert them in a timely manner.

Parties are not permitted to sandbag adjudicatory tribunals and adversaries by failing to raise a claim in a timely manner, only so as to be able to raise the claim when it most

11/ The same is true for Applicant-FEMA correspondence.

prejudices the other parties. A contrary rule would encourage litigants to remain silent about possible violations of their rights until after completion of the hearing, and thereby "save" their challenge should the hearing not meet their expectations. A requirement that such claims be raised in a timely manner also serves the ends of justice by permitting adjudicatory tribunals to fashion appropriate relief without having to resort to draconian sanctions (such as denying a license application) or reopening a proceeding for additional evidence.[12/] As the Appeal Board stated in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 N.R.C. 179, 189 (1978):

> A party is entitled to a fair hearing, not a perfect one; it must make a reasonable error to have a procedural error corrected, not hoard it for use as a ground for reversal in the event it does not like the ultimate decisions on the merits.

In this regard, it also must be noted that Joint Intervenors have suffered no real prejudice, having had unrestricted access through the local public document room to all correspondence between Applicant and the NRC Staff.

In sum, Joint Intervenors' inexcusable delay in asserting their alleged right bars them from any relief at this late date.

12/ This concept is analogous to the doctrine of laches, which requires that claims be timely raised or lost. If a party, without excuse, delays in asserting a right or claim, and such delay causes undue prejudice to the other party, the late asserted right or claim is lost. See, e.g., Environmental Defense Fund v. Alexander, 614 F.2d 474, 478 (5th Cir.), cert. denied, 449 U.S. 919 (1980).

IV. Conclusion

For all of the foregoing reasons, Applicant respectfully submits that the requests in Joint Intervenors' above referenced pleadings be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 822-1000

By: _____
Bruce W. Churchill
Ernest L. Blake, Jr.
James B. Hamlin
Delissa A. Ridgway

Counsel for Applicant

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