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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

Public Service Electric and Gas Company	)	
	)	Docket No. 50-354-OL
(Hope Creek Generating Station)	)	

APPLICANTS' MOTION TO DISMISS THE PROCEEDING AS A RESULT OF DEFAULT BY THE PUBLIC ADVOCATE IN NOT COMPLYING WITH THE BOARD'S ORDER OF AUGUST 10, 1984 AND ANSWER TO INTERVENOR'S MOTION FOR ADDITIONAL DELAY

Preliminary Statement

In an Order entered August 10, 1984, the presiding Atomic Safety and Licensing Board ("Licensing Board" or "Board") required the Public Advocate to identify its witnesses in this proceeding no later than August 20, 1984 and "to make them reasonably available for depositions within two weeks thereafter."[1/] The Board further stated: "Noncompliance with such dates may be grounds for dismissal or other sanctions."[2/]

The Order resulted from the motion by Applicants to compel the Public Advocate to designate his witnesses and

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1/ Public Service Electric & Gas Company (Hope Creek Generating Station, Unit 1), "Order" (August 10, 1984) (slip op. at 2-3).

2/ Id. at 3.

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make them available for depositions or, alternatively, to dismiss the proceeding.[3/] Over the opposition of the Public Advocate, the Licensing Board granted the motion, ruling that the Public Advocate "has not shown good cause for its request [of a 60-day extension] at this time"[4/] and that his "dilatory conduct cannot be condoned."[5/]

Notwithstanding the Licensing Board's explicit finding that good cause for a 60-day extension had not been shown and its clear instruction to produce his witnesses forthwith, the Public Advocate has again requested an extension of approximately 60 days before he would even begin to comply with the Licensing Board's discovery orders. Instead of compliance, the Public Advocate has attempted to divert attention away from his own inaction in obtaining expert witnesses and making them available for depositions by making excuses that cannot withstand serious examination.

The Public Advocate has had almost a year to identify and prepare its expert witnesses. Moreover, two of the three expert witnesses he identified on August 20, 1984 were previously identified as prospective witnesses in discovery

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3/ See Applicants' Motion to Compel Designation of Witnesses and Their Availability for Depositions and/or to Dismiss the Proceeding (July 30, 1984).

4/ Hope Creek, supra, "Order" (August 10, 1984) (slip op. at 1).

5/ Id. at 2.

responses filed more than four months ago (the third is with the same consulting firm). Obviously, the Public Advocate did not pursue consultation with his witnesses. If any degree of diligence had been exercised, potential scheduling problems could and should have been resolved long ago.

Accordingly, the Public Advocate's request for further delay is yet another instance of inexcusable dilatory conduct. The unavailability of the three identified witnesses for depositions now merely emphasizes that the Public Advocate has totally wasted precious time from the admission of his contentions in November 1983.[6/] The Board has correctly ruled that such delay is unacceptable and should therefore reject the Public Advocate's bootstrap argument that further delay is necessary just because no attempt to contact expert witnesses was made until the last few days. The Public Advocate's motion for an extension of two months, previously denied by the Board, should again be denied. The Board should also dismiss his contentions and this proceeding as an appropriate sanction for failure to provide discovery.

6/ From the representations by the Public Advocate as to the schedules of his three witnesses, it is evident that they will not be able to begin their review of technical documents related to Hope Creek until late September or early October 1984. Therefore, it is optimistic to assume that the witnesses would be fully prepared for their depositions in October.

Argument

I. Any Scheduling Problems Result from the Public Advocate's Procrastination and Demonstrate that the Proceeding Should be Dismissed.

Although the Public Advocate makes several arguments, the basic justification for his request for an extension is that "the experts will be provided with an adequate opportunity to familiarize themselves with the intervenor's contentions."[7/] It is incredible that the Public Advocate can seriously claim, nine months after admission of his contentions, that his experts have not already had "an adequate opportunity to familiarize themselves" with those contentions. The detailed statement of his experts' schedules in the near future does not by any means demonstrate that such an adequate opportunity has been lacking. Rather, it dramatically underscores the inevitable result of the Public Advocate's procrastination in making arrangements to obtain experts.

Neither the Licensing Board nor Applicants are responsible for any possible scheduling problems which the Public Advocate has brought on himself by stalling. Any sanction incurred as a result, including dismissal of the contentions as an appropriate sanction for failure to provide discovery, is clearly self-inflicted. Had the Public Advocate

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7/ Intervenor's Petition for Additional Time at 14 (August 20, 1984).

consulted with his witnesses on a timely basis, he would have been advised of their other commitments and could have arranged for their depositions when Applicants sought identification of the witnesses in January 1984 or shortly thereafter.[8/] Alternatively, other experts could have been consulted. The Public Advocate's attempt to force a fait accompli upon the Board and other parties on account of his own inaction should not be permitted.

The Public Advocate's reluctance to present his experts for depositions is perhaps understandable in the context of previous events. As Applicants noted in their initial motion,[9/] the Public Advocate's two experts on Contention 4, relating to salt deposition from the Hope Creek cooling tower, were deposed on January 13, 1984. As a result of those depositions, Applicant filed a motion to strike Contention 4 on February 3, 1984. Acknowledging now that he was then unable to justify the retention of Contention 4 on any technical basis,[10/] the Public Advocate consented to its

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8/ Applicants served a preliminary set of initial interrogatories to identify deponents on January 3, 1984, and requested further information regarding the testimony of the Public Advocate's witnesses in interrogatories served January 20, 1984.

9/ Applicants' Motion to Compel Designation of Witnesses and Their Availability for Depositions and/or to Dismiss the Proceeding at 9-10 (July 30, 1984).

10/ Intervenor's Petition for Additional Time at 6 (August 20, 1984).

dismissal on February 17, 1984. Obviously, the Public Advocate is concerned that the remaining contentions would fare no better once the witnesses supporting them have been deposed.[11/]

II. The Public Advocate's Excuses for Further Delay are Wholly Without Merit.

The first argument advanced by the Public Advocate for more delay is that the procedural history of the case shows his diligence. Applicants fail to see how the Public Advocate's various pleadings have any relevance whatever to the adequacy of his discovery responses. The Appeal Board rejected the same argument in much less aggravated circumstances in the North Anna proceeding.[12/] The intervenor in that case failed to meet a briefing deadline and attempted to justify its tardiness on the ground that counsel "has been extensively involved in [other] matters both before the Commission and against the Commission in federal courts."[13/] Here, the Public Advocate similarly claims that he has been

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11/ As noted by Applicants previously, the Public Advocate personally testified before the New Jersey Senate that the contentions are unsupported by any technical evidence. See Applicants' Answer to Motion by the Public Advocate for Extension of Time to Respond to Applicants' Motion to Compel at 6-10 (August 7, 1984).

12/ Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-568, 10 NRC 554 (1979).

13/ Id. at 555 (quoted in original).

attending to other matters before this Board and related litigation with Applicants in the New Jersey courts. The Appeal Board noted that counsel "was fully aware well in advance" of his obligations under the rules and "was duty-bound" to comply.[14/] The Public Advocate's implicit assertion that he was too busy to respond to discovery or consult with his experts is frivolous on its face.[15/]

The next argument posited by the Public Advocate is that the Board should take it upon itself to create delay because of communications from Applicants' officers to the Public Advocate seeking to resolve his concerns informally. Under the NRC's rules, settlement negotiations are not discoverable or admissible in evidence.[16/] By the same token, such discussion should never be cited or relied upon as a basis for staying discovery. Indeed, under the Commission's policy for the conduct of proceedings, discussions aimed at voluntary settlement of issues between parties

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14/ Id.

15/ Again, Applicants note that the Public Advocate has a staff of some 335 attorneys. See Affidavit of Joseph H. Rodriquez, Esq. at ¶4 (March 26, 1984). In any event, the Commission has flatly rejected such lame excuses, stating that "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." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

16/ Florida Power & Light Company (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 183-84 (1979).

should expedite, not delay, hearings.[17/] In any event, the willingness of Applicants to address the Public Advocate's concerns,[18/] even though dismissal of the proceeding has been sought, is certainly no justification for the Public Advocate's failure to produce its witnesses.

The final argument raised by the Public Advocate is that two months delay will permit his witnesses sufficient time to "familiarize themselves with the intervenor's contentions."[19/] As discussed above, this is a self-serving, bootstrap conclusion. The witnesses need more time only because the Public Advocate failed to act diligently. The cases relied upon by the Public Advocate are therefore entirely inapposite. This is not an instance, as

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17/ Statement of Policy on Conduct of Licensing Proceedings, supra, at 456.

18/ Applicants do not agree with the Public Advocate's description of the attempts by Applicants' officers to meet informally with him. First, there is no explanation as to why the Public Advocate declined to respond to the letter from Mr. Selover, Vice President and General Counsel of Public Service Electric and Gas Company. Mr. Selover was available to meet with Mr. Rodriguez at any time convenient to him. The purpose of Mr. Sonn's call was only to request that Mr. Rodriguez meet with Mr. Selover. Mr. Sonn did not, as the Public Advocate's motion implies, request any meeting personally with Mr. Rodriguez. The suggestion that settlement discussions were delayed even in part by Applicants, or that this proceeding should therefore be delayed, is without factual basis.

19/ Intervenor's Petition for Additional Time at 14 (August 16, 1984).

in Catawba,[20] where Applicants sought an expedited hearing to accommodate a substantially accelerated fuel loading date. The Public Advocate also cites the Board's statement in Indian Point that "the purpose of permitting discovery only after admitting contentions is to assure that there will be no time and effort wasted in irrelevant discovery."[21] Here, by sharp contrast, Applicants have been diligently pursuing the identification of the Public Advocate's witnesses on contentions which were admitted nine months ago. There can be no question as to the propriety or relevance of that discovery.[22]

III. The Public Advocate's Willful Noncompliance With the Board's Discovery Order Warrants Dismissal of His Contentions and the Proceeding.

In providing guidance to its adjudicatory boards on the conduct of hearings, the Commission has expressly authorized the imposition of appropriate sanctions, including dismissal

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20/ Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-83-8A, 17 NRC 282 (1983).

21/ Consolidated Edison Company of New York (Indian Point, Unit No. 2), LBP-82-12A, 15 NRC 515, 518 (1982).

22/ The Public Advocate also misplaces reliance upon Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-46, 14 NRC 862 (1981). The Licensing Board restricted discovery in that case, which involved a license amendment application, only to permit commencement of an expedited hearing with night and Saturday sessions. Nothing in that decision purports to authorize the delay of discovery with a corresponding delay in the conduct of a hearing.

of contentions or a party, when a participant fails to meet its obligations.[23/] In this instance, dismissal of the contentions is the only appropriate remedy and, because the Public Advocate is the sole intervenor, dismissal of the proceeding is necessarily required. The Board should determine from the following considerations that dismissal is justified.

First, the Public Advocate is, of course, represented by counsel. While boards have been understandably lenient in cases involving lay representatives who were unfamiliar with the NRC's procedures or unaware of the consequences of discovery default, the Public Advocate has been fully aware of his discovery obligations and the more comprehensive obligation of a party to cooperate in the conduct of the proceeding in "making the system work."[24/] Second, the Public Advocate participated in this case at the construction permit stage. Therefore, he should be doubly aware of the importance of meeting discovery obligations and compliance with a board's order.

Third, the conduct for which sanctions is sought involves a willful neglect by the Public Advocate over an extensive period of time. Through repeated written

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23/ Statement of Policy on Conduct of Licensing Proceedings, supra, 13 NRC at 454.

24/ Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-270, 1 NRC 473, 476 (1975) (quoted in original).

discovery requests and informal correspondence, the Public Advocate was put on notice on many earlier occasions that Applicants desired to depose his witnesses as soon as possible without further delay. Thus, this is not a case involving a momentary lapse or unintentional oversight on the part of a party from whom discovery has been sought.

Fourth, the failure of the Public Advocate to identify his witnesses and make them available for depositions goes to the very heart of the case. As the Appeal Board in Susquehanna noted, discovery is essential to put a party on notice of what it must meet at a hearing and thereby "eliminate, insofar as possible, the element of surprise."[25/] As of this date, the Public Advocate's interrogatory responses are virtually worthless because they merely repeat information provided by Applicants in discovery or make general references to NRC licensing requirements under 10 C.F.R. Part 50 and related regulatory guidance. Nothing specific as to the Hope Creek facility per se has been identified. Therefore, Applicants can prepare for a hearing only by deposing the witnesses upon which the Public Advocate

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25/ Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 321-22 (1980). The Appeal Board stated: "The underlying concept is to shorten the actual trial, with its attendant expense and inconvenience for all concerned, while increasing the parties' ability to develop a complete record for decisional purposes." Id. at 322.

intends to rely. Accordingly, the Public Advocate's deliberate neglect over the past nine months in failing to even begin consultation with his witnesses, much less produce them for depositions, has effectively stopped this proceeding in its tracks.

Finally, there is no remedy short of dismissing the contentions which would be appropriate to the harm inflicted by the Public Advocate's default. There is no way that the many months wasted by the Public Advocate can be recovered at this stage. As Applicants have noted previously, completion of the hearings prior to the fuel load date for Hope Creek has thereby been seriously jeopardized. Even now, the Public Advocate does not propose to make his witnesses available for depositions until an unspecified time in October. Given the busy schedule for the witnesses delineated by the Public Advocate, it is highly doubtful whether the witnesses would be fully prepared to testify in October. More likely than not, Applicants would be compelled, as a practical matter, to take the deposition of the witnesses again once they had fully completed their review of the Final Safety Analysis Report and related licensing documents.

In dismissing the contentions, this Board should follow the example of the Board in the Seabrook proceeding, which similarly dismissed a party and its contentions for failure to meet discovery obligations. As in this case, the Board in Seabrook required the intervenor to provide discovery

following a motion to compel, clearly stating that failure to comply with the order would result in dismissal of its contentions.[26] As here, the Board in Seabrook found that, after several months of discovery, the intervenor "is still unable (or else unwilling) to provide very basic information about its contentions such as a specification of its concerns, the bases for these concerns and documents which support its position."[27] The Board stated:

> [The intervenor] appears to misunderstand its obligations as an intervenor. It does not suffice for an intervenor to merely frame (or in this case adopt) an acceptable contention and then lie in wait and expect the Applicants and the NRC Staff to prepare testimony on the issue raised in the contention. Although an Applicant has the ultimate burden of proof in a licensing proceeding, an intervenor has the burden of going forward with respect to its own contentions. . . . The requirement is not obviated by an intervenor's strategic choice to make its case through cross-examination.
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> It would be patently unfair to Applicants and Staff to require them to prepare expert testimony in response to [the intervenor's contentions], where [intervenor] has provided no information concerning these contentions.[28]

26/ Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 NRC 586 (1983).

27/ Id. at 589.

28/ Id. at 589-90 (emphasis in original). In Wisconsin Electric Power Company (Point Beach Nuclear Plant Unit 1), ALAB-719, 17 NRC 387 (1983), the Appeal Board

(Footnote Continued)

Dismissal of the Public Advocate's contentions and the proceeding is warranted for the same reasons.[29/] No other sanction will, as a practical matter, provide any meaningful relief to Applicants.

Conclusion

For the reasons discussed above and in Applicants' previously filed motion to dismiss, the requested extension of two months by the Public Advocate should again be denied.

(Footnote Continued)
affirmed the Licensing Board's dismissal of an intervenor for its default on hearing obligations, similarly finding that dismissal was, under the circumstances, the sole available sanction.

29/ The Board's holding in Seabrook on discovery obligations also clarifies the apparent confusion on the part of the Staff in its response to the Public Advocate's motion for an extension as to the basis for Applicants' motion to dismiss. Dismissal is warranted because the Public Advocate has refused to produce individuals he previously identified as witnesses in this case. In discovery responses filed January 18, 1984, the Public Advocate definitively stated that experts on Contentions 1, 2 and 3 would be called to testify. The Public Advocate stated that he anticipated consulting and selecting these witnesses "in the near future." See the Public Advocate of New Jersey's Response to the Applicants' Preliminary Set of Initial Interrogatories and Request for Production of Documents at 1 (January 18, 1984). Later, in response to the Staff's interrogatories, the Public Advocate stated that it "anticipates" relying upon Dale G. Bridenbaugh on Contention 1, Dr. Steven H. Hanauer on Contention 2, and Robert D. Pollard on Contention 3. See the Public Advocate of the State of New Jersey's Responses to the NRC Staff's First Set of Interrogatories at 7-8 (March 16, 1984). As noted, all attempts by Applicants to obtain confirmation of these designated witnesses failed.

The contentions and proceeding should be dismissed for his failure to comply with the Board's discovery orders.

Respectfully submitted,

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August 24, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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(Hope Creek Generating Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicants' Motion to Dismiss the Proceeding as a Result of Default by the Public Advocate in Not Complying with the Board's Order of August 10, 1984 and Answer to Intervenor's Motion for Additional Delay," dated August 24, 1984 in the captioned matter have been served upon the following by deposit in the United States mail on this 24th day of August, 1984:

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