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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND
LICENSING BOARD

IN THE MATTER OF PUBLIC SERVICE ELECTRIC AND GAS CO., et al.,	:	DOCKET NO. 50-354-OL
(Hope Creek Generating Station Unit 1)	:	

INTERVENOR'S RESPONSE TO
APPLICANT'S THIRD MOTION TO DISMISS

PRELIMINARY STATEMENT

On July 30, 1984, the applicants filed a "motion to compel designation of witnesses and their availability for depositions and/or dismiss the proceeding."[1] On August 10, 1984, this Board ordered the intervenor, the Department of the Public Advocate, to identify its witnesses by August 20, 1984, and "to make them reasonably available for depositions within two weeks thereafter." (Order of August 10, 1984, at 2-3).[2]

The Public Advocate filed a timely response to the Board's order, and identified the names and addresses of the three expert witnesses who would explain and support the three admitted contentions of the intervenor.[3] The

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1 Applicants' prior motion to dismiss was denied by the Board on June 18, 1984.

2 The Board further stated that "[n]oncompliance with such dates may be grounds for dismissal or other sanctions."

3 These contentions, which the Board has already ruled admissible, relate to pipe cracks, management competence to safely operate Hope Creek and environmental qualification. Special Prehearing Conference Report, dated December 21, 1983.

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Public Advocate also advised the Board, in a separate Petition for Additional Time Within Which To Make Expert Witnesses Available For Depositions, that our expert witnesses have extensive prior commitments which would make them unavailable for depositions until October 1984, approximately one month after the date contemplated in the Board's order. Because of these unanticipated circumstances, and in accordance with the Commission's policy regarding requests for extension of time,[4] the Public Advocate requested that the depositions of our expert witnesses be scheduled during the month of October.

On August 27, 1984, the applicants filed a motion to dismiss this proceeding.

As the Public Advocate will explain below, the applicants' motion is predicated on a misstatement of the thrust of the intervenor's petition for additional time and a misapprehension of the position of the Public Advocate in these proceedings. Additionally, applicants' cavalierly rely on wrenching language out of context from Board decisions to support its tenuous legal position. Finally, when applicants are forced to rely on authority rather than rhetoric, they are unable to present any decision from the Commission or a licensing Board to justify the extreme sanction of dismissal of the sole intervenor in an operating licensing proceeding because the intervenor requests a four week extension in the scheduling of depositions. The harshness of such a suggestion in these circumstances is clearly contrary to "the Commission's fundamental commitment to a fair and through hearing

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[4] Statement of Policy On Conduct of Licensing Proceedings, CLF-81-8, 13 N.R.C. 452, 454-55 (May 20, 1981).

process."[5]

Preliminarily, two essential points must be clarified. First, applicants' redundant use of terms such as "default" and "willful neglect," cannot mask the fact that the intervenor has fully complied, to the best of its abilities, with the Board's order of August 10, 1984, and with the Commission's procedure for seeking extensions when unavailable and unanticipated circumstances arise. The Public Advocate did "identify its witnesses," by August 20, 1984, but because of their heavy schedules is not able to make them available for depositions until approximately one month later. Accordingly, the Public Advocate did what every responsible and conscientious attorney would do in these circumstances -- he sought a brief extension of time in accordance with the pertinent rules of practice of the Commission. The Public Advocate filed this fully detailed and carefully documented request for additional time by the August 20, 1984, deadline set by the Board. The Public Advocate has clearly not defaulted on any obligation in this proceeding; he simply was unable to have his retained experts readjust their tight schedules until October 1984.

Second, the applicants and, with all due respect, the Board appear to be laboring under a misconception regarding the Public Advocate's view of its role as an intervenor in these proceedings. This misapprehension flows from certain assertions made by the Public Advocate, Joseph H. Rodriguez, at a public hearing before a Joint New Jersey Senate Committee on the status of the Hope Creek Nuclear Power Plant.[6] Because the

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5 Id. at 453.

6 Transcript of Public Hearing Before Sentate Energy and Environment Committee and Senate Legislative Oversight Committee, dated May 10, 1984.

applicants make liberal reference to these proceedings and because the Board has already taken note of this testimony,[7] we will seek to clarify this testimony so as to avoid further misunderstandings that could impair our interest in assisting the Board in producing a record "which lead to high quality decisions that adequately protect the public health and safety and the environment."[8]

As the Board is aware, the Public Advocate has broad statutory discretion to represent the public interest of the citizens of New Jersey, N.J.S.A. 52:27E-29; N.J.S.A. 52:27E-31. In this instance, he exercised that discretion, in the words of a recent decision of the Superior Court of New Jersey, Appellate Division, to represent "the very apparent public interest in nuclear energy matters." Public Service Electrice and Gas Company v. Rodriguez, ___ N.J.Super. ___ (1984) (slip op. at 7).

The Public Advocate's statements at the state legislative hearing should not be construed as reflecting anything less than a full commitment to represent the public interest fully and aggressively in these proceedings. At this hearing, the Public Advocate did repeatedly employ the term "monitoring" [p. 5, 8-10, 12]. However, a close reading of the testimony reveals that he was distinguishing "monitoring" -- the term he employed to describe our intervenor status -- from a role in these proceedings that would "duplicate NRC's Service." [P. 9]. This was perhaps most evident when the Public Advocate testified as follows:

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7 Order of August 10, 1984, at 2.

8 Statement of Policy On Conduct of Licensing Proceedings, supra, note 4, at 453.

> No, I am saying we are going to continue to monitor them, but we can't become the NRC [P. 9].
>
> But, if you are suggesting that I should go there and examine the plant in order to determine whether it is safe or not, I would need the capability of 23 disciplines to go into that plant and duplicate the NRC. I am suggesting to you that unless you have a total lack of confidence in the NRC, New Jersey shouldn't duplicate their work. We should monitor; we should never once yield our position to monitor in order to see that safety is taken care of. [P. 10].

In other words, the Public Advocate was seeking to explain that we would complement, not duplicate, the NRC's responsibility. He has never stated, and does not take the position on these proceedings, that the Public Advocate will not actively seek to discharge the role and responsibilities of an intervenor in an NRC operating licensing proceeding. Indeed, anything less would be inconsistent with his statutory mandate and his active participation to date in these very important proceedings.

With this background in mind, the Public Advocate will now explain why the Applicants' motion to dismiss should be denied.

THE APPLICANTS' EXTRAORDINARY AND UNPRECEDENTED REQUEST TO DISMISS THESE PROCEEDINGS SHOULD BE DENIED

In suggesting that the intervenor's license request for a one-month extension for the deposition of its experts warrants the extreme sanction of dismissal, the applicants overlook well-established principles in operating license proceedings. Furthermore, applicants have transmogrified prior NRC opinions in an effort to support the unprecedented disposition of dismissal in the present circumstances. The Board should, therefore, reject the unsupporable and unjust invitation of the applicants

Several basic principles underlie a proper analysis of the applicants' motion. First, sanctions are only appropriate "[w]hen a participant fails to meet it obligations."[9] Second, when sanctions are appropriate, the Commission's policies contemplate a more balanced and judicious attitude towards their use than the precipitate and summary dismissal proposed by the applicants. The Commission has stated quite clearly that "[c]ourts 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." Id.

Finally, as the Atomic Safety and Licensing Appeal Board recognized in In the Matter of Wisconsin Electric Power Company, (Point Beach Nuclear Plant, Unit 1), ALAB-78, 17 NRC 387 (1983), "[d]ismissal of a party is a serious step that generally should be reserved for 'the most severe failure of a participant to meet its obligations.'" Id. at 392, quoting, In the Matter

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9 Statement of Policy On Conduct of Licensing Proceedings, supra at 454, note 4.

of Commonwealth Edison Co., (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1406 (1982). Clearly, there is a "spectrum of sanctions from minor to severe" available to licensing boards to assist in the management of proceedings,[10] and it is equally clear that dismissal is the most extreme sanction. Id.

The record in this case demonstrates that the applicants have not shown that the intervenor's actions even merit sanctions. The Public Advocate has not refused to comply with orders of the Board. The intervenor did respond to the August 10th order insofar as possible and contemporaneously sought a brief extension for the depositions. This request for an extension was presented to the Board in accordance with the provisions of 10 C.F.R §2.711 which states, in relevant part:

> Whenever an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may for good cause be extended or shortened by the Commission or the presiding officer . . .

Licensing Boards have acknowledged that a party may have "good cause" for requesting an extension of time from a discovery deadline set by a Board, In the Matter of Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 & 2), LBP-83-79, 16 NRC 1400 (1983), and have stated that they will give such a request "a sympathetic ear" if raised in a timely fashion. Id. at 1402; see also, In the Matter of Philadelphia Electric Co., (Limerick Generating Station, Units 1 & 2), LBP-82-72, 16 NRC 968 (1982). The Commission itself has stated in its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454-455 (1981), that a Board

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10 Statement of Policy On Conduct of Licensing Hearings, supra at 454, note 4.

may grant an extension of time if a party satisfies the "good cause" standards of 10 C.F.R. §2.711. The Commission noted that such requests for additional time should generally be in writing and received by the Board before the specified time expires. Id. at 454-55.

In the instant case, the Public Advocate fully complied with these dictates. The intervenor submitted his request for a extension in writing and it was received by the Board before the time specified for the depositions. Moreover, the intervenor set forth three reasons for the request. The principal reason advanced by the intervenor was the heavy schedules of our experts which precluded their availability prior to October 1984.[11]

While the intervenor acknowledges that requests for extension should be avoided where possible, every practitioner working with experts has experienced the unavoidable delays in pre-trial or even trial proceedings because of their scheduling difficulties. Notwithstanding the overblown rhetoric of the applicants, a brief request for an extension in these circumstances is commonplace and appropriate. For the applicants to suggest that this Board should respond to a modest request for an extension by a dismissal of the sole intervenor and representative of the citizens of New Jersey is an affront to the "Commission's fundamental commitment

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[11] The applicants are flatly wrong in asserting that the Public Advocate has a staff of 335 attorneys available to work on the Hope Creek matter. Only two attorneys - the undersigned - are available to participate in these proceedings. The remainder of the attorneys referred to in the Affidavit of Joseph H. Rodriguez cited by applicants [Motion to Dismiss at 7 n. 15] are statutorily limited to criminal matters, work in other Divisions of the Department or are actively engaged in other pending litigation. The applicants' statement reflects a total ignorance of the operations of this agency and should be rejected by the Board.

to a fair and thorough hearing process." Statement of Policy On Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981). The intervenor respectfully submits that any sanction, let alone dismissal, is entirely inappropriate at the present time.

However, even if a sanction were appropriate, the Commission's policies dictate a reasoned assessment of the appropriate sanction, not the procrustean approach of the applicants. Id. at 454. The Appeal Board has interpreted the Commission's Statement of Policy to require that a Board consider a four-factor test to determine whether it is appropriate to impose sanctions for a default:

(1) the relative importance of the unmet obligation and its potential for harm to other parties or the orderly conduct of the proceeding;

(2) whether the default is an isolated incident or a part of a pattern of behavior;

(3) the relative importance of the safety or environmental concerns raised by the party; and

(4) all of the circumstances to determine whether the Board can tailor sanctions to mitigate the harm caused by a party's failure to fulfill its obligations. In the Matter of Commonwealth Edison Co., (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400, 1417-1419 (1982). (emphasis added). Review of these factors demonstrates that dismissal is wholly improper in the present circumstances.

The Public Advocate recognizes that the deposition of the experts is important, but the potential for harm to the applicants is minimal since only a brief one-month extension was sought. Besides vague assertions of harm, the applicants have failed to point out any specific reason why

this period of time would prejudice them or why the orderly conduct of the hearing will be impaired by the short extension. Additionally, as we have fully set forth in our request for additional time, the Public Advocate has always filed timely responses to applicants' discovery requests, has successfully responded to a battery of meritless motions, and has initiated discovery and other pre-trial actions of our own. (Petition 2-9).[12]

Moreover, the safety and environmental concerns raised by the intervenor have been admitted as contentions and present serious issues relating to the public health and safety of the citizens of New Jersey and the environment in this State. Since the Public Advocate is the sole intervenor in these proceedings, his dismissal would be the equivalent of a dismissal of the operating license proceeding -- a sanction that would wholly deprive the citizenry of New Jersey from asserting their interests before the Nuclear Regulatory Commission.

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[12] Applicants' failure to understand how the intervenor's "various pleadings have any relevance whatever to the adequacy of his discovery responses" [Motion to Dismiss at 6] is obviously a product of their total lack of appreciation for the principles in the Commission's Statement of Policy and the Commonwealth Edison decision. Furthermore, applicants' citation to North Anna is puzzling, for the case does not, in any way, support the applicants' motion to dismiss. In the Matter of Virginia Electric and Power Co., (North Anna Nuclear Power Station, Units 1 and 2), ALAB-568, 10 NRC 554 (1979). The situation in North Anna did not involve a motion to dismiss or a petition for more time. In fact, the North Anna proceeding was not even a case which involved the use of sanctions. Rather, in North Anna the Atomic Safety and Licensing Appeal Board accepted a late-filed brief even though the intervenors' failed to file a brief on its due date, failed to apply for an extension of briefing time, and ignored an order to show cause why the intervenors' exceptions to the licensing board decision should not be dismissed for want of dilgent prosecution. Id. at 555. The Appeal Board only warned the intervenors that, in the future, if intervenors are unable to meet filing deadlines they should seek an extension of time in advance of the filing due date. Id. at 555.

The facts in the instant proceeding are entirely different than in North Anna because the Public Advocate filed a timely response to the Board's August 10, 1984 order and a timely request for additional time within which to make our experts available for depositions. The North Anna case simply does not stand for the proposition that applicants claim.

Finally, the Public Advocate is requesting an extension because his experts are actively engaged in other NRC proceedings that are progressing simultaneously. As the licensing board stated in In the Matter of Pennsylvania Power and Light Company, (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-31, 10 NRC 597 (1979):

> '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.' Citing, Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-566, 10 NRC 527, 530 (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 that modification of our previously established schedules will have no effect on our ability to bring this proceeding to a timely conclusion. Id. at 604. (emphasis added).[13]

The reasoning and holding of the Susquehanna case have direct application to the instant proceedings. Like the intervenor in Susquehanna, the Public Advocate is requesting in our Petition for Additional Time that this Board take into account our expert witnesses' obligations in estalishing the schedule in this case. Just as in Susquehanna, a modification of this Board's previously established schedule will not effect the timing of the operating licensing proceeding.

In these circumstances, the Board could certainly take a variety of steps other than dismissal to ensure "that the process moves along at an

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[13] The Atomic Safety and Licensing Appeal Board cited this language with approval when it affirmed the Licensing Board's discovery rulings in In the Matter of Pennsylvania Power and Light Co., (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 336 and 336 n. 34 (1980).

expeditious pace, consistent with the demands of fairness."[14] For example, a very clear and precise pre-trial discovery schedule could be worked out between the Board and the parties. Non-compliance with that schedule in the future could result in the dismissal of contentions or the denial of the right to cross-examine or present evidence. This is merely one example of how the Board could respond to the twin concerns of expedition and fairness in a just manner.

Since the applicants' proposal that the proceedings be dismissed is neither just nor reasonable in the present circumstances, it is not surprising that they are unable to provide the Board with any authority to support their novel approach. Indeed, they solely rely on language which, when read in context, does not support their analysis and on decisions which considered very different factual circumstances.

The two principal cases cited by the applicants to support its dismissal request are Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-20A, 17 NRC 586 (1983) and Wisconsin Electric Power Company (Point Beach Nuclear Plant, Unit 1), ALAB-719, 17 NRC 387 (1983). Seabrook involves the repeated failure of the intervenor to answer interrogatories and a total failure to fulfill discovery obligations. Additionally, the intervenor's failure to respond to interrogatories was not "an isolated incident," but was indicative of its "general confusion and lack of expertise in these proceedings." 17 NRC 591. Finally, the environmental and safety concerns would still be advanced despite the intervenor's dismissal and, in fact, the intervenor had "no information to contribute to this phase of the

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14 Statement of Policy On conduct of Licensing Proceedings, supra at note 4, at p. 453.

hearing." Id. Even a cursory review of Seabrook reveals that the Board in that case was faced with a very different situation than that presented here.

Point Beach is even more off the mark, for in that case the intervenor willfully failed to attend a scheduled prehearing conference and failed to put forth at least one acceptable contention. The Atomic Safety and Licensing Appeal Board concluded in these circumstances that dismissal was the only appropriate sanction. Wisconsin Electric Power Company (Point Beach Nuclear Power Plant, Unit 1), ALAB-719, 17 NRC at 393 (1983). Point Beach is noteworthy for its distinct differences, rather than similarities, with the present case.

In short, the applicants have failed to provide one single authority that would justify dismissal of the sole intervenor in an operating license proceeding because the intervenor requested a one-month extension for depositions.

CONCLUSION

Since the New Jersey Department of the Public Advocate has identified its expert witnesses, is willing to make them reasonably available for depositions, and has promptly responded to all discovery requests to date, this Board should deny the applicants' motion to dismiss the operating license proceeding.

Respectfully submitted,

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Dated: September 11, 1984.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

PUBLIC SERVICE ELECTRIC AND GAS COMPANY (HOPE CREEK GENERATING STATION)	:	Docket No. 50354OL

CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenor's Response to the Applicant's Third Motion to Dismiss" dated September 11, 1984, in the above-captioned matter, have been served upon the following by deposit in the United States mail on this 11th day of September, 1984:

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