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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 FOR SANCTIONS

Background

On November 21, 1984, the Atomic Safety and Licensing Board ("Licensing Board" or "Board") issued an "Order To Show Cause Why OL Proceeding Should Not Be Dismissed" requiring that the Public Advocate of the State of New Jersey ("Intervenor") show cause why he and his contentions should not be dismissed due to Intervenor's failure to comply with the Board's Order of August 10, 1984.[1/] That Order stated, in pertinent part, that the Intervenor must identify its expert witnesses by August 20, 1984 and make them reasonably available for depositions within two weeks thereafter.[2/] In that Order, the Board also stated that

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1/ Public Service Electric and Gas Company (Hope Creek Generating Station), Docket No. 50-354-OL, "Order To Show Cause Why OL Proceeding Should Not Be Dismissed" (November 21, 1984) at 3.

2/ Public Service Electric and Gas Company (Hope Creek
(Footnote Continued)

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noncompliance with such dates could be grounds for dismissal or other sanctions.[3/]

On December 17, 1984, a conference of parties and counsel was held in Bethesda, Maryland to hear arguments of counsel on why the proceeding should not be dismissed. At that conference, the Board held that Intervenor was in default for noncompliance with its August 10, 1984 Order.[4/] The Board further stated that it was important that all parties obey the Board's orders and that flagrant disregard of the Board's orders trivializes NRC practice.[5/]

In its Order of December 24, 1984, the Board decided that dismissal of the proceeding was unnecessary in light of Intervenor's commitment to a discovery and trial preparation schedule which would adequately protect the public interest in reasonably expeditious proceedings and in light of Intervenor's commitment to provide the resources necessary to fulfill its responsibilities as an intervening party.[6/]

(Footnote Continued)
Generating Station), Docket No. 50-354-OL, "Order" (August 10, 1984) at 2-3.

3/ Id.

4/ Tr. 363-364.

5/ Id. at 365.

6/ Public Service Electric and Gas Company (Hope Creek Generating Station), Docket No. 50-354-OL, "Order" (December 24, 1984) at 2.

Further, the Board reiterated its prior instruction that all discovery be updated promptly and kept currently accurate.[7/]

In conference calls initiated by the Applicants on December 18 and 19, 1984 with Intervenor, Applicants followed up on this Board order and asked when Intervenor would update its responses to Applicants' Preliminary Set of Initial Interrogatories and Applicants' First Set of Interrogatories.[8/] Intervenor responded that these answers would be served on the Applicants by December 28, 1984.[9/] Instead, on December 27, 1984, in contravention of this expression of urgency, Intervenor informed Applicants that these answers would not be served on Applicants until January 4, 1985 because its experts' offices were closed for the holidays.[10/] Intervenor did not meet even this

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7/ Id. at 3.

8/ Applicant's Preliminary Set of Initial Interrogatories and Request for Production of Documents (January 3, 1984); The Public Advocate of New Jersey's Response to the Applicants' Preliminary Set of Initial Interrogatories and Request for Production of Documents (January 18, 1984); Applicants' First Set of Interrogatories and Request for Production of Documents to Public Advocate (January 20, 1984); The Public Advocate's First Responses to the Applicant's First Set of Interrogatories (March 28, 1984).

9/ Letter to R.E. Shapiro from J.H. Laverty (December 20, 1984) at 5.

10/ Letter to R.M. Rader from J.P. Thurber (December 27, 1984).

deadline, however, as Applicants did not receive these answers until January 7, 1985.[11/]

A review of "Intervenor's Supplemental Response to Applicants' Preliminary and First Sets of Interrogatories and Requests for Production of Documents" ("Supplemental Response") demonstrates that, contrary to Intervenor's representations at the conference of counsel that it seeks to move beyond "posturing and rhetoric" and to "move forward towards a resolution of the merits of this case,"[12/] the Intervenor's updated and supplemental responses are evasive, incomplete, and unresponsive. Thus, Intervenor has once again failed to comply with the Board's explicit instructions in its orders on the requirement to provide full, timely, and responsive answers to discovery requests and to promptly update such answers on a continuous basis.[13/]

11/ Adding to its lateness, Intervenor flagrantly disregarded the Licensing Board's requirement that expedited delivery be made; instead, Intervenor used ordinary mail for service.

12/ Tr. 295-96.

13/ Public Service Electric and Gas Company (Hope Creek Generating Station), Docket No. 50-354-OL, "Special Prehearing Conference Order" (December 21, 1983); Public Service Electric and Gas Company (Hope Creek Generating Station), Docket No. 50-354-OL, "Order" (August 10, 1984); Public Service Electric and Gas Company (Hope Creek Generating Station) Docket No. 50-354-OL, "Order to Show Cause Why OL Proceeding Should Not Be Dismissed" (November 21, 1984); Public Service Electric and Gas Company (Hope Creek Generating Station), Docket No. 50-354-OL, "Order" (December 24, 1984).

The Intervenor is attempting to utilize the discovery process as a one way street, to the extreme detriment and prejudice of Applicants and in contravention of the NRC's Rules of Practice and the Licensing Board's clear requirements. On one hand, Intervenor has now propounded hundreds of multipart interrogatories and document requests to Applicants and received responses on the schedule established by the Board. Thousands of pages of documents have been made available to it.[14/] On the other hand, Intervenor has failed to respond to the most fundamental requests which have been pending for almost a year.

As the Board recognized when it issued its "Order to Show Cause Why OL Proceeding Should Not Be Dismissed," Intervenor's failure to make its experts available for depositions, as ordered by the Board, warranted dismissal of the proceeding. Even more does Intervenor's failure to fully, responsively, and currently answer Applicants' discovery requests, as ordered by the Board, warrant dismissal of the proceeding. Intervenor's recent provision of evasive, incomplete, and unresponsive answers is more serious than its failure to comply with the Board's Order of August 10, 1984 as it follows so closely on the conference of counsel at which the Board found Intervenor to be in

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14/ Intervenor has seen fit only to move to compel the response of only a single interrogatory.

default and is so close to the close of discovery as set by the Board. Such provision evinces Intervenor's continuing disregard of the Board's orders.

It is clear from its Order of December 24, 1984 that the Board rested its decision not to dismiss the proceeding on Intervenor's commitment to an expeditious discovery and trial preparation schedule and on Intervenor's commitment to provide the resources necessary to fulfill its responsibilities as an intervening party.[15/] Intervenor's Supplemental Response makes a mockery of these commitments. Accordingly, Applicants move that the Board impose the sanction of dismissal of the contentions. While a seemingly harsh penalty, it is certainly warranted by the continuing failure at this late stage of discovery to abide by the Board's requirements. Merely ordering the Intervenor to fully respond to Applicants' discovery requests is not an adequate remedy. By flouting the Board's orders, Intervenor has essentially delayed any meaningful response until after the close of the discovery period and deprived Applicants of their right to probe the basis of the contentions and prepare its testimony in an orderly manner. Intervenor must know that it is against the Applicants' interest to extend discovery or otherwise delay the proceeding.

15/ Public Service Electric and Gas Company (Hope Creek Generating Station), Docket No. 50-354-OL, "Order" (December 24, 1984) at 2.

Argument

I. Intervenor's Responses to Applicants' Preliminary Interrogatories Are Evasive Incomplete, and Unresponsive

Applicants filed interrogatories and requests for production of documents on January 3 and January 20, 1984.[16/] For the most part, these discovery requests remain unanswered one year later. If answered, the answer provided by Intervenor is unresponsive or incomplete. The most fundamental questions regarding the bases for Intervenor's contentions and the substance of testimony to be adduced at the hearing remain unanswered. For example, Applicants' request that the substance of the facts and opinions as to which Intervenor's expert witnesses are expected to testify has not been answered.[17/] In its Supplemental Response, Intervenor merely states that "[t]he opinions of these experts . . . is still being developed following receipt of applicants' responses to the Public Advocate's interrogatories and request for production of documents."[18/]

16/ Applicant's Preliminary Set of Initial Interrogatories and Request for Production of Documents (January 3, 1984) [hearinafter Applicants' Preliminary Interrogatories]; Applicants' First Set of Interrogatories and Request for Production of Documents to Public Advocate (January 20, 1984) [hearinafter Applicants' First Set of Interrogatories].

17/ Applicants' Preliminary Interrogatories at 2.

18/ Supplemental Response at 2. The Supplemental Response states that the professional qualifications of (Footnote Continued)

Further, Intervenor does not state when the substance of the facts and opinions on which its experts are expected to testify will be provided.

Intervenor has had Applicants' responses to Intervenor's First Set of Interrogatories and Request for Production of Documents since February 1984. Moreover, Applicants have already responded to Intervenor's Second Set of Interrogatories and Request for Production of Documents. For the most part, the information requested in its Third Set of Interrogatories and Request for Production of Documents, received on January 7, 1985, is remotely related, if at all, to Contentions 1 and 2.[19/] Thus, it is misleading for

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(Footnote Continued)
Intervenor's expert witnesses are attached. They are not. On January 9, 1985, Intervenor called Applicants to inform them that, contrary to the statement made in the Supplemental Response, the professional qualifications of Intervenor's experts were not attached to the Supplemental Response, but are available for copying at the Intervenor's office in Trenton, New Jersey. Telephone call to J.H. Laverty from J.P. Thurber (January 9, 1985).

19/ For example, in Interrogatory I.19, Intervenor requests that Applicants describe the SWRI facilities which will be used to certify all of the equipment normally used for ISI. In Interrogatory I.29, Intervenor requests that Applicants identify how they will deviate from the minimum requirements developed by the Ad Hoc Committee for Development of Qualification Requirements for Nuclear Utility Examination Personnel, Document NUR-MR-1A. In Interrogatory I.37, Intervenor requests that Applicants describe how the special pitch catch unit designed for the transducer developed by SWRI for PSE&G is able to alleviate the particular acoustic problems presented by the UT examination of CRC. Such interrogatories are obviously only remotely related to Contention 1.

Intervenor to suggest that Intervenor's experts cannot form their opinions until they have received information from Applicants.

In response to Applicants' request that Intervenor state whether it intends to present any fact witnesses and, if so, the subject matter of their testimony, Intervenor states in its Supplemental Response: "[n]o supplemental response."[20/] Intervenor's sole response to this interrogatory was provided on January 18, 1984, at which time Intervenor stated that it would inform Applicants of the identities of its witnesses as soon as it completed the consultant selection and contract negotiation process, anticipated to be in the near future.[21/]

Applicants requested that Intervenor identify the documents it intends to rely on in presenting its direct case and in conducting cross-examination.[22/] In its Supplemental Response, Intervenor has identified only those documents on which it intends to rely in presenting its

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20/ Id. at 2.

21/ The Public Advocate of New Jersey's Response to the Applicants' Preliminary Set of Initial Interrogatories and Request for Production of Documents (January 18, 1984). In its response to the Board's Order of August 10, 1984," Intervenor said nothing about fact witnesses, but referred solely to expert witnesses. Intervenor's Response to the Atomic Safety and Licensing Board's Order of August 10, 1984 (August 20, 1984).

22/ Applicants' Preliminary Interrogatories at 2-3.

direct case; it has never answered the latter part of this interrogatory.[23]/

II. Intervenor's Responses to Applicants' First Set of Interrogatories Are Evasive, Incomplete, and Unresponsive

With regard to Contention 1, Applicants requested that Intervenor identify any failure to meet applicable NRC regulatory requirements. In its Supplemental Response, Intervenor states: "Applicants' failure to meet the regulatory requirements set forth in response to Interrogatory 1 of Applicants' First Set of Interrogatories will be addressed in the testimony of the Public Advocate's expert witness."[24]/ Intervenor also refers to its supplemental response to Interrogatory 1 of Applicants' Preliminary Interrogatories.[25]/ This response, of course, merely states that Intervenor's expert witnesses are still developing their opinions.[26]/

Apparently, Intervenor believes that it need not provide this information until its testimony is submitted. This, of course, ignores the purpose of discovery and is clearly unfair in light of the Applicants' provision of vast

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23/ Supplemental Response at 2-4.

24/ Id. at 5.

25/ Id.

26/ Id. at 2.

quantities of documents and information to Intervenor in response to Intervenor's discovery requests.[27/]

Similarly, in response to Applicants' question that Intervenor specify and describe in detail in what way the Applicants have failed to demonstrate that they can prevent and mitigate IGSCC in accordance with 10 C.F.R. Part 50, Appendix A, Criterion 30, in the Hope Creek recirculation piping, Intervenor states: "Applicants' failure to demonstrate that they can prevent and mitigate IGSCC in recirculation piping installed at Hope Creek will be addressed in the testimony of the Public Advocate's expert witnesses."[28/] This type response is repeatedly utilized throughout Intervenor's Supplemental Response.

Intervenor has never specified what critical recirculation piping has not been identified by Applicants as susceptible to IGSCC.[29/] Instead, Intervenor states that it does not understand the question,[30/] despite the fact that it is Intervenor who is alleging that all critical

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27/ Applicants estimate that responding to Intervenor's Second Set of Interrogatories and Request for Production of Documents alone took approximately 2,500 man hours.

28/ Id. at 6.

29/ Applicants' First Set of Interrogatories at 5.

30/ The Public Advocate's First Responses to the Applicant's First Set of Interrogatories (March 28, 1984) at 5.

recirculation piping must be identified and tested for susceptibility to IGSCC.

Such responses pervade the Supplemental Response. Intervenor has still not specified the deficiencies Intervenor alleges exist in Applicants' system for identification of cracks in recirculation piping nor the inspection techniques, other than manual ultrasonic testing, which Intervenor asserts Applicants should use to identify recirculation piping susceptible to IGSCC.[31/] Intervenor merely states that Applicants should refer to its supplemental responses to Interrogatories I.1 and I.2 of Applicants' First Set of Interrogatories which, in effect, state that the subject may be addressed in its testimony. Intervenor's response to Interrogatory I.1 lists three NUREGs and three Regulatory Guides. These documents do not specifically respond to Applicants' interrogatories. Further, Intervenor's supplemental response to Interrogatory I.2 merely states that Applicants' failure to meet regulatory requirements will be addressed in the Public Advocate's testimony. Such responses are evasive and incomplete.

Essentially, with regard to Contention 1, all that Applicants have learned after more than a year of discovery is Intervenor's assertion that all recirculation piping must

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31/ Applicants' First Set of Interrogatories at 5.

be replaced.[32] The basis for this assertion is unknown. Applicants also have not learned which of Applicants' mitigation measures Intervenor believes are inadequate and why. Furthermore, Applicants have not learned the regulations Intervenor believes have not been complied with and why.

With regard to Contention 2, in response to Applicants' request that Intervenor specify each respect in which Intervenor claims that PSE&G management of Hope Creek's administrative, procurement, maintenance and quality assurance programs fails to meet applicable regulatory requirements,[33] Intervenor responds that the subject matter of this interrogatory will be addressed in its testimony.[34] The same response is provided to Applicants' request that Intervenor specify and describe in detail the precise management function(s) alleged to be deficient, the names and/or job titles of the particular PSE&G management officials with responsibilities for preventing or eliminating the deficiencies alleged, the acts or omissions performed by such individuals, the actions which should have been taken by such officials, and all actions which Intervenor contends must be taken with respect to PSE&G management prior to

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32/ Supplemental Response at 7.

33/ Applicants' First Set of Interrogatories at 6.

34/ Supplemental Response at 8.

issuance of an operating license for Hope Creek.[35/] Again, Intervenor responds that its testimony will address Applicants' request that Intervenor identify and discuss in detail the particular aspect as to which it alleges that PSE&G lacks technical qualifications and all actions which must be taken by PSE&G in order to eliminate any such alleged deficiencies.[36/]

To sum up, other than listing the titles of some documents, Intervenor has in no way at this late date specified either the bases for its contentions or the substance of the testimony it expects to put on at the hearing. These titles do not assist Applicants in determining the bases for Intervenor's contentions or the substance of its testimony. For example, NUREG-0313 and NUREG-0313 Rev. 1, listed in Intervenor's Supplemental Response, provide for the very steps that Applicants have already taken with regard to recirculation piping.

Applicants submit that Intervenor's failure to provide the response under oath or affirmation or to indicate the individual who responded to each supplement as required by 10 C.F.R. §2.740b(b) and Applicants' interrogatories takes on some significance. The responses are merely signed by counsel for the Intervenor. No involvement of Intervenor's

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35/ Applicants' First Set of Interrogatories at 6-7.

36/ Supplemental Response at 9.

experts in the response is shown. It is not at all clear why Intervenor delayed until January 4, 1985 to provide these responses. These responses could have been submitted in late 1983, at the time the contentions were admitted. The Board has already stated that it "doesn't see any reason why discovery couldn't be completed within 30 days" and stated that Intervenor has "had plenty of time."[37/]

III. Intervenor's Failure to Provide Full, Responsive, and Timely Responses is Grounds for Imposition of Sanctions

Intervenor should not be permitted to continue to shirk its responsibilities as a party to this proceeding. At the conference of counsel on December 17, 1984, Intervenor represented to the Board that it has been consulting with its expert witnesses since before the contentions were admitted.[38/] Yet, Intervenor persists in its failure to provide the most basic information about its allegations.

In Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813 (1975), the Licensing Board held:

> Status as a party affords certain rights, including the right to ask questions; but it also involves certain obligations, including the duty to answer questions of other parties to the proceeding. There are appropriate questions to be asked before the evidentiary hearing (i.e., discovery

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37/ Tr. 341-342.

38/ Id. at 323.

> interrogatories, depositions of opposing parties, etc.) and there are questions to be asked at the evidentiary hearing (i.e., examination, cross-examination). But these rights to ask questions are on a "two-way street". 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. This is a basic rule of any adjudicatory proceeding, whether it be a judicial trial in court or an administrative hearing.

Id. at 816-17 (emphasis in original).[39/]

In Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-678, 15 NRC 1400 (1982), the Appeal Board stated:

> The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. . . . 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].

Id. at 1417.

In Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317

39/ Quoting the above language, the Licensing Board in Commonwealth Edison Company (Byron Station, Units 1 and 2), LBP-81-52, 14 NRC 901 (1981) held that where a party's derelictions of duty concerning the furnishing of ordered discovery are part of a pattern of behavior rather than isolated incidents, such conduct warrants striking of all the party's contentions and its dismissal. See also Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, (1981).

(1980), the Appeal Board addressed a situation very similar to the case at hand and held that interrogatories designed to discover what (if any) evidence underlies an intervenor's own contentions are proper.[40/] The Appeal Board stated that "[a] litigant may not make serious allegations against another party and then refuse to reveal whether those allegations have any basis."[41/] The Appeal Board held that while the ultimate burden of persuasion rests with the applicant, intervenors must shoulder their responsibilities and comply with the NRC's rules.[42/] The Appeal Board also held that "[s]imply as a matter of fairness, a licensing board may not waive the discovery rules for one side and not the other.[43/]

Despite this ruling, the intervenor in the Susquehanna proceeding persisted in its refusal to answer the interrogatories of the applicants and staff. Accordingly, the Licensing Board held that the intervenor had "demonstrated a callous disregard of the responsibilities it owe[d] to the Board and the parties and as a result [would] not be

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40/ ALAB-613 at 340.

41/ Id. at 339.

42/ Id. at 340.

43/ Id. at 338-39.

permitted to participate further in the hearing on [the] application on safety contentions."[44/]

Similarly, here, Intervenor has demonstrated a callous and continuing disregard of its responsibilities to the Board and to the parties by failing to provide the evidence underlying its contentions and to identify the substance of what it expects to testify at the hearing. Intervenor has repeatedly failed to meet its discovery responsibilities by fully and completely responding to discovery regarding its contentions despite the fact that it admits to working with its expert witnesses since late 1983.

The Catawba proceeding provides another striking similarity to the instant case.[45/] There, the Licensing Board found that the intervenor's responses to many key discovery requests were vague, evasive, incomplete or nonexistent and set a deadline for the intervenor to furnish responsive answers. The Board emphasized that, if the responses provided were not adequate, the Board would consider narrowing contentions to the areas in which specifics had been given or rejecting contentions altogether.[46/]

44/ Pennsylvania Power and Light Company (Susquehanna Steam Electric Station, Units 1 and 2), Docket Nos. 50-387 and 50-388, "Memorandum and Order on Pending Motions" (May 20, 1981) at 27-28.

45/ Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-83-29A, 17 NRC 1121 (1983).

46/ Id. at 1122.

Intervenor's Contention 7 alleged that the Applicants had "consistently failed" to adhere to required operating and administrative procedures at their facilities. Both the Staff and the Applicants had repeatedly sought to elicit from the intervenor the specific violations of regulations and other incidents constituting such "consistent failure." The Board ordered the intervenor to particularize what it meant by its contention and to specify which regulations the Applicants had consistently failed to meet. The Board further held that general references to NRC documents would be insufficient.47/

In its supplementary responses, the intervenor stated that it had no information on the contention other than some quotations from NRC Staff reports, the material from which Contention 7 had been fabricated.48/ The Board held:

> While such quotations may form an adequate contention, they are far from an adequate basis for litigation. Palmetto's responses to interrogatories on this contention reflect that it did essentially no work on this contention in discovery. Basic terms remain undefined. Palmetto did not even perform the irreducible minimum task of specifying rule or procedure violations which, in its view, evidence a lack of management capability. In the present state of the record, it would be grossly unfair to the Applicants and Staff to require them to defend further against

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47/ Id. at 1126.

48/ Id. at 1127.

> this contention. Contention 7 is rejected.

Id. at 1127.

Similarly, on Contention 8 which alleged that Catawba reactor operators and shift supervisors lacked sufficient levels of operating experience with large pressurized water reactors to operate Catawba safely, the intervenor refused to specify what constituted "sufficient" experience and stated that it was up to Applicants to articulate a meaningful definition of nuclear power plant experience.[49/] The Board held that it would not require opposing parties to go to hearing on a contention whose key terms were undefined and thus, dismissed the contention.[50/]

Filing additional or follow-up discovery requests is not a sufficient remedy.[51/] Left to its own devices, Intervenor would certainly be expected to respond with statements similar to those discussed above, i.e., that the answers will be found in the testimony that it will file. Intervenor is no stranger to NRC proceedings or requirements having participated in a number of adjudicatory hearings. While the dismissed party in Susquehanna was not represented

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49/ Id. at 1127-28.

50/ Id. at 1128.

51/ Applicants find it necessary, while the Board is deciding this motion, to submit follow-up discovery requests.

by counsel, that is not the case here. Intervenor's conduct warrants dismissal of Contentions 1 and 2 from the proceeding.52/

Conclusion

For the reasons discussed above, Applicants move that the requested relief be granted.

Respectfully submitted,

CONNER & WETTERHAHN, P.C.

Troy B. Conner, Jr.
Mark J. Wetterhahn
Jessica H. Laverty
Counsel for the Applicants

January 14, 1985

52/ While it may be argued that the Board held discovery regarding Contention 3 in abeyance, the failure of Intervenor to respond to discovery on the other two contentions is sufficiently grievous to have all three contentions dismissed. In any event, Applicants request that Contentions 1 and 2 be dismissed.