



### Discussion

The Commission's regulations provide that failure to file findings of facts and conclusions of law create a default. Specifically, 10 C.F.R. § 2.754(b) provides:

Failure to file proposed findings of fact, and conclusions of law or briefs when directed to do so may be deemed a default, and an order or initial decision may be entered accordingly.

This regulation has been discussed in numerous decisions by the Commission's adjudicatory boards. In Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 332-34 (1973), the Appeal Board emphasized the importance of the submission of proposed findings and put litigants on notice that a default in the performance of this obligation would be taken into account in any challenges on appeal to the findings of the Licensing Board. In a subsequent case, the Appeal Board noted that where a Board directs all parties to file proposed findings and conclusions within a specified time period and where the record reflects not only the presence of intervenors' counsel when that order was given, but his understanding and acquiescence as well, intervenors' failure to file proposed findings is a default under the Commission's Rules of Practice. Florida Power & Light Co., (St. Lucie Nuclear Power Plant, Unit 2), ALAB-280, 2 NRC 3, 4 n.2 (1975). It should be noted that the Appeal Board has distinguished those cases where the Licensing Board has invited but not ordered the parties to file proposed findings of fact. In Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-709, 17 NRC 17, 21 (1983) the Appeal Board stated:

The filing of proposed findings of fact is optional, unless the presiding officer directs otherwise.<sup>2</sup>

The presiding officer is also empowered to take a party's failure to file proposed findings, when directed to do so, as a default. (citation omitted).

Licensing Boards have ruled that when intervenors fail to file proposed findings of fact and conclusions of law, the Boards would deem that the intervenors had abandoned those matters not filed upon and consider and decide only those contested matters upon which findings were filed. Kansas Gas & Electric Company, et al. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 20 NRC 53, 61 n.3 (1984) (Where intervenors failed to file proposed findings of fact and conclusions of law with respect to 161 out of 216 contentions admitted as issues in controversy regarding emergency preparedness, the Board deemed that the intervenors had abandoned those matters not filed upon); Cincinnati Gas and Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), LBP-82-48, 15 NRC 1549, 1568 (1982) (The Board stated: "Consistent with 10 CFR § 2.754(b), we treat those contentions for which [intervenor] has not submitted findings as having been abandoned."). A contrary result has been reached where a Board did not direct the filing of proposed filings. Duquense Light Company, et al. (Beaver Valley Power Station, Unit No. 1), LBP-78-16, 7 NRC 811, 815 n.7 (1978).

In this proceeding, the Board did set a schedule for the filing of proposed filings while Intervenors' representative, Ms. Korem, was present and notice was provided on the record that failure to file findings could result in a penalty. Tr. 1055. In short, Intervenors were on notice that failure to file proposed findings would create a default.

Intervenors failed to submit findings on their Contention 1(a) Offer of Proof Issues 3, 4 and 6 and Contention 1(b) at their peril and the Board should deem those matters abandoned and not consider and decide them. Wolf Creek, supra; Zimmer, supra. The Board clearly has the discretion to take this action. In its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 457 (1981), the Commission stated:

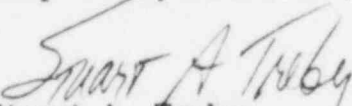
Parties should be expected to file proposed findings of fact and conclusions of law on issues which they have raised. The boards, in their discretion, may refuse to rule on an issue in their initial decision if the party raising the issue has not filed proposed findings of fact and conclusions of law.

In these circumstances, the other parties and the Board should not be required to continue to expend resources on these matters. The Board should issue an order immediately dismissing these issues.

Conclusion

For the reasons set forth above, the Staff supports Applicant's Motion that the Board issue an Order immediately dismissing Contention 1(a) (Offer of Proof Issues 3, 4 and 6) and Contention 1(b).

Respectfully submitted,

  
Stuart A. Treby  
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland  
this 29th of April, 1986

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
)  
COMMONWEALTH EDISON COMPANY ) Docket Nos. 50-456  
) 50-457  
(Braidwood Station, Units 1 and 2 )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE IN SUPPORT OF APPLICANT'S MOTION TO DISMISS INTERVENOR'S CONTENTION 1(a) OFFER OF PROOF ISSUES 3, 4 AND 6 AND CONTENTION 1(b)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or deposit in the Nuclear Regulatory Commission's internal mail system (\*), or by express mail or overnight delivery (\*\*), or by hand delivery (\*\*\*), this 29th day of April, 1986:

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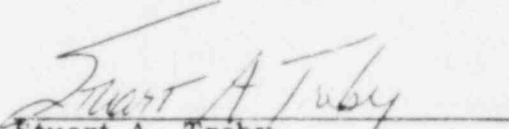
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