

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

SOUTH CAROLINA ELECTRIC &
GAS COMPANY, et al.

(Virgil C. Summer Nuclear
Station)

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Docket No. 50-395

APPLICANT'S MOTION FOR DISMISSAL OF INTERVENOR
BRETT BURSEY AND INTERVENOR'S CONTENTIONS

South Carolina Electric and Gas Company ("Applicant") moves the Atomic Safety and Licensing Board ("Board") to dismiss Intervenor Brett A. Bursey on the grounds that he has failed to comply with the previous discovery requests of the Applicant and the discovery orders of this Board, and has also failed to respond to the Board's order of August 6, 1979 directing that "[e]ach party shall report to the Board within 30 days" as to its recommendations or plans for a deliberate and timely consideration of the issues. Intervenor has thereby shown his unwillingness or inability to participate in these proceedings in a manner that is likely to provide assistance to the Board. Further, his continuing disregard of the Board's orders violates the Commission's Rules of Practice, despite repeated admonition from the Board that future misconduct would not be tolerated. In effect, he has abandoned his contentions in this proceeding and should be dismissed as a party.

Background

On June 13, 1978, the Applicant took the oral deposition of Mr. Bursey. The Notice of Taking of Deposition stated, inter

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alia, that Mr. Bursey would be questioned regarding his knowledge of the contentions allowed by this Board and further directed as follows:

Be prepared to furnish at this deposition the names, address, and identities, backgrounds, and qualifications of all individuals from whom you have or will obtain information, expert opinion, or other matters, either as witnesses in this proceeding or otherwise. For individuals who may be called as witnesses, be prepared to describe the scope of their testimony and the substance thereof.

At the time of deposition, Mr. Bursey was either unable or unwilling to identify potential witnesses for his contentions. Aside from broad generalizations, he stated that he could not provide further information or bases for his contentions. Accordingly, by motion dated June 30, 1978, the Applicant moved to compel discovery by an order requiring Intervenor to identify potential witnesses and to state the substance of facts and opinions, along with a summary of the grounds for each fact and opinion, as to each contention.

By Memorandum and Order dated July 13, 1978, the Licensing Board ordered Intervenor to appear, be deposed, and to participate as a party at a prehearing conference in this proceeding. The Board specifically noted that the information sought by the Applicant was proper discovery:

Both the staff and applicant have made their cases well for orders to compel discovery pursuant to 10 CFR §2.740(f). The Board finds that the discovery requests directed against Mr. Bursey are reasonable, consistent with the

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Commission's discovery rules, and desirable for an orderly disposition of the issues in contention.^{1/}

In order to enable the Applicant to prepare for the deposition, Mr. Bursey was further directed to "respond to the remaining questions of the Applicant's deposition"^{2/} except for informant identities before July 28, 1978.

At the prehearing conference on August 2-3, 1978, the Applicant proceeded to depose Mr. Bursey once more, as directed by the Board in its Memorandum and Order of July 13, 1978. During that deposition, Mr. Bursey stated that he would complete his answers to the Applicant's interrogatories as well as questions he had failed to answer at the time of his deposition then and before on June 13, 1978.^{3/} Intervenor did not meet this commitment and on August 24, 1978, Applicant moved for his dismissal for failure to comply with the Licensing Board order compelling discovery.

Intervenor's failure to respond to Applicant's pending discovery requests, except in an evasive and misleading manner,^{4/}

^{1/} Memorandum and Order at 2 (July 13, 1978).

^{2/} Id. at 5.

^{3/} A description of the information promised by Mr. Bursey at that time is described in the Applicant's Motion for Dismissal at 3-4 (August 24, 1978).

^{4/} For example, as demonstrated in the Applicant's Motion to Supplement Its Motion of August 24, 1978 Seeking Dismissal (September 18, 1978), each of the three persons identified by Intervenor as witnesses in response to Staff interrogatories as to Contention A-2 disclaimed any contact with Mr. Bursey or an agreement to testify in this proceeding.

and despite the many opportunities given him by this Board, evidenced a failure to meet his obligations as a party to this proceeding. Although Intervenor failed to make a timely response to the Applicant's motion to dismiss, the Board nevertheless denied the motion. The Board did note, however, that "Mr. Bursey has not been fully responsive to discovery requests"^{5/} and that in some instances, "Mr. Bursey has not made a reasonable effort to comply with the Board's Order and with repeated admonitions to respond to discovery requests."^{6/} The Board then stated that it would therefore permit the Applicant "to seek relief consistent with the observations in this memorandum."^{7/} Finally, the Board discussed the problem of the Intervenor's witness "wish list," observing that it appears to the board "that Mr. Bursey may be unreasonably optimistic about his ability to produce his named witnesses."^{8/}

By letter dated September 20, 1979, the Applicant again called upon Mr. Bursey to provide the information promised at his earlier depositions, focusing in particular on the requested summaries of testimony. The letter asked that the summary of

^{5/} Memorandum and Order at 2 (October 2, 1978).

^{6/} Id. at 3.

^{7/} Id.

^{8/} Id. at 4.

testimony be furnished no later than October 1, 1979. Mr. Bursey has not responded to Applicant's letter.^{9/}

As of this date, Intervenor has still failed to honor his commitment at the time of his deposition before the Licensing Board on August 2-3, 1978 to provide the parties with proper discovery information, including a statement of the substance of facts and opinions to which each witness is expected to testify, along with a summary of the grounds for each fact and opinion.

As a separate matter, Intervenor has failed to respond to a Board order seeking the assistance of parties for the prompt resolution of the pending issues. By Memorandum and Order dated August 6, 1979, this Board suggested that the parties consider the possibility of summary disposition under Section 2.749 as to some or all of the pending issues, and also identify issues that could be heard before the issuance of the Staff's Final Environmental Statement or Safety Evaluation Report. The Board stated:

Each party shall report to the Board within 30 days after service of this Order any recommendations or plans it has to proceed with a deliberate and timely consideration of issues amenable to early disposition.

^{9/} The letter of September 20, 1979 requests a summary of testimony specifically relating to Contention A-10. It is clear from the August 2-3, 1978 deposition as well as the Board's Order of August 2, 1978, however, that Mr. Bursey was obliged but failed to provide a summary of requested testimony as to the other remaining contentions as well. The following contentions are still at issue: A-2 (Financial Qualifications/Decommissioning Costs); A-3 (Anticipated Transients Without Scram); A-4 (Seismicity); A-8 (Emergency Planning); A-9 (Quality Control) and A-10 (Health Effects).

Although both the Applicant and Staff responded as required, Mr. Bursey did not respond.

Argument

Mr. Bursey's erratic and uncooperative participation in this proceeding, in particular, his failure to fulfill discovery obligations and to abide by the orders of this Licensing Board, are now a matter of record. A licensing board clearly has authority to dismiss an intervenor or enter other appropriate sanctions if there is a failure to comply with discovery obligations. Public Service Electric & Gas Company (Atlantic Nuclear Generating Station, Units 1 and 2), LBP-75-67, 2 NRC 702, 706 (1975); Northern States Power (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1300-01 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Plants), 2 NRC 813 (1975); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), Order Granting NRC Staff Motion of August 18, 1978 to Impose Sanctions (October 27, 1978); Ohio Edison Company (Erie Nuclear Power Plant, Units 1 and 2), Order Relative to Applicants' Motion for Dismissal of Certain Contentions and the Coalition's Motion for Additional Time (April 20, 1978) (copies attached).

The Supreme Court has expressly recognized the obligation of intervenors in NRC proceedings to stick with issues by conforming to procedural requirements. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc., 98 S. Ct. 1197, 1217 (1978), the Court stated:

Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstruction by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented." In fact, here the agency continually invited further clarification of Saginaw's contentions. Even without such clarification it indicated a willingness to receive evidence on the matters. But not only did Saginaw decline to further focus its contentions, it virtually declined to participate, indicating that "no conventional findings of fact to set forth" and that it had not "chosen to search the record and respond to this proceeding by submitting citations of matter which we believe were proved or disproved."

Although the Board has previously indicated its disinclination to order dismissal of the Intervenor in favor of a lessor sanction, Mr. Bursey's continued default with regard to his discovery responsibilities, in the face of repeated admonitions from the Board and requests by the parties, justifies dismissal. Thus, these circumstances are distinguishable from a situation in which an intervenor's failure to comply with a discovery order is merely a single lapse where the intervenor had otherwise "adequately discharged its responsibilities as a party on prior occasions."^{10/} An intervenor has an obligation to stick with its issues and assist the Board and the parties in developing a proper evidentiary record. E.g., Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253 (1978). Inasmuch as Mr. Bursey

^{10/} Public Service of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-488, 8 NRC 187 (1978).

has failed to provide a summary of the testimony he expects to proffer at the upcoming hearing, it can be reasonably assumed that he will be of no assistance to the Board in developing his contentions.

Conclusion

In light of Mr. Bursey's ongoing failure to provide relevant and proper discovery and to abide by the orders of the Licensing Board, it is altogether fair and appropriate that the Board now order the dismissal of Intervenor.^{11/} If the Board is yet reluctant to dismiss Mr. Bursey, at a minimum, he should be required to proffer the summaries of testimony previously promised in their entirety within a specified time. If Mr. Bursey then fails to provide the requested discovery, he should be barred from put-

^{11/} Since there are no further issues in controversy with, the dismissal of the only intervenor, there is nothing further for this Licensing Board to decide unless the Board determines that a serious safety, environmental, or common defense and security matter exists. 10 C.F.R. § 2.760a, as amended, 44 Fed. Reg. 67088 (Nov. 23, 1979). The proceeding should therefore be dismissed. See Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), Docket No. 50-263, Order Dismissing Proceeding (October 25, 1979); Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), Docket Nos. 50-266, 50-301, Order (January 8, 1979); Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), Docket No. 50-263, Order Dismissing Proceeding (February 28, 1978) (copies attached).

ting on an affirmative case pursuant to the Board's Memorandum
and Order of October 2, 1978.^{2/}

Respectfully submitted,

CONNER, MOORE & CORBER

Troy B. Conner, Jr. /RMR
Troy B. Conner, Jr.

Robert M. Rader
Robert M. Rader
Counsel for Applicant

November 29, 1979

^{12/} Relief of this nature was granted by the Licensing Board in Cincinnati Gas & Electric Company (Wm. W. Zimmer Nuclear Station), Docket No. 50-358-OL, Memorandum and Order (October 23, 1979); Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), Docket No. 50-272, Amendment to Pretrial Order of March 29, 1979 (April 24, 1979) (copies attached).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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SOUTH CAROLINA ELECTRIC &) Docket No. 50-395
GAS COMPANY, et al.)
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(Virgil C. Summer Nuclear)
Station))

CERTIFICATE OF SERVICE

I hereby certify that copies of "Applicant's Motion for Dismissal of Intervenor Brett Bursey and Intervenor's Contentions," dated November 29, 1979, in the captioned matter, has been served upon the following by deposit in the United States mail this 29th day of November, 1979:

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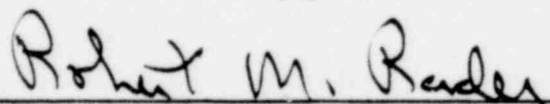
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Robert M. Rader

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board



In the Matter of)
LONG ISLAND LIGHTING COMPANY)
(Shoreham Nuclear Power Station,)
Unit 1))

Docket No. 50-322

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ORDER GRANTING NRC STAFF
MOTION OF AUGUST 18, 1978
TO IMPOSE SANCTIONS

The NRC Staff moved for the dismissal of Consolidated Intervenorors (CI) Contention 7(g) on August 18, 1978, on the basis that CI responses to the Staff's Interrogatories 1 and 4 of the First Set of Interrogatories "are demonstrably inadequate and indicative of persistent failure to perform their obligations as a party to this proceeding." On October 12, 1978, CI responded in opposition on the basis "that they have responded to Staff's interrogatories as fully as possible given the presently unresolved status of the Mark II Containment System."

CI's filing ignores the explicit Staff position detailed on pages 4, 5, and 6 of the motion. The Staff sought to discover "where does the facility fail to comply with Appendix J and why?"

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The Board concurs with Staff that the Mark II Program is to resolve questions relating to dynamic responses and that Appendix J is an NRC Regulation to assure that appropriate leak tightness of the containment is maintained and demonstrated by leak testing. The Board agrees with the Staff that the two areas are disparate and do not impact on each other.

The Staff is entitled to a timely and adequate response to discovery requests. CI has not only frustrated the Staff's efforts but has not fully complied with the Board's Orders. The Staff's motion for dismissal of CI's Contention 7(g) is granted.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Elizabeth S. Bowers
Elizabeth S. Bowers, Chairman

Dated at Bethesda, Maryland

This 27th day of October 1978.