UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In The Matter of	)	
COMMONWEALTH EDISON COMPANY	)	Docket Nos. 50-454 OL 50-455 OL
(Byron Nuclear Power Station, Units 1 & 2)	)	

BRIEF OF COMMONWEALTH EDISON COMPANY

Submitted on behalf of
COMMONWEALTH EDISON COMPANY

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Date: April 29, 1982

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INTRODUCTION

In its appeal, the Rockford League of Women Voters ("League") requests that the Appeal Board reverse the Licensing Board's order dismissing the League as a party to the operating license proceedings involving Commonwealth Edison Company's ("Edison") nuclear generating station located in Byron, Illinois. The League was dismissed from the proceedings as a sanction for its repeated failure to comply with an order of the Licensing Board directing the League to provide answers to written interrogatories served on the League by Edison pursuant to 10 CFR § 2.740b.

The issue in this appeal concerns a fundamental tension which exists in all public proceedings: the right of a person to participate in the proceeding as opposed to

the right of the tribunal to conduct the proceeding itself and to control the parties who appear before it. In NRC proceedings, as elsewhere, these potentially conflicting rights are harmonized by written rules of procedure which spell out the rights and obligations of parties to licensing proceedings. Since public participation in licensing proceedings is encouraged, intervenors are specifically (and gently) treated by the NRC's rules of practice. Part 2 of 10 CFR has detailed rules which describe such matters as how members of the public are admitted to licensing proceedings; the discovery tools available to the parties; and the manner in which the evidentiary hearings should be conducted. These rules and the NRC and judicial decisions interpreting them are limits on the rights of persons to participate in proceedings. They are reasonable and workable and have been upheld in the face of challenges to their fairness.[1]

The League and its counsel have pursued a course before the Licensing Board which flouts the rules to which all parties to NRC proceedings must adhere. The League has simply refused to answer written interrogatories properly posed by Edison in the operating license proceeding. Indeed, the League's position in this regard is pristine. Throughout the progress of this issue before the Licensing Board, it never stated that the interrogatories would be answered, even in its petition for reconsideration of the order dis-

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[1] See e.g. BPI v. Atomic Energy Commission, 502 F.2d 424 (D.C. Cir. 1974).

missing it as a party. Similarly, it makes no statement in its opening brief to this Board that could conceivably be regarded as a concession that if it is readmitted to the Byron licensing proceeding it will answer the interrogatories. Thus, under the League's approach there are to be one set of rules for all other parties to any licensing proceeding and another rule for the League and its counsel. Such an approach makes a mockery of the NRC's Rules of Practice and of the licensing process itself.

We will demonstrate that, under the circumstances, the imposition of the sanction of dismissal was authorized and constituted an entirely proper exercise of the discretionary powers conferred on the Licensing Board to enable it to carry out its duty to conduct a fair, impartial and expeditious hearing. We will also demonstrate that the League's excuses for its behavior are factually insupportable and legally insufficient and that the orders appealed from should be affirmed.

STATEMENT OF THE FACTS

The League's persistent refusal to answer written interrogatories is not an isolated incident. The history of its actions in the operating license proceeding demonstrates a pattern of uncooperative and dilatory behavior, calculated to abuse the process and frustrate the efforts of Edison, the Staff and the Licensing Board to obtain a timely identification of the issues in controversy. While each event,

taken in isolation may be excusable, taken together they demonstrate a clever and opportunistic plan to delay and subvert the NRC's licensing process for the Byron station. In order to gauge the pervasive nature of these tactics, a brief recitation of the steps to date in the operating license proceeding is appropriate.

1. The League's Admission as a Party to the Proceeding.

In December, 1978, the NRC issued a public notice announcing the docketing of Edison's operating license application for the Byron Station which authorized the filing of intervention petitions requesting that hearings be conducted on Edison's application. 43 Fed. Reg. 58659 (December 15, 1978). Intervention petitions were filed by the League[2] and by the DeKalb Area Alliance for Responsible Energy ("DAARE") and the Sinnisippi Alliance for the Environment ("SAFE").[3] By order dated March 23, 1979, the Licensing Board found that these organizations had standing to intervene in the proceeding, announced that a special prehearing conference would be held, and instructed the intervenors to file a supplement to their petitions identifying contentions sought to be litigated.[4] On July 30, 1979, the

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[2] "Petition For Leave To Intervene," dated January 13, 1978.

[3] "Petition For Leave To Intervene," dated January 13, 1979.

[4] "Order," dated March 23, 1979.

League filed 13 contentions with the Board.[5] On August 21-22, 1979, a special prehearing conference was held in Rockford, Illinois. The Board found that the League and DAARE and SAFE had each identified at least one viable contention, and admitted these organizations as parties to the proceedings.

2. Events Leading To The Admission of the League's Contentions.

At the special prehearing conference, the Board ordered Edison, the NRC Staff, and the League to meet for the purpose of attempting to negotiate a mutually acceptable statement of contentions, and requested that the parties provide the Board, by October 15, 1979, with a report on the League's final statement of contentions and issues.[6] Pursuant to that direction, a meeting was scheduled between the NRC Staff, Edison and the League for the purposes of attempting to negotiate contentions. The meeting was scheduled for September 26, 1979 to accomodate Myron Cherry, Esq., who, at the time, had just been retained to represent the League only with respect to negotations on contentions.

At the meeting the Staff and Edison discussed with Mr. Cherry, in detail, their respective positions on each of the League's 13 contentions. Shortly after the meeting, as requested by Mr. Cherry, Edison and the Staff prepared and

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5 "Contentions of Intervenor League of Women Voters of Rockford, Illinois," dated July 28, 1979.

6 Prehearing Conference Transcript at p. 114.

sent the League letters outlining their positions with respect to each of the 13 contentions.[7] The League, however, did not respond to the written submission. Rather, between September 26, 1979 and February, 1980, Edison and the Staff were repeatedly told that further discussions must await the League's negotiations with Mr. Cherry on the terms of his representation of the League.

By February 13, 1980 the League had still not submitted a revised statement of contentions. Accordingly, on that date Edison filed a Motion with the Board requesting a ruling on the League's existing contentions.[8] In response to this motion, by Order dated February 21, 1980, the Board requested that the parties file briefs on the League's contentions.[9] The next day, Mr. Cherry filed his appearance on behalf of the League,[10] and concurrently requested an extension of time to March 10, 1980 in which to file revised contentions.[11] The League's revised contentions were filed on March 10, 1980. The revised contentions incorporated the

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7 "Motion For A Ruling On The Admissibility Of Contentions Of The Rockford League of Women Voters," dated February 13, 1980. Attached to the Motion are letters written by counsel for the NRC Staff documenting contention negotiation efforts.

8 Id.

9 "Order Requesting Briefs on Contentions Of League of Women Voters," dated February 21, 1980.

10 "Appearance," dated February 22, 1980.

11 Letter to Marshal E. Miller, Esq. from Myron M. Cherry, dated February 22, 1980.

League's original 13 contentions and added a total of 133 additional contentions.[12] Many of these contentions were identical to contentions filed in the Consumers Power Company Midland operating license proceeding including the attribution of verbatim quotes to Edison's management which had earlier been attributed to Consumer's management.[13] Others were a recital of numerous generic issues, identified by the NRC staff in various publicly available documents.

Two days later, on March 12, 1980, the League served identical sets of interrogatories on Edison and the NRC Staff.[14] Briefly summarized, the interrogatories requested that Edison and the Staff identify their positions regarding the applicability of each of the League's 146 revised contentions to the Byron Station, identify changes between construction permit commitments and the manner in which the Byron units were constructed, and identify any deviations or nonconformances occurring during construction at Byron. Both Edison and the Staff objected to these

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12 "Revised Contentions of Intervenor Rockford League of Women Voters," dated March 10, 1980.

13 Compare League Revised Contention 13 with Contention 18 submitted by Mary Sinclair in the Midland proceeding. A copy of Mary Sinclair's contentions was submitted to the Licensing Board with "Answer of Commonwealth Edison Company To The Revised Contentions of the Rockford League of Women Voters," dated April 18, 1980.

14 "League of Women Voters of Rockford, Illinois' First Interrogatories To Commonwealth Edison Co.," dated March 12, 1980 and "League of Women Voters of Rockford, Illinois' First Interrogatories to Nuclear Regulatory Commission Personnel With Knowledge," dated March 12, 1980.

interrogatories on the grounds that the Board had yet to rule on the admissibility of the League's contentions and that therefore, under the provisions of 10 CFR § 2.740(b)(1), discovery was not authorized.[15] The League filed a reply to these objections requesting that the Board order Edison and the Staff to respond to its interrogatories.[16] In that document the League asserted that it required answers to its interrogatories in order to bolster its arguments in support of the admissibility of its contentions, a patently improper use of discovery under the NRC's Rules of Practice. The requested order was not issued; neither Edison nor the Staff answered the League's interrogatories.

Edison and the Staff filed detailed answers and objections to the League's revised contentions on April 18, 1980 and April 25, 1980 respectively.[17] On October 24, 1980, Edison filed a Motion with the Board requesting a ruling on the League's pending revised contentions.[18] On

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15 "Commonwealth Edison Company's Objection To First Interrogatories of League of Women Voters," dated March 19, 1980 and "NRC Staff Answer to Motion of League of Women voters of Rockford, Illinois," dated March 26, 1980.

16 "Reply of League of Women Voters of Rockford, Illinois, In Support of Its Interrogatories Directed To Applicant and Staff," dated April 1, 1980.

17 "Answer of Commonwealth Edison Company To The Revised Contentions of Intervenor Rockford League of Women Voters," dated April 18, 1980 and "NRC Staff Answer To Revised Contentions of Rockford League of Women Voters," dated April 25, 1980.

18 "Motion Requesting A Ruling On Pending Contentions," dated October 24, 1980.

December 18, 1980, the Board issued an order admitting 114 of the League's revised contentions, and authorizing the conduct of discovery with respect to the matters raised in the admitted contentions.[19]

3. Edison's Petition For Reconsideration.

Edison sought, and received, authorization to file a Petition For Reconsideration of the Board's December 18, 1980 decision.[20] Edison's Petition was filed February 13, 1981.[21] The Petition challenged the admission of approximately 50 contentions which, in Edison's opinion, did not meet the pleading requirements imposed by this Board's decision in Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760 (1977). The Petition also requested that the Licensing Board require that the League demonstrate "good cause" for submitting revised contentions which were not related to the League's original 13 contentions. Edison did not request that the effectiveness of the December 18 order be stayed, nor, of course, did the Board enter an order to this effect.

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19 Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 & 2) LBP-80-30, 12 NRC 683 (1980).

20 "Motion For Leave To File Petition For Reconsideration," dated January 23, 1981 and "Order (Granting Leave To File Petition For Reconsideration)," dated January 31, 1981.

21 "Petition For Reconsideration," dated February 13, 1981.

4. Edison's July 8, 1981 Interrogatories and Events Leading to the Board's Order Compelling the League to Provide Answers Thereto.

While its Petition For Reconsideration was pending, on July 8, 1981 Edison served written interrogatories on the League.[22] The interrogatories requested basic and limited information from the League regarding its contention.[23] The information sought would have been utilized for

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[22] "Commonwealth Edison Company's First Round of Interrogatories To Be Answered By The Rockford League of Women Voters," dated July 8, 1981.

[23] The entire text of the interrogatories reads:

"Interrogatories: 1. With respect to each Contention advanced by the League which has been admitted by the Atomic Safety and Licensing Board in the above-captioned proceeding, list the following:

a. A concise statement of the facts supporting each Contention together with references to the specific sources and documents and portions thereof which have been or will be relied upon to establish such facts;

b. the identity of each person expected to be called as a witness at the hearing;

c. the subject matter on which the witness is expected to testify;

d. the substance of the witness's testimony.

2. With respect to each witness identified in the League's response to Interrogatory 1 above, identify each document which the witness will rely upon in whole or in part in the preparation of his testimony or in the development of his position.

3. With respect to each witness identified in the League's response to Interrogatory 1 above, identify the witness's qualifications to testify on the subject matter on which the witness will testify.

4. Identify all persons who participated in the preparation of the answers, or any portion thereof, to these Interrogatories."

further discovery, as appropriate, by way of requests for documents and depositions. Thereafter, Edison anticipated the filing of motions for summary disposition with respect to those contentions which seemed suitable for that procedure. Responses to Edison's interrogatories were requested as provided in 10 CFR § 2.740b(b), within 14 days of service, that is not later than July 27, 1981.

The League did not answer Edison's interrogatories by July 27 nor did it attempt to seek an extension of time in which to respond. Thus, on July 30, 1981, Edison filed a Motion with the Board seeking to compel the League to provide the requested discovery.[24] On August 5, 1981, the League filed blanket objections to Edison's interrogatories.[25] In addition, the League filed a response to Edison's Motion To Compel.[26] In these pleadings, the League asserted a right not to answer Edison's outstanding interrogatories. The League argued that since the Licensing Board had not yet ruled on Edison's Petition for Reconsideration and since the NRC Staff's Safety Evaluation Report had not been issued, Edison's interrogatories were "premature." In addition, the League asserted that the interrogatories were unduly burden-

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24 "Motion of Commonwealth Edison Company to Compel Discovery By The Rockford League of Women Voters," dated July 30, 1980.

25 "Objections To Commonwealth Edison's First Round of Interrogatories To Rockford League of Women Voters."

26 "Response of Rockford League of Women Voters To Motion To Compel Discovery."

some, that it had not yet selected the individuals to present as witnesses at the hearings, and that counsel for the League were involved in other pressing personal and professional matters.

On August 18, 1981, the Licensing Board entered an order denying Edison's Petition for Reconsideration of the League's contentions and granting Edison's Motion to Compel Discovery.[27] In rejecting the League's objections to Edison's interrogatories, the Board emphasized the importance of discovery as a tool for narrowing and focusing the issues raised in contentions so as to assure that the issues are limited to that which is relevant to the subject matter involved in the proceeding.[28] The Board also expressly overruled the League's assertion that the Interrogatories were in some way premature because the SER had not yet been published.[29] In addition, the Board pointed out that the League's counsel's involvement in other matters did not excuse noncompliance with the requirements imposed by the Commission's Rules of Practice.[30] Accordingly, the Board ordered that the League provide answers to Edison's outstanding interrogatories promptly, subject to a requirement

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27 "Memorandum and Order," dated August 18, 1981.

28 Id. at 7-8.

29 Id. at 7-8 and 13. In view of the fact that the Board's Order denied Edison's Petition for Reconsideration, the League's prematurity argument based on the pendency of that Petition was no longer germane.

30 Id. at 14.

that the parties be allowed a reasonable period of time to confer regarding discovery.[31]

In addition, the Board set forth some general guidelines and suggestions regarding the conduct of discovery. Among other things, the guidelines included a requirement that the parties confer regarding future discovery prior to resorting to motions to the Board, and stated that interrogatories would be deemed continuing in nature. The Board also suggested that the parties avoid the use of boiler plate formulas involving unnecessary and redundant details in preparing interrogatories and encouraged the use of depositions.[32]

5. Events Leading To Edison's Motion For Sanctions.

By Order dated August 19, 1982, the Board established a schedule for future prehearing matters.[33] The Board set December 15, 1981, revised by Order dated September 9 to November 1, 1981, as the last date for completion of discovery pending under its August 18, 1981 order. The Board also established dates for any additional discovery arising from new matters brought to light by the issuance of NRC Staff documents.

In accordance with the Board's instructions, on August 25, 1981, Edison contacted the League to determine

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31 Id. at 14.

32 Id. at 8-13.

33 "Scheduling Order," dated August 19, 1982.

when it could expect answers to Edison's interrogatories which were compelled by the Board's August 18 order. Following a number of additional communications between the League and Edison, on September 15, 1981, Mr. Cherry, on behalf of the League, finally agreed to supply written answers to the July 8, 1981 interrogatories not later than October 1, 1981. This commitment was confirmed in a letter from Edison's attorney's dated September 16, 1981, a copy of which was served on all parties of record, including the League, and on the Board.[34]

Counsel for Edison called counsel for the League to arrange to pick up the League's answers to Edison's interrogatories late on October 1, 1981. At that time, counsel for the League stated that the League would not provide answers to the interrogatories unless Edison was willing to grant concessions to the League in connection with a discovery dispute between the League and Edison in the Illinois Commerce Commission proceeding. Counsel for Edison informed the League's counsel that, in view of the League's position, Edison would initiate a telephone conference call with the Licensing Board on October 2, 1981,

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[34] See Exhibit B attached to "Motion of Commonwealth Edison Company For Sanctions," dated October 2, 1981. During this same time period, Edison and the League were engaged in proceedings pending before the Illinois Commerce Commission. These proceedings involved an attempt by the League to have the Commerce Commission reconsider its decision that the Byron Station be completed and placed into commercial service as expeditiously as practicable. The conduct of discovery associated with that proceeding was also a subject of discussion between these parties. (See infra pp. 24-28.)

for the purpose of seeking relief from the Board for the League's failure to answer the interrogatories.

The next day, prior to placing the conference call, counsel for Edison called the League's counsel, Staff's counsel, representatives of DAARE/SAFE and the offices of the Licensing Board Judges, to inquire as to when would be a suitable time to hold the conference call. The League's counsel stated he would be available all day. The conference call was set up for early afternoon, and Edison, at the request of the Chairman, engaged a court reporter to transcribe the call. Approximately 15 minutes prior to the time the call was scheduled to take place, the League's counsel informed Edison's counsel that he would not participate in the call. The call took place, with all parties participating except counsel or other representative of the League. At the conclusion of the call, the Board requested that, since the League had not participated in the conference call, Edison present a written motion to the Board concerning the outstanding interrogatories to the League.[35]

6. Edison's Motion For Sanctions.

On October 2, 1981, Edison filed a Motion requesting that sanctions be imposed against the League for its refusal to provide discovery and its failure to comply with the Board's order requiring that it do so.[36]

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[35] Transcript of October 2, 1982 Conference Call at 23.

[36] "Motion of Commonwealth Edison Company For Sanctions," dated October 2, 1981.

On October 13, 1981, the League responded to Edison's Motion for Sanctions.[37] In its response the League stated that its commitment to provide answers to Edison's interrogatories was based upon a corresponding commitment on Edison's part to provide discovery in the Illinois Commerce Commission proceeding. As evidence of this purported agreement the League appended certain letters to its pleading, which on their face refer only to the ICC proceeding and are inconsistent with the existence of the alleged agreement.[38] Concurrently, the League also filed a Motion with the Board requesting the imposition of sanctions against Edison for its failure to comply with the purported discovery agreement by failing to respond to discovery pending in the proceeding before the ICC.[39]

Three months after the League's answers to Edison's interrogatories were due, and approximately two months after the Board had ordered the League to answer these interrogatories, on October 27, 1981, the Board issued an order dismissing the League.[40] The Board found that the League had failed to answer Edison's outstanding interrogatories; had deliberately and willfully refused to comply with the

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37 "Response of Rockford League of Women Voters To Motion For Sanctions," dated October 13, 1981.

38 Id., Exhibits A and B.

39 "Rockford League of Women Voters Motion For Sanctions," dated October 13, 1981.

40 "Memorandum and Order," dated October 27, 1981.

Board's August 18, 1981 order compelling such answers; and that such conduct seriously impeded the proceedings and the integrity of the Board's order.[41] The Board struck all of the League's contentions and dismissed the League as a party to the proceedings.[42]

7. The League's Petition For Reconsideration.

On November 6, 1981, the League filed a Petition for Reconsideration of the Licensing Board's imposition of sanctions.[43] The basic thrust of the League's Petition was that it was justified in refusing to answer Edison's interrogatories, notwithstanding the Board's Order compelling the League to provide such answers. The League reiterated its earlier arguments, previously rejected by the Board, regarding the existence of an overall discovery agreement pertaining to both the NRC operating license and the Illinois Commerce Commission proceedings, the pendency of Edison's Petition for Reconsideration of the Licensing Board's Order admitting contentions, and the fact that counsel for the

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41 Id. at 9.

42 Id. at 9, 10.

43 "Rockford League of Women Voters' Petition For Reconsideration of Board Orders of October 27, 1981," dated November 6, 1981. At the same time the League filed a request with this Board that the time for filing its exceptions be stayed until after the Licensing Board ruled on the League's Petition for Reconsideration. "Motion of the Rockford League of Women Voters To Extend The Time Within Which To Take An Appeal From The Final Order of The Atomic Safety and Licensing Board Or In The Alternative To Stay The Time Schedule For Exceptions And Briefings In Connection With An Appeal," dated November 6, 1981.

League was busily engaged in other personal and professional matters. In addition, the League presented a new argument. For the first time, the League sought to justify its refusal to answer Edison's interrogatories based on the fact that neither Edison nor the Staff had provided answers to the League's interrogatories filed in March, 1980, nor had the Board compelled them to do so.

The Board issued an Order denying the League's Petition for Reconsideration on January 27, 1982.[44] With respect to the excuses previously raised by the League, the Board reiterated its position that these excuses in no way justified the League's conduct. The Board also responded to the League's attempt to rely on Edison's failure to answer the League's March, 1980 interrogatories which the League first raised in its Petition for Reconsideration. The Board pointed out that the League's interrogatories were filed well before the point at which discovery was authorized to proceed, and that throughout the entire period which led up to the Board's Order imposing sanctions, the League never once mentioned the March, 1980 interrogatories nor made any claim that these interrogatories were still pending or unanswered. Consequently, the Board determined that the League's arguments on this score constituted a post mortem attempt to resurrect its interrogatories in an effort to alter the known facts after the sanctions were imposed.

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44 "Memorandum and Order (Denying Motion For Reconsideration)," dated January 27, 1982.

The Licensing Board's Orders became ripe for review, and this appeal ensued.

ARGUMENT

A. Introduction

The basic legal issues and factual questions involved in this appeal are relatively simple and straightforward, and, in large measure uncontested. There is no question but that Edison was entitled to the information sought in its interrogatories, and that the information was necessary to enable Edison to adequately prepare for hearing. Similarly, there is no dispute regarding the fact that the League did not answer Edison's interrogatories for a period of three months, and failed to obey the Licensing Board's explicit order that it provide answers for a period of two months prior to the issuance of the dismissal order. Finally, the law is clear that it is within the scope of the Licensing Board's discretionary authority to dismiss a party for its wilful refusal to comply with duly issued Licensing Board orders.

The League's brief does not quarrel with these basic propositions. Rather, stripped of its irrelevant arguments and unfounded accusations, the brief seeks to avoid the consequences of the League's actions based on an assertion that Edison's refusal to pay expert witness fees in connection with depositions which were to be held in

another proceeding, before a different agency, justified the League's refusal to answer the interrogatories filed in this proceeding.[45] Stated otherwise, the League's basic position is that Edison's failure to honor an asserted agreement regarding discovery at the Illinois Commerce Commission excuses its disobedience of an NRC Licensing Board order. This position represents a gross abuse of the Commission's discovery process and was properly sanctioned by the League's dismissal from the proceeding.

In the following sections, we first show that the Commission's regulations authorize the dismissal of a party as a sanction for the party's deliberate and wilful refusal to comply with a licensing board order. Secondly, we demonstrate by its own admissions and documents filed to support its arguments, that the League deliberately attempted to misuse the Commission's discovery process in an effort to extract concessions from Edison in connection with another separate proceeding over which the Licensing Board had no authority. Under the circumstances the Board properly sanctioned the League, without first holding a hearing on the League's conduct. Thirdly, we address collateral claims presented by the League, and show that these claims amount to nothing more than an after the fact attempt to justify

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[45] When the League finally, after being dismissed from this proceeding, raised the question of witness fees to before the Illinois Commerce Commission, the Hearing Examiner assigned to the proceeding denied the League's request to be compensated by Edison for their witnesses time.

its improper conduct. Finally, we show that, in light of the League's demonstrated unwillingness to participate meaningfully in the proceeding, and the adverse effects on the licensing process which resulted from the League's conduct, the sanction imposed by the Board was appropriate, and should be upheld.

B. A Licensing Board Is Authorized To Impose The Sanction Of Dismissal On A Party Who Attempts To Abuse The Licensing Process

The law governing the imposition of sanctions by a licensing board is clear. A board has the power, indeed the duty, to regulate the course of proceedings over which it presides. Section 2.718 of 10 CFR provides, in pertinent part:

> A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to avoid delay, and to maintain order. He has all powers necessary to those ends, including the power to ... (e) regulate the course of the hearing and the conduct of the participants.

This regulation gives licensing boards broad powers to regulate the course of their proceedings, including the power to regulate the course of discovery. Consumers Power Company (Midland Plant Units 1 and 2) ALAB-123, 6 AEC 331, 340 (1973). As the Commission has previously recognized, the reason for granting licensing boards this broad degree of discretion is that, at least as to procedural and scheduling matters, only licensing boards have "first-hand

contact with and appreciation for all the circumstances surrounding a case." Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2) CLI-74-16, 7 AEC 313, 314 (1974).

As a necessary corollary to the duty to regulate the course of proceedings, licensing boards are also conferred broad discretionary powers to compel compliance with their orders through the use of sanctions. Thus, 10 CFR § 2.707 provides, in pertinent part:

> On failure of a party to file an answer or pleading within the time prescribed in this part or as specified in the notice of hearing or pleading; to appear at a hearing or prehearing conference, to comply with any prehearing conference order entered pursuant to § 2.751a or § 2.752, or to comply with any discovery order entered by the presiding officer pursuant to § 2.740, the Commission or the presiding officer may make such orders in regard to the failure as are just ...

Finally, it is well recognized that one of the sanctions a licensing board may impose upon a party for its wilful refusal to comply with board orders compelling discovery is dismissal of that party from the proceeding. Metropolitan Edison Company (Three Mile Island Station, Unit No. 1), LBP-80-17, 11 NRC 893 (1980); Northern States Power Company, et al. (Tyrone Energy Park, Unit 1), LBP-77-37, 5 NRC 1298, 1301 (1977); Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), LBP-75-67, 2 NRC 813, 817 (1975); Public Service Electric & Gas Company (Atlantic Nuclear Generating Station, Units 1 and 2), LBP-75-62, 2 NRC 702, 705-06 (1975).

C. The League's Own Statements And Documents Demonstrate Its Wilful And Deliberate Refusal To Obey The Board's Order

Given the severity of the sanction, dismissal of a party may generally not be imposed unless the party is found to have deliberately and wilfully refused to obey duly issued board orders, and such refusal prejudiced the rights of the other parties to the proceeding. Atlantic Nuclear Generating Station, supra, 2 NRC at 706. See also, National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976). And, if there is a genuine issue of material fact necessary to the determination of whether the party's conduct warrants sanction, evidentiary hearings have generally been required by federal courts prior to the imposition of the sanction of dismissal. Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1973). However, it is for the Board to determine whether any genuine issue of material fact existed. When the very documents relied upon show that a party's claim is frivolous and not worthy of serious consideration, no genuine issue of material fact exists. Legerlotz v. Rodgers, 266 F.2d 457, 458 (D.C. Cir. 1959); cert. granted 361 U.S. 808; cert. dismissed 362 U.S. 938 (1959).

As we show below, the League has repeatedly admitted, and continues to do so in its brief to this Board, that its refusal to comply with the Licensing Board's order was based upon Edison's refusal to pay witness fees to deponents which the League was required to produce in another

proceeding, in a different forum. Stated differently, the League engaged in a calculated attempt to use the discovery process in this case to extort concessions from Edison in another proceeding. These admissions and documents establish two important points. First, the League's refusal to comply with the Board's Order was wilful and a deliberate abuse of the discovery process. Second, there are simply no genuine material factual issues regarding the League's conduct. Consequently, a hearing prior to the League's dismissal was not required.

The basis for the League's refusal to provide answers to Edison's interrogatories was clearly articulated to the Licensing Board in its response to Edison's Motion for Sanctions. It is repeated in the League's brief to this Board:

> But Edison then chose to scuttle the entire process. Edison suddenly refused to pay the deposition expenses of Messrs. Hubbard and Minor, even though its counsel knew full well that in other NRC proceedings involving the very same witnesses and issues Edison's counsel had been ordered to pay those very same expenses.

(League brief, p. 19.)

Even if the above mentioned dispute regarding payment of the League's witnesses arose in connection with discovery requests pending in the operating license proceeding, the League's refusal to provide answers to the outstanding interrogatories would have been improper. The League had been ordered to provide the answers. That order was

binding upon the League unless stayed, reversed or modified and the Commission's Rules of Practice provide the means to seek these remedies. Parties are not free to choose, which if any, orders they will obey, and simply disregard all others. However, the record in this case shows more than mere improper behavior; it shows a wilful and calculated scheme of deliberate abuse.

The League claimed before the Licensing Board and continues to claim to this Board, that its refusal to obey the Licensing Board's order was fully justified. This justification purportedly arises from a breach on Edison's part of "detailed agreements concerning overall discovery and scheduling," agreements which "are reflected in part in counsel's letters of September 16, 1981 and September 17, 1981" (League's Brief at p. 17). Moreover, the League claims that its assertion of the existence of the agreements in response to Edison's motion for sanction required, at a minimum, that the Licensing Board hold hearings to resolve what was an obvious dispute regarding the existence of the agreement (League's Brief at pp. 23-24).

The purported agreement and overall discovery plan could not possibly have justified the League's conduct because it did not exist. It is a patent and transparent fabrication by the League which is directly contradicted by the very documents to which the League earlier directed the Licensing Board and now directs this Appeal Board. Nor, of course, was the League entitled to a hearing on its obvious

misrepresentation to the Licensing Board, when the very documents which are asserted to reflect the agreement, in fact give lie to the assertions. Legerlotz v. Rogers, supra, 266 F.2d at 458.

The League claims, in its statement of facts, that a comprehensive agreement was reached between Edison and the League regarding discovery pending in two separate proceedings before the NRC Licensing Board and the Illinois Commerce Commission ("ICC") Hearing Examiner. The League points to two letters appended as Exhibits 13 and 14 to its Petition for Reconsideration as reflecting in part those agreements. When the Licensing Board first dismissed the League as a party to this proceeding, it had both the referenced letters before it, as well as a third letter dated September 16, 1981 from Edison attorneys to the League's attorney, which reflected an agreement that the League would provide answers to Edison's NRC Interrogatories by October 1, 1981.[46] The letter shows the NRC's docket number in its face, and is copied to all parties to this proceeding. No conditions are attached to the agreement.

Unlike the letter from Edison's attorneys referred to above, the two letters cited by the League show the caption, and in the case of Edison's letter, the docket number, of a hearing pending before the ICC. They show that copies were sent to the Hearing Examiner conducting that

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[46] See Exhibit B to "Motion of Commonwealth Edison Company for Sanctions" dated October 2, 1981.

proceeding before the ICC. Not only do these letters clearly relate only to discovery pending at the ICC, they directly contradict the existence of the so-called (and plainly irrelevant) agreement on discovery which the League claims Edison subsequently breached.

Numbered paragraph 2 of Mr. Cherry's letter of September 16, 1981 does not reflect any agreement with respect to witness fees for Messrs. Hubbard and Minor; it shows quite clearly that no agreement had been reached. The opening paragraph and numbered paragraph 6 of the letter state that the parties had agreed to submit in late October, 1981, for resolution in early November, 1981, by Hearing Examiner Kamphuis of the ICC, all matters on which the parties had failed to reach agreement. The agreement to submit to the ICC Hearing Examiner Kamphuis all unresolved discovery matters for resolution in late October is also reflected in the letter from Edison's attorneys. The letter flatly and clearly contradicts the assertion on page 18 of the League's brief that Edison agreed to await answers to the interrogatories in this proceeding until after the completion of depositions pending in the ICC hearing. At the time these letters were exchanged, the Revised Scheduling Order of the NRC Licensing Board set November 1, 1981 as the last date for completion of all discovery. Edison and the League clearly never contemplated resolving discovery disputes pending at the ICC in a time frame consistent with

the Licensing Board's schedule in this proceeding, including the dispute regarding witness fees.

Thus, the dispute between Edison and the League involved the payment of $2,200.00 in fees for a one day deposition of the League's witnesses in connection with a proceeding pending at the ICC. The dispute existed at the time of of the so-called overall discovery agreement. Although that dispute could only be appropriately resolved by recourse to the Commerce Commission, the League chose to refuse to obey the Licensing Board's order in this proceeding instead. Simply put, the League embarked on a course of conduct in the operating license proceeding, which, had it been condoned by the Licensing Board, threatened significant delays, in an effort to extort from Edison concessions to which the League may or may not have been entitled in some other proceeding.[47]

When the Licensing Board eventually ruled on the Motion for Sanctions, it was acting on a record that showed far more than an inexcusable and wilful disregard of Board's authority to regulate the course of the proceedings and the conduct of the participants so as to avoid delay and maintain order. (10 CFR § 2.718). The League asserted a <u>right</u> to refuse to conform its conduct in the operating license proceeding to the Licensing Board's orders. And, in what

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[47] During the pendency of this appeal, the ICC Hearing Examiner denied the League's request that Edison be required to pay for the time of League's witnesses in the ICC hearings.

can only be interpreted as a defiant gesture of contempt, the League moved the Licensing Board to impose sanctions on Edison for its alleged failure to respond to discovery pending before the ICC. This frivolous motion was accompanied by letters between attorney for the League and attorneys for Edison which showed on their face that the correspondence was related exclusively to the matter pending before the ICC. Moreover, the letters showed that the obviously irrelevent agreement on payment of witness fees for deposition in some other forum that was alleged to have been reached and later breached by Edison, had never in fact existed, and that the parties had agreed to submit that dispute to the ICC Hearing Examiner in a time frame inconsistent with the schedule set in this proceeding.

That the League, represented by counsel with years of practice before the NRC and its licensing boards, seriously expected the Licensing Board to use its authority to resolve disputes regarding discovery in a proceeding before another forum strains credulity.[48] Clearly the League gambled on the unwillingness of the Licensing Board to enforce its valid orders notwithstanding the transparency of the League's excuses for not having done so in a timely fashion. It is clear that if the Licensing Board had been unwilling to

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[48] Edison also filed a Motion to Compel answers from DAARE/SAFE to a similar set of interrogatories as was served on the League. In marked contrast to the League's response, DAARE/SAFE, who are not represented by counsel, agreed to and did answer Edison's interrogatories.

impose meaningful sanctions in accordance with the NRC's Rules of Practice, unnecessary delay would have been the only consequence of the League's contumacious behavior. Of course, the League's interests are unaffected or even enhanced by delay.

The only meaningful sanction available to the Board was the dismissal of the League from the proceeding. If the NRC's issuance of an operating license were delayed unnecessarily, Edison would suffer massive economic harm. It is quite clear that the League sought to use the threat of delay in this proceeding to force Edison into conceding issues pending before some other forum. This constitutes a flagrant and willful abuse of the NRC's hearing process which should not be countenanced. Failure to take stern measures to avoid such obvious abuses practically invites their continuation. By October 27, 1981, the pattern of willful disregard of the League for the NRC's Rules of Practice and the Licensing Board's authority to enforce them was obvious, and that pattern continues unabated today.

Any doubt as to the appropriateness of dismissal which might conceivably have existed before the League moved for reconsideration of the Licensing Board's order was dispelled by that motion. Even after having been dismissed as a party for the willful refusal to obey the Board's order, the League reiterated what it seems to believe is a right to disregard any Board order with which it disagrees. It supplemented its earlier filing of letters exchanged by

counsel in the ICC hearing with a number of pleadings and additional correspondence from that proceeding. As with the letters filed earlier, the documents in no way suggested any overall discovery agreement involving this operating license hearing. Moreover, as discussed below, the League raised for the first time the fact that the League had not received responses to discovery it filed before discovery was opened. The League did not, however, even hint that if readmitted as a party it would respond to Edison's interrogatories. Finally, in seeking review before this Board, it now makes the incredible argument that it did not understand the Licensing Board's direct order that the League answer Edison's interrogatories as requiring it to do so.

D. The League's Collateral Excuses For Its Failure To Comply With The Board's Order Cannot Justify Its Conduct

As in its Petition For Reconsideration filed with the Licensing Board, the League's brief to this Board contains an assortment of assertions and arguments by which the League seeks to explain that its refusal to comply with the Board's order was proper, or at worst, based on an innocent misunderstanding of the Board's orders and requirements imposed by the Commission's Rules of Practice. These arguments and assertions are, for the most part, either irrelevant or unfounded, and given the manner in which they evolved, patently frivolous. They constitute a disingenuous attempt

to alter the facts which precipitated the League's dismissal, which attempt, we submit, highlights the fact that the League does not intend to participate meaningfully in these proceedings.

For example, in its Petition for Reconsideration, the League raised, for the first time, arguments related to a set of interrogatories filed concurrently with its statement of revised contentions, and attempted to justify its conduct based on the fact that neither the NRC nor Edison had provided answers to these interrogatories, nor had the Board compelled such answers. The League repeats its claim in its brief to this Board.

The League's argument as it relates to its March, 1980 interrogatories has two, somewhat interconnected, prongs. First, the League attempts to show that the Licensing Board was biased against the League in that it sustained Edison's objection to the League's interrogatories and overruled what the League characterizes as an "identical"[49] objection to Edison's July, 1981 interrogatories. Secondly, the League attempts to show that since Edison did not provide answers to the League's interrogatories, the League was justified in its refusal to provide answers to Edison's interrogatories, notwithstanding the Board's order compelling the League to do so. These arguments are equally without merit.

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[49] League Brief, p. 14.

The interrogatories filed by Edison and by the League were filed at very different stages in the proceeding. The League's interrogatories were served concurrently with its revised statement of contentions, a point in time when none of the League's contentions had been admitted, and there were consequently no matters in controversy. Accordingly, under the provisions of 10 C.F.R. § 2.740(b)(1) which provides that discovery "shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order," the conduct of discovery could clearly not be authorized by the Licensing Board. Both the NRC Staff and Edison interposed objections to the League's interrogatories on this basis. Quite appropriately, the Board never ordered Edison or the Staff to answer the League's interrogatories. Following the Board's December, 1980 Order admitting certain of the League's contentions as issues in controversy, at which time discovery became permissible, the League never attempted to renew its earlier filed interrogatories, nor did it file any other discovery requests in the proceeding.

In contrast, Edison's interrogatories were served following the Board's ruling on the League's contentions, a stage in the proceeding at which, as the Board had authorized in its Order, discovery was clearly permissible. Thus, the fact that the Licensing Board entered an order compelling the League to respond to Edison's interrogatories, and did not compel Edison to respond to the League's interrogatories

simply reflects an understanding of the Commission's rules governing discovery, and in no way demonstrates unfair treatment of the League by the Board.

The League's second argument to the effect that Edison's failure to answer the League's interrogatories justified its refusal to answer Edison's interrogatories simply reveals the League's expectation of effective immunity from the Board's authority. The League was under a clear and direct Board order to provide answers to Edison's interrogatories, which, as a party to the proceeding, it was obligated to comply with. Therefore, even if the League honestly believed that "the Board's overruling of the League's 'prematurity' objection to Edison's interrogatories (14 NRC at 373) applied pari parsu to Edison's ... objection to the League's own Interrogatories,"[50] this belief cannot possibly serve to justify the League's outright refusal to comply with the Board's order requiring that it answer Edison's interrogatories.

Moreover, the League's own pleadings demonstrate quite vividly that the League's refusal to comply with the Board's order was not based upon Edison's failure to answer the League's interrogatories. In response to Edison's motion for sanctions, the League filed two pleadings. The League's "Response of Rockford League of Women Voters To Motion For Sanctions" does not even mention the League's July, 1980 interrogatories, much less indicate that the

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50 League Brief, p. 14.

League based its conduct on Edison's failure to answer these interrogatories, or upon its belief that the Board's August 18, 1981 Order imposed an obligation on Edison to do so. Indeed, even in its accompanying "Rockford League of Women Voters Motion For Sanctions," the League does not mention its previously filed Interrogatories. Quite obviously, had the League believed that its March, 1980 interrogatories provided any justification whatsoever for its refusal to provide answers to Edison's interrogatories it would have raised the matter in these motions.

Similarly, the League's disingenous attempt to rely upon the Licensing Board's general suggestion that "a well-timed deposition can often accomplish more than six months of back-and-forth fencing over interrogatories and answers" led the League to believe that it was relieved of its obligation, compelled by the very same order, to answer Edison's interrogatories is equally transparent. The above-quoted language was obviously intended as a suggestion regarding the conduct of future discovery; it could not possibly be reasonably interpreted as an indication that the League could comply with the Board's order compelling answers to Edison's interrogatories by providing witnesses for deposition. Again, if the League believed this to be the case, undoubtedly it would have raised this matter in its response to Edison's motion for sanctions. That it did not clearly demonstrates that it is attempting to create an after-the-fact justification for its improper conduct.

In sum, despite the League's efforts to portray a different set of circumstances than actually existed, the record is clear that the League knew full well that it was obliged to provide answers to Edison's interrogatories, and that its outright refusal to do so would subject the League to possible sanctions. The League's refusal was based on a calculation that the Licensing Board would tolerate its conduct and that Edison would capitulate to the League's demands in connection with the proceedings pending before the Illinois Commerce Commission. The League and its counsel simply miscalculated, and were appropriately dismissed.

E. The Sanction Of Dismissal Is Appropriate

Finally, in its brief, the League argues that even if this Board accepts the findings made by the Licensing Board, which as we have demonstrated in the previous sections of this brief are clearly established by the record in this case, the sanction of dismissal imposed by the Board was improper. In support of its argument it relies principally upon the Commission's Statement on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), and decisions of other licensing boards considering the imposition of sanctions. In this section, we address the League's arguments, and show that the Licensing Board's decision furthers the objectives of the Commission's Statement of Policy, and is consistent with prior NRC and judicial decisions.

1. The Commission's Statement of Policy Clearly Contemplates Dismissal as an Appropriate Sanction for Refusal to Provide Discovery.

At the outset, it is important to note the reasons for which the Commission's recent Statement of Policy was issued. In the prefatory statement, the Commission expressly recognized the significant impact of licensing delays on operating license applications. Licensing boards were expressly encouraged "to expedite the hearing process by using those management methods already contained in Part 2 of the Commission's Rules and Regulations." In addition, the Commission emphasized that "virtually all of the procedural devices discussed in this Statement [including, of course, the sanction of dismissal] are currently being employed by sitting boards to varying degrees. The Commission's re-emphasis of the use of such tools is intended to reduce the time for completing licensing proceedings."

With specific reference to the sanction provisions contained in Part 2, the Commission stated:

> Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligation imposed by and in accordance with applicable law and Commission regulations. While a Board should endeavor to conduct the proceeding in a manner that takes account of special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceedings does not relieve the party of its hearing obligations. When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party. A spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings. For exam-

> ple, the boards could warn the offending party that such conduct will not be tolerated in the future, refuse to consider a filing of the offending party, deny the right to cross examine or present evidence, dismiss one or more of the party's contentions, impose appropriate sanctions on counsel for a party, or, in severe cases, dismiss the party from the proceeding. In selecting a sanction, a board should consider the relative importance of the unmet obligation, its potential for harm to other parties or the orderly conduct of the proceeding, whether its occurrence is an isolated incident or part of a pattern of behavior, the importance of the safety and environmental concerns raised by the party, and all of the circumstances. Boards 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.

Each of the factors identified by the Commission to be considered in deciding the appropriate severity of the sanction to be imposed militates in favor of the league's dismissal. This is particularly so in light of the Commission's earlier quoted statements regarding the need to avoid unnecessary licensing delays and its clear directive to its boards to use the tools provided in the Rules of practice to assure fair and expeditious proceedings.

a. The Importance of the Unmet Obligation.

The unmet obligation in this case was the League's refusal to provide answers to Edison's initial round of interrogatories, which primarily requested that the League identify the factual support for its contentions. As the Appeal Board has recognized, fairness to an applicant in a licensing proceeding, and the public interest in developing

a sound record mandates that intervenors cooperate fully with discovery.

> The Applicants in particular carry an unrelieved burden of proof in Commission proceedings. Unless they can effectively inquire into the positions of the intervenors, discharging that burden may be impossible. To permit a party to make skeletal contentions, keep the basis for them secret, then require its adversaries to meet any conceivable thrust at hearing would be patently unfair, and inconsistent with a sound record.

Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317 at 338 (1980). In addition, the Appeal Board explained why cooperation with discovery is essential to avoid unnecessary delay:

> 'Pleadings' and 'contentions' no longer describe in voluminous detail everything the parties expect to prove and how they plan to go about doing so. Rather, they provide general notice of the issues. It is left to the parties to narrow those issues through the use of various discovery devices so that evidence need be produced at the hearing only on matters actually controverted. This is why curtailing discovery tends to lengthen the trial - with corresponding increase in expense and inconvenience for all who must take part.

Susquehanna, supra, 12 NRC at 334-335 (citations omitted).

In view of the facts of this case, the Appeal Board's statements seem prophetic. Of the 114 of the League's contentions which were admitted in this proceeding, it is quite apparent that the vast majority of them were, at best, skeletal and of uncertain relevance to the Byron plant. In admitting these contentions the Licensing Board expressly stated that the matters raised therein would be further

refined and focused through the discovery process, and that contentions which proved to be irrelevant to Byron, or which did not raise contested issues of material fact would be disposed of via the summary disposition process permitted by 10 CFR § 2.749. Byron, supra, LBP-80-30, 12 NRC at 696.

Edison's initial attempt to flesh out the issues raised in the contentions was completely thwarted by the League's refusal to answer Edion's interrogatories. As a result, Edison's ability to prepare for hearings to meet its burden of proof was seriously jeopardized. The answers to the interrogatories were crucial to the adequate preparation of Edison's case, and the League's refusal to provide answers assured that Edison would not receive the needed information prior to the November 1 discovery cut off date.[51] Moreover,

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[51] In this regard, the League's suggestion that because the purported "second wave" of discovery pertaining to "SER contentions" was not to commence "until several months after the Board summarily dismissed the League" the League's failure to answer Edison's interrogatories was, at worst, a partial default is sheer nonsense. (See League brief at 22 and 27 fn. 23.) In its Order compelling the League to answer Edison's interrogatories, the Board expressly rejected the League's argument that it need not provide the requested answers until after the issuance of the SER.

> The League's objections based largely upon the argument that the four interrogatories, are premature, are denied. While more information may be available when the SER is filed, there is presently available a large amount of documentary and other information. [Edison] is entitled to full and responsive answers based upon the presently known status of these motions, and to additional information when it becomes available.

Memorandum and Order, August 18, 1981 at p. 13. In light of this language, the League could not possibly have thought that it was not obliged to answer Edison's interrogatories with respect to all of the League's admitted contentions.

the League's refusal to provide facts in support of its contentions and identify witnesses who would be relied upon to establish such facts, would have severely hampered Edison's ability to obtain summary disposition. This in turn would have required needless expenditures of time and resources to litigate contentions which raised no material issues of fact. In short, the League's willful and defiant default pertained to an obligation of central importance to the licensing process.

b. Potential For Harm to Other Parties and the Orderly Conduct of the Proceedings

The matters discussed above demonstrate that the League's conduct severely prejudiced Edison and the orderly conduct of the proceedings, and need not be repeated here. However, one additional point should be mentioned. Quite obviously, unless parties intend to adhere to board orders it is not realistic to expect licensing proceedings, or any other kind of adjudicatory proceeding, to move forward in an orderly manner. By its conduct, the League has demonstrated outright contempt for the Licensing Board's orders and the Commission's Rules of Practice, and there is no reason to believe that if readmitted the League would conduct itself any differently. Indeed, in view of the patently frivolous and wholly unsupportable claims which the League has presented to this Board in an attempt to justify its conduct, it is apparent that the League does not believe its conduct is constrained by the rules applicable to other participants

in licensing hearings. Such conduct can only serve to undermine the licensing process and should appropriately be sanctioned with dismissal.

c. Isolated Incident or Pattern of Behavior

From the very inception of its participation in this proceeding, the League's behavior has been characterized by endless delay and obstinate refusal to conform with the obligations imposed on parties to licensing proceedings. The League's course of conduct pertaining to Edison's interrogatories most vividly reflects its consistency in this regard. The League's initial response to Edison's interrogatories was to simply ignore them until a motion to compel was filed. The League then asserted that notwithstanding the Commission Rules of Practice and the Board's Order of December 19, 1980 opening discovery, the interrogatories were "premature," and that in any event, counsel for the League was too busy to attend to the matter. On August 18, 1981 the Licensing Board rejected these excuses, and ordered the League to respond promptly, subject only to a conference with Edison, presumably to fix a date for the responses. The date which the parties fixed for responses, October 1, 1982, again passed without action by the League.[52] The League's response of October 13, 1981 to Edison's Motion for Sanctions reflected clearly that the League had not yet

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[52] The League has never denied that it agreed to provide responses by October 1, 1981, or that it received a copy of the letter informing the Board of that unconditioned agreement.

beg.. to prepare responsive answers even though almost two months had passed since it had been ordered to do so promptly. Moreover, the League equally as clearly announced that it had no intent to obey the Board's Order until certain conditions wholly irrelevant to its obligation to do so were met.

Contrary to the League's apparent suggestion that it simply missed one deadline and was dismissed from the proceeding, the record clearly demonstrates that the League was, in effect, provided ample opportunity to answer Edison's interrogatories, yet refused to do so. On three separate occasions, in response to Edison's Motion to Compel, in response to Edison's Motion for Sanctions, and in its Petition for Reconsideration, the League could have simply committed to answer Edison's interrogatories, which most likely would have warranted the imposition of a lesser sanction. Instead, its obstinately refused to make such a commitment, in clear violation of the Commission's Rules of Practice and the Licensing Board's Order. In light of these circumstances, the Board was totally justified in determining that the League's refusal to answer Edison's interrogatories was not an isolated incident but part of a pattern of behavior which seriously impeded the proceedings and the integrity of the Board's orders.

d. Importance of the Matters Raised by the League

Finally, the Commission's Statement of Policy identifies the "importance of the safety and environmental concerns raised by the party" as a factor to be considered

in determining the appropriate severity of sanctions. The League argues that the fact that its contentions were admitted in this proceeding constitutes an implicit recognition of the importance of the safety and environmental matters raised in these contentions. The League also asserts that it is clear that it will "actively participate" and "aggressively pursue its contentions" if reinstated as a party in this proceeding. The Board's Order admitting the League's contentions contradicts the first argument, and the League's consistent pattern of obstruction and delay belies the second assertion.

Obviously, the mere admission of contentions in a licensing proceeding does not of itself translate into a recognition that the matters raised therein are of significant importance. See, 10 CFR § 2.714, and Houston Lighting and Power (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980). Moreover, as previously stated, the Licensing Board's order admitting the League's contention and the Commission's Rules of Practice clearly contemplate that the question of whether the League's contentions raised significant questions of material fact was to be answered through discovery and other prehearing proceedings. Thus, a determination regarding the importance of the League's contentions was not possible without first ascertaining whether the contentions raised material issues of fact. However, the League's conduct totally frustrated this endeavor.

Additionally, because of the requirements imposed on intervenors in licensing proceedings, the question of whether contentions raise important matters must be considered together with the question of whether the intervenor is likely to participate meaningfully in the proceeding. As the League's counsel must recognize, an intervenor has an affirmative obligation to come forward with evidence "sufficient to require reasonable minds to inquire further" to insure that its contentions are explored and considered. Consumers Power Company (Midland Plant, Units 1 and 2), CLI-74-5, 7 AEC 19, 30-32 and Fr. 27 (1974), reversed sub nom. Aeschlimann v. NRC, 547 F.2d 622, 628 (D.C. Cir. 1976), reversed and remanded sub nom. Vermont Yankee Nuclear Corp. v. NRC, 435 U.S. 519, 55154 (1978). Also, like any party, an intervenor has an obligation to provide information, through discovery, thought to support the claims advanced in its contentions to insure that the issues litigated in hearings are relevant to the facility under review and present contested issues of material fact. Susquehanna, supra, 12 NRC at 340. If an intervenor is unwilling to meet these obligations, the question of whether its contentions may conceivably raise important issues becomes irrelevant to the value of the intervenor's continued status as a party.

In this case, the League has clearly demonstrated its unwillingness to participate meaningfully in this proceeding. It has flatly refused to provide even the most basic information regarding its contentions, despite being

ordered by the Licensing Board to do so, and has shown no interest in pursuing any discovery of its own. Rather, it seems intent on delaying, to the maximum extent possible, a decision on the central issue presented by Edison's operating license application, i.e. whether the Byron facility will be operated safely without posing any unacceptable environmental impacts. Given these circumstances, the Board's order dismissing the League was clearly appropriate.

2. NRC Decisions in Which Intervenors Have Been Dismissed are in Accord with the Sanctions Imposed by the Licensing Board in this Case.

The League also cites a number of NRC licensing board decisions wherein the imposition of sanctions for failure to comply with discovery orders was considered, and argues that the Board's decision in this case is inconsistent with the NRC's prior practice. The thrust of the League's arguement appears to be that the League's behavior in this proceeding was not quite as egregious as the behavior of parties in the cited licensing board decisions, and since some of these parties were not dismissed, the League's dismissal is an abuse of discretion. The argument is obviously specious.

The issue here is not whether other Boards have tolerated greater abuses of the NRC's licensing process, but whether the Licensing Board's dismissal of the League, under the circumstances of this case, constituted an abuse of the Board's discretionary authority. Indeed, the League's

unacceptable behavior in this case seems to have been tailored to approach but not cross the threshold which was no longer tolerated in the past by licensing boards.

Quite obviously, such behavior should not be permitted. Even if the League were correct in its assertion that other boards have tolerated greater abuses for longer periods of time, this conclusion does not alter the fact that the League's conduct was nonetheless unacceptable and warranted its dismissal. Moreover, it is clear that the League's conduct in this case is at least as flagrant as the conduct of offending parties in prior cases. It is true that in the prior cases cited by the League the parties eventually dismissed generally made unequivocal statements regarding their intent to defy board orders. In this case, the League shared the very same intent. However, instead of candidly admitting it, the League chose to conceal its intent by creating nonexistent agreements and inventing spurious after-the-fact justifications for its defiant conduct.

Finally, it should be noted that the decisions cited by the League predate the Commission's Statement of Policy quoted earlier in this section. This Statement of Policy contains an explicit directive to its boards to use the procedural tools provided in the Commission's Rules of Practice to promote efficient and expeditious hearings. This directive, Edison submits, was deemed necessary in part because of the past reluctance of certain licensing boards

to insist that all parties to a proceeding meet the obligations imposed on a party by the Commission's Rules of Practice. The League's conduct demonstrated its unwillingness to meet these obligations; the Commission's regulations authorize the imposition of sanctions, including dismissal, for such conduct; and the Licensing Board appropriately availed itself of this sanction.

Finally, the Board's dismissal of the League is supported by decisions of federal courts interpreting the Federal Rules of Civil Procedure, after which the Commission's Rules of Practice were modeled. The judiciary has established standards for the imposition of sanctions comparable to those set forth in the Commission Policy Statement. See Marshall v. Segona, 621 F.2d 763, 768 (5th Cir. 1980). It has been held repeatedly that under Rule 37(b)(2) of the Federal rules, the analogue to 10 CFR §2.707, dismissal for default in discovery is appropriate when the default was willful and in bad faith. See e.g. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976); Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976); Independent Investor Protective League v. Touche Ross & Company 607 F.2d 530 (9th Cir. 1978), and decisions cited therein. The conduct of the League plainly meets the criteria established in both NRC and judicial decisions.

CONCLUSION

If flagrant behavior such as that demonstrated by the League in this case does not warrant dismissal, the sanction

of dismissal exists in name only for NRC licensing boards. Lesser sanctions such as precluding the League from responding to motions for summary disposition or from presenting affirmative evidence or conducting cross examination with respect to the issues on which the League refused to provide discovery would be the functional equilavent of dismissal. Since the League's discovery default was total, it would have been precluded totally from participating in the proceeding. Other lesser sanctions, such as a reprimand, would be ineffective and reward the League's efforts to delay this proceeding. But in words of the Supreme Court, " . . . administrative proceedings should not be a game or forum for unjustified obstructionism . . ." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 435 U.S. 519, 554-55, 98 S.Ct. 1197, 1217 (1978). NRC hearings will become just that if licensing boards are not permitted the discretion to take appropriate steps to prevent it.

For all the foregoing reasons, the Licensing Board's Order dismissing the League from this proceeding should be upheld.

Respectfully submitted,

By _____
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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Commonwealth Edison Company, certifies that on this date he filed two copies (plus the original) of the attached brief with the Secretary of the Nuclear Regulatory Commission and served a copy of the same on each of the persons at the addresses shown on the attached service list in the manner indicated.

Date: April 29, 1982

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U.S. Nuclear Regulatory Commission
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