

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Louis J. Carter, Chairman
Frederick J. Shon
Dr. Oscar H. Paris

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
(Indian Point, Unit No. 2)

POWER AUTHORITY OF THE STATE OF NEW YORK
(Indian Point, Unit No. 3)

Docket Nos.
50-247 SP
50-286 SP

May 28, 1982

LICENSEES' MOTION TO IMPOSE SANCTIONS
FOR DEFAULT AND TO STRIKE CONTENTIONS

The Consolidated Edison Company of New York, Inc., and the Power Authority of the State of New York, licensees of Indian Point Units 2 and 3, respectively, hereby move the Atomic Safety and Licensing Board (Board) to issue an order to compel Westchester People's Action Coalition, Inc. (WESPAC), Rockland Citizens for Safe Energy (RCSE), and West Branch Conservation Association (WBCA) to answer the licensees' emergency planning interrogatories within five days of the issuance of such order. Additionally, the licensees request the Board to strike contentions 5 and 6 submitted by WESPAC,

contentions (1), (2), and (4) submitted by RCSE, and contentions submitted by WBCA on the Nuclear Regulatory Commission's (Commission's) questions 1, 3, 4, and 5,¹ on the ground that the intervenors² have again failed to provide factual bases for these contentions.³

I. INTERVENORS ARE IN DEFAULT FOR FAILURE TO COMPLY WITH THE BOARD'S ORDER AND THE COMMISSION'S REGULATIONS

During the second special prehearing conference, the Board stressed the importance of using discovery to identify the crucial issues in this case.⁴ Transcript of Proceedings at 605 (Apr. 13, 1982). After the conference, the Board issued an order which contained an initial dis-

1. WBCA submitted emergency planning contentions under Commission questions 1 and 5 dealing with risk. The Board, in formulating its own contentions, realigned these contentions under Commission questions 3 and 4. See Memorandum and Order (Formulating Contentions, Assigning Intervenors, and Setting Schedule) at 11 (Apr. 23, 1982) (WBCA contentions under Commission questions 1 and 5 used as basis for Board's contention 3.9).

2. The term "intervenors" as used herein refers only to WESPAC, RCSE and WBCA.

3. The licensees recognize that an order striking the stated contentions would alleviate the intervenors' obligation to respond to interrogatories that address these contentions exclusively.

4. Answers to interrogatories are particularly important in this proceeding because the Board has found that discovery would serve to supply the specific factual bases for contentions which were notably absent from any of the intervenors' filings. See Transcript of Proceedings at 605 (Apr. 13, 1982).

covery schedule. The Board stated that "[i]nterrogatories shall be answered promptly and fully, answers being complete yet succinct." Memorandum and Order (Formulating Contentions, Assigning Intervenors, and Setting Schedule) at 21 (Apr. 23, 1982).¹

WESPAC, RCSE and WBCA have not even attempted to comply with this order. Instead, they offer lame excuses which "amount[] to no more than blatant refusals to answer."² In re Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), 11 N.R.C. 559, 564 (1980). Yet, these three intervenors have

1. The Board's order reinforced the Commission's rule that "[e]ach interrogatory shall be answered separately and fully in writing under oath or affirmation." 10 C.F.R. § 2.740b(b) (1981). This regulation evinces the intervenors' procedural duty to respond to discovery requests in a diligent manner.

2. WESPAC claims "the utilities [sic] interrogatories to be generally oppressive," Westchester Peoples [sic] Action Coalition (WESPAC) answers [sic] to Interrogatories from NRC Staff at 1 n.* (May 18, 1982). A claim of burdensomeness is not a valid objection to a discovery request. In re Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), 1 N.R.C. 579, 584 (1975).

Both RCSE and WBCA claim that they were "hampered" by not having received the licensees' answers to interrogatories. RCSE's Preliminary Response to Interrogatories at 1 (May 18, 1982); West Branch Conservation Associations [sic] Response to Interrogatories, List of Witnesses and Exhibits A-D at 1 (May 15, 1982).

filed interrogatories with the licensees to which the licensees have responded with painstaking particularity.¹

WESPAC, RCSE and WBCA seem to be unaware that their right to make inquiries of the licensees is "on a 'two-way street.' A party may not insist upon his right to ask questions of other parties, while at the same time disclaiming any obligation to respond to questions from those other parties." In re Offshore Power Systems (Manufacturing License for Floating Nuclear Power Plants), 2 N.R.C. 813, 817 (1975) (emphasis in original). The named intervenors' behavior fully warrants, "on the basis of rules, precedents, and practice, [their] dismissal."² In re

1. WESPAC has propounded in excess of 100 interrogatories and document requests, including subparts, to each licensee. See WESPAC's Interrogatories for Consolidated Edison (May 3, 1982); WESPAC's Interrogatories for Power Authority, State of New York (May 3, 1982).

Like WESPAC, RCSE has asked that the licensees answer the interrogatories which it has proffered. See Interrogatories of Rockland Citizens for Safe Energy (May 3, 1982). WBCA has filed three sets of interrogatories directed to the licensees. West Branch Conservation Association Interrogatory to the Licensees (May 23, 1982); West Branch Conservation Associations [sic] Request to NRC Staff to Expedite Replies and Second Set of Interrogatories to Staff, Licensees and State of N.Y. (May 15, 1982); Interrogatory to the Licensees from West Branch Conservation Association (Apr. 29, 1982).

2. Dismissal is appropriate at this stage of the proceeding. However, the licensees recommend, at a minimum, that the Board compel WESPAC, RCSE and WBCA to respond to the licensees' interrogatories within five days of the issuance of such an order. Failure of the inter-

Pennsylvania Power & Light Co., 11 N.R.C. at 565; see In re Public Service Electric & Gas Co. (Atlantic Nuclear Generating Station, Units 1 and 2), 2 N.R.C. 702, 706 (1975) (10 C.F.R. § 2.707¹ "empowers the Board to dismiss a recalcitrant party for refusing to comply with a direct order of the Board"); accord, In re Northern States Power Co. (Tyrone Energy Park, Unit 1), 5 N.R.C. at 1298, 1301 (1977); In re Offshore Power Systems, 2 N.R.C. at 817.

WESPAC, RCSE and WBCA either seek to thwart, or are oblivious to, the licensees' need to prepare their case.

[T]he purpose of discovery is to enable each party prior to hearing to become aware of the positions of each adversary party on the various issues in controversy, and the information available to adversary parties to support those positions.

In re Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), 10 N.R.C. 597, 599 (1979), later opinion, 11 N.R.C. 559 (1980) (emphasis in

venors to respond to this order will result in a motion from the licensees to dismiss them from participating in this proceeding.

1. The Commission's regulation provides, in pertinent part:

On failure of a party to . . . comply with any prehearing order pursuant to § 2.751a . . . [,] the presiding officer may make such orders in regard to the failure as are just

10 C.F.R. § 2.707 (footnote omitted).

original). Intervenor may not "improperly frustrat[e] their adversaries' legitimate efforts to prepare for the cross-examination" with impunity. In re Northern States Power Co., 5 N.R.C. at 1301 & n.3. The Board should not tolerate such behavior, but should compel WESPAC, RCSE and WBCA to answer the licensees' interrogatories.

II. INTERVENORS HAVE AGAIN FAILED TO PROVIDE FACTUAL BASES FOR THEIR CONTENTIONS

At the second special prehearing conference, the Board stated that discovery would reveal to the licensees and to the Commission Staff the factual bases for the intervenors' contentions. Transcript of Proceedings at 605 (Apr. 13, 1982). Yet, discovery is now in progress and WESPAC, RCSE and WBCA have again failed to disclose the bases for several of their emergency planning contentions. Accordingly, the Board should strike these contentions from consideration in this proceeding.

The licensees asked WESPAC, RCSE and WBCA to specify the grounds for certain contentions concerning the Commission's third and fourth questions. Interrogatory No. 182, Licensees' Interrogatories and Document Request Under Commission Questions 3 and 4, at 53-54 (May 3, 1982). By failing to answer,¹ the intervenors have contravened the

1. See Westchester Peoples [sic] Action Coalition

Commission's mandate that the bases for each contention be "set forth with reasonable specificity," 10 C.F.R. § 2.714(b) (1981); accord, BPI v. AEC, 502 F.2d 424, 428-29 (D.C.Cir. 1974), have deprived the licensees of their right to notice of matters against which the licensees must defend themselves, see In re Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), 8 A.E.C. 13, 20 (1974), and have proved what the licensees have maintained all along -- WESPAC, RCSE and WBCA have filed emergency planning contentions for which they have no bases.¹

WESPAC deigns to excuse itself from answering the licensees' interrogatories by asserting that it does not have the information to do so. Westchester Peoples [sic]

(WESPAC) answers [sic] to Interrogatories from NRC Staff at 1 n.* (May 18, 1982); RCSE's Preliminary Response to Interrogatories at 1 (May 18, 1982); West Branch Conservation Associations [sic] Response to Interrogatories, List of Witnesses and Exhibits A-D at 1 (May 15, 1982).

1. See Con Edison's Reply Memorandum Respecting Contentions Proposed by Prospective Intervenors at 21-24, 26-30 (Feb. 11, 1982); Authority's Reply to Responses to Objections to Contentions of Potential Intervenors at 19-22, 27-32 (Feb. 11, 1982); Con Edison's Memorandum Respecting Contentions Proposed by Prospective Intervenors at 32-36, 37, 46-48 (Dec. 31, 1981); Power Authority's Objections and Answers to Contentions of Potential Intervenors at 13-14, 47-49, 56-59 (Dec. 31, 1981); see also Licensees' Petition for Directed Certification Pursuant to 10 CFR § 2.718(i) and for Waiver of 10 CFR § 9.103, at 2, 6, 7, 11-12 & n.* (May 10, 1982).

Action Coalition (WESPAC) answers [sic] to Interrogatories from NRC Staff at 1 n.* (May 18, 1982). Similarly, RCSE and WBCA argue that they cannot specify reasons for their claims unless the licensees provide these reasons, see RCSE's Preliminary Response to Interrogatories at 1 (May 18, 1982); West Branch Conservation Associations [sic] Response to Interrogatories, List of Witnesses and Exhibits A-D at 1 (May 15, 1982). The intervenors await "information [from the licensees] crucial to development of [their] case." RCSE's Preliminary Response to Interrogatories at 1. WESPAC, RCSE and WBCA have missed the point. Before they can "develop[] [their] case," they must reveal their bases.

Where, as here, interrogatories . . . seek[] to uncover the basis for and rationale of a contention, a party must delineate the information, if any, currently in its possession (and the source of that information where applicable) on the particular subject. Presumably, it must have relied on information of some sort to formulate a contention; such information must be revealed. . . . [W]e stress again that a party must, in response to discovery requests, identify the information, if any, which it possesses and on which it is basing its contentions.

In re Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), 11 N.R.C. 477, 479 (1980) (emphasis added).

Because WESPAC, RCSE and WBCA have not set forth the bases of the following emergency planning contentions, the Board should strike WESPAC's contentions 5 and 6; RCSE's contentions (1), (2), and (4); and the contentions submitted by WBCA on Commission questions 1, 3, 4, and 5, from consideration in this proceeding. To allow WESPAC, RCSE and WBCA

to make skeletal contentions, keep the bases for them secret, then require [the licensees] to meet any conceivable thrust at [the] hearing would be patently unfair, and inconsistent with a sound record.

In re Northern States Power Co., 5 N.R.C. at 1301.

III. RELIEF REQUESTED

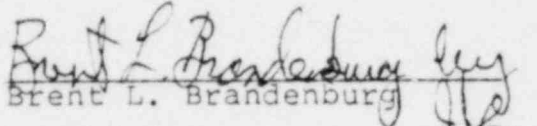
Based upon the default of the named intervenors to respond to interrogatories, and their refusal to provide bases for the stated contentions, the licensees request that the Board issue an order:

(1) striking the designated emergency planning contentions of WESPAC, RCSE and WBCA;

(2) compelling WESPAC, RCSE and WBCA to respond to the licensees' interrogatories within five days of the issuance of such order, to the extent that contentions remain to which interrogatories relate;

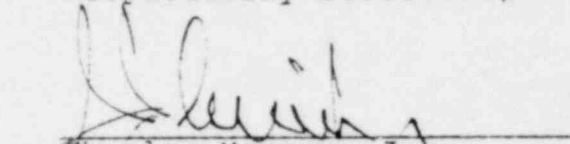
(3) requiring all responses to this motion to be filed by Friday, June 4, 1982; and

(4) imposing any other sanctions which the Board
deems reasonable and just.


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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 1982, I
caused a copy of the Licensees' Motion to Impose Sanctions
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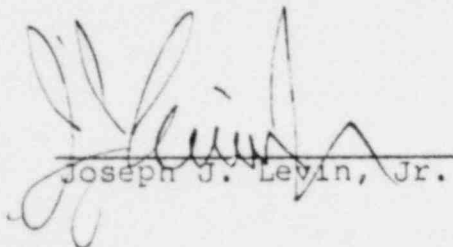
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