

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket Nos.
Commonwealth Edison Company)	50-454
(Braidwood Station, Units 1 and 2)	50-455

APPLICANT'S SUPPLEMENTAL BRIEF ON CONTENTION 4

Commonwealth Edison Company ("Applicant"), pursuant to the Licensing Board's request, submits the following supplemental brief regarding Intervenor's, Bob Neiner Farms, Inc., et al. ("Neiner Farms") Contention 4.

ARGUMENT

Contention 4 states:

Intervenors contend that the proximity of the Illinois Central Railroad to the plant site and the use of the rail system to transport explosive materials from the Joliet, Illinois arsenal and other plants, or depositories creates an unacceptably hazardous condition not considered by the Atomic Safety and Licensing Board, which issued the partial initial decision on environmental and site suitability matters for the Braidwood Station (CBP-75-1, 8 AEC 1197 (January, 1975). At the construction permit stage the analysis of the probability of an explosion was inadequate in that:

(a) the six month period during 1974 for which the traffic from the Joliet arsenal was analyzed is not representative of the traffic to be expected in the future.

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(b) the analysis of the traffic was based on peacetime traffic only.

(c) only the probability of accidental or inadvertent explosions were assessed and the probability of sabotage or purposefully caused explosions were not explored.

Intervenors believe that adequate protection to the facility requires relocation of the railroad line, redesign of the features of the Braidwood Station to mitigate the consequences of an explosion of a magnitude that could develop if greater traffic loads of explosive materials were considered or the development of procedures by the railroad to reduce the probability of explosion.

In Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-74-12, 7 AEC 203 (1974), the Commission held that the judicial doctrines of res judicata and collateral estoppel are applicable to proceedings before the Commission so long as they are applied with a sensitive regard for any supported assertion of changed circumstances or the existence of some special public interest factors in the particular case. These doctrines are intended to promote judicial and administrative economy and to avoid needless duplication of evidentiary hearings and the heavy additional burden in time and expense required to bring litigation to an end. See United States v. Utah Construction Co., 394 U.S. 395 at 420-422 (1966); Safir v. Gibson, 432 F.2d 137, 143 (2nd Cir. 1979) cert. denied 400 U.S. 850 (1970).

Moreover, the Appeal Board has ruled that the application of the doctrine of collateral estoppel "does not hinge upon a demonstration that the decision of the first

tribunal . . . [was] correct; it is enough that that tribunal had jurisdiction to render the decision." The Toledo Edison Company, The Cleveland Electric Illuminating Company (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), The Cleveland Electric Company, et al. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-378, NRC 557, 563 (1977). Absent a showing of overriding competing public policy considerations, the Licensing Board is not free to withhold the application of collateral estoppel as a discretionary matter. Id. at 5 NRC 563-564 n.7.

When considered in light of the principals set forth above, Intervenor's Contention is clearly objectionable. The Contention unambiguously asserts that the Construction Permit Licensing Board erred in its "analysis of the probability of an explosion" from railroad cars carrying explosive materials. This is precisely the type of contention which the doctrines of administrative repose prohibits.

Intervenor does not assert the existence of newly discovered facts or changed circumstances regarding railway explosives hazards; it simply asserts that the construction permit record does not adequately support the previous Board's decision. The Contention amounts to a request that this Board exercise appellate review over the Construction Permit Licensing Board's decision as well as the Appeal Board's affirmance of that decision. This is precisely the situation in which the Commission's instruction that "an

operating license proceeding should not be utilized to rehash issues already ventilated and resolved at the construction permit stage" is most singularly applicable. Farley, supra at 7 AEC 203. A decision which would authorize the relitigation of these issues on the grounds that the construction permit Board incorrectly analyzed accident probabilities would abolish the requirements, established in the Farley decision, for reexamining matters which have been previously considered.

Given that the Contention is inappropriate on its face as a collateral attack on the decision of the Construction Permit Licensing Board, Applicant believes that it would be inappropriate for the Board to go behind the decision of the Construction Permit Licensing Board to determine whether the record supported the Board's decision. However, in compliance with this Board's request, a discussion of the relevant construction permit proceedings follows.*

The Construction Permit Licensing Board concluded that the probability of unacceptable damage to the Braidwood Station due to explosives traffic on the adjacent railroad is significantly less than 10^{-6} per year. Commonwealth Edison Company (Braidwood Station, Units 1 and 2) LBP-75-1, 8 AEC 1197, 1227 ¶88. As indicated in its decision, the

* In "Answer of Commonwealth Edison Company to The Contentions of Bob Neiner Farms", dated August 22, 1978, Applicant cited, at p. 5, the portion of the Licensing Board's Decision which discusses railway explosives hazards. Consequently, Applicant will identify the evidence in the record upon which the Board presumably relied in reaching its decision.

evidence relied upon by the Board for its conclusion was as follows: (a) the Braidwood Station can withstand at least the explosive force of the detonation of an boxcar load of TNT without exceeding design overpressure (Tr. p. 612); (b) a discussion of the types and quantities of materials which may pass the site ("Report of the AEC Regulatory Staff on Site Suitability", following Tr. p. 583 at p. 4); (c) a detailed reconstruction of U.S. explosives traffic over the past 60 years (Klopp Ex.2, Ch. 2, App.A*); (d) a survey of actual shipments of TNT from the Joliet Arsenal during the first six months of 1974 (Id.); (e) an estimation of the explosive accident rate experienced by military munitions traffic (Id.); (f) a detailed discussion of the comparative insensitivity to detonation of the explosives which may pass the site (Id.); (g) the quality of the track which passes the site, absence of curves, roadcrossings, switching yards and sidings near the plant (AEC Site Suitability Report, supra, at p.7); and an extensive examination by the Board of the Applicant's and Staff's expert witnesses on the subject of explosions near the site (Tr. 594-615).

Obviously, it is impossible to guess what weight the Board gave the various pieces of evidence identified above. Suffice it to say that the Board considered this

* Klopp Ex.2 is the Braidwood Station Preliminary Safety Analysis Report.

issue in depth, and its final decision is well supported by the evidentiary record.*

In subpart (a), Intervenor asserts that the six month period of time for which each shipment of explosives to and from the arsenal was analyzed was not representative of future traffic. However the 60 year railway explosives study, the sensitivity studies, and most of the other evidence identified above are independent evidentiary bases for the Board's final decision regarding explosives hazards probabilities. More importantly, Intervenor has failed to allege any facts which might reasonably lead to the conclusion that future traffic past the site will increase the probability of explosions. The issue would obviously not warrant reconsideration if circumstances have changed so as to decrease the probability of explosion.

The assertion in subpart (b) regarding railroad traffic in war years is similarly unpersuasive. First, the assertion that the wartime traffic was not considered is simply wrong. There was evidence before the Board which expressly considered production rates and exposure to the plant during war years (AEC Site Suitability Report, supra at p.5). Furthermore, the 60 year reconstruction study clearly encompasses wartime production activity. Second, at the time of the construction permit review, as now, this

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* The Board did recognize that some types of changed circumstance might warrant reanalyzing the explosion hazard (Tr. 615). This is, of course, consistent with the NRC's general responsibilities and with the doctrine of repose enunciated in Farley, supra.

country was at peace. There has therefore not been a showing of change in factual circumstances which would warrant reexamining these issues at this time.

Finally, subpart (c) attempts to raise questions concerning the probability of purposefully caused explosions. Again, Intervenor's assertion is factually incorrect. The 60 year reconstruction survey considered all TNT detonations regardless of causation. (See AEC Site Suitability Report, supra, at p.5) Accordingly, there was reliable and probative evidence before the Board relating to the probabilities of TNT detonations caused by accident or otherwise. Furthermore, the evidence concerning insensitivity to detonation, building design, etc. is also relevant to purposefully, as well as inadvertantly caused explosions. Subpart (c) does not identify changed circumstances or other factors which would warrant the relitigation of these issues at this time.

What Intervenor has attempted to do by this Contention is isolate certain portions of the evidence relied on by the Licensing Board in reaching its conclusion that the potential for railroad explosions is not such as to render the Braidwood site unsuitable for the proposed reactors. However, the Board's decision was based on the totality of the evidence before it, and an argument that any particular piece of evidence is not totally despositive of the issue hardly warrants reopening this matter.

WHEREFORE, for the reasons stated above, Applicant
urges the Licensing Board to dismiss Intervenor's Contention
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Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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COMMONWEALTH EDISON COMPANY)

(Braidwood Nuclear Power Station,)
Units 1 and 2))
)

Docket Nos. 50-456
50-457

CERTIFICATE OF SERVICE

I, Alan P. Bielawski, one of the attorneys for Commonwealth Edison Company, certify that copies of "APPLICANT'S SUPPLEMENTAL BRIEF ON CONTENTION 4" in the above-captioned matter have been served on the following by United States mail, postage prepaid, this 14 day of September, 1979:

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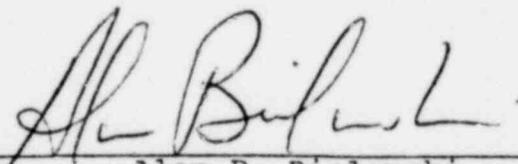
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