

UNITED STATES OF AMERICA  
 NUCLEAR REGULATORY COMMISSION



In The Matter Of	:	
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COMMONWEALTH EDISON CO., <u>et al.</u>	:	Docket Nos. 50-237
	:	50-249
(Amendments to Operating Licenses)	:	50-254
	:	50-265

NATURAL RESOURCES DEFENSE COUNCIL RESPONSE  
 TO APPLICANT AND STAFF OBJECTIONS TO CONTENTIONS

Introduction

At this stage in the proceeding the Board is in a position to rule on the admissibility of a contention based upon the adequacy of the statement or basis of the contention or based upon a showing that regardless of the facts adduced as a matter of law the contention is incorrect.<sup>1</sup> The applicant objections are consistent with these principles. The Staff objections are not. In the preamble to its brief, the Staff cites Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 55 L.Ed.2d 460, 485 (1978), for the proposition that there is a threshold evidentiary requirement which must be met before an agency is required to develop a case with respect to a contention. Of course, no such threshold test applies to the admissibility of a contention which is judged

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<sup>1/</sup> As we noted during the conference phone call, the Board's jurisdiction to decide the admissibility of more than one contention, much less reach the legal merits of any contention, is dependent upon an expansion of the limited powers now delegated to this Board.

before any evidentiary presentation has been made. A number of staff objections are based upon evidentiary disputes which are premature at this time. When evidence is adduced, NRDC will be more than able to meet any threshold test. The admission of a contention is a precondition to rule an evidentiary presentation because it triggers discovery rights from which some of the evidence may be developed.<sup>2</sup>

#### Contention 1

Contention 1 is challenged by the Staff on the theory that it conflicts with Commission policy. In fact the contention is based on Commission policy. The contention rests upon completion of the programmatic EIS being prepared by NRC and the one being prepared by DOE. The NRC policy statement was written when only NRC was doing a programmatic review and only relates to that review. The DOE review is related to a proposed programmatic solution to interim storage. That proposed solution does not include transshipment. The NRC policy statement specifically authorized challenges to individual actions based on the absence of the programmatic review where it could be shown, inter alia, that the proposed action would "tend to significantly foreclose the alternatives available with respect to any other individual licensing action of this type" or would not be necessary to keep reactors operating where their operation was needed for system reliability, economics or control of

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<sup>2/</sup> Our comments on specific contentions are intended to incorporate by reference comments on these same contentions filed by the Illinois Attorney General.

pollution. 40 Fed. Reg. 42801, 42802 (last column), September 16, 1975. Our contentions 1(c), 2, and 3 all address these factors.<sup>3</sup>

If Applicant expends funds now to transship its spent fuel, it will have used funds that could have been spent to expand at-reactor storage capability. Transshipment only makes sense if the Applicant plans to ship to an away-from-reactor storage facility (AFR) in the future. The cost-benefit analysis of such an AFR will appear more favorable as compared to at-reactor storage if, as proposed here, Applicant has already sunk costs in anticipation of the availability of an AFR. Today, without transshipment, DOE has concluded that (DOE/ET-0055, p. 3):

It is assumed that there would be economic and other advantages to the utilities of keeping their spent fuel at their own reactor sites rather than shipping it to interim AFR storage basins.

That is a advantage of at-reactor storage which we seek to preserve. Transshipment may destroy that advantage and Contention 1 seeks to pursue the issue.

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<sup>3/</sup> The Staff appears to ignore the possibility that on-site expansion of spent fuel storage includes building an additional pool and not merely compaction. Their ignorance is unjustified inasmuch as we pressed this option in our comments on the spent fuel GEIS. See September 15, 1978, letter from Anthony Z. Roisman to Clifford Smith and attached Analysis of Space Available for Storage of Spent Fuel at Existing Operating Reactor Sites.

Contention 2

The Staff objection is based upon their belief that when all the evidence is presented the Staff will be able to demonstrate that no impact statement is required. Of course that is a basis for admitting the contention so that Intervenors and the Staff can join issue. The basis for our belief that major impacts will occur if transshipment is allowed is fully articulated in the contention. Staff takes issue with the reference to the dangers of proceeding with waste half-measures prior to having a permanent waste disposal solution. We reference these dangers because they are part of the residual environmental risk created by the decision in Natural Resources Defense Council v. Nuclear Regulatory Commission, 524 F.2d (D.C. Cir. 1975); Project Management Corporation (CRBR), ALAB-330, 3 NRC 613, 619-20, reversed on another issue CLI-76-13, 4 NRC 67.

Contention 3

The Staff asserts with respect to 3(a) and (b) objections which go to the adequacy of an evidentiary basis for the contention. As the Staff itself states, at this time it is premature to determine the evidence for this contention. What is ripe is our clear articulation of our contention -- inadequate consideration of alternatives -- and the listing of possible alternatives which are not on their face unreasonable. We have done that. Combining Contentions 3(c) and 9 is not objectionable to us.

Contention 4

The Staff objection is to the factual merits and not the legal adequacy of the contention. The portion of 4(b) emphasized by the Staff and the applicant was merely intended to disclose that our experts believe the level of worker exposures are 10 times higher than safe. That is a measure of perception of the residual risk of merely meeting the regulation, not a call to change the regulation.

Contention 5

Part of the alleged need for the proposed action is the assertion of the need to maintain a full core discharge capability. Because full core discharge capability is not a regulatory requirement, retaining that capacity is only desirable if it is itself beneficial. The practice of other utilities confirms that the full core reserve is neither desirable nor required.

Contention 6

In opposing Contention 6 applicant and Staff rest upon the allegation that current regulations concerning security protection for special nuclear material do not cover shipments of spent fuel. However, at no time does the Commission exempt from consideration the potential health and safety effects of sabotage directed against such shipments. Clearly there is a health and safety problem requiring security measures. In its

draft EIS on spent fuel storage policy (DOE/EIS-0015-D) the DOE, although concluding the risks are small, nonetheless addressed sabotage of spent fuel shipments as relevant to any spent fuel storage policy. In adopting the exemption to the requirements of Part 73 contained in § 73.6, the AEC did not make any finding that there is no sabotage danger associated with spent fuel in transit -- a finding which it could not make. Thus it left open for litigation in any proceeding the question of whether such a danger does exist and its impact on the public health and safety. NRDC is entitled to raise this issue, particularly in the absence of any data from the applicant on how it intends to cope with this problem.

#### Contention 7

Staff objects to the lack of specificity of a contention which is itself based upon a lack of specificity of the application. Without data on emergency planning and an ER we cannot assess the adequacy of the emergency planning and the environmental impacts. To date there is virtually no evidence from the applicant on environmental issues and none on emergency planning.

#### Contention 8

This contention tracks the standards developed by the NRC for consideration of interim spent fuel handling proposals and identifies how those standards are not met by the proposed action. If it is insufficiently precise, the Staff should

object to the Commission which adopted the standards.

Conclusion

For the reasons provided here and in the filing of the State of Illinois, the contentions should be admitted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRDC RESPONSE TO  
APPLICANT AND STAFF OBJECTIONS TO CONTENTIONS were mailed  
today, January 26, 1979, to the following:

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