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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

MEMORANDUM OF INTERVENOR ROCKFORD LEAGUE OF WOMEN VOTERS IN OPPOSITION TO PETITION FOR RECONSIDERATION

On January 8, 1981, the Board issued a detailed Memorandum and Order ruling on the admissibility in this proceeding of the revised contentions of the Rockford League of Women Voters ("the League"), an intervenor herein. On February 13, 1981 the Applicant, Commonwealth Edison Company ("Edison"), filed a petition to reconsider the Board's ruling in three areas. This memorandum responds to that petition, and to the Staff's March 3, 1981 memorandum supporting Edison's position.

Introduction

At the outset three observations must be made. The first is that Edison's petition confronts the Board with nothing new. Edison simply reiterates arguments it made in response to the League's revised contentions--arguments already rejected by the Board. The second is that, contrary to Edison's apparent position, this Board has substantial authority over the procedure and timing to be followed here--authority which the Board thoughtfully, and properly, exercised in its January 8 Memorandum and Order. And the third observation has to do with the nature of the contentions and the procedures

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applicable to contentions. As the Board correctly observed, Memorandum, January 8, 1981, at 2, 4, contentions are analogous to pleadings in Federal civil practice. Their function is to serve notice of issues, not to set out evidence or finally resolve disputed points. With contentions as with pleadings:

> "It is neither Congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities.
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> "Nor is a Board at liberty to reject a party's intervention petition--as applicants' papers seemingly imply--because of doubts about the party's ability to prove its case. The Rules of Practice designate avenues for avoiding an evidentiary hearing where it is not needed; one must follow the paths prescribed, however, to reach that result. 10 CFR 2.749."

Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649-50 (1979).

These basic principles have particular application to Edison's present situation. Edison wishes, in substance, to dispose summarily and at the threshold of a substantial number of contentions admitted by this Board. As the Appeal Board pointed out in South Texas, there are appropriate ways to do so--which Edison has not invoked here. See also Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546-50 (1980). Of course it is as yet premature to invoke 10 CFR § 2.749. But that section, South Texas, and Allens Creek underscore an important point. If after discovery the contentions Edison attacks ultimately prove valueless, the mechanics for resolving them short of an evidentiary hearing exist. Edison has, then, another bite at the apple.[1] But if those contentions are summarily rejected now,

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1. Edison also expresses concern over burdensome discovery. Again Edison misconceives its remedy. Should discovery proceedings become unduly burdensome to Edison (which, we note, has far more resources than the League), Edison may seek relief under 10 CFR §§ 2.720, 2.740(c). But to scuttle issues in advance on the ground that discovery might at some point become burdensome is a form of throwing out the baby with the bath water authorized neither by the Rules of Practice nor by common sense.

at the initial pleading stage, the League has no remedy until this entire proceeding is terminated. No interlocutory appeal can be had. 10 CFR § 2.714a; Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-586, 11 NRC 472 (1980).

Simply in light of these general benchmark principles, Edison's petition to overturn the Board's ruling admitting the League's contentions (and thereby truncate important portions of this proceeding, in advance of any meaningful factual inquiry) does not commend itself. Nor does Edison's petition for reconsideration fare better on closer scrutiny, as we show below.

I
THE BOARD CORRECTLY REJECTED EDISON'S "LATE FILED CONTENTIONS" ARGUMENT

Edison's first complaint is that ten of the League contentions admitted by the Board were "late filed," and must therefore be reviewed in light of the five factors set forth in 10 CFR § 2.714(a)(1). Petition at 2-6. This Board rejected exactly the same Edison argument as to exactly the same contentions (and others, of which Edison does not now complain), in its January 8, 1981 Memorandum and Order. Edison offers no persuasive reason why its argument is any better now than it was when the Board rejected it.

Edison begins by misconstruing the relevant events. Edison assumes that the League's initial statement of thirteen contentions somehow constituted a "final" pleading. As the Board explained at pages 7-8 of its January 8, 1981 Memorandum and Order, however, that simply is not the case. The Board explained that the August 1979 conference (and the Board-requested negotiations which followed) were "not intended to...limit the lay parties to the narrow scope of the proffered contentions."[2] The Board concluded that any such limitation:

2. As the Board noted (Id.), "at the special prehearing conference held in Rockford, Illinois on August 21-22, 1979, none of the Intervenors was represented by counsel."

> "...would also be unfair to the Intervenors because the Board never intended nor indicated to them that they were rigidly bound to the scope of unrevised contentions in developing or negotiating a set of contentions reflecting their concerns." [Emphasis added.]

Accordingly, the Board held:

> "We do not regard these revised contentions as nontimely within the meaning of our rules."

Thus the occasion for pursuing a 10 CFR § 2.714(a)(1) inquiry simply does not arise. Edison claims that the timing provisions of § 2.714(a)(3) leave the Board with no leeway in this regard. But that is not true. Section 2.714(a)(1) specifically provides--immediately before setting out the factors governing a non-timely petition to intervene--that the Board may establish what is "timely." And the sole authority cited by Edison on this issue, Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372-73 (1973), specifically upheld the Board's authority to extend the time for filing contentions. See also Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 544 (1980), upholding a contention which "first surfaced in [an] authorized supplemental filing." Certainly, Waterford (where the contentions in issue were concededly not timely) affords no basis for overturning this Board's determination, on the facts of this proceeding, that the League's challenged contentions were timely.

In particular, Waterford did not (as Edison contends, Petition at 5) hold that "new" contentions are ipso facto untimely. Nor did Waterford hold that the §2.714(a)(1) factors must automatically be applied to all such contentions. What Waterford did was to reverse a Licensing Board rejection of admittedly untimely contentions, on the ground that the Board's rejection had erroneously failed to take into account the § 2.714(a)(1) factors on a contention-by-contention basis. But to say that those factors must be applied to admittedly untimely

contentions (as Waterford did) is obviously not to hold that they must be applied to contentions which this Board has held timely. Waterford, and Edison's argument, are both wide of the mark here.

That disposes of this issue. In view of this Board's holding that the contentions Edison attacks were timely, it is not appropriate at this stage to address the 10 CFR § 2.714(a)(1) factors in detail on a contention-by-contention basis (as Waterford would require)--nor has Edison or the Staff done so.[3] On that score we note only that if the issue were to arise, the League would be entitled to be heard on the matter (and to respond to anything Edison or the staff might present). Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521 (1979).

II
THE BOARD'S RULING ACCEPTING THE LEAGUE'S UNRESOLVED-SAFETY-ISSUE CONTENTIONS WAS CORRECT

A number of the League's Revised Contentions relate to so-called "generic" unresolved safety issues, having particular applicability to Byron, which are the subject of ongoing Commission and Staff effort and of Task Action Plans of varying levels of structure or implementation. In the celebrated River Bend decision, Gulf States Utilities Co. (River Bend Station, Units 1 and

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3. Arguably Edison's failure to address those factors in its response to the League's Revised Contentions, despite its claim of untimeliness in that response, should dispose of the matter even if--contrary to the Board's subsequent holding--the contentions it attacks were not timely. Waterford's reversal of the Licensing Board's rejection of admittedly untimely contentions plainly stands for the proposition that under the circumstances here (see note 2 supra), non-timeliness is not alone a sufficient ground for ruling contentions out of issue on a wholesale basis. Edison having failed to present anything more (in effect demanding that the Board conduct a sua sponte line-by-line inquiry), its objection should be denied even apart from the Board's express holding of timeliness. A party who fails to argue his own objection is hardly in a position to demand reconsideration of its denial so that he can then raise arguments he forewent earlier.

2), ALAB-444, 6 NRC 760 (1977), the Appeal Board imposed an affirmative duty on Licensing Boards to identify, and to evaluate the impact on plant safety of, such unresolved safety issues—even in uncontested proceedings.

In its January 8, 1981 Memorandum and Order, this Board carefully analyzed River Bend and two subsequent decisions, Virginia Electric and Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-491, 8 NRC 245 (1978), and Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-620, 12 NRC ___ (November 24, 1980). This Board pointed out that beginning with River Bend, in the context of unresolved safety issues, those decisions carved out a major role for the SER in the context of unresolved safety issues. As River Bend held, 6 NRC at 775:

> "The SER is, of course, the principal document before the licensing board which reflects the content and outcome of the staff's review. The Board should, therefore, be able to look to that document to ascertain the extent to which generic unresolved safety problems which have been previously identified in a TSAR item, a Task Action Plan, an ACRS report or elsewhere have been factored into the staff analysis for the particular reactor—and with what result....
>
> "....
>
> "In short, the Board (and the public as well) should be in a position to ascertain from the SER itself--without the need to resort to extrinsic documents—the staff perception of the nature and extent of the relationship between each significant unresolved generic safety question and the eventual operation of the reactor under scrutiny."

In River Bend (a construction permit proceeding), the SER was already in existence at the time the contentions under discussion in that case were submitted. 6 NRC at 771. Under those circumstances, and in the context of a construction permit proceeding (where, as noted in North Anna, 8 NRC at 248, unresolved safety issues may have less immediate significance than they do in an operating license proceeding like this one), the Appeal

Board held that contentions addressed to unresolved safety issues were required to establish a "nexus" between the particular issue and the facility in question.[4] But here the SER--the crucial document from the standpoint of this Board's and the parties' analysis of unresolved safety issues--has not yet been issued. What effect does that have?

Quite properly, this Board held that the fact that the SER has not issued cannot be used to deprive the League of the opportunity to plead inadequate resolution of particularized generic safety issues with respect to Byron:

> "The League is entitled to put in issue by its pleadings the adequacy of the staff's treatment of unresolved generic safety issues in relating to the Byron facility. The specificity and nexus contemplated by River Bend, supra, cannot be expected until the staff's SER has been filed. Accordingly, these contentions are admitted, subject to subsequent refinement and particularization after the SER has been filed and appropriate discovery completed."

Memorandum and Order, January 8, 1981, at 17-18. This is an eminently practical result. As the Board pointed out (Id., at 18), if in light of the SER it appears that some of the League's generic safety issue contentions are without substance, the procedure of 10 CFR § 2.749 is available to dispose of those contentions at that point. (On the other hand, if the League's contentions are rejected at this purely pleading stage, the League has no immediate remedy--see pages 2-3, above--and the League's ability to assert those contentions when the SER is ultimately issued may be questionable.[5])

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4. Contrary to Edison's assertions in its petition for reconsideration, we believe the requisite nexus has been established here, as much as is reasonably necessary at the pleading stage. There is hardly room to doubt that the issues pertain to Byron, and that they bear upon safety--the basic "nexus" requirements of River Bend, 6 NRC at 773. Nor do we understand this Board's January 8 Memorandum and Order to have held otherwise. Additional specificity will be desirable when the Byron SER is issued; but the Board's ruling explicitly leaves room for that to occur.

5. Both Edison and the Staff indicate that were they to succeed in dismissing the contentions now, they would also oppose raising them when the SER is ultimately issued. The Staff suggests that the SER, "when issued, may raise matters...which could lead to the admission of late contentions...if it can be shown such information was not reasonably available...." Staff Response to Petition for Reconsideration, March 3, 1981, at 4. Edison takes a similar position. Petition at 16, note.

Nevertheless, instead of pursuing the altogether sensible course mapped out by the Board--which fully preserves Edison's ability to challenge safety issue contentions on which the SER (or developing events) cast doubt--Edison wishes to subject the League to a form of "Catch-22." As the Board observed, lacking the SER it is extremely difficult to achieve the level of specificity (unwarranted at the pleading stage in any event, we believe: see note 4 supra) which Edison demands. Edison therefore insists that the League's unresolved-safety-issue contentions be dismissed. But when the SER is available, Edison will then subject the League to an even more stringent threshold burden by taking the position that the contentions are "late" at that point--because they were earlier dismissed. See note 5 supra. That sort of merry-go-round is inappropriate in any proceeding. As the Board correctly observed (Memorandum, January 8, 1981, at 2), quoting Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974), the Commission's pleading rules--of which, we submit, River Bend's "nexus" test is a part--"should not be...construed as establishing secretive and complex technicalities." And Edison's merry-go-round, intended artificially to erect technical obstacles to the League's contentions, is even more inappropriate here, where it pertains to safety issues as to which the League expects to provide the Board with a degree of particularized analysis and evidence simply unavailable if the Board's role is restricted (as Edison would have it be) to the limited review authorized in an uncontested proceeding. Surely that is the precise point made in Northern States Power Co. (Monticello Nuclear Generating Plant, Unit 1), ALAB-620, 12 NRC ___ (November 24, 1980), quoted at page 17 of the Board's January 8 Memorandum:

> "In view of the limitations imposed by regulation, and the fact that our review was necessarily unaided by any of the parties, we have not probed deeply into the substance of the reasons put forth by the staff [in the SER]... Scrutiny of

the substance of particular explanations will have to await a contested proceeding." [Emphasis added by the Board.]

That "scrutiny" is important, particularly at the operating license stage. River Bend, North Anna, and Monticello all so hold.[6] Here the League's pleadings have invoked it, and "put [Edison] on notice" of the issues with which the League is concerned. Peach Bottom, supra, 8 AEC at 20-21; see pages 3, 17-18 of the Board's January 8 Memorandum. Lacking the SER, more can hardly be required at this point (even assuming arguendo more is needed at some stage as a matter of pleading). The Board's handling of this question was entirely correct, as a matter of both law and common sense. To be sure, Edison complains that discovery concerning the safety issues the League has raised may be burdensome. This is both premature and beside the point. The obvious remedy for a discovery problem--if it arises--is not to bar substantive issues at the threshold, but rather to address the problem under 10 CFR §§ 2.720 and 2.740(c). The Commission's discovery rules are modeled on the Federal Rules of Civil Procedure. Florida Power & Light Co. (St. Lucie Plant, Unit No. 2), LBP-79-4, 9 NRC 164, 169 (1979). Nothing in the Federal Rules remotely authorizes rejecting a pleading, or barring a substantive issue, because discovery might be burdensome. Rather, the Federal Courts--and this Board--have ample authority to supervise discovery as may be necessary.

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6. Those holdings are reinforced by what we have learned from the Three Mile Island accident. The Kemeny Commission criticized the practice of "issu[ing] operating licenses to plants when there are still 'open safety items,'" and the NRC's own Special Inquiry Group remarked--on the basis of a survey of Licensing Board members--that "NRC staff safety analysis presentations, some say, have become legalistic tracts that repeatedly recite the same assurances in case after case." The Need for Change: The Legacy of TMI (U.S. GPO, October 1979), p. 53; NUREG/CR-1250, Three Mile Island, A Report To The Commissioners And To The Public (U.S. NRC, January 1980), p. 140. One hopes that since those documents were written, matters have improved; but they certainly underscore the importance of thoroughly analyzing safety issues rather than--as Edison seeks to do--muzzling the inquiry at the outset.

It is in the discovery process, not here, that Edison's concerns can be properly addressed, if and when the problems it hypothesizes manifest themselves.[7]

III.
THE BOARD'S RULING ACCEPTING THE LEAGUE'S REGULATORY-GUIDE CONTENTIONS WAS CORRECT

There remains only Edison's attack on this Board's ruling accepting the League's four contentions "assert[ing] that in certain described respects, the Byron design does not comply with Staff Regulatory Guides." Memorandum and Order, January 8, 1981, at 18-19. Inasmuch as Edison's rather cursory argument on this point essentially reiterates its attack on the Board's unresolved-safety-issue ruling (discussed under II, above), we need not belabor the matter. As the Board observed:

> "A Regulatory Guide sets forth one, but not necessarily the only, method which may be employed by an Applicant in order to conform to a regulatory standard. However, at some point and probably in the SER, the Staff will analyze and discuss the reasons why it finds acceptable (or not acceptable) an alternative method which this Applicant has chosen to employ in order to conform to a regulatory standard. For the same reasons discussed regarding unresolved generic safety issues, supra, these contentions will be admitted, subject to subsequent refinement with respect to nexus and particularization requirements."

Memorandum and Order, January 8, 1981, at 19.

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7. And even in the discovery context, "[a] general objection that the interrogatories are too numerous or burdensome"--the appropriate equivalent of Edison's concern here (though in Edison's case the stated concern is wholly speculative and hypothetical)--"will not suffice." Stonybrook Tenants Ass'n v. Alpert, 29 F.R.D. 165, 167 (D. Conn. 1961). Specific defects in specific discovery demands must be shown--just as is the case in Commission proceedings. Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 583 (1975). A fortiori Edison's attempt to bar contentions wholesale at the pleading stage on the ground of hypothetical, generalized discovery difficulties cannot be allowed.

The Board's treatment of this question was quite correct, for the same reasons its treatment of the unresolved-safety-issue question was correct. Regulatory Guides are not mandatory per se, but they are important; and if an Applicant chooses not to comply with a Regulatory Guide, we ought to know whether what it plans is sufficient.[8] As with unresolved safety issues, the kind of thorough and focused scrutiny the League expects to bring to bear on the Regulatory Guide Issues which this Board has admitted, is simply not available if the League's contentions are rejected, and those issues are therefore "uncontested." See pages 8-9, above. For that reason, Edison's attempt to cut-off this inquiry at the threshold was correctly rejected by this Board.

CONCLUSION

For the reasons set forth herein, the League respectfully submits that Edison's Petition for Reconsideration of the Board's January 8, 1981 Memorandum and Order is without merit and should be denied.

Respectfully submitted,

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8. A review of the Byron FSAR Appendix A indicates that according to Edison's own assessment, Byron does not comply, or complies only in part, with over 20% of the relevant Division 1 Regulatory Guides; that as to a further 23%, the most Edison is willing to offer is a "commitment" that at some unspecified future point, Byron will comply with the "intent" of the Guide; and that Edison disagrees, or has "qualifications", or reservations, or interpretations of its own, with over 20% of the pertinent Guides.

PROOF OF SERVICE

I certify that a copy of the foregoing Opposition to Reconsideration was served, postage prepaid and properly addressed, by mail on April 13, 1981, upon the Chairman and members of the Atomic Safety and Licensing Board, counsel for Commonwealth Edison, counsel for DAARE/SAFE, Intervenor, as well as the Secretary of the Nuclear Regulatory Commission.