

10/12/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
COMMONWEALTH EDISON COMPANY
(Byron Station, Units 1 and 2)

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Docket Nos. 50-454
50-455

NRC STAFF RESPONSE TO DAARE/SAFE MOTION TO RECONSIDER
SUMMARY DISPOSITION OF CONTENTION 1(h)

I. INTRODUCTION

By Motion of September 23, 1982, Intervenor DAARE/SAFE seeks to have the Licensing Board reconsider its ruling summarily disposing of DAARE/SAFE's contention 1. Intervenor's motion is specifically directed to a portion of the contention, subpart 1(h), is supported by various affidavits and documents attached to the motion, and purports to demonstrate that the Licensing Board should reconsider its ruling and readmit DAARE/SAFE contention 1(h) for litigation.

II. BACKGROUND

On June 7, 1982, the Applicant filed a motion for summary disposition of DAARE/SAFE contention 1 in its entirety.^{1/} Contention 1 generally challenged the Applicant's technical qualifications and commitment to operate Byron safely and in compliance with NRC regulations.

1/ Contention 1 had several subparts containing the asserted bases therefor. As relevant to the instant motion, subpart (h) cites:

The history at all of Applicant's plants (whether now operating) of its failure (and that of its architects-engineers and contractors) to observe on a continuing and adequate basis the applicable quality control and quality assurance criteria and plans adopted pursuant thereto.

The summary disposition motion was accompanied by three supporting affidavits of Applicant's Vice-President for Nuclear Operations, Assistant Vice-President for Nuclear Engineering, and Byron Station Superintendant. It also contained a statement of material facts pursuant to 10 CFR § 2.749(a).

On July 14, 1982, the Staff filed an answer in support of the Applicant's motion for summary disposition of contention 1. The answer was accompanied by the supporting affidavit of the NRC Senior Resident Inspector at Bryon.

On July 19, 1982, the Intervenor filed an answer in opposition to summary disposition of contention 1. Its answer was accompanied by the affidavit of a programmer for a metals concern.^{2/}

At the August 18, 1982 prehearing conference, the Licensing Board granted the motion for summary disposition of DAARE/SAFE contention 1.^{3/} This ruling was memorialized in this Board's September 10 Memorandum and Order.

As relevant to the present reconsideration motion, the Board accorded no weight to the Intervenor's unsubstantiated general allegation that the Applicant failed to observe on a continuing basis applicable quality control and quality assurance requirements at all of its plants. Memorandum and Order at 6. The Board found that the Intervenor affiant was not shown to have any expertise in the application of NRC regulations or the nuclear energy field and that the data base for his opinion was never detailed. Id. at 6-7.

^{2/} The answer referred to a "Gogol Affidavit" which was never supplied.

^{3/} Tr. at 17.

In sum, the Board concluded, on the basis of the summary disposition papers, that while occasional and isolated deficiencies have been experienced at Applicant facilities, its compliance record is comparable to the industry average and is not such a record as to demonstrate inability, unwillingness or lack of qualifications to operate the Byron plant in accordance with NRC regulations, as contended. Id. at 8-9.

On September 23, 1982, through new counsel, the Intervenor filed a motion to reconsider summary disposition of that aspect of contention 1 (subpart h) regarding quality assurance and quality control. The motion does not seek reconsideration of summary disposition of the balance of contention 1. The reconsideration motion is accompanied by six "exhibits".

The six new exhibits consist of the following: three affidavits executed in September, 1982 by former workmen variously employed at the Byron site in the late 1970's; a June 24, 1982 NRC special inspection letter and report regarding construction quality assurance at Byron; a September 17, 1982 NRC Office of Inspection and Enforcement informational notice regarding potentially defective control panels in a number of plants under construction or in operation; an undated newspaper article regarding the Hayward-Tyler Pump Company; and a September 22, 1982 affidavit of Edward M. Gogol, a professed "author and consultant "on nuclear power plants.^{4/} The motion also references seven attachments to Intervenor's unsuccessful July 30, 1982 financial qualifications petition. These documents are comprised of assorted NRC inspection

^{4/} Mr. Gogol is the Executive Director of Citizens Against Nuclear Power. See August 6, 1982 letter from H. Denton, NRC, to E. Gogol attached to the Staff's August 17, 1982 response to DAARE/SAFE's financial qualifications petition.

reports (attachments Q-T)^{5/} and correspondence regarding a heating and ventilation company (attachments V-W) not employed at Byron.

The present reconsideration motion is not grounded upon arguments or evidence contained in the DAARE/SAFE response to the summary disposition motions. Rather, the motion seeks reversal of the Board's summary decision on contention 1(h) on entirely new grounds and factual bases. This is improper and impermissible under established agency precedent as this Board has earlier recognized in its rejection of a late-filed (Sternglas) affidavit offered by DAARE/SAFE in response to motions for summary disposition of another contention.^{6/} With the sole possible exception of reconsideration motion Exhibit D (the June 24, 1982 inspection report), there is no indication why the other exhibits proffered in support of the present motion could not have been advanced in a timely manner in DAARE/SAFE's response to the summary disposition motion.^{7/} In actuality, the present motion is tantamount to a motion to introduce a late contention on construction QA/QC at Byron, for which the requisite factors

^{5/} These exhibits were addressed in the Staff affidavit of William L. Forney which accompanied the August 17, 1982 Staff response to the DAARE/SAFE financial qualifications petition. The deficiencies identified in exhibits Q,S,T are of relatively minor safety significance. Most have already been corrected. Mr. Forney referred to the NRC Systematic Appraisal of License Performance (SALP) evaluation and NRC Construction Assessment Team report (see Exhibit F to Intervenor's present motion) to the effect that the Applicant had demonstrated a good overall QA/QC program. See August 17 Forney affidavit at 2; see also July 1 Forney affidavit which accompanied Staff response to summary disposition motion at 5-7.

^{6/} See August 16 prehearing conference at Tr. 63.

^{7/} The Intervenor had approximately six weeks within which to prepare its response to the June 7 summary disposition motion.

must be addressed and balanced in accordance with 10 CFR § 2.714.^{8/} The intervenor has not done this.

III. DISCUSSION

In the Staff's view, Intervenor's motion to reconsider is both legally and substantively deficient. Under Commission precedent, a party may not raise in a petition for reconsideration matters which were not placed in controversy originally before the decisional authority.^{9/} The Appeal Board has indicated an intention to deny reconsideration motions when they do not present an elaboration upon, or refinement of, arguments previously advanced, but rather are grounded upon an entirely new thesis.^{10/} That is precisely the situation which obtains here. Further, the Intervenor has not demonstrated that anything in the newly proffered "exhibits" justifies a different result than that reached by the Board in its September 10 summary disposition ruling wherein the Board found that, despite an imperfect regulatory compliance record in limited areas, the Applicant's overall performance record was comparable to the industry average and did not compromise the Applicant's ability to safely operate the Byron plant in compliance with NRC regulations. Memorandum and Order at 8-9. Additionally, following the August 17-18 prehearing conference, the Board readmitted certain Rockford League of Women Voters' (Rockford League) contentions, including a contention on the efficacy of Applicant's

^{8/} See, e.g., Duke Power Co. (Catawba Nuclear Station), ALAB-687, 16 NRC _____, Slip op. at 17-18 n.17 (August 19, 1982).

^{9/} Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-477, 7 NRC 766, 768 (1978); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 1B, 2A, 2B), ALAB-467, 7 NRC 459, 462 (1978).

^{10/} Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 1B, 2A, 2B), ALAB-418, 6 NRC 1, 2 (1978).

QA/QC program.^{11/} This would tend to assure consideration of the matters raised in the present motion such that readmission and litigation of DAARE/SAFE Contention 1(h) would result in unnecessary duplication.^{12/}

As to the substance of the allegations made in support of the reconsideration motion, Exhibits A, B and C constitute the affidavits of three former employees of two contractors at Byron. The affiants in Exhibits A and C worked for a steel and concrete contractor for various periods of time in separate capacities. The former was a QA/QC inspector for the subject contractor from October 1978 to March 1979 responsible for inspection and documentation relating to structural steel erection and bolting in. His affidavit contains allegations about nonconforming reinforcing steel tendons, poor quality of aggregate in cement fabrication, and criticism of his employer's QA/QC program.

The affiant in Exhibit C was a batch plant operator for the same contractor from August 1975 to November 1977 and from February 1978 to June 1979. His affidavit contains allegations about poor aggregate in the cement fabrication and criticism that Applicant had less regard for compliance with specified procedures for producing concrete for safety-related use than in pressing for adherence to daily construction quotas.

^{11/} Specifically, League contention 1A states:

Intervenor contends that the Applicant does not have the ability or the willingness to comply with 10 CFR Part 50, Appendix B, to maintain a quality assurance and quality control program, as evidenced by its past history of noncompliance. In addition, Applicant's quality assurance program does not require complete independence of the quality assurance functions from other departments within the company.

^{12/} This is the case unless dismissal is sought and obtained of League contention 1A on res judicata grounds which preclude relitigation of matters that were previously determined or could have been determined in the same cause of action.

The affiant in Exhibit B was a quality assurance auditor for another Byron contractor from October 1978 to October 1980. He was critical of the adequacy of his QA training and alleged that he was told by his employer to distance himself from both NRC site inspectors and the Applicant.

The NRC Region III office plans to initiate a special inspection into the allegations contained in these exhibits immediately. It expects to have the results of the inspection by December 1, 1982. The ensuing report will be supplied to the Board and parties.

As a general (and necessarily preliminary) observation, the present allegations are not directed to the adequacy of the Applicant's construction or operational QA/QC program per se. They appear confined to limited aspects of the construction QA programs of two contractors regarding activities occurring over two years ago. None of the affiants explain why their allegations were not raised in a more timely manner so that they could have been rectified. This is particularly significant if the affiants believed that the matters complained of had safety significance to the plant. In any event, if the present allegations are substantiated on inspection and otherwise prove of safety significance, DAARE/SAFE can seek their evidentiary consideration at that time.

Exhibit D is a June 24, 1982 NRC letter report to the Applicant detailing the results of an extensive special inspection conducted by a team of NRC inspectors between March and May 1982. The purpose of the inspection was to assess the adequacy of certain aspects of the quality assurance construction activities at Byron. The inspection encompassed audits of QA program interfaces and overview, corrective action systems, design change control, material traceability of installed

structures and components, electrical cable installation, inprocess inspections, and effectiveness of QC inspectors. Letter report at 1. The inspection found that, in general, within the areas inspected, the QC program for Byron appeared good. Id. Examples of program implementation deficiencies were identified which require corrective action. Id. Activities that appeared to be in noncompliance with NRC requirements are specified in the enclosure to the letter.

As relevant to the allegations contained in Exhibits A, B and C, the inspection encompassed the QA program of Byron contractors^{13/} and Applicant oversight of contractor activities.^{14/} Some items of noncompliance were identified and some items remained unresolved in these areas.

The inspection further entailed interviews with QA/QC inspectors for fourteen on-site contractors, including the two contractors for whom the affiants in Exhibits A, B and C were employed. Letter report at 70-71, Tables 1 and 2. As further relevant to the present allegations, QA/QC inspectors for the subject contractors were among those questioned "whether there is a sense of intimidation based upon the need/requirement to keep up with construction" and whether there is a "reluctance to make adverse findings if they will impact on the construction schedule." Letter report at Table 3. No one answered in the affirmative. Id. Similarly, those questioned felt that they have "an avenue to management if they come across a problem" and that "management will get involved." Table 3 at 2. These responses are contrary to the allegations in the motion Exhibits.

^{13/} Letter report at 14-15.

^{14/} Id. at 21-30.

Exhibit E is an NRC Information Notice concerning potentially defective welds in main control panels supplied to a number of plants under construction, including Byron, and in operation. The problem seems to encompass inadequacies in the panel vendors' quality assurance program. The matter is still under NRC review and the affected permittees and licensees have been advised to determine the applicability of the known information to their facilities. It is not readily apparent what inference is to be drawn from this matter relative to the Applicant's QA/QC program which successfully detected the nonconforming panels. No specific action or response is presently required.

Exhibit F is an undated newspaper article in an unidentified periodical regarding allegedly faulty cooling water pumps built by the Hayward Tyler Pump Company. The article is apparently cited because of a statement attributed to an Applicant employee to the effect that the Applicant does not inspect some kinds of suppliers' equipment for use at its plants, but instead relies on the QA/QC programs of suppliers. Motion at 8. According to the article, the Applicant employee is quoted as saying: "They're [the suppliers] are bound by their [QA] program to conduct these inspections . . . [y]ou can't go in and inspect everything yourself." Exhibit F at 1. The Staff is not in a position to ascertain the accuracy of this quote or the context in which it may have been made. Nonecheless, it is the recognized obligation of a product supplier to assure that the fabricated product meets design specifications. The applicant recipient of the product is not required to disassemble every product it purchases and conduct a separate inspection for conformance to design criteria.

An applicant is required to "examine" the purchased product upon delivery to assure that it conforms to the procurement documents and to retain documentary evidence of this fact.^{15/} As a separate and related matter, an applicant is required to periodically "assess" the effectiveness of the control of quality by contractors and subcontractors consistent with the "importance, complexity, and quantity of the product."^{16/} Thus, there is nothing particularly exceptional about the statement attributed to the named Applicant employee or the inference drawn therefrom.

Exhibit G is a September 22, 1982 affidavit of Edward Gogol. Mr. Gogol asserts that he has studied public information concerning construction deficiencies at LaSalle and that, on the basis of that study, contends that there are "grounds to question the Applicant's qualifications and willingness to build and operate the Byron Station safety." *Id.* at 1. The matters raised in this affidavit are a rehearsal of those upon which DAARE/SAFE's unsuccessful financial qualifications petition were grounded and have already been addressed by the Applicant,^{17/} Staff^{18/} and the Board in that context.^{19/} As the Board aptly noted in its ruling on that petition, despite disclosed areas of noncompliance in LaSalle plant construction, NRC inspectors determined that they were not so significant as to preclude operation

^{15/} 10 CFR Part 50, Appendix B, ¶ VII.

^{16/} *Id.*

^{17/} August 17 Applicant response to DAARE/SAFE waiver petitions at 4.

^{18/} August 17 Staff response to DAARE/SAFE financial qualifications petition at 6-7.

^{19/} Memorandum and Order, dated August 26, 1982, at 6-7.

of LaSalle.^{20/} There is nothing in the Gogol affidavit that has not already been exhaustively considered by the NRC in the course of LaSalle licensing.^{21/} Moreover, as the Staff noted in its response to the summary disposition motion on contention 1, it has not identified any "systematic" corporate policies or attitudes that would lead to the conclusion that the performance at another of the Applicant's nuclear plants is indicative of the expected operating experience of Byron with its completely different plant management and operating staff.^{22/}

The Board's grant of summary disposition of DAARE/SAFE contention 1 was not predicated on a determination that the Applicant had a perfect QA/QC program or compliance record.^{23/} It does not. Rather, the Board found, on the basis of the summary disposition papers submitted, that the deficiencies in Applicant's QA/QC compliance record were of a sporadic and limited nature consistent with its status as a long term, major operator of nuclear power plants and that its overall record was comparable to the average in the industry.^{24/} The Intervenor has not met its obligations of demonstrating that a different result would have been reached had the matters raised in its reconsideration motion been considered prior to the Board's summary decision.

^{20/} Id.

^{21/} See, e.g., letter from H. Denton to E. Gogol, dated August 6, 1982, attached to August 17 Staff response to Intervenor's financial qualifications petition.

^{22/} See August 17 Forney affidavit at 4, 7.

^{23/} September 10 Memorandum and Order at 8-9.

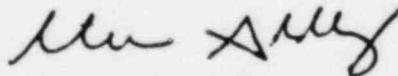
^{24/} Id.

If the new allegations in motion Exhibits A, B and C of former contractor workers are substantiated or otherwise prove of safety significance, the Intervenor can seek their evidentiary consideration at that time. Moreover, whatever the merits of the relevant, new matters raised in the present motion, they can be adequately addressed in the context of Rockford League contention 1A barring that contention's dismissal on purely legal grounds.^{25/} There is no need or justification for a duplicative contention which would likely require consolidation under 10 CFR § 2.714a in any event.

IV. CONCLUSION

As noted above, the DAARE/SAFE motion to reconsider summary disposition of contention 1(h) is grounded upon new facts and arguments not pleaded in its summary disposition papers and is therefore impermissible. In addition, DAARE/SAFE has failed to demonstrate that the new allegations and arguments raised in its motion for reconsideration raise genuine issues of material fact that might have caused the Licensing Board to rule differently on the summary disposition motion had it considered such new matter. Accordingly, the present motion should be denied.

Respectfully submitted,



Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of October, 1982.

^{25/} See n.12 supra.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO DAARE/SAFE MOTION TO RECONSIDER SUMMARY DISPOSITION OF CONTENTION 1(h)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of October, 1982:

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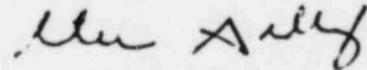
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