11/8/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

ROCKFORD LEAGUE OF WOMEN VOTERS' MOTION TO STAY BRIEFING AND RULING ON COMMONWEALTH EDISON COMPANY'S MOTION FOR SUMMARY DISPOSITION ON LEAGUE CONTENTIONS 1A AND 111

The Rockford League of Women Voters, ("the League"), by its attorneys, hereby moves the Licensing Board to stay briefing and ruling on Commonwealth Edison Company's ("CECO") Motion for Summary Disposition of League Contentions 1A and 111, on the following grounds:

1. CECO's motion is premature and attempts to substitute a mere similarity of issues raised by the League and Intervenor DAARE/SAFE for a thorough and proper presentation of the extremely different amounts and types of evidence that were available to DAARE/SAFE at the time of the hearing on the Motion for Summary Disposition on their Contentions and that which the League expects to present to the Board following completion of discovery. Consequently, any ruling on CECO's Motion for Summary Disposition on the League Contentions should be stayed, pending the completion of the discovery process.

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2. CECO's reliance in its Motion on the application of the doctrine of res judicata, based on an alleged identity of the issues presented by the two Intervenors, is unfounded. League Contention 1A raises issues concerning the unwillingness and inability of CECO to maintain an adequate quality assurance program at Byron, including the ensuring of complete independence of the quality assurance functions from other CECO departments It should also be noted at this point that the language of Contention 1A was not drafted by the League but was drafted by this Board in an effort to consolidate the League's Contentions 2, 5, 10, 88, 89, 90, and 116, all of which dealt with QA/QC procedures. Memorandum and Order, January 8, 1981. Consequently the League did not itself control the precise language of Contention 1A.

DAARE/SAFE also argued in their Contention 1 that CECO's QA/QC policies were inadequate. However, DAARE/SAFE primarily relied for support for that Contention on a number of specific and almost entirely pre-1979 incidents involving CECO and its various plants and practices. DAARE/SAFE also focused on the overall history of CECO's QA/QC performance through 1978 as an indication that the Board should be concerned about CECO's future performance at Byron.

Despite any seeming similarity between the language of League Contention 1A and that of DAARE/SAFE Contention 1, the issues raised by the Contention 1A, as the League intends to present them, are vastly different from the issues raised by DAARE/SAFE Contention 1. The entire focus of the League's efforts concerning Contention 1A has been on events which have occurred specifically at the Byron site and specifically since January 1, 1979. Consequently the two Contentions which CECO would have the Board believe are identical, in fact present very different issues, both of whose merits should be independently determined by this Board.

Finally, because these issues are totally dissimilar, the argument of res judicata raised by CECO in its motion is without substance, as the very nature of the res judicata doctrine requires that the issue already litigated and the issue to be litigated be identical. Without that identity of issues, as in the instant case, res judicata has no bearing on the matter and, therefore, the League is entitled to a hearing on the merits of its Contention 1A.

The same reasoning applies also to League Contention 111 and DAARE/SAFE Contention 2, except that here the difference between the two issues is apparent in the very language of the Contentions and is, therefore, all the more striking. DAARE/SAFE Contention 2 argues that CECO should reevaluate the dose impacts of its projected routine releases of radioactive materials by inclusion of data concerning radionuclide releases from all other operating units or units under construction within the Byron area. League Contention 111, however, raises a broader issue dealing with inadequate monitoring provisions and the design basis provisions for keeping radiation levels as low as possible at Byron. The only reference in Contention 111 to the calculation of cumulative doses from other sites is in Contention 111(B)(4) where it is suggested that such a calculation be performed as only one of several components which are necessary for the final accurate calculation of design doses at Byron. Therefore, it is clear that the whole thrust of Contention 111 is that a reevaluation of the entire basis of the expected dosage levels be made, including accurate monitoring of exposure levels. This would also include as one element, but would far from rely entirely upon, the inclusion of calculations of dosage levels from other plants. Yet the thrust of DAARE/SAFE Contention 2 is solely that the evaluation of dosage levels from other plants be made, even in isolation from any other calculations. Consequently,

as was stated above, Contention III and Contention 2 are far from identical issues, even in their concern for and use of the possible cumulative effects of exposure from all the area units and notwithstanding CECO's efforts to "bootstrap" the League's concern for proper and continuing monitoring at Byron into a backhanded attempt to state that Byron will not meet applicable emissions standards. It is not altogether clear, despite CECO's allegation at page 16 of its Motion, that implicit in the Board's finding that CECO will meet all emissions standards is the additional finding that radiation monitoring at Byron is adequate. In any event, CECO's attempt to say that DAARE/SAFE's Contention 2 concerning correct computation of dosage levels and the League's Contention III relating to monitoring emission levels are identical because they both relate to public exposure to radiation is analogous to saying that a concern that a driver wear a seat belt and a concern that a driver not drink while driving are identical because they both relate to reducing traffic fatalities. They are not identical, but separate and independent issues, both in need of determination on their own merits. Consequently, the League clearly is not barred by the doctrine of res judicata from litigating Contention III.

3. Furthermore, CECO's Motion for summary disposition differs from the typical motion for summary disposition in that it has been filed prior to the completion of discovery and therefore the standard to be used in evaluating the Motion also differs from the typical standard. As regards CECO's Motion, the standard which should be used at this stage is that there has been a showing of good reason for the Board to defer judgment until after specific discovery requests have been made and answered. Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-85, 14 NRC 1017 (1981).

4. A showing of good reason for the deferral of judgment by the Board has been made simply by the differing evidentiary positions of DAARE/SAFE at the time of the Board's September 10, 1982 Order and the League at the present time.

5. During the pendency of the DAARE/SAFE discovery period, DAARE/SAFE was unrepresented by counsel. By contrast, the League has been fully represented by counsel who have been engaged in, and continue to be engaged in at the present time, active discovery including massive amounts of document discovery regarding the QA/QC issue. The League has also retained technical experts, and is in the process of submitting the QA/QC documents to MHB Technical Associates, recognized experts in the field of nuclear engineering, for their evaluation of the documents. In addition, on October 15, 1982, the League filed Interrogatories directed to CECO and on October 22, 1982, also filed proposed Interrogatories to be answered by the NRC Staff. Furthermore, the League intends in the near future to establish deposition schedules, all in compliance with this Board's schedule established in the Memorandum and Order of August 30, 1982, and in conformity with the October 14, 1982 telephone prehearing conference. To allow the League to proceed this far in the discovery process, and to expend significant amounts of time, money and energy in securing voluminous documentation necessary for the effective presentation of the League's contentions, and then to cut away the remaining time necessary for the League properly to evaluate and marshal the evidence in support of its contentions by prematurely ruling on CECO's summary disposition motion, would totally violate the concept of due process.

6. As specifically regards the Motion for Summary Disposition on the League's Contention 1A, the League is in a substantially different position than was DAARE/SAFE at the time of the Board's Order of September 10, 1982 in that the Board's decision, based primarily on the fact that CECO appeared to

have improved its QA/QC practices since the beginning of 1979, was based on the submission of evidence by DAARE/SAFE which only covered the period up to and including 1978. See DAARE/SAFE Contention 1. DAARE/SAFE was unable to present to the Board significant evidence on post-1978 QA/QC violations in time for the Board's ruling on September 10, 1982. By contrast, the League has been specifically concentrating its efforts on QA/QC problems which have become apparent or have arisen since January 1, 1979, with particular emphasis on the analysis of CECO's internal procedures at Byron, which is a far different focus than the one used by DAARE/SAFE in its Contention 1. The evidence which has been accumulated thus far, including CECO's own internal QA/QC audits for 1981 and 1982, is still in the process of being evaluated by the League's expert witnesses. However, it is apparent from the DAARE/SAFE Motion for Reconsideration (which contained as exhibits three Affidavits of former employees of contractors at the Byron site and a June 24, 1982 inspection report of the Byron site citing numerous QA/QC violations) that, as the League has contended since the inception of these proceedings, CECO is still unwilling or unable to establish a satisfactory QA/QC program. This evidence, and the additional evidence which the League is amassing and which will be available upon final evaluation of all discovery material, was not available to DAARE/SAFE at the time of the hearing on its Motion for Summary Disposition.

7. Hence CECO's attempt to force DAARE/SAFE's and the League's Contentions into the same mold is simply without merit as a factual matter. In addition, further support for the League's position that CECO's Motion for Summary Disposition is premature is found in the fact that the Staff response to DAARE/SAFE's Motion for Reconsideration on the Summary Disposition of its Contention 1H, filed October 12, 1982, itself notes that the NRC Region III

office has taken DAARE/SAFE's allegations seriously enough to initiate a special inspection, which it expects to complete by December 1, 1982. Thus, it is clear that the NRC itself, despite the Board's September 10, 1982 ruling, still has substantial doubt as to the level of QA/QC compliance at the Byron site.

8. Pursuant to 10 C.F.R. Sec. 2.771, an intervenor may file a petition for reconsideration of a final decision within 10 days of that decision, and the grounds for a petition for reconsideration must be founded on a elaboration or refinement of arguments previously advanced rather than upon entirely new arguments. See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 1B, 2A, 2B), ALAB-418, 6 NRC 1, 2 (1978). This section explicitly contemplates that even after a final decision has been reached, further argument may be heard on the matter which indicates the Commission's willingness to give a full and complete hearing to all matters raised in the licensing process. However, the Staff has taken the position that this provision should be used as a sword when it argued in its reply to DAARE/SAFE's Motion for Reconsideration that DAARE/SAFE was presenting new material for consideration by the Board and was not restricting itself to arguments previously advanced. The Staff partially founded its argument on the basis that the League would have an opportunity to litigate CECO's QA/QC program, including the matters which DAARE/SAFE is attempting to raise. NRC Staff Response to DAARE/SAFE Motion to Reconsider Summary Disposition of Contention 1H, pp. 5-6. The Staff then noted that the League could litigate these new matters unless it was precluded by res judicata, which is precisely the basis of CECO's Motion. Therefore, the Staff's position is (i) that new evidence cannot be litigated by DAARE/SAFE but can be litigated by the League, and (ii) it is CECO's position that the League cannot litigate that same new evidence because it is barred by the previous

ruling on DAARE/SAFE's similar contention. This is a classic -- and outrageously unfair — "Catch-22" position. Such a position does not comport with ideals of fairness in due process and should not be allowed to prevail.

Furthermore, CECO alleges that the League could have litigated the issues raised in Conetntion 1A and 1ll during the hearing on Summary Disposition of the DAARE/SAFE Contentions. CECO is therefore suggesting that the League should have litigated in the dark, before any evidence had been secured by discovery or any preparation had been made for the presentation of the League's case. That would have made a mockery of the licensing proceedings and the discovery schedule set by this Board would have been an exercise in futility. CECO's view on this issue should not be accorded any consideration whatsoever.

9. The League has consistently stated in its answers to CECO's first and second rounds of Interrogatories and in its answers to the Staff's first set of Interrogatories that it would provide further evidentiary support for its contentions in the form of supplemental answers as discovery progressed and as new information came to light. The League and its counsel have been diligently pursuing all available avenues of discovery for that very purpose and the discovery process is nearing a close. With the completion of discovery so close at hand, and with the date for summary disposition motions set by this Board in its August 30, 1982 Order still a month away, as a practical matter all motions for summary disposition should be decided at one time and on the basis of all the evidence which will be adduced during discovery.

WHEREFORE, the League respectfully requests this Board to stay briefing and ruling on CECO's Motion for Summary Disposition on the League's

Contentions 1A and 111 until the completion of discovery, and, should the Board not grant that relief, that this Board grant the League 20 days from the date of the Board's ruling on this Motion to respond to CECO's Motion for Summary Disposition.

ROCKFORD LEAGUE OF WOMEN VOTERS

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PROOF OF SERVICE

The undersigned, one of the attorneys for the Rockford League of Women Voters, certifies that a copy of the foregoing Rockford League of Women Voters' Motion to Stay Briefing and Ruling on Commonwealth Edison Company's Motion for Summary Disposition on League Contentions 1A and 111 was served by messenger upon counsel for Commonwealth Edison Company on November 8, 1982, and by United States mail, first class, postage prepaid and properly addressed, on all parties on the Service List entitled to notice this 6th day of November, 1982.

Brian Rosen