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June 7, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
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| COMMONWEALTH EDISON COMPANY | ) | Docket Nos. 50-456 OL<br>50-457 |
| | ) | |
| (Braidwood Nuclear Power Station, Units 1 and 2) | ) | |

NRC STAFF RESPONSE TO BRIDGET LITTLE ROREM, ET AL.
MOTION TO ADMIT QUALITY ASSURANCE CONTENTION

## I. INTRODUCTION

On May 24, 1985 Intervenor Bridget Little Rorem, et al., ("Rorem" or "Intervenors") by their counsel filed their Motion to Admit Amended Quality Assurance Contention ("Rorem's Motion"). Rorem's Motion proffers a complex 14 part proposed amended quality assurance contention with numerous subparts which Intervenors purport satisfies the requirements imposed by the Board's April 17, 1985 Order.

As set forth below, Rorem's Motion fails to demonstrate that a balancing of the five factors of 10 C.F.R. § 2.714(a)(1) weighs in its favor so as to justify the receipt of the late-filed amended contention. Further, the amended contention lacks the basis required by 10 C.F.R. § 2.714(b) and does not comply with the stringent basis requirements imposed by the Board in its April 27, 1985 Special Prehearing Conference Order and should be rejected.

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## II. BACKGROUND

On March 7, 1985 Rorem moved for leave to file a late-filed quality assurance ("QA") contention pursuant to 10 C.F.R. § 2.714(a)(1) ("March 7, 1985 Motion"). Both Commonwealth Edison Co. ("Applicant") [1/] and the NRC Staff ("Staff") [2/] opposed the motion asserting that the Intervenors "fail[ed] to demonstrate that a balancing of the five factors of 10 C.F.R. § 2.714(a)(1) weighed in their favor so as to justify receipt of the late-filed proposed contention." Id. at 1. Applicant and Staff both asserted that the proposed QA contention failed to meet the specificity and basis requirements of 10 C.F.R. § 2.714(b) and applicable Commission case law and should therefor be rejected.

In its Order [3/] of April 17, 1985 the Board found that the proposed QA/QC Contention was too "broadly worded and open-ended" to meet the admissibility standards of 10 C.F.R. § 2.714. Order at 29. Notwithstanding its finding that the contention lacked specificity, the Board decided to provide Rorem an opportunity to file an amended contention (Order at 38) and to "accommodate Intervenors' need to provide specificity to develop what we believe may become an important part of the record, by permitting Intervenors to depose Mr. Keppler . . . and

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1/ Commonwealth Edison Company's Answer to Intervenor's Motion for Leave to File an Additional Contention, March 25, 1985 ("Applicant's Response").

2/ NRC Staff Response to Bridget Little Rorem, et al. Motion for Leave to File Additional Contention, April 1, 1985 ("Staff Response").

3/ Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-11, 21 NRC ___ (April 17, 1985).

possible other members of the Staff . . . before submitting an amended contention." Order at 38 and 39.

The Board's Order also discussed the application of the five factors of 10 C.F.R § 2.714 to the late-filing of the proposed QA/QC contention. While the Board's Order does not contain a specific ruling that the balancing of the 10 C.F.R. § 2.714(a)(1) factors weigh in favor of the Intervenors, it found (1) that the Intervenors had "not prevailed in showing good cause" (Order at 23); (2) that the second and fourth factors weighed in the Intervenors' favor (Order at 28); (3) that the third and fifth factors could weigh in the Intervenor's favor if Intervenors comply with the requirements imposed by the Board for acceptance of an amended contention (factor iii - Order at 29; factor v - Order at 32); and (4) that the negotiations which resulted in the voluntary withdrawal of some contentions now permits the substitution of a QA/QC contention with "little, if any, net broadening effect." Order at 33, 34.

Applicant filed "Objections To The Board Order" on April 27, 1985 ("Applicant's Objections") wherein, inter alia, it moved the Board to reconsider its determination to allow Intervenors to submit an amended QA contention. In its May 6, 1985 "NRC Staff's Objection to and Motion for Reconsideration of Licensing Board's Special Prehearing Conference Order Dated April 17, 1985 (LBP-85-11)," the Staff also sought reconsideration of the Board's determination granting the Intervenor an opportunity to file an amended QA contention as well as its analysis of factors iii and v of 10 C.F.R. § 2.714(a)(1). In the May 10, 1985 telephone conference call among the Board and the relevant parties concerned with Rorem's request for an extention of time to file the QA contention, the Board

stated that it would not rule on the motions for reconsideration until after it received and considered the parties' filings regarding an amended QA contention.

On May 20, 1985, Rorem deposed James G. Keppler, NRC Region III Administrator, and Robert F. Warnick, Branch Chief, Reactor Projects and Branch I, Region III on the subject of QA/QC at Braidwood. 4/ Tr. 1-245. A follow-up telephone deposition on May 23, 1985 afforded Applicant's counsel an opportunity to question Mr. Keppler on his responses in the May 20, 1985 deposition. Tr. 246-296.

## III. DISCUSSION

### A. The Balancing Of The Five Factors Of 10 C.F.R. § 2.714(a)(1) Weighs Against Admission Of Rorem's Late-Filed Amended QA Contention

The Staff discussed the five factors of 10 C.F.R. § 2.714(a)(1), as well as the Appeal Board's three-part test for good cause in Duke Power Co., et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (1982), in its April 1, 1985 Staff Response, and will not repeat that discussion here. Staff Response at 3-11. The Board clearly

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4/ In response to Rorem's request, the Staff made James Keppler, Administrator, NRC Region III available for deposition. Intervenor identified a list of the headquarters, Region I, Region III and contractor personnel for possible deposition with Mr. Keppler. In response to this further request, the Staff determined to make available Robert F. Warnick, the Branch Chief from Region III who supervised the Braidwood inspection program from March 19, 1984 to April 1, 1985. Mr. Warnick supervised all the Braidwood personnel identified by Rorem. Review of the deposition transcript discloses that this panel made available by the Staff was able to respond to Intervenors' questions. Even if we were at a discovery stage of the

(FOOTNOTE CONTINUED ON NEXT PAGE)

expected Intervenors to address the five factors in their amended filing as evidenced by its suggestions as to what information with regard to factor iii Intervenors might include. Order at 42. During the telephone conference of May 10, 1985, the Board stated it would not rule on motions for reconsideration until after it received the parties' filings regarding an amended QA contention. By its statement, the Board implied that it anticipated the parties would have further discussion of the factors regarding the late-filed amended QA contention. Notwithstanding the need to address the five factors which it must affirmatively assert in order to demonstrate that the balancing required by 10 C.F.R. § 2.714(a)(1) weighs in favor of admission of its late-filed contention, Rorem failed to brief this issue in its Motion except for vague assertions regarding factor iii. Rorem's Motion at 12-13. For the reasons discussed below, the balancing of the five factors of 10 C.F.R. § 2.714(a)(1) weighs against admission of Rorem's proposed late-filed amended QA contention.

1. Factor i, Good Cause: Intervenors Fail to Demonstrate Good Cause For Late Filing

The Staff reiterates its earlier assertion in response to Rorem's originally proposed late-filed QA contention that Rorem fails to demonstrate good cause for the filing delay. Given the even later date of its

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proceeding with regard to this proposed contention, provision of this panel by the Staff would have fully complied with the

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proposed amended contention its burden to demonstrate good cause for late filing should be greater than for its March 7, 1985 filing of the originally proposed QA contention. Rorem makes no mention of good cause in its May 24, 1985 filing. Given the Board's prior finding that Intervenors had not demonstrated good cause in its March 7, 1985 petition (Order at 28) and the fact that Rorem does not even address good cause in its May 24, 1985 filing, it can only be concluded that no good cause exists for Rorem's untimely filing of their QA contention. In fact, the asserted underlying support for the proposed amended contention and Mr. Keppler's deposition testimony confirm that most of the information on which the proposed contention is based was in the public record long before the March 7, 1985 filing of Intervenors' original QA contention. In these circumstances Rorem has the increased burden to demonstrate that the remaining four factors tip the balance in its favor. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-431, 6 NRC 460, 462 (1977).

2. Factors ii and iv

Although Rorem's Motion does not discuss the alternative means of protecting Intervenors' interest and the extent to which other parties

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Commission's regulations relating to deposition of Staff witnesses. 10 C.F.R. § 2.720(h)(1)(2)(i). In addition, the Staff made every effort to cooperate with Rorem including identifying all NRC personnel and consultants associated with Braidwood, searching for documents and files during the May 20, 1985 deposition and providing copies of the material requested by Rorem. See e.g., Deposition Tr. at 66, 90, 203 and 211.

may represent Intervenors' interest the Staff concedes that these factors, ii and iv, continue to "weigh in favor of protecting the Intervenors' hearing right. . . ." Order at 28.

3. Factor iii: Intervenors Fail to Assert That They Will Assist In Developing a Sound Record

The Staff contended in its April 1, 1985 Staff Response that Rorem had not demonstrated its ability to contribute to the record. Staff Response at 9-11. The Staff reasserts that position here. 5/

In its April 17, 1985 Order the Board gave Rorem the benefit of the doubt regarding factor iii, and reasoned that Intervenors' "expected assistance in developing a sound record" could be demonstrated by the "specification of the factual and expert witnesses they expect to present at the hearing, and the subjects on which each witness or witness panel will testify." Order at 42. The Commission's case law indicates that a party seeking to raise an untimely contention must affirmatively demonstrate that they have special expertise which would aid in developing a sound record. See South Carolina Electric and Gas Co., (Virgil C. Summer

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5/ In "Intervenors' Motion to Extend Date for Filing Amended Contention" filed May 9, 1985 ("May 9 Motion"), Intervenors stated that the requested 3 week extension was needed because Intervenors had had to employ an "attorney with extensive experience in litigating QA matters. . . ." May 9 Motion at 1 and 2. The subsequent need to hire an attorney with QA expertise is inconsistent with the Intervenors earlier assertion, relied upon in part by the Board (Order at 29), that "the experience of their counsel in litigating similar issues at Byron" evidenced their ability to contribute to a sound record. March 7, 1985 "Motion" at 6. At a minimum it raises a question as to the resources Rorem is able to devote to this proceeding which in turn is a factor to consider when considering Rorem's ability to contribute to a sound record.

Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 892-93; Cincinnati Gas & Electric Co. (William H. Zimmer Nuclear Station), LBP-80-14, 11 NRC 570, 576 (1980). Intervenor is required to "set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses and summarize its proposed testimony. Vague assertions regarding petitioner's ability . . . are insufficient. Mississippi Power & Light Co. (Grand Gulf Nuclear Station , Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); Washington Public Power Supply System (WPPSS Nuclear Project, No. 3), ALAB-747, 18 NRC 1167, 1177-78, 1181, and 1182-83 (concurring opinion of Mr. Eddles) (1983).

Despite the Board's clearly stated desire to know what witnesses Rorem will call on each subject (Order at 42), Rorem blithely ignores its instructions and states that they have "consulted" with unidentified "individuals and organizations with substantial quality assurance expertise" which "confirmed that the record evidence itself at Braidwood best establishes the claim of quality assurance breakdown." Rorem Motion at 12. Further, Rorem states:

> Should it prove necessary, or appear helpful to the Board, Intervenors would expect to present expert opinion testimony to evaluate the QA record at Braidwood and establish that it does represent a pervasive failure of the QA system. Intervenors have also undertaken to retain expert QA assistance to evaluate the effectiveness of the BCAP and other Braidwood corrective action programs. Although QA experts to perform this evaluation effort have not yet been retained, counsel expect to do so in a timely fashion in light of the incomplete status of BCAP and the Board's anticipated October hearing schedule. Several firms and individuals believed by counsel to be highly qualified on these subjects have been consulted since the Board's April 17 Order. Intervenors expect to be able to identify their expert consultants in time for the scheduled pre-hearing conference and to schedule their review efforts in light of the present hearing schedule.

Rorem's Motion, at 12-13. In sum, all Rorem holds out as its ability to contribute are vague assertions that it is undertaking to retain experts, but has not done so. Such vague assertions are insufficient to establish that factor iii, relating to Rorem's ability to contribute to development of a sound record, weighs in Rorem's favor.

Even if credit is given for these assertions, the Staff notes the proposed witness[es] and testimony are directed toward evaluating the QA record and the effectiveness of the corrective action programs. This is not the subject of the proposed amended QA contention. Rather, analysis of the 14 parts and their various subparts of the proposed contention discloses a cataloging of construction or QA deficiencies documented in inspection reports originated by NRC Region III. Staff does not deny the existence of QA problems at Braidwood. In fact, these problems were the basis for the implementation of various corrective action programs, including BCAP, which are closely monitored by NRC Region III. However, Rorem has made no attempt to identify the particular overall unacceptable pattern(s) purported to exist when the allegedly related individual incidents are aggregated and provide an explanation of why each specified deficiency supports the overall unacceptable patterns under which it has been grouped contrary to the explicit direction of the Board. See Order at 41. In these circumstances, litigation of these alleged deficiencies would serve no demonstrable purpose except to delay the hearing in this proceeding. In addition, litigation of these alleged deficiencies would consume Staff resources better used to monitor the corrective action programs.

Although Rorem alludes to a potential issue of whether the corrective action programs are sufficiently comprehensive to provide reasonable assurance that the safety-related components, systems and materials at Braidwood are built to required codes, specifications and procedures and will perform satisfactorily in service (Rorem's Motion at 7-8), it is not part of the proposed QA contention (Rorem's Motion at 16-47). In any event, Rorem has not established it would be able to contribute to development of a sound record on this matter. Rorem's Motion contains no showing that Rorem has any special expertise in analyzing the effectiveness of corrective action programs. Rorem's Motion contains no showing that Rorem currently has any witnesses or testimony addressing the effectiveness of the ongoing corrective action programs at Braidwood. To the contrary, Rorem provides only vague assertions that they have "undertaken to retain expert QA assistance to evaluate the effectiveness of the BCAP and other Braidwood corrective action programs." Rorem's Motion at 12-13. Intervenors state that they have not yet identified any expert consultants but that they "expect to be able . . . in time for the prehearing conference" [July 23-24, 1985]. Id. As noted above, under Commission case law such vague assertions are not sufficient. Grand Gulf, supra., WPPSS supra. The NRC Region III Staff identified various QA/QC deficiencies and took steps to assure that the Applicants instituted corrective action programs which are in progress including BCAP. Since Counsel for Rorem is aware of these programs and even attended the monthly status meetings, and still cannot identify any witnesses or testimony they will present, Rorem's assertions that they will be able to contribute are not persuasive. Further, as

discussed below, based on assertions that they expect to identify witnesses "in time for the prehearing conference" (Rorem's Motion at 13), admission of this contention has substantial potential for delay of the hearing. For all these reasons, Staff submits that factor iii of 10 C.F.R. § 2.714(a)(1) weighs against admission of the late-filed contention.

4. Factor v: Intervenors Fail to Address The Extent To Which Their Participation Will Broaden The Issues or Delay The Proceeding

The Staff's evaluation of the extent to which Intervenors' participation will broaden the issues or delay the proceeding militates against admitting the late-filed contention. The admission of the proposed contention will both substantially delay the proceeding and broaden the scope of the proceeding because it would introduce an expansive new issue. With regard to delay, only the delay in the proceeding directly attributable to the lateness of the petition must be considered in applying this factor. Nuclear Fuel Services, Inc. and New York State Atomic and Space Development Authority (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975); Long island Lighting Co. (Jamesport, Units 1 and 2), ALAB-292, 2 NRC 631, 650 and n. 25 (1975).

In its April 17, 1985 Order, the Board approved a schedule for the conduct of litigation in this proceeding. The schedule provided for a May 20, 1985 date for the close of discovery; week of July 22, 1985, prehearing conference; September 13, 1985, filing of direct testimony and October 1, 1985, evidentiary hearing. Discovery is closed on the admitted contentions. If the proposed contention is admitted, additional discovery will be necessary. Since Rorem has not identified any

witnesses or scope of testimony, it would not be possible to begin meaningful discovery at this time. By the time Intervenors identify witnesses which Rorem claims will be done "in time for the scheduled pre-hearing conference" Rorem Motion at 13, the Board's discovery and prehearing schedule would be delayed by at least several months to allow time for discovery and motions for summary disposition on the QA contention. This could result in a delay in the commencement of the hearing. The delay factor becomes especially significant because "barring the most compelling countervailing considerations -- an inexcusably tardy petition would (as it should) stand little chance of success if its grant would likely occasion an alteration in hearing schedule." Jamesport, supra, at 651.

While Rorem's Motion presents a list of deficiencies and supporting deficiency reports, it fails to meet the stringent criteria set by the Board and simply presents what the Staff believes to be a list of unrelated QA problems as opposed to a litigable pattern of QA deficiencies. QA problems did arise, however, nuclear power plants are not expected to experience "error free construction." Union Electric Co. (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343, 346 (1983); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 NRC 471 (1985). Rorem's failure to set forth the unacceptable pattern and relate its inspection report findings to that pattern will result in considerable delay while the parties engage in discovery to determine what Rorem intends to litigate.

For all these reasons, the Staff submits that factor v of 10 C.F.R. § 2.714(a)(1) weighs against admission of the late filed contention.

B. The Proposed Amended QA Contention Should Be Denied Admission Since It Lacks The Specificity and Basis Required By 10 C.F.R. § 2.714(b) and April 17, 1985 Order

The Order stated that the Board would "consider the specificity, bases and significance of any amended proposed QA/QC contention . . . ." The Board set forth" several requirements to which [the Board] will stringently adhere." Order at 41. Intervenors must "provide much greater specification . . . they must submit a highly detailed petition tailoring their allegations and the underlying data so we may adjudicate a carefully focused, well reasoned contention." Id. at 32. The Board imposed specific pleading requirements on the amended QA contention to minimize delay, including setting forth ". . . the exact bases for each allegation asserted." Order at 41. "At a minimum this includes a precise specification of each occurrence of an alleged QA/QC deficiency, the data on which each alleged deficiency is premised (e.g., NRC inspection reports), the particular overall unacceptable pattern(s) purported to exist when the allegedly related individual incidents are aggregated and an explanation of why each specified deficiency supports the overall unacceptable pattern under which it has been grouped." Id. The Board concluded that "Intervenors must supply an amended contention which, at this late stage, demonstrates clear and specific bases that significant QA/QC questions exist which rise to the level of this pertinent overall issue." Id. at 42.

Rorem contends that "the amended contention is amply supported by factual bases set forth with reasonable specificity'" citing 10 C.F.R. § 2.714(b). Intervenors state "the evidence cited of a pervasive QA breakdown at Braidwood . . . need not be evaluated at this pleading stage

beyond its acknowledgement as establishing sufficient basis for admission and litigation." Rorem's Motion at 12. Intervenors' interpretation of the pleading requirements of the amended contention flies in the face of the Board's pleading requirements and which demand that "Intervenors meet these requirements because . . . in any construction project of the magnitude and complexity of a nuclear power plant there are bound to be isolated instances of inadequate workmanship due to imperfect quality assurance supervision (citations omitted)." Order at 42.

The Board imposed additional requirements beyond those of 10 C.F.R. § 2.714(b) due to what it viewed as special circumstances surrounding the late-filed QA contention originally proffered by Rorem. The consideration of such an amended contention was conditioned upon compliance with the pleading requirements set out by the Board. Intervenors have not complied with the Board's requirements in that the contention does not describe "the unacceptable pattern purported to exist" nor does it "[explain] why each specified deficiency supports the overall unacceptable pattern." See, Order at 41. Contrary to presenting a well-integrated evaluation of factual material as envisioned by the Board, Intervenors simply present a catalog of QA weaknesses and deficiencies drawn from various inspection reports, undocumented allegations of "Braidwood site employees" Rorem at 22-24 and various documents provided by the Applicant and the NRC Staff. Tr. 66, 90 202 and 211. Intervenors broadly state that "many of these deficiencies constitute violations of multiple criteria . . . [and] allege each such deficiency to be a violation of each and every applicable criteria." Rorem's Motion at 18. No light is shed on the alleged "overall and

pervasive breakdown" aside from the list of unrelated QA deficiencies. Intervenors generalizations are too vague to form the basis of a litigable contention.

On the contrary, the Staff views the amended contention as a regurgitation of the public record without any supporting evaluation in the form of a "carefully focused and well-reasoned contention" as required by the Board, Order at 32, and 10 C.F.R § 2.714(b). The proposed contention does not "rise to the level of this pertinent overall [QA] issue," as anticipated in the Board's Order. Id. at 42.

For all these reasons, the proposed amended QA contention should be denied admission since it lacks the specificity and basis required by 10 C.F.R. § 2.714(b) and the April 17, 1985 Order.

## IV. CONCLUSION

Based on the discussion set forth above, the Staff opposes the granting of Rorem's Motion and the admission of the late-filed amended quality assurance contention. Since the Staff concludes that the proposed QA contention is inadmissible, it makes no recommendations for further discovery and other prehearing procedures or scheduling for any QA/QC contention.

Respectfully submitted,

Elaine I. Chan
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 7th day of June, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| | ) | 50-457 |
| (Braidwood Nuclear Power Station, Units 1 and 2) | ) | |

## NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with § 2.713(b), 10 C.F.R. Part 2, the following information is provided:

| | |
|---|---|
| Name | - Stuart A. Treby |
| Address | - Office of the Executive Legal Director<br>U.S. Nuclear Regulatory Commission<br>Washington, D.C. 20555 |
| Telephone Number | - Area Code (301) 492-8661 |
| Admissions | - Supreme Court of the United States<br>Court of Appeals for the State of New York |
| Name of Party | - NRC Staff<br>U.S. Nuclear Regulatory Commission<br>Washington, DC 20555 |

Stuart A. Treby
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland
this 6th day of June, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO BRIDGET LITTLE ROREM, ET AL. MOTION TO ADMIT QUALITY ASSURANCE CONTENTION" and "NOTICE OF APPEARANCE" for Stuart A. Treby 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, through deposit in the Nuclear Regulatory Commission's internal mail system (*), or by hand delivery (**), or by express mail or overnight delivery (***), this 7th day of June, 1985:

Lawrence Brenner, Esq., Chairman **
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. A. Dixon Callihan***
Administrative Judge
102 Oak Lane
Oak Ridge, TN 37830

Dr. Richard F. Cole **
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Rebecca J. Lauer, Esq.
Isham, Lincoln & Beale
Three First National Plaza
Suite 5200
Chicago, IL 60602

Ms. Bridget Little Rorem
117 North Linden Street
Essex, IL 60935

Commonwealth Edison Company
ATTN: Cordell Reed
Assistant Vice President
P. O. Box 767
Chicago, Il 60690

C. Allen Bock, Esq.
P.O. Box 342
Urbana, IL 61801

Thomas J. Gordon, Esq.
Waller, Evans & Gordon
2503 S. Neil
Champaign, Il 61820

Region III
U.S. Nuclear Regulatory Commission
Office of Inspection & Enforcement
79 Roosevelt Road
Glen Ellyn, IL 60137

Joseph Gallo, Esq.**
Isham, Lincoln & Beale
Suite 840
1120 Connecticut Avenue, N.W.
Washington, DC 20036

Atomic Safety and Licensing Board
Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Douglass W. Cassel, Jr., Esq.**
Timothy Wright, Esq.
109 North Dearborn Street
Suite 1300
Chicago, IL 60602

Atomic Safety and Licensing Appeal
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Lorraine Creek
Route 1, Box 182
Manteno, IL 60950

Erie Jones, Director
Illinois Emergency Services
and Disaster Agency
110 East Adams
Springfield, IL 62705

Elaine I. Chan
Counsel for NRC Staff