

10/17/85

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

ANSWER OF INTERVENORS ROREM, ET AL.
OPPOSING PETITIONS BY COMMONWEALTH EDISON COMPANY
FOR WAIVER OF COMMISSION REGULATION
AND FOR REVIEW OF APPEAL BOARD DECISION

Intervenors Bridget Little Rorem, et al., oppose Applicant Commonwealth Edison's improper request for a waiver or exception from the Rules of Practice and oppose Applicant's request for Commission review of an Appeal Board decision since such Review is barred by those Rules and would not be warranted even if it were permissible.

Without any serious showing or effort at compliance with the procedures required by 10 CFR Section 2.753(b), Applicant claims the right to an exception from 10 CFR §2.786(b)(1) and entitlement to interlocutory Commission review of a Licensing Board's decisions admitting serious Quality Assurance and QC Inspector Harassment contentions in this proceeding. Interlocutory review of licensing board decisions on such matters is barred by the Rules of Practice. 10 CFR §§2.714a and 2.730(5). Applicant's request for directed certification of these licensing board decisions was denied by the Appeal Board in a Memorandum and Order of

September 6, 1985. Further leave to press this interlocutory appeal of such a decision on certification to the Commission is barred by 10 CFR §2.786(b)(1).

7. THE LICENSING BOARD DECISIONS ADMITTING IMPORTANT QUALITY ASSURANCE CLAIMS WERE PROPER.

Even if review were permissible, it would not be warranted. On June 21, 1985, the Braidwood Licensing Board admitted a detailed Quality Assurance contention filed by Intervenors Rorem et al., which the Board characterized as raising "potentially significant QA issues," (Memorandum and Order Admitting Rorem et al. Amended Quality Assurance Contention, LBP-85-20, 21 NRC 1732, _____, (1985)) which, if not adequately corrected "could lead us to reasonably conclude that the Braidwood QA program was not functioning effectively during the plant's construction." Id. at 1744. Each of the numerous Quality Assurance deficiencies cited in the contention was based directly upon NRC staff inspection report findings specifically identified and appended to the proposed contention. Id. at 10.

The acknowledged genesis of the contention was the sworn testimony given by NRC Region III Administrator James G. Keppler on August 1, 1984, during remanded licensing hearings for Edison's Byron facility. The Braidwood Board, expressing its concern about the QA problems identified by Mr. Keppler, quoted his Byron testimony as follows:

Another point, though, I would like to make, if I could, is, I tried to express to this Board the confidence that I have -- more importantly

the Board ought to be interested in the confidence my Staff has -- and I say this because the Staff has had to contend with major quality problems at Zimmer, at Midland. We've got serious quality assurance questions at Braidwood and at Clinton, and major reinspection efforts are underway to deal with these concerns.

(Special Prehearing Conference Order, LBP-85-11, 21 NRC 609, 633 (1985)).

While rejecting Intervenor's original QA claims for lack of specificity, (Id., 21 NRC at 636) the Board provided an opportunity, under the most stringent requirements, (id.) for the filing of an amended QA contention which might satisfy the specificity standards. On its own motion the Board suggested that the deposition of Mr. Keppler would clarify for the Board and parties more specifically the QA problems Mr. Keppler had in mind during his testimony. Id., 21 NRC at 635.

At the deposition, in response to questions by Intervenor's, the Applicant and the NRC staff, Mr. Keppler simply directed attention to the public record of inspection activity at Braidwood - already available to and reviewed by Intervenor's - as reflecting the concerns he had expressed in his August 1984 testimony. He emphasized particularly Inspection Report 82-05, which included a \$100,000 civil penalty for a Quality Assurance breakdown in the area of mechanical safety-related equipment, and Inspection Report 83-09, a special quality assurance inspection which identified serious violations by site mechanical, electrical and HVAC contractors and a failure of Edison's overview of these contractors. Deposition of James G. Keppler, May 20, 1985, Tr. 108-111.

The role of the Keppler deposition, then, was simply to return the Board and parties to the important inspection activity already on the public record. It is those inspection reports and the serious, programmatic quality assurance deficiencies underlying those reports, which form the specified bases for Intervenor's amended quality assurance contention.

The Licensing Board's adoption of the Keppler deposition device -- the central focus of Applicant's vociferous complaints here (Petition for Review, p. 1) -- was a proper measure under the circumstances, as explained by the Board itself. Special Prehearing Conference Order, supra, 21 NRC at 635. But even if it had not been, the Keppler deposition did no harm to Applicant, whose counsel appeared and actively participated in the examination. The deposition testimony forms no part of Intervenor's admitted contention and in only the most remote fashion does it even form a part of the legal basis for the contention. Intervenor's agree, in substance, with the Appeal Board majority who observed that the contention would likely "once again be admitted" even if the deposition were stricken as demanded by Applicant, since the contention itself rests on an independent - indeed, pre-existing - foundation. ALAB-817, Slip. op., p. 8, fn. 21.

Ignoring all this, Applicant also chides the Appeal Board majority for its "extreme naivete," (Petition for Review, p. 4) in failing to grasp the darkness of Edison's predicament. For the second time in this proceeding they summon up the sworn statement of the Braidwood Project Manager Michael J. Wallace to

attest to the gravity of the alleged harm done them by admission of Intervenor's Quality Assurance contention.

Mr. Wallace's claims should be credited no more in this second airing than they were in the first. There, the Licensing Board rejected with "skepticism" and "strain[ed] credulity" Mr. Wallace's efforts to blame the lateness of Intervenor's contention for delay likely occasioned in the completion of important corrective action programs at Braidwood:

We have substantial difficulty in understanding why Applicant, if it really had flexibility to do so, would not in the first instance have scheduled the completion of the corrective action programs on the more expeditious schedule in light of the cumulative significance and scope of these programs, the need for NRC Staff review, and Applicant's goal of loading fuel in April 1986.

Order Admitting Rorem Et Al. Amended Quality Assurance Contention, LBP 85-20, 21 NRC 1732, 1748 (1985).

The Board also found the April fuel load date concededly "optimistic" and dependent then upon the acceleration of a number of activities. They noted Mr. Wallace's acknowledgement, then, that "'unforeseen events' (apparently unrelated to admission of the QA contention) 'may lengthen ... the fuel load date ... by several months.'" Id., fn. 9.

Now Mr. Wallace attributes to the litigation of the QA contention "the delay in the completion of critical path activities ... on the order of 3 or 4 months." Wallace, September 23, 1985 Affidavit, p. 16. This self-serving claim that we should now substitute the contentions' effects for the earlier "unforeseen circumstances" should be received with no less skepticism

then the Board accorded Mr. Wallace's prior version.

In addition to the facts noted by the Licensing Board, Mr. Wallace's efforts to blame Intervenor's QA contention for the need to correct significant problems at the Braidwood station is belied by his own so-called "project priorities" lists, before and after the contention (pages 6 and 7 of his affidavit). Is it really credible that such activities as: "completion of corrective action programs;" "completion of BCAP" (Braidwood Construction Assessment Program); "resolution of open NRC Region III items;" and "processing and closing non-conformance reports" should not have been "priorities" before admission of the contention? It truly "strains credulity" to rest claims of "significant prejudice" on such a foundation. */

Not content with all the foregoing overreaching, Applicant stretches even further in seeking dismissal, not only of the QA contention, but also of the subsequent "QC inspector harassment issue" which Applicant's Petition For Review links for the first time now to its complaints against the Licensing Board. Petition for Review, p. 10. Applicant offers no further argument or explanation of why the harassment allegations, too, should be dismissed, leaving one to assume that somehow they go away on the coattails of the rest of the QA issue.

*/ Apart from their unpersuasiveness, such facial flaws in the Wallace Affidavit highlight the unreliability of all un-cross-examined affidavit for the resolution of inherently controversial questions of fact. Such factual questions are properly resolved, as necessary, by the licensing boards through the adversary process.

One month after the original QA contention was admitted, Applicant and the NRC Staff entered a Joint Stipulation with Intervenor as to the admissibility of a detailed "Quality Control (QC) Inspector Harassment Contention," a copy of which is attached hereto. This stipulation reflected recent (1984-85) complaints of harassment, including threats of physical violence by supervisors, as documented in written reports of complaints to the NRC by some 25 Quality Control inspectors at Braidwood. It was approved by the Licensing Board at the Prehearing Conference on July 23, 1985, with only minor language change as indicated. Prehearing Conference Order, p. 2 (August 1, 1985). While that stipulation did not waive Applicant's objection to the overall admissibility of the QA contention, (Stipulation, p. 1), it contained no statement whatever purporting to Applicant's right to broaden that complaint to include the stipulated harassment issues as well.

2. COMMONWEALTH EDISON'S WAIVER REQUEST IS IMPROPER
AND SHOULD BE DENIED; THE PETITION FOR REVIEW
SHOULD BE DISMISSED.

Applicant's request is also in blatant violation of Commission rules. Applicant seeks exception from the effect of 10 CFR 2.786(b)(1) which prohibits a petition for Commission review of "a decision or action on a referral or certification" such as Applicant seeks here. Id. As 10 CFR §2.758 provides, the petition for waiver shall be considered in the first instance by the "presiding officer," (i.e., the Licensing Board and not the Commission as sought by Applicant) for the Licensing Board's

determination, upon consideration of the pleading, affidavits and responses, whether a prima facie showing of entitlement to waiver has been made out. Applicant fails to even acknowledge these procedural requirements, let alone explain or excuse its nonconformance. Further, as provided in §2.758(b):

The sole ground for a petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation (or provisions thereof) would not serve the purposes for which the rule or regulation was adopted.

Applicant advances only the most lame effort to meet this requirement of the waiver rule, devoting less than two paragraphs to the task. Petition for Review, p. 8. What are the "special circumstances with respect to the subject matter" of the Braidwood proceeding which justify a waiver? According to Applicant it is the "conduct of the Licensing Board ... which clearly exceeded its authority." Id. Acceptance of such a claim as this would transform virtually every adverse board decision into a candidate for "special circumstances." "That one party ... may differ sharply with the Licensing Board's resolution of contested issues is not a 'special circumstance' that could justify waiver under 10 CFR 2.758." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-22, 14 NRC 598, 600 (1981).

Applicant cites no precedent for waiver of §2.786. Indeed, precedent is to the contrary:

We note that the petition seeks review of an Appeal Board decision on an issue certified to it for determination, and is therefore not authorized

by our rules. 10 CFR §2.786(b). By this order, the Commission denies the petition and declines to exercise its sua sponte review authority. See 10 CFR §2.786.

Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-77-23, 6 NRC 455 (1977). If ever there were "special circumstances" justifying a waiver of the review rule they would likely have existed in Diablo Canyon since the Appeal Board decision under attack involved litigation of the sensitive plant physical security plan. Wisely, though, the Commission deferred to the decision of its licensing board "in the first instance ... subject of course to the ordinary procedures for review by the Appeal Board and the Commission." Id.

The inappropriateness of Applicant's attempted procedural end-run is further shown by the specific procedure in the Rules for bringing "major" questions before the Commission from the Appeal Board under appropriate circumstances. 10 CFR §2.785(d) authorizes the Appeal Board to certify questions to the Commission for its determination. In Offshore Power Systems (Floating Nuclear Power Plants), ALAB-500, 8 NRC 323 (1978), an Appeal Board which was divided on the merits certified a question regarding consideration of Class 9 accidents for Commission determination pursuant to 10 CFR 2.785(d). In explaining the reason for its certification the Appeal Board expressly acknowledged that the parties themselves were barred from seeking review:

Finally, because we brought the matter before us by certification, the parties themselves are precluded under the present Rules of Practice from petitioning the Commission for review ...

Id., 8 NRC at 325.

The Offshore Power Systems decision clearly points the way to be followed where (unlike here) Commission review is justified. However, Applicant did not seek nor did the Appeal Board on its own motion provide for certification to the Commission of the questions raised here. In the absence of certification by the Appeal Board pursuant to 10 CFR §2.785(d), Applicant's request for Commission review of these matters is barred by 10 CFR §2.786(b)(1).

CONCLUSION

For the foregoing reasons, Applicant's Petition For Waiver should be denied and its Petition For Review dismissed.

DATED: October 7, 1985

Respectfully submitted,

Robert Guild (per)

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One of the Attorneys for
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et al.

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July 24, 1985

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Dr. A. Dixon Callihan
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Re: In the Matter of Commonwealth Edison Company
 (Braidwood Nuclear Power Station, Units 1 and 2)
 Dockets Nos. 50-456 and 50-457

Gentlemen:

Submitted herewith is the executed Joint Stipulation of
 Quality Control (QC) Inspector Harassment Contention and the
 revised contention as admitted by the Licensing Board at the
 Prehearing Conference on July 23, 1985.

Sincerely,

Robert Guild
 One of the Attorneys for
 Intervenor Rorem, et al.

RG:beg
 Encl.

cc: Docketing & Service Section
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DUP 8507300534

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UNITED STATES OF AMERICA
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In the Matter of)	
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COMMONWEALTH EDISON COMPANY)	
)	Dockets 50-456
(Braidwood Nuclear Power)	50-457
Station, Units 1 and 2))	

JOINT STIPULATION OF QUALITY CONTROL (QC)
INSPECTOR HARASSMENT CONTENTION

The parties below named, by their counsel, hereby stipulate and agree to the admission of a contention for litigation in this proceeding regarding claims of harassment and intimidation of Quality Control (QC) inspectors employed by the Braidwood site electrical contractor, the L.K. Comstock Engineering Company.

Commonwealth Edison Company (Applicant) and the Nuclear Regulatory Commission Staff enter this stipulation without waiving any positions they have taken with respect to the overall admissibility of the late-filed quality assurance contention previously admitted by the Licensing Board.

The parties agree that a contention in the terms set forth below should be admitted for litigation together with the additional documentary materials attached as Exhibits to Intervenor's July 12 and July 15, 1985, filings, which documents supply further specific incidents and factual bases for the contention. These documents are incorporated in this contention by reference as if fully set forth here.

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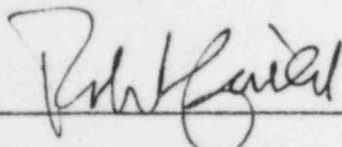
While the parties are in substantial agreement as to the text of the harassment contention, language not agreed to but proposed by one or another party is indicated as follows:

1. text proposed by Intervenors but not agreed to by either Applicant or the NRC Staff is indicated by inclusion in brackets, [.....];
2. text proposed by Applicant but not agreed to by Intervenors is indicated by underlining,

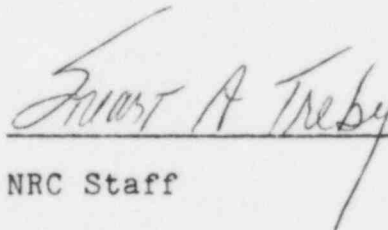
The parties are unable to agree to the adoption of a protective order as sought by Intervenors.

WHEREFORE, the parties below named, by their counsel, do stipulate to the admission of the attached contention for litigation in this proceeding.

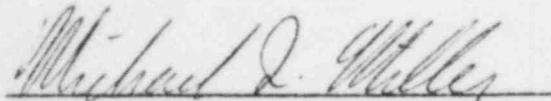
DATE:



Intervenors Bridget Little
Rorem, et al.



NRC Staff



Commonwealth Edison Company

Contrary to Criterion I, "Organization" of 10 C.F.R. Part 50, Appendix B, and 10 C.F.R. Section 50.7, Commonwealth Edison Company and its electrical contractor, L.K. Comstock Engineering Company have failed to provide sufficient authority and organizational freedom and independence from cost and schedule as opposed to safety considerations to permit the effective identification of and correction of quality and safety significant deficiencies. Systematic and widespread harassment, intimidation, retaliation and other discrimination has been directed against Comstock QC inspectors and other employees who express safety and quality concerns by Comstock management. Such misconduct discourages the identification and correction of deficiencies in safety related components and systems at the Braidwood Station.

Instances of harassment and intimidation include [at least the following]:

1. [At various times since at least August 1984,] more than twenty five (25) Comstock QC inspectors have complained to the NRC in March 1985 about harassment and intimidation by Comstock supervisors. Such harassment and intimidation has been carried out or participated in by QC Manager Irv DeWald, [Assistant QC Manager Larry Seese, QA Manager Bob Seltman] and QC Supervisor R.M. Sakalac.

Such harassment included widespread pressure to approve deficient work, to sacrifice quality for production and cost considerations and to knowingly violate established quality procedures. Harassment and retaliatory treatment included threats of violence, verbal abuse, termination of employment, transfer to undesirable jobs or work in areas where quality deficiencies could not be noted, assignments to perform burdensome or menial "special projects" and other adverse treatment. Such discriminatory action was taken because of the victim's expression of quality or safety concerns. Former Level II QC inspector John D. Seeders has knowledge of these widespread instances of harassment. By letter of August 17, 1984, Seeders complained to the NRC, Edison and Comstock management regarding instances of harassment directed against him. Subsequently, Mr. Seeders was involuntarily transferred to the position of Engineering Clerk in retaliation for his expression of quality concerns. Such assignment was intended by Comstock to keep Mr. Seeders away from sensitive work areas. Although QC Supervisor R.M.

Sakalac was finally terminated in 1985 for his mistreatment of QC inspectors and other misconduct, the effects of his harassment remain uncorrected [and systematic harassment continues at Comstock to the present]. The existence of widespread harassment impugns the integrity and effectiveness of on-going corrective action programs designed only to address other widespread QA failures at Comstock. [As stated in Mr. Seeder's affidavit, these Comstock QC inspectors are eager to cooperate with the licensing board in identifying and correcting the harassment problems at Comstock, but require board protection from retaliation in order to provide testimony and documentation of their harassment.]

2. Comstock management, including QC Manager Irv DeWald and Corporate QA Manager Bob Marino harassed, discriminated and retaliated against, and ultimately terminated Level III QC Inspector Worley O. Puckett because Mr. Puckett made numerous complaints about safety and quality deficiencies which he identified in the course of his duties at Braidwood.

Mr. Puckett was hired by Comstock in May 1984 in the newly created position of Level III QC Inspector whose duties included conducting a review of Comstock procedures, tests requirements for the more than 50 Level II QC Inspectors, review of the Level II's inspection work, and the resolution of inspection disputes. Mr. Puckett was highly qualified with 20 years' nuclear Navy and nine years' nuclear power experience. See, Resume, Exhibit B. During the course of his employment with Comstock Mr. Puckett was shocked by the widespread deficiencies in procedures, qualifications and workmanship. He identified numerous instances of improper construction procedures, improper qualification of welders, and material traceability deficiencies. He ultimately recommended a complete stop work order for all welding activity to permit effective corrective action. See, Memos of August 10 and August 17, 1984, Exhibits C and D.

Finally, he warned QC Manager Irv DeWald that "we are approaching a complete breakdown in our QC program." August 22, 1984 Memo, Exhibit E. Puckett was subjected to harassment and retaliation because he raised these safety and quality concerns and was terminated on August 27, 1984 by DeWald on the pretext that he should have scored higher than his 86% on a qualification test. He filed a complaint with the U.S. Department of Labor, alleging violation of the employee protection provisions of the Energy

Reorganization Act, 42 USC 5851. Letter, September 5, 1984, Exhibit F. The U.S. Department of Labor Area Director sustained Mr. Puckett's complaint finding unlawful discrimination by Comstock against Puckett and ordered relief. Notes of Decision, November 6, 1984, Exhibit G. Mr. Puckett presented his case at a hearing before an Administrative Law Judge on Comstock's appeal. See, Complainants' Pre-Hearing Exchange, Exhibit H. Comstock settled Mr. Puckett's claim before putting on its case. The terms of settlement are subject to a non-disclosure agreement between Comstock and Mr. Puckett.

R E V I S E D

Contrary to Criterion I, "Organization" of 10 C.F.R. Part 50, Appendix B, and 10 C.F.R. Section 50.7, Commonwealth Edison Company and its electrical contractor, L.K. Comstock Engineering Company have failed to provide sufficient authority and organizational freedom and independence from cost and schedule as opposed to safety considerations to permit the effective identification of and correction of quality and safety significant deficiencies. Systematic and widespread harassment, intimidation, retaliation and other discrimination has been directed against Comstock QC inspectors and other employees who express safety and quality concerns by Comstock management. Such misconduct discourages the identification and correction of deficiencies in safety related components and systems at the Braidwood Station.

Instances of harassment and intimidation include at least the following:

1. At various times since at least August 1984, including in March 1985, more than twenty five (25) Comstock QC inspectors have complained to the NRC about harassment and intimidation by Comstock supervisors. Such harassment and intimidation has been carried out or participated in by QC Manager Irv DeWald, Assistant QC Manager Larry Seese, QA Manager Bob Seltman and QC Supervisor R.M. Sakalac.

Such harassment included widespread pressure to approve deficient work, to sacrifice quality for production and cost considerations and to knowingly violate established quality procedures. Harassment and retaliatory treatment included threats of violence, verbal abuse, termination of employment, transfer to undesirable jobs or work in areas where quality deficiencies could not be noted, assignments to perform burdensome or menial "special projects" and other adverse treatment. Such discriminatory action was taken because of the victim's expression of quality or safety concerns. Former Level II QC inspector John D. Seeders has knowledge of these widespread instances of harassment. By letter of August 17, 1984, Seeders complained to the NPC, Edison and Comstock management regarding instances of harassment directed against him. Subsequently, Mr. Seeders was involuntarily transferred to the position of Engineering Clerk in retaliation for his expression of quality concerns. Such assignment was intended by Comstock to keep Mr. Seeders away from sensitive work areas. Although QC Supervisor R.M.

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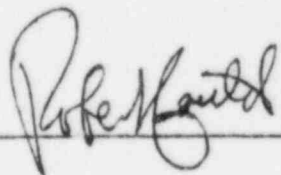
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COMMONWEALTH EDISON COMPANY)	Docket No. 50-456
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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of Answer Of Intervenor Rorem, et al. Opposing Petitions By Commonwealth Edison Company For Waiver Of Commission Regulation And For Review Of Appeal Board Decision on all parties to this proceeding listed on the attached Service List, by having said copies placed in envelopes, properly addressed and postaged (first class), and deposited in the U.S. mail on this 7th day of October, 1985. In addition, copies were served via air mail on Commissioners Palladino, Roberts, Asselstine, Bernthal and Zech at the U.S. Nuclear Regulatory Commission, Washington D.C. 20555.



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