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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

SERVED MAR 21 1986

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

ORDER

On December 5, 1985, the Commission issued an order in which it posed seven questions to the parties to this proceeding to help it determine whether it would be productive for the Commission to take review of ALAB-817. In that decision, the Appeal Board, by a divided vote, denied applicant Commonwealth Edison Company's motion for directed certification of certain actions of the Licensing Board relating to the admission of a quality assurance contention submitted by the intervenors.

For the reasons set forth below, the Commission has determined that the Licensing Board's actions in this proceeding warrant intervention, but on an issue which applicant did not raise before the Appeal Board, and which is therefore not before us on review of ALAB-817. That issue is the correctness of the Licensing Board's balancing of the five factors governing admission of late-filed contentions. Although applicant and staff have, in their responses

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to the Commission's questions, stated their views on this question, the matter has not formally been briefed to the Commission. Accordingly, as we shall describe in greater detail below, the Commission by this order is directing the parties to submit briefs on the issue of whether the five-factor test for submission of a late-filed contention is satisfied by the intervenors' amended quality assurance contention. First, however, a discussion of the circumstances that brought about this controversy is in order.

A review of the pertinent facts reveals that the Board, the staff, the intervenor, and the applicant all bear responsibility for the present situation. The intervenors in this proceeding, Bridget Little Rorem, et al., first raised their quality assurance concerns in the spring of 1984. In August, 1984, they notified counsel for the other parties of their intention to introduce a late-filed quality assurance contention into the proceeding. Yet the intervenors did not file their contention until March, 1985. In response to one of the questions posed in our December, 1985 order, intervenors state that initially they hoped that the Braidwood corrective action program would be sufficient to resolve quality assurance concerns at the plant, and that they elected to file a contention only when it became apparent to them that that program would not satisfy their concerns. Thus the decision to forego litigation of quality assurance was, according to the intervenors, a deliberate choice, and the decision to file a QA contention reflected the fact that they had changed their minds.

It might seem, based on the foregoing, that intervenors would be hard put to demonstrate that they had met the five-part test for judging a late-filed contention, in view of the fact that good cause for lateness is one of the factors to be examined. But the Licensing Board found, on a weighing of the factors, that the standards for admission would be met if the contention were

resubmitted with appropriate revisions. The Board dismissed the contention before it, finding that it would fail to meet applicable standards of specificity and basis even if it had been timely filed, and set forth a schedule for resubmission of an amended QA contention. The Licensing Board also established criteria against which such a contention would be judged.

The Licensing Board did not stop there. Notwithstanding the provisions of 10 CFR 2.740, by which discovery is limited to matters admitted into controversy by the Board, and 10 CFR 2.720(h)(2)(i), by which a particular named NRC employee may be deposed only upon a finding of "exceptional circumstances" by the Board, the Licensing Board authorized the intervenors to take the deposition of Mr. James Keppler, NRC's Region III Administrator. The Licensing Board explained that certain public comments of Mr. Keppler on QA problems at Braidwood were of interest to it, and that it would have considered whether Mr. Keppler's statements warranted taking up the quality assurance issue sua sponte if intervenors had not raised the issue.

Both the applicant and the NRC staff filed objections with the Licensing Board to the Board's order, but neither sought Appeal Board or Commission intervention prior to the Keppler deposition, although the Licensing Board had stated, weeks before the Keppler deposition, that no ruling would be made on the objections until after the Keppler deposition had taken place.

In the aftermath of the Keppler deposition, an amended contention was filed and was admitted by the Licensing Board. Not until then did the applicant file its motion for directed certification with the Appeal Board. The NRC staff then expressed its support for the applicant's position.

For reasons best known to the applicant, its motion to the Appeal Board specifically stated that the question on which it sought review was "not whether Intervenors' amended quality assurance contention satisfies the basis

and specificity requirements of 10 CFR §2.714(b), nor whether Intervenors should prevail on a balancing of the factors governing admission of late-filed contentions under 10 CFR §2.714(a)." Motion for Directed Certification, p. 1. Rather, applicant sought review of the question "whether the rules of practice sanction a licensing board's allowing an intervenor to obtain discovery on a contention which the board has found deficient and to resubmit an amended contention after obtaining the discovery, under guidelines and on a schedule set by the Board." Id. at 2.

The applicant's motion stated, correctly, that the threshold test which a moving party must meet in order to obtain Appeal Board review of an interlocutory order of this type is that set out in the Marble Hill decision. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977). That decision provides that to obtain review of the merits of the interlocutory decision below, the moving party must demonstrate that the decision either (a) threatens the moving party with immediate and serious irreparable harm, not capable of being rectified on later appeal, or (b) affects the basic structure of the proceeding in a "pervasive and unusual manner." The applicant, in its motion to the Appeal Board, did not allege that the Licensing Board's admission of the quality assurance contention would result in any harm to it, immediate and irreparable or otherwise. The applicant argued to the Appeal Board that the "pervasive and unusual effect" standard was met because the Licensing Board was on a "collision course" with the Commission's regulations, and because the Licensing Board had adopted a different role from that of an impartial arbiter, using the intervenors as surrogates to pursue its own areas of concern.

The Appeal Board, by a divided vote, found that the threshold test for directed certification of the admission of a contention had not been met. The Appeal Board reasoned that while "it may be" that the Licensing Board had violated the Commission's regulations by authorizing discovery against the NRC staff after dismissing the intervenors' original quality assurance contention, it was not prepared to find a "pervasive and unusual effect" from this action, "especially where the staff itself did not find the matter sufficiently disruptive to seek relief from us in its own right." ALAB-817 at 7, n. 17. The Appeal Board therefore did not reach the issue on which applicant had sought review. Nor did it address sua sponte the issues on which applicant explicitly did not seek review.

As the applicant recognized, the Commission's rules bar appeals to the Commission from Appeal Board decisions on motions for directed certification. Accordingly, when the applicant filed a petition for Commission review of the Appeal Board's action, it was accompanied by a motion asking for an exemption from the regulation (10 CFR § 2.786(b)(1)) barring such appeals. In its petition to the Commission, the applicant for the first time alleged that the admission of the quality assurance contention would cause it harm. According to the applicant, litigation of the amended quality assurance contention had delayed, and would continue to delay, completion of the Braidwood facility. Applicant explained that it had made no such allegation to the Appeal Board because at the time, it could not quantify the extent of the delay which litigation of QA would cause. Although applicant had received intervenors' first set of interrogatories before it filed its motion with the Appeal Board, it was only on completing the responses to those interrogatories, applicant said, that it was able to predict the harm that would result from litigating the quality assurance contention.

In deciding whether to intervene in an ongoing licensing proceeding, particularly in a situation in which to do so means to deviate from the Commission's own procedural rules, it is necessary for us to ask whether the party seeking relief has truly been aggrieved by the actions of others, or has in significant measure brought its difficulties on itself. In the present case, we are constrained to say that the applicant must share a significant part of the blame for the predicament in which it finds itself. To make this observation is not by one whit to minimize the blame which attaches to the intervenors, for what we view as their unjustified dawdling in the filing of their quality assurance contention, or to the Licensing Board, for what appears to us a flagrant disregard for the plain and unambiguous text of the Commission's regulations.

In the present case, the applicant elected not to seek Appeal Board or Commission intervention prior to the Keppler deposition. Nor did the NRC staff seek such intervention, although the Licensing Board's authorization of the Keppler deposition was in plain conflict with a regulation designed to prevent unwarranted burdens from being placed on the NRC staff. When the applicant did seek Appeal Board relief, it framed the issues in such a way as to exclude from consideration the issue of whether the Licensing Board correctly balanced the factors for a late-filed contention. As a result, that issue would not be before the Commission if it were to take review of ALAB-817.[1]

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[1]Although the staff informs us that it "argued, albeit unsuccessfully, before the Licensing and Appeal Board ... [that] the late-filed amended contention should have been rejected because the Licensing Board concluded erroneously that, on balance, the factors listed in 10 CFR §2.714(a)(1)

[Footnote Continued]

Moreover, the applicant has previously asserted (in arguing to the Licensing Board that the quality assurance contention should not be admitted, through an affidavit attached to its June 7, 1985 filing) that if it had known in late 1984 that a quality assurance contention would be filed, it could have had its corrective action program completed by October 1, 1985. (Affidavit of Braidwood Project Manager Michael J. Wallace at 4-5.) Assuming this statement to be correct, we are at a loss to understand why the applicant, having the capacity to complete its corrective action program by October 1, 1985, elected to proceed so much more slowly.

In addition, in its filing in response to our seven questions, applicant volunteers that intervenors stated on August 6, 1984 their intention to file a quality assurance contention, and applicant also complains that the contention ultimately filed (on March 7, 1985) was "almost identical to the [draft] contention submitted to counsel for Applicant and Staff in April 1984." In other words, the applicant knew that the intervenors might file a quality assurance contention; had seen a draft contention "almost identical" to the one which intervenors finally filed; and yet took its time about completing a corrective action program which could have been completed by October 1, 1985. We are not persuaded by applicant's assertion that at the time that intervenors filed their contention, on March 7, 1985, applicant "had no basis for speculating about what issues Intervenors would attempt to raise in any

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[Footnote Continued]

militated in favor of admitting the contention," our review of the pleadings before the Appeal Board indicates that the Appeal Board was never asked to address the correctness of the Licensing Board's balancing of the five factors. Rather, the Appeal Board was merely informed by the staff that staff had argued to the Licensing Board that the five-factor test weighed against admission of the contention.

contention they proposed," and that any acceleration of its construction schedule would therefore have been "rash."

Finally, we are not persuaded by applicant's explanation of its failure to alert the Appeal Board to the possibility that litigation of the QA contention might delay completion of the Braidwood plant -- an argument which if made to the Appeal Board and found meritorious might well have satisfied the "immediate and irreparable harm" test of the Marble Hill doctrine. According to applicants, they were unable to quantify the extent of the delay until they finished responding to the intervenors' first set of interrogatories, and therefore raised the issue for the first time before the Commission. We see several problems with this explanation. First, applicant already had the first set of interrogatories in hand, and thus had an opportunity to judge how extensive and time-consuming the litigation of QA might turn out to be. Second, applicant's September 1985 filing before the Commission included no quantification whatever of the delay which litigation of QA would cause.[2] Third, none of this explains why the applicant did not advise the Appeal Board in July 1985 that there was at least the possibility that QA litigation would delay -- to an extent not yet quantifiable -- completion of the plant. In short, we see no reason to revise our earlier conclusion that the applicant, through its petition to the Commission, was seeking an exemption from the Commission's rules in order to make an argument which it could have made, but failed to make, to the Appeal Board.

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[2]See the affidavit of Michael J. Wallace, attached to the petition to the Commission: "In my judgment, the completion schedule for these critical path activities will be adversely impacted in a significant manner by the continued litigation of the QA contention. The major mechanism by which the Project

[Footnote Continued]

The foregoing suggests that the applicant bears primary responsibility for its failure to take appropriate steps to avert the consequences of the Licensing Board's errors. It must be emphasized, however, that it was the Licensing Board which erred in the first place. Not even the intervenors, in their response to the questions posed by the Commission in its December 5, 1985 order, attempt to justify the Board's refusal to abide by the plain language of the Commission's regulations.

The issue here is not whether quality assurance is or is not an important issue at Braidwood -- no one disputes that it is an important issue -- but rather whether the Commission's rules of general applicability may be ignored when the members of a Licensing Board happen to believe that the public interest warrants ignoring them. Our insistence that Commission procedures be followed is not a reflection of bias for or against applicants or intervenors. Rather, it is a reflection that before administrative agencies, just as before courts, fairness demands that one set of rules should apply to all participants. In the present case, as the Board and all parties were aware, the rejection of the intervenors' first contention did not bar the intervenors from submitting an amended contention, if it could satisfy applicable standards. Likewise, the Board and all parties were aware that even if the intervenors were unable to sustain the admission of a QA contention, the Licensing Board was not precluded from raising the issue sua sponte, provided that the Commission's stringent standards for raising issues sua sponte could be met. See Louisiana Power & Light Co. (Waterford Steam Electric Station,

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will be affected is through a significant diversion of the time and attention of the key leaders and decisionmakers of the project." Affidavit at 16.

Unit 3), CLI-86-1, Jan. 30, 1986, 23 NRC ___, Slip op. at 8. But what the rules do not countenance is a Board's deciding that to satisfy the Board's own concerns on a particular issue, a party shall be allowed to conduct discovery on a rejected contention, the better to be able to redraft that contention and secure its admission. In our view, this procedure is indistinguishable in substance from the conditional admission of a contention, a practice barred by the Catawba decision in language which leaves little room for misunderstanding: "[A] licensing board is not authorized to admit conditionally for any reason, a contention that falls short of meeting the specificity requirements ... Stated otherwise, neither Section 189a of the Act nor 2.714 of the rules permits the filing of a vague, unparticularized contention followed by an endeavor to flesh it out through discovery against the Applicant or Staff." Duke Power Company (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 467-68 (emphasis in original).

If the issue before us were simply one of whether the applicant had shown itself entitled to relief, it would not be difficult to answer that question in the negative, in view of the substantial responsibility which the applicant bears for the present situation. But that is not the only issue before us. The broader issue is whether the Commission's own interest in the assurance of a properly conducted adjudicatory process allows it to stand idly by while the Commission regulations and Commission precedents are flouted. The answer is that our inherent supervisory authority over the conduct of NRC adjudications implies a responsibility to the adjudicatory process as a whole, and to the parties to all our proceedings, which must take precedence over the question of how capably a particular party conducted an individual case. There are times when the Commission must take action not because of a party's submissions, but in spite of them.

At this time, the Keppler deposition is a matter of record. It would serve no useful purpose to try to turn the clock back and pretend that it never took place. What is far from clear to us, however, is whether, even with the Keppler deposition, the intervenors' amended contention satisfied the five-part test set forth in 10 CFR § 2.714 for evaluating late-filed contentions. That issue, not having been raised before the Appeal Board, has not formally been briefed to us. We accordingly direct the parties to submit briefs, to be in the hands of the Secretary of the Commission no later than close of business on April 3, 1986, addressing the question of whether the amended contention meets the five-part test.

The five-part test is ordinarily prospective, calling for predictions as to the probable effect on a proceeding of adding one or more proposed contentions to those already admitted. In particular, the presiding officer must make judgments on the probable contribution which the contention would make to the development of a sound record, and on the extent to which admission of the contention will broaden or delay the proceeding. In the present case, we have more than mere prediction on which to base a judgment. The record of the proceeding before the Licensing Board, since the admission of the amended quality assurance contention, offers the most probative evidence on the extent of the intervenors' ability to contribute to the proceeding, and on the extent to which admission of the contention means broadening and delay of the proceeding.

Accordingly, the parties should address two questions:

(1) Did the Licensing Board apply the five-part test correctly in admitting the intervenors' amended quality assurance contention?

(2) If the intervenors' contention were to be rejected, and then were to be resubmitted today, would the contention satisfy the five-part

test, if it were judged in light of all the information which has developed in the course of the proceeding to date?

The petition for review of ALAB-817 is therefore DENIED. The Commission has decided that it will exercise its inherent supervisory authority to consider whether the amended quality assurance contention meets the five-part test of 10 CFR § 2.714 for the evaluation of late-filed contentions. It is not the Commission's intent that the proceeding before the Licensing Board be stayed during the pendency of its consideration of this issue.

Chairman Palladino and Commissioner Asselstine disapproved this order and have separate views attached.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC
this 20th day of March, 1986.

Dissenting Views of Chairman Palladino

In my judgment, the Commission should exercise its sua sponte and supervisory authority to reverse the Licensing Board's decisions that resulted in admission of intervenors' amended quality assurance contention in this case. I conclude that the Licensing Board exceeded its authority in admitting that contention. Specifically, the Board departed improperly from NRC rules and practice when it permitted discovery on quality assurance in advance of the admission of a contention on that subject. Further, the Board should not have admitted -- the amended quality assurance contention that was based on that discovery and that was formulated pursuant to procedures developed by the Board.

Whatever its reasons, the Licensing Board should not have followed the course it did in this case. The Commission's rules and decisions prescribe the basic procedures for operating license proceedings; the Boards do not have the general authority to depart from the procedures because of their perceptions about the special circumstances of a particular case. So fundamental is the point described above in my view that it justifies the Commission's intervention in this case. I thus find myself in

SUBSTANTIAL AGREEMENT WITH THE DISSENTING OPINION OF JUDGE MOORE OF THE APPEAL BOARD IN ALAB-817. 22 NRC 470, 476 (1985).

SINCE THE COMMISSION HAS CHOSEN TO ADOPT ANOTHER APPROACH, I DISSENT.

SEPARATE VIEWS OF COMMISSIONER ASSELSTINE

In my separate views on the December 5, 1985 order issued in this matter, I stated that neither the NRC staff nor applicant Commonwealth Edison Company had made a case for directed certification of the issue of whether the Licensing Board presiding over the Braidwood operating license proceeding had acted improperly in allowing intervenors, after obtaining discovery from the NRC staff, to amend a rejected contention alleging quality assurance deficiencies. After obtaining the parties' answers to seven questions posed in the December 5 Order, a majority of my colleagues now apparently are in agreement with my earlier assessment because they have voted in this Order to deny the petition for review of the Appeal Board's decision in ALAB-817 rejecting the applicant's certification request.

These same Commission members nonetheless are unwilling to accept the result of such a denial -- i.e., that the intervenors' quality assurance contention will be litigated. Instead, by this Order they interpose the Commission into the adjudicatory process both to scold the Licensing Board for its action in allowing discovery prior to accepting the contention and to indicate that the Commission itself now will take up the issue of whether the contention can meet the five-part test of 10 CFR §2.714(a)(1). While this Order does not decide that issue, the fact that the majority of the Commission is willing to take the time to delve into the case-specific balancing process that the test requires suggests they have in mind a result that does not bode well for further Licensing Board consideration of intervenors' quality assurance contention.

Faced with an apparently serious safety issue but a wholly deficient intervenor contention, undoubtedly the better way for the Licensing Board to have proceeded in this instance would have been to take up the matter sua sponte. Indeed, the majority's Order alludes to this possibility. Certainly at this point, even putting aside Mr. Keppler's deposition, there seems to be more than enough public material available to the Licensing Board, which it could marshal itself or which intervenors undoubtedly would make available to it voluntarily, to support sua sponte consideration of the quality assurance issue. As a practical matter, however, it is unlikely the Licensing Board then or now could gain authorization from a majority of the Commission for such sua sponte consideration, meaning that quality assurance concerns undoubtedly will not be aired as part of the Braidwood adjudicatory proceeding.