029

DOCKETED
USNRC

'86 MAY -5 P3:53

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Herbert Grossman, Chairman
Richard F. Cole
A. Dixon Callihan

SERVED MAY 6 1986

In the Matter of	Docket Nos. 50-456-OL 50-457-OL
COMMONWEALTH EDISON COMPANY	ASLBP No. 79-410-03-OL
(Braidwood Station, Unit Nos. 1 and 2)	May 2, 1986

MEMORANDUM AND ORDER
(Admitting Harassment and Intimidation Issue on Five-Factor Balance)

In CLI-86-08, 23 NRC ____, issued on April 24, 1986, the Commission determined that Intervenors' Amended Quality Assurance Contention, with the possible exception of Subpart 2.C relating to harassment and intimidation, did not meet the five-part test set forth in 10 C.F.R. § 2.714 for the evaluation of late-filed contentions. With regard to Subpart 2.C, the Commission found that it had been admitted to the proceeding separately, pursuant to a stipulation signed by all parties and approved by the Licensing Board. Referring to Boston Edison Company (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461,

D502

466 (1985), the Commission held that a Licensing Board must find that the five-factor test of § 2.714 is satisfied in order to entertain a late-filed contention, notwithstanding that the parties might have stipulated to the admission of the contention. Accordingly, upon its finding that Subpart 2.C had not been subjected to a formal balancing of the five factors, the Commission directed the Licensing Board to evaluate the admissibility of Subpart 2.C in light of the five-factor test.

We apply the five-factor test to Subpart 2.C and determine that it weighs in favor of admitting the subpart.

MEMORANDUM

In their respective briefs to us on this matter, Intervenors and Applicants allude to the stipulation to the admission of the harassment contention as though that has some importance to us. Intervenors suggest (Br. 2) that the stipulation reflected an implicit recognition by Applicant and Staff that the five-factor test was met. Applicant, on the other hand, explains away this stipulation (Br. 2) as having come after the Licensing Board's prior rulings that had already admitted the bulk of the contention, which Applicant had strenuously opposed, and points out that the stipulation did not waive Applicant's objections to the admission of the contention.

These arguments are misplaced. The parties' motivation for entering into this stipulation and the stipulation, itself, are not relevant. How the parties may have viewed the admissibility of Subpart 2.C when they entered into the stipulation has no bearing on its admissibility. The Commission has directed the Board to apply the five-factor test and we attempt to do so on the basis of an objective evaluation.

Factor (i) Good cause, if any, for failure to file on time.

In applying the five-factor test with regard to the remainder of the quality assurance contention (i.e., other than 2.C), the Commission has reaffirmed that this first factor is a crucial element in the analysis of whether a late-filed contention should be admitted. CLI-86-08, supra, slip op. at 2.

In their original quality assurance contention, filed on March 7, 1985, Intervenors did not refer to any harassment matters. In its Special Prehearing Conference Order of April 17, 1985, the Licensing Board established the date of May 20, 1985 for Intervenors to submit an amended quality assurance issue. The date was subsequently extended to May 24, 1985. On that latter date, Intervenors timely filed their amended contention which, for the first time, raised the issue of harassment and intimidation, in Subparts 2.A, 2.B, and 2.C. On

June 21, 1985, the Board admitted Intervenors' amended quality assurance contention with the exception of Subparts 2.A, 2.B, and 2.C. It rejected Subparts 2.A and 2.B outright, and deferred ruling on Subpart 2.C pending Intervenors' further listing of each specific example of harassment and intimidation in addition to the ones already specified. The Board gave Intervenors until July 12, 1985 to add the other examples. On July 12, 1985, Intervenors filed that amended Subpart 2.C which was essentially what was later stipulated to by the parties on July 24, 1985.

The nub of the dispute between Applicant on the one hand and Intervenors and Staff on the other, as to whether there was good cause for the delay in filing the harassment and intimidation issue on May 24, 1985, is whether Intervenors were effectively on notice of that issue upon the issuance of the NRC Staff Inspection Report 84-34, sent to Intervenors on December 31, 1985. That report alluded to an allegation being closed in which the alleger, an employee of the L. K. Comstock Quality Control Department, stated that he had been intimidated and harassed by supervisory personnel. The report describes the investigation, inter alia, as follows:

> On September 21, 1984, the inspector met with the alleger and four other quality control inspectors. The five individuals did not provide any specific examples or records substantiating intimidation or harassment. During the course of the interview, it was revealed that the main issue

is a morale problem which appears to be related to monetary matters and subjective opinions of poor management.

Intervenors point out that during the same time frame covered by the report, Mr. Worley Puckett, the electrical contractor's Level III inspector had been fired and been found by the Department of Labor to have been the subject of retaliatory discharge, and that these facts were not mentioned in the inspection report. Intervenors point to a telephone call they received on May 17, 1985 from an unidentified source advising them of Mr. Puckett's firing, as their first receipt of information that would lead them to suspect a possibly serious problem involving harassment. * They filed their original harassment contention shortly thereafter, on May 24, 1985.

We agree with Intervenors and Staff that the information presented in Staff's Inspection Report 84-34 was not sufficient to apprise Intervenors of a possible serious harassment issue. In that the report dismissed the allegation before the NRC as being a morale problem "related to monetary matters," the report was not only uninformative, it was somewhat misleading. Intervenors cannot be faulted

---

* The fact of the telephone call is not in dispute. The information received by Intervenors has been provided to Applicant's attorneys in camera pursuant to an agreed protective order. Applicant does not question that Intervenors' counsel was informed of Mr. Puckett's firing in that telephone conversation.

for not raising an issue which, in the first instance, the NRC Staff had dismissed as being so inconsequential.

We find that Intervenors had good cause for filing their original harassment contention no earlier than May 24, 1985, in that they had received no meaningful information with regard to harassment and intimidation until May 17, 1985. Although Subpart 2.C, as filed on May 24, 1985, was specific enough to have met the specificity requirements for the filing of a contention and could have been admitted at that time, the Board established further deadlines for filing of additional specific information for the purpose of limiting Intervenors to only those specifics in discovering and trying the harassment issue. Thereafter, Intervenors complied with the Board's deadlines in amending the harassment subpart to include specific incidents of harassment. None of the information subsequently added to the original harassment subpart had been known to Intervenors on May 24, 1985.

In addition to finding that Intervenors had good cause for filing the original harassment subpart on May 24, 1985, we find that Intervenors had good cause for not filing amendments to that subpart any earlier than they subsequently did. The new information contained in the amendments was newly discovered and the Intervenors complied with the filing dates established by the Board for amending the contention

(that had been adopted by the Board to limit the scope of the contention).

Factors (ii) and (iv) The availability of other means whereby the petitioner's interest will be protected and the extent to which the petitioner's interest will be represented by the existing parties.

The parties agree that, although these two factors are of little weight, they weigh in Intervenors' favor. We find that there are no other means whereby Intervenors' interest will be protected or any other parties who would protect Intervenors' interest.

Factor (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

In remanding to us the application of the five-factor test to the harassment subpart, the Commission did not indicate whether we were to weigh the factors as of the time the contention was proposed or as of now. In either case, however, it appears that Intervenors have the ability to contribute to the development of a sound record. They have identified the witnesses they intend to offer, including three expert witnesses. Although they have not prefiled testimony of the fact witnesses, those witnesses on the whole being adverse witnesses, the subject of the prospective testimony consists of specific incidents of alleged harassment that are well known to the parties. Intervenors' preparation for this issue through discovery and retention of experts

has been considerable and promises to afford Intervenors a reasonable basis for developing a sound record on behalf of their case. How sound that case itself is cannot be evaluated by the Board at this juncture, without at least the Board's examining all of the products of discovery. We do not believe that such an evaluation, of matters that are not yet part of the evidentiary record, would be appropriate. Moreover, that discovery record was not in existence at the time Intervenors proffered their harassment contention, which the Commission has determined should have been subjected at that time to the five-factor test.

We are not impressed with Applicant's reliance (Br. 9-10) upon the deposition of each Comstock QC inspector to the effect that no action undertaken by Comstock management deterred him from the conscientious performance of his inspection duties. Whether or not that was the case would be a question on the merits, not a consideration in determining the admissibility of the contention. Moreover, one can hardly expect an employee to admit that he had been derelict in his duties.

We weigh this third factor in Intervenors' favor.

Factor (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Whether we balance the factors as of the time the amended contention was filed or of now, the result is the same: the admission of this harassment subcontention would broaden the issues considerably. At the present time, all of the other issues have been heard or stipulated. At the time the contention was filed, even if we take into account the entire quality assurance contention, which the Commission ruled should not have been admitted, the harassment subpart could have been seen as constituting a significant portion of the expected evidentiary hearing.

With regard to delay, however, the situation is somewhat different. If we acccept as the measure of delay only the time attributable to the tardiness of the untimely contention, we would find no delay because we have found, above, with regard to the first factor that Intervenors filed their contention as soon as the necessary facts became available to them. If we were to look at the overall delay resulting from the admission of this contention, we would find that delay to be considerable at the time the contention was filed because the broadening of the issues could be expected to delay the proceeding. If we were to view the overall delay as of now, we would have to

conclude that the proceeding would be delayed because without the contention the evidentiary hearing record would now be complete.

Because of the considerable broadening of the issues, whether or not any delay can be attributed to Intervenors, we weigh the fifth factor against Intervenors.

Conclusion

In balancing the five factors, the Board finds each of the first four factors, including the important first factor of good cause for failure to file on time, to be in favor of the admission of the harassment contention. Only the fifth factor, that of broadening and delaying the proceeding, is opposed to the admission of the contention. Consequently, the Board concludes that the five factors weigh in favor of admitting the contention.

O R D E R

For all of the reasons stated, above, and based upon a consideration of the entire record in this matter, it is, this 2nd day of May, 1986,

ORDERED,

That the evidentiary hearing on quality assurance (now consisting of only Contention Subpart 2.C) shall begin as previously scheduled in Kankakee, Illinois at 9:00 a.m. on May 6, 1986.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Herbert Grossman, Chairman
ADMINISTRATIVE JUDGE

May 2, 1986,
Bethesda, Maryland.