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MAY 2, 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD
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In the Matter of)
)
COMMONWEALTH EDISON COMPANY)
)
(Braidwood Station, Units 1 and 2))

OFFICE OF SECRETARY
DOCKETING
Docket Nos. 50-456
 50-457 OL

NRC STAFF RESPONSE TO APPLICANT'S
"MOTION IN LIMINE-PUCKETT SETTLEMENT AGREEMENT"

I. INTRODUCTION

On April 25, 1986, Applicant filed a motion in limine with the Board in which it requests the Board to enter an order "barring all parties, their counsel and their witnesses from making any reference to, or submitting any evidence of, a settlement agreement entered into between Mr. Worley O. Puckett and Comstock Engineering[.]" Motion at 1.

The Staff supports Applicant's motion in part. As explained below, the Board should rule that the settlement agreement between Mr. Puckett and L.K. Comstock Engineering ("LKC") is inadmissible if offered to prove liability or fault on the part of LKC.

II. DISCUSSION

Although the Nuclear Regulatory Commission is not bound by the federal evidentiary or procedural rules, Applicant notes correctly that NRC adjudicatory boards often look to those rules for guidance. See e.g. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365 n.32 (1983).

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Rule 408 of the Federal Rules of Evidence speaks directly to the situation presented here:

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

The purpose of Rule 408 is to remove disincentives to the settlement or compromise of disputed claims. A party would not be inclined to try to resolve its differences extrajudicially if it knew that in the event settlement negotiations proved unfruitful, offers or statements made by it in the course of those negotiations could be used at trial to establish that party's fault or liability. Similarly, there would be little incentive for a party to reach an extrajudicial agreement with another if evidence of that agreement is admissible to provide liability on its part when offered by a third party. Such a result would frustrate rather than promote the public policy favoring out of court settlements of claims.

The settlement agreement involved here resolved the contested Department of Labor proceeding between Mr. Puckett and LKC arising from LKC's alleged unlawful termination of Mr. Puckett's employment at

the Braidwood facility and is precisely the type of situation in which Rule 408 is intended to apply. The Staff believes it is appropriate to apply the principles of Rule 408 to Applicant's motion. Consequently, the settlement agreement itself and testimony concerning that agreement should be excluded by the Board if offered for the purpose of proving that Mr. Puckett was harassed, intimidated, or fired unlawfully by LKC.

The Staff, however, does not agree with Applicant that the Board should bar unconditionally all uses of the settlement agreement in this proceeding. In the Staff's view, evidence of the settlement agreement is inadmissible only if offered by Intervenor to prove fault or liability on the part of LKC. Such evidence, however, may be admitted if offered for some other relevant purpose. Rule 408 make this clear:

This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

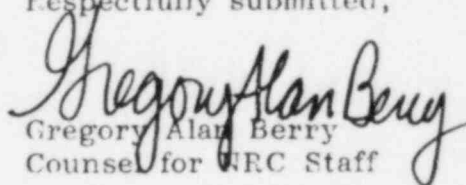
In addition to the situations identified in Rule 408, there are a host of others in which a settlement agreement could be relevant such as, for example, to prove knowledge, control, or the existence of an agency relationship. Since it cannot be said at this time that no issue will arise in the proceeding to which evidence of the settlement agreement would be relevant, it would be premature for the Board now to bar unconditionally all uses of that evidence. Rather, the Board should follow the provisions of Rule 408 and rule that evidence relating to, or consisting of, the settlement agreement between LKC and Mr. Puckett is not admissible if offered to prove liability or fault on the part of LKC. The Board should

reserve ruling on the admissibility of the settlement agreement if offered by a party for some other purpose until such time that an offer of proof is made and responded to by the other parties.

III. CONCLUSION

For the reasons stated herein, the Board should grant Applicant's motion in part by ruling that evidence of the settlement agreement between L.K. Comstock Engineering and Worley C. Puckett is not admissible to prove fault or liability on the part of L.K. Comstock Engineering arising out of its termination of Mr. Puckett's employment at the Braidwood facility. The Board should defer its ruling on other uses of that agreement until after an offer of proof has been made by a party and responded to by the other parties.

Respectfully submitted,


Gregory Alan Berry
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 2nd day of May, 1986

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NEC STAFF RESPONSE TO APPLICANT'S 'ACTION IN LIMINE-PUCKETT SETTLEMENT AGREEMENT'" 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, this 2nd day of May, 1986:

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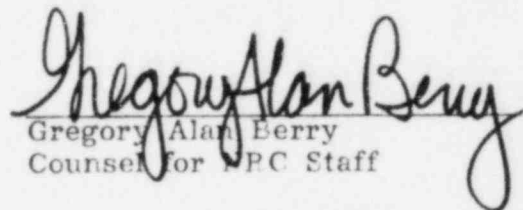
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