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April 30, 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

INTERVENORS' RESPONSE TO APPLICANT'S MOTION TO REQUIRE INTERVENORS TO FILE OFFERS OF PROOF

Applicant's motion to require Intervenors to file offers of proof should be denied for two reasons:

(1) Such offers of proof would be tantamount to showing one's cross examination plans to adverse witnesses prior to their cross examination, thereby inhibiting the candor and spontaneity that are essential elements in any testimony involving hotly contested issues of fact and recollection, and

(2) Applicant already has ample notice of the subject matters to be addressed in the witnesses' testimony.

Far from the "trial by surprise" Applicant professes to fear, the trial under Applicant's proposed procedure would become a "trial by rehearsal." Instead of enhancing fundamental fairness, as Applicant suggests, the result would be unjust

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because it would thwart the most fundamental objective of any hearing: the pursuit of truth.

1. Intervenors' Witnesses On Their QC Inspector Harassment Contention.

In their February 28, 1986 filing, Intervenors identified 36 witnesses on their QC inspector harassment contention. Three of these are experts whose testimony will be prefiled and is not affected by Applicant's Motion.

Each of the remaining thirty-three witnesses falls within the category of "a hostile witness, an adverse party, or a witness identified with an adverse party." Fed. Rule of Evidence 611(c). Under the Federal Rules of Evidence, each such witness may therefore be examined by Intervenors as if on cross examination, i.e., by leading questions.

The thirty-three include four of Applicant's executives, four Comstock supervisors and managers, five NRC inspectors, and twenty present or former Comstock QC inspectors, most of whom are still employed by Comstock at Applicant's plant, and all or nearly all of whom continue to desire employment in the nuclear industry.

None of these witnesses is under Intervenors' control, and Intervenors do not necessarily vouch for any of their testimony; rather, we intend to call them because they are the persons with direct knowledge of the facts. In the case of any particular witness, it may be that he or she will testify truthfully and accurately of his or her own volition; but if not, the veracity of the witness' testimony will depend on the ability of

Intervenors' counsel to elicit the truth through questioning equivalent to cross examination. Likewise, the weight and credibility to be accorded the witness' testimony will turn on the judges' observation of the witness' demeanor, spontaneity, apparent candor or lack thereof, ability to recall, etc.

In addition, if the Board grants leave, Intervenors now intend to call three additional witnesses, for the following reasons. One, NRC Inspector L.G. McGregor, was identified by the NRC staff as a witness on the harassment contention; Intervenors had accordingly planned to cross examine him. However, the NRC Staff filed no prefiled testimony by Mr. McGregor, and Intervenors believe his testimony is important (he co-authored two of the three NRC Staff internal memoranda attached to Intervenors' July 15, 1985 Supplement to their motion to admit the harassment contention).

In addition, two of Applicant's executives, Chairman James O'Connor and Quality Assurance Manager Walter Shewski, both identified in Intervenors' February 28 filing as witnesses on (among other issues) the extent and significance of the QA breakdown at Braidwood, should now be called, in light of the Commission's dismissal of the other aspects of Intervenors' QA contention. Intervenors had intended to question them on their knowledge of the harassment issues, and on the resultant significance of the harassment to the overall QA breakdown at Braidwood. While other aspects of their testimony are no longer relevant, these aspects clearly remain relevant.

What has been said of the earlier witnesses applies, of

course, with equal force to these three witnesses (two of Applicant's executives and one NRC inspector).

2. Applicant's Motion.

Applicant's motion does not seek merely a general description of the subject matter of each witness' testimony; that was already provided in Intervenors' February 28, 1986 filing. Rather, Applicant requests offers of proof that "describe with particularity the expected testimony" and identify all documents to be used in examining the witness (Motion, p. 4). In other words, Applicant seeks to be provided, in advance, the equivalent of cross examination plans which, for good reason, are normally provided to the adverse party only after a witness has been cross examined. (While, technically speaking, Intervenors' examination of these witnesses is not "cross examination," because they have not previously been called for direct examination by another party, this is only a technical truism. In all real respects, Intervenors' examination of these witnesses will be the practical equivalent of cross examination, and Intervenors will provide the Board with cross examination plans, prior to examining each witness, if so requested.)

Applicant's Motion also rests, in part, on an outdated, outsized notion of this case. Applicant argues, "Since there are over 65 separate sub-contention items, Applicant cannot even begin to guess at the content or scope of Intervenors' direct case." (Motion, p. 5.) This point was greatly overstated even when originally made, because each of Intervenors' 65

subcontentions was set forth with exacting particularity, and Intervenors' February 28, 1986 witness list identified each subcontention (or other subject matter) upon which each witness was to be examined. Now, however, following the Commission's April 24, 1986 dismissal of all but one of Intervenors' 65-plus subcontentions, the asserted factual basis of Applicant's Motion has been entirely eroded.

3. The Pursuit of Truth.

There are good reasons why Licensing Boards do not customarily require parties to show their cross examination plans to adverse parties before the cross examination takes place. Counsel for the adverse party would then be likely to discuss the plans with the adverse witnesses, coaching them on the "best" answers, or the "best" ways to "explain away" particular documents. As a result, the testimony presented at trial would be, in effect and sometimes literally so, "rehearsed" testimony. The Board would then hear not the witness' candid, personal recollection of the facts, but rather the cleaned-up, smoothed-down, rendition jointly arrived at by counsel and witness prior to the hearing.

To so suggest is not to accuse anyone of impropriety. All careful lawyers do their best to "prepare" witnesses for their testimony. In so doing, however, they do not ordinarily do so with the benefit of having, in advance, a roadmap of opposing counsel's cross examination.

In addition, when the subjects of cross examination must be

identified "with particularity" in advance, adverse witnesses who learn they are to be examined on the same subjects are then enabled to plan ahead how to "get their stories straight". Normally this takes place to some extent anyway, but to supply Applicant's proposed offers of proof ahead of time would virtually invite collusion among witnesses.

The hearing on Intervenors' QC inspector harassment contention will not be some dry, technical discussion of engineering facts by impartial experts. (Applicant's proposed procedure might have some merit in such a case.) Rather, the 36 witnesses affected by Applicant's proposal are fact witnesses. Issues will often involve who said what to whom, and when, and the clash of conflicting recollections and renditions. The Board's evaluation of the testimony may turn very largely on issues of credibility of witnesses. In such a case, the pursuit of truth demands unrehearsed candor, not canned collusion.

4. Notice.

Applicant's plea that it requires the equivalent of cross examination plans in advance, in order to afford it fair notice of the issues to be heard, rings hollow. Ever since Intervenors on July 12 and July 15, 1985, filed the Seeders documents, the Puckett documents, and the three internal NRC staff memoranda, it should have been perfectly clear to Applicant what Intervenors intend to prove through their harassment contention.

Moreover, since then, Applicant has had ample opportunity to interview and depose the Comstock QC inspectors (some of whom it

interviewed for hours before deposing); to interview Comstock supervisors and the Company's managers concerning their knowledge of the events in question; and to read the reports and take the depositions of the NRC staff inspectors.

By now, Applicant knows full well - or should know - what each witness knows of the facts in dispute. All that Applicant does not know - and what it seeks to find out - is precisely which witness Intervenors will attempt to use to prove particular facts, and to introduce specific documents. To require Intervenors to turn over such a comprehensive outline of their planned equivalent of cross examination to Applicant would not be fair notice, but rather an unfair deprivation of Intervenors' right to question adverse witnesses effectively, and of the right of this Board and the public to a hearing from which the fullest possible measure of truth emerges.

CONCLUSION

To grant Applicant's unprecedented Motion would be unfair to Intervenors, to the public and the Board, and to the pursuit of truth. Applicant's Motion should be denied.

DATED: April 30, 1986

Respectfully submitted,

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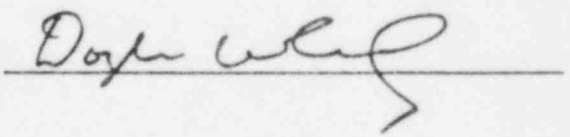
CERTIFICATE OF SERVICE

I hereby certify that I have served copies of Intervenors' Response To Applicant's Motion To Require Intervenors' To File Offers of Proof on each party to this proceeding as 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 at 109 North Dearborn, Chicago, Illinois 60602, on this 30th day of April, 1986; except that the Licensing Board and NRC Staff Counsel Mr. Treby were served via Federal Express overnight delivery, and Edison counsel Mr. Miller was served by personal delivery.



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