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MAY 2, 1986

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of )  
 )  
COMMONWEALTH EDISON COMPANY )  
 )  
(Braidwood Station, Units 1 and 2) )

Docket No. 50-456

OFFICE OF THE SECRETARY  
50-456  
BRANCH

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

I. INTRODUCTION

On April 15, 1986, Applicant filed a "Motion To Require Intervenors To File Offers of Proof." In that motion, Applicant requests the Board to direct Intervenors to identify in writing all evidence they hope to introduce as part of their affirmative case which does not originate from an Intervenor sponsored witness or from permissible cross-examination of adverse witnesses. Prompting Applicant's motion is the fact that at least forty-seven (47) of the fifty (50) witnesses identified by Intervenors are past or current members of the NPC Staff; past or current employees or agents of Applicant; or neither directly sponsored by Intervenors nor subject to their control. The Staff supports Applicant's motion.

II. DISCUSSION

As Applicant points out, Intervenors must assume certain obligations if they intend to put on an affirmative case in this proceeding. The most important of those obligations is to provide opposing parties notice of the nature of its direct case to alert them to the evidence that they should be

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prepared to address. Ordinarily, this burden is discharged by the filing of written testimony pursuant to 10 C.F.R. § 2.743(b). Other than their three experts, however, Intervenors have not indicated that they plan to submit written testimony for any of the other 47 persons identified as witnesses on whose testimony Intervenors plan to rely in support of their direct case.

Some of these 47 persons are witnesses proposed to be called by the Staff or Applicant. To the extent Intervenors' examination of these witnesses is expected to go beyond the scope of the witnesses' direct testimony on behalf of the Staff or Applicant, the Staff and Applicant are left to guess as to the particular facts or conclusions Intervenors hope to elicit from these witnesses. Other persons on Intervenors' list have not been proposed as witness by the Staff or Applicant. Again, with respect to these persons, the Staff and Applicant are left to guess the scope of Intervenors' intended evidence. In these circumstances, a written offer of proof describing the evidence to be elicited from these witnesses by Intervenors is essential to enable Applicant and the Staff to interpose objection or prepare to meet the proffered evidence, and to prevent Intervenors' examination from degenerating into a fishing expedition. See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1096 (1983).

It is an Intervenor's prerogative to rest its entire case on testimony elicited during cross-examination of Applicant and Staff witnesses. E.g. Tennessee Valley Authority (Hartsville Nuclear Power Plant, Units 1A, 2A, 1B, and 2E), ALAB-463, 7 NRC 342, 356 (1978). If it does so, however, it is limited to rebutting the direct testimony of those witnesses.

Id. Cross-examination beyond the scope of a witness' direct examination generally is not permitted. In fact, the Appeal Board has recognized that before cross-examination beyond the scope of direct examination is permitted, an Intervenor may be compelled to make an offer of proof or give some other advance indication of what is to be elicited from the witness. Waterford, supra, 17 NPC at 1096.

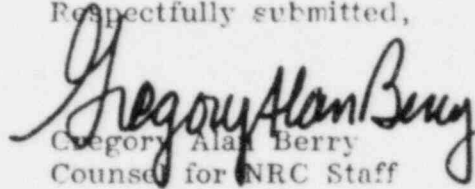
Intervenors have a choice with respect to the manner in which they may present their case. They can attempt to demonstrate that Applicant has not met its burden of proof by relying on their cross-examination of adverse witnesses, or they can present affirmative evidence to show that the quality of construction at the Braidwood facility has been compromised due to the harassment and intimidation of L.K. Comstock quality control inspectors. If they choose the latter course, fundamental fairness requires that they provide opposing parties notice of the nature of the evidence they intend to present either by the filing of written testimony or a written offer of proof.

### III. CONCLUSION

For the reasons stated herein, the Board should direct Intervenors to submit written testimony or a written offer of proof describing the facts and conclusions they expect to introduce as part of their affirmative

case, or limit the scope of Intervenors' cross-examination of adverse witnesses to such witnesses' direct testimony.

Respectfully submitted,

  
Gregory Alan Berry  
Counsel for NRC Staff

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

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANT'S MOTION TO REQUIRE INTERVENORS TO FILE OFFERS OF PROOF" 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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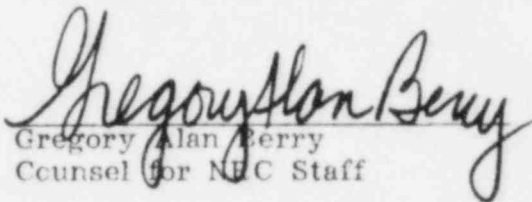
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