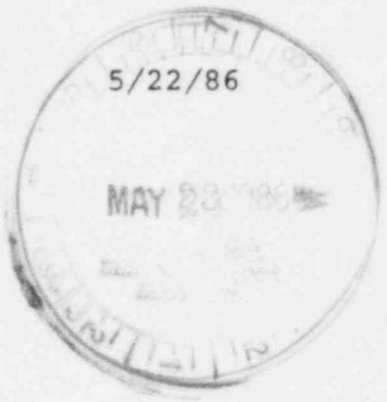

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

INTERVENORS' ANSWER TO APPLICANT'S MOTION FOR REFORMATION OF COMMISSION ORDER

Applicant's Motion For Reformation of Commission Order seeks to sanitize the Commission's March 21, 1986 Order of all language critical of Applicant. Applicant contents that: (1) the criticisms of Applicant were dicta unnecessary to the Commission's conclusion (Motion, p. 1); (2) in failing to press its grievances vigorously and expeditiously, Applicant was not resting on its remedies, but evincing a principled regard for Commission law (id. at 15); and (3) the Commission should alter its reasoning for fear of consequences in another forum.

In fact, the Commission's criticism of Applicant was not dicta, but central to the result reached by the March 21 Order. Moreover, Applicant failed to press its claims as fully and timely as it should have. Finally, this Commission should not subject its reasoning to censorship based on speculation concerning proceedings before another body in which it has no interest.

1. The Commission's Criticisms Were Not Dicta.

The essence of the Commission's March 21 Order was that, because Applicant had failed diligently to pursue its remedies, two conclusions resulted: first, Applicant's petition for review had to be denied and, second, the Commission was obliged sua sponte to address a separate issue, on which Applicant had failed to seek review.

The Commission's criticisms of Applicant were thus not mere dicta - gratuitous side tracks - but were central to the reasoning which underlay both conclusions reached by the Commission. Of course, it would have been possible to reach the same result by different reasoning (as proposed by Applicant's mark-up of the Commission's Order), but the criticisms of Applicant were central to the Commission's reasoning.

Thus, Applicant is not asking the Commission merely to delete surplus language unnecessary to its reasoning, but rather to abandon the very reasoning on which the Commission's two main conclusions rested. Such a step should not be taken lightly.

Indeed, such a revision of the Commission's reasoning plainly constitutes a reconsideration of the Commission's Order. Applicant's Motion is thus, in reality, a petition for reconsideration, which is precluded by 10 CFR §2.786(b)(7). Even if it were otherwise valid (which it is not, as explained below), it would have to be denied as an impermissible effort to circumvent the Commission's rule against petitions for reconsideration.

2. Applicant Failed To Press Its Remedies Diligently.

Applicant's excuses for not pressing its remedies more vigorously and expeditiously are not persuasive.

Applicant now argues (Motion, pp. 3-6) that it had no appellate remedy available before the Keppler deposition; yet somehow Applicant was sufficiently creative to devise a remedy after the Keppler deposition. There is no mystery in this delay: Applicant simply waited until after the ruling to which it truly objected - namely the Licensing Board's June 21, 1985 Order admitting the contention - before deciding whether to seek review of the earlier ruling requiring the deposition. If that ruling was as truly destructive of Commission regulations as Applicant later claimed, surely Applicant could and should have brought the problem to the Commission's attention before the deposition became a fait accomplis.

Applicant's claim that its only available remedy was to request a stay, and that it could not show the irreparable harm required to obtain a stay (Motion, pp. 3-4), ignores several other steps Applicant might have taken.

First, Applicant could and should have pressed the Licensing Board more vigorously to refer its Order requiring the Keppler deposition for appellate review. Prior to the Keppler deposition, Applicant's request for such referral was supported by only one conclusory sentence in its Objections. (Applicant's

Objections To Board Order, April 29, 1985, p. 13.) */ Applicant did not then provide the Licensing Board the benefit of the far more extensive, specific and forceful arguments made two months later in its July 8, 1985 Motion For Directed Certification. In that Motion - but not before the deposition - Applicant argued that the Keppler deposition had the potential for a "pervasive or unusual effect on the structure of the proceeding" (id., p. 12) and raised "an important legal issue with generic implications" (id., p. 14), thereby meriting appellate review.

Second, Applicant could have pressed the Board for a ruling on its Objections before the Keppler deposition. Appellant contented itself with merely responding, in a telephone conference call, to the Board's statement that it would not rule before the deposition. Applicant could and should have moved for a more expedited ruling, setting forth the urgency of its concerns.

Third, Applicant could and should have filed - before the Keppler deposition - the petition for review it ultimately filed two months later. All the elements of the issue for review, as

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*/ Applicant's entire argument on its request for referral consisted of the following sentence: "Applicant submits that prompt decision would be necessary to prevent detriment to the public interest because the Licensing Board's decision would contravene the efficacy of the Commission's regulations as interpreted by Catawba." (Id., p. 13.)

defined by Applicant, were already in place before the deposition. */

If Applicant had taken each of these steps, its inability to show irreparable harm for a stay should not have mattered. Given the importance of the erroneous deposition procedure as later claimed by Applicant, a forceful, early assertion by Applicant of the need for prompt and effective appellate review could have alerted the Commission, in May 1985, to exercise sua sponte its supervisory authority. Alternatively, Applicant could have invoked 10 CFR §2.758(b) to ask for a waiver of or exception to the usual requirements for a stay, on the ground that requiring a specific showing of irreparable harm in the special circumstances of this case would not serve the normal purpose of the stay requirements.

Indeed, months later, Applicant finally did ask the Commission to waive application of a similar procedural rule which ordinarily precludes Commission review. **/ But Applicant made no effort to seek any waiver before the Keppler deposition.

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*/ The issue on which Applicant belatedly sought review was "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." (Motion For Directed Certification, July 8, 1985, pp. 1-2.)

**/ On September 23, 1985, Applicant filed with this Commission a Petition For Review Of Appeal Board Decision And Petition For Exemption From Commission Regulation. Applicant acknowledged that normally 10 CFR §2.786(b)(1) precludes Commission review of Appeal Board decisions on directed certification. (Id., p. 7.) Accordingly, Applicant petitioned the Commission, pursuant to 10 CFR §2.758(b), for a waiver or exception from this rule.

In short, Applicant failed to press its objections to the Keppler deposition with the vigor and expedition that would have been commensurate with its after-the-fact claims of grievous error. Instead, Applicant indeed "rested on its remedies."

Applicant's further claim (Motion, pp. 6-9) that it could not have obtained directed certification of the Licensing Board's ruling on the five-factor test for late-filed contentions is similarly unpersuasive, for two reasons. First, Applicant's argument (id, p. 7) is that the "mere erroneous admission of a contention" is not enough for directed certification. However, in this case there was more - the allegedly improper procedure that, Applicant later claimed, led to the erroneous admission. Applicant could have argued, but did not, that the allegedly erroneous procedure and the allegedly erroneous admission were interrelated and, jointly, should have been reviewed. Second, as noted earlier, Applicant could have asked for a waiver of the usual rule against review of the erroneous admission of a contention, in light of the special circumstances presented in this case. Perhaps these arguments by Applicant, if made, would have prevailed; perhaps not. But Applicant simply failed to make them.

No comment from Intervenors is appropriate on Applicant's further argument (Motion, pp. 9-12) that it could not show irreparable harm, since that argument apparently rests on a claim that the Commission "misapprehended" Applicant's position (id., p. 11). However, Intervenors note that by its own admission, Applicant knew of irreparable harm no later than January 27,

1986, yet still waited more than two months (until April 3, 1986) before bringing this knowledge to the Commission's attention (id., pp. 11-12). Thus, even Applicant's version of events fails to show prompt and diligent pursuit of all reasonably available remedies.

Applicant's final excuse (Motion, pp. 12-14) is arguably the weakest of all. Applicant contends that Intervenors' draft quality assurance contention, submitted to Applicant's counsel in April 1984, did not put any of Applicant's corrective action programs in issue (id., p. 13). That claim is simply not credible. Intervenors' draft contention was a sweeping indictment of Applicant's QA performance; evidence of Applicant's corrective action programs would have been a logical defense to that contention, just as it was to Intervenors' revised contention of May 1985. While the April 1984 draft contention did not specifically allege inadequacies in any particular corrective action program, neither did the May 1985 contention, which Applicant now claims put these programs in issue "for the first time" (id.). */

In short, Applicant's corrective action programs would have been placed in issue as much by the draft April 1984 contention

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*/ Intervenors' May 24, 1985 motion to admit the contention asserted inadequacies in these programs. However, this was merely an argument in anticipation of Applicant's expected defense. The actual contention itself did not affirmatively put any of these programs "in issue," any more than had the earlier draft contention. (See the Licensing Board's June 21, 1985 order, pp. 7 n. 3, 15.)

as they were by the revised May 1985 contention. Applicant's excuse for not accelerating these programs is simply not credible.

3. The Commission Should Not Tailor Its Decisions To Suit Another Forum.

For the reasons set forth above, Applicant's argument that the Commission's March 21 Order will encourage parties to file frivolous pleadings (Motion, p. 15) is misplaced; on the contrary, the portions of the Commission's Order contested by Applicant will merely encourage parties to do what Applicant here has failed to do: to press their claims in vigorous and timely fashion. */

Still less worthy of consideration is Applicant's additional argument (pp. 16-17) that this Commission should tailor its reasoning to suit Applicant's speculations concerning what may happen in another forum. Such extraneous matters are not relevant to this Commission's decisionmaking. Either the Commission's reasoning in its March 21 Order was correct, in which case it should not be "reformed"; or it was incorrect, in which case it should be modified. **/ In either event, the question should turn solely on the merits of the Commission's

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*/ Applicant has offered no affirmative reason for its delays and omissions, but merely claims that it had no other remedies available when in fact, as shown above, it did.

**/ This issue is not even reached, of course, if Edison's Motion is dismissed on the threshold ground that it is an improper petition for reconsideration, as suggested in page 2 above.

reasoning, and not on extraneous considerations. */

CONCLUSION

Applicant's effort to circumvent the Commission's rule against petitions for reconsideration asks the Commission not merely to delete certain language, but to abandon the reasoning on which the Commission's Order was based. Applicant's request ignores the various steps it could and should have pursued, had it vigorously and timely pressed its claims, but which it failed to undertake. Applicant's request further asks that this Commission improperly alter its reasoning, based on extraneous considerations.

For all these reasons, Applicant's Motion For Reformation Of Commission Order should be denied.

DATED: May 22, 1986

Respectfully submitted,

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*/ Applicant (p. 18) cites Donnelly v. U.S., 228 U.S. 708 (1913) to support modification of the Commission's opinion based on "collateral" consequences. In Donnelly, however, the Supreme Court was not asked in effect to abandon its reasoning, and to substitute another line of reasoning, as Applicant asks here. Instead, the Court chose to rely on only one of two alternative grounds stated in its initial decision - and the one on which the appellant had, in fact, "principally relied." Id. at 711. Moreover, the alternative ground which the Court withdrew involved a finding which was alleged to be in conflict with prior decisions of a state Supreme Court, id. at 709. It did not involve, as here, mere speculation about possible effects in some future case. Donnelly thus provides no support whatever for Applicant's novel proposal that this Commission, in drafting its opinions, should tailor its reasoning based on speculation about how its findings may be viewed in the future by some other regulatory body.

5/22/86

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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of Intervenors' Motion For Leave To File Answer Instanter and Intervenors' Answer to Applicant's Motion For Reformation of Commission Order on all parties to this proceeding as listed on the attached Service List, by having said copies placed in envelopes, properly addressed and postaged, and deposited in the U.S. mail at 109 North Dearborn, Chicago, Illinois 60602, on this 22nd day of May, 1986; except that the Commission was served via Federal Express overnight delivery and Edison counsel Mr. Miller was served by personal delivery.

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