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May 5, 1986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

MOTION FOR REFORMATION OF COMMISSION ORDER

I. INTRODUCTION

Pursuant to 10 CFR § 2.730, Applicant, Commonwealth Edison Company, moves that the Commission reform its Order of March 20, 1986, in accordance with the revisions shown in Attachment A. The suggested revisions amend the language of the majority opinion commenting on Applicant's conduct of these proceedings. On the face of the Order, these portions of the opinion are dicta, immaterial to the result reached by the Commission, which Applicant does not challenge. Applicant submits that these dicta are inconsistent with the Commission's settled decisional law. If the majority opinion is allowed to stand as written, however, it will encourage the filing of frivolous pleadings with the Commission and its subordinate adjudicatory tribunals. Moreover, the dicta may significantly prejudice Applicant in future proceedings before the Illinois

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Commerce Commission which review the reasonableness of Applicant's decisions with respect to all aspects of construction of Braidwood Station, including its management of the licensing process before the U.S. Nuclear Regulatory Commission.

The majority opinion of the Commission's Order makes three comments criticizing Applicant for not seeking more prompt appellate relief from the actions of the Licensing Board and for not raising certain legal arguments when it did seek relief. First, the Commission majority faults Applicant for not seeking appellate intervention prior to the Keppler deposition ordered by the Licensing Board. (Order at 3, 6.) Second, the majority concludes that when Applicant sought directed certification from the Appeal Board of the propriety of the Licensing Board's admission of the QA contention, Applicant should have raised the question whether the Licensing Board had properly balanced the five factors governing the admission of late-filed contentions. (Order at 4, 6.) Third, the majority faults the Applicant for not arguing to the Appeal Board that it would be irreparably harmed by the Licensing Board's admission of the contention. (Order at 4, 8.) In addition, the Commission criticizes Applicant for not expediting the schedule of its corrective action programs at Braidwood prior to the filing of the QA contention. (Order at 7.)

The majority opinion makes plain that these comments did not form a basis for its decision to review the question whether the QA contention had been properly admitted. The

Commission states that Applicant had not shown itself entitled to relief, because it bore substantial responsibility for the posture of the proceeding. Nonetheless, the Commission took review because it could not stand by while its regulations and precedents were flouted by the Licensing Board. (Order at 10.)

Applicant takes exception to the four strictures on its conduct voiced by the Commission majority for the reasons explained below. Applicant will also explain why the Commission should entertain this motion and grant the relief sought.

II. ARGUMENT

1. Under Applicable Commission Law, Applicant Could Not Have Obtained Effective Appellate Relief Reversing the Licensing Board's Order Directing the Keppler Deposition.

Although the Commission majority criticizes Applicant for failing to seek appellate intervention before the taking of the Keppler deposition, the majority never suggests any grounds on which such relief might have been granted. Indeed, it is plain that the majority could not do so consistent with established Commission precedent.

The only appellate action that would have provided relief from the taking of the unauthorized Keppler deposition was a stay of the Licensing Board's order under 10 CFR § 2.788. Because the prerequisite for such relief under the regulation is that the movant would be irreparably injured, the Commission

majority's comment must assume that Applicant was irreparably injured by the unauthorized taking of a deposition of an NRC Staff member. There is no warrant for such an assumption, and the Commission majority suggests none. By contrast, the majority explains lucidly why appellate intervention could properly have been sought by the NRC Staff. As the majority points out, "the Licensing Board's authorization of the Keppler deposition was in plain conflict with a regulation [10 CFR § 2.720(h)(2)(i)] designed to prevent unwarranted burdens from being placed on the NRC Staff." (Order at 6.) Thus, the Staff could have demonstrated a clear violation of a protected interest that could not have been cured by a later appeal.

The case was far otherwise with Applicant. Unlike the Staff, Applicant was not directly harmed by the taking of a deposition of a Staff member. Applicant understood that the taking of the deposition could result in the admission of a contention which was clearly contrary to Applicant's interest. However, Applicant was also aware of the well-settled principle in NRC jurisprudence that the mere burden of having to litigate an issue because of Licensing Board error does not constitute irreparable injury for purposes of obtaining a stay enjoining a licensing board order. The Commission itself has expounded this principle. Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 815 (1984) ("The necessity of participating in a hearing does not constitute sufficient harm to justify a stay . . . ."); Uranium Mill

Licensing Requirements, CLI-81-9, 13 NRC 460, 465 (1981); South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 898, 901 (1981); Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1979); Allied General Nuclear Services (Barnwell Nuclear Fuel Plant Separation Facility), ALAB-296, 2 NRC 671, 684 (1975).

Applicant, therefore, reasonably concluded that under the case law it could show irreparable injury only if the taking of the Keppler deposition would result in the admission of a contention of such complexity that its litigation would delay Applicant's fuel load date, thereby causing serious financial loss. Such a conclusion would have been sheer speculation. Applicant would have had to assume that the deposition would trigger the Licensing Board's erroneous admission of a late-filed contention. Applicant would also have had to speculate that this contention would be so complex that its litigation would jeopardize Applicant's estimated fuel load date, which at that time was a full year in the future. Although in hindsight this is precisely what happened, on the facts known at the time, April 1985, it is plain that Applicant could only have supported its entitlement to a stay with speculation. A threat of irreparable injury must be actual and imminent, not remote and speculative. State of New York v. NRC, 550 F.2d 745, 755 (2d Cir. 1977). A movant may not merely allege something feared to occur at an

indefinite time in the future. Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931).

Thus, on the bases of well-settled law and a lack of factual support, Applicant concluded that an application for a stay would be summarily rejected by the Appeal Board and that filing such an application would constitute frivolous litigation.

2. Under Applicable Commission Law, Applicant Could Not Have Obtained Directed Certification of the Licensing Board's Decision on the Five Factors.

After the Licensing Board erroneously admitted the QA contention, Applicant sought directed certification from the Appeal Board on the ground that the Licensing Board's violation of Commission regulations would pervasively affect the structure of the proceeding. The Commission majority faults Applicant for not also seeking directed certification of the question whether the Licensing Board had properly balanced the five factors governing the admission of a late-filed contention. Again, the majority does not suggest on what ground Applicant could have obtained directed certification of this issue consistent with NRC jurisprudence. Again, a review of the applicable law demonstrates beyond peradventure that the Appeal Board would not have entertained such a request.

As the Commission majority recognizes, the test which a movant must satisfy to obtain appellate review of an interlocutory order is set forth in Public Service Company of Indiana

(Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977). Under that test Applicant would have had to demonstrate that the Licensing Board's erroneous balancing of the five factors, resulting in the improper admission of a late-filed contention, either (a) threatened Applicant with immediate and serious irreparable harm, not capable of being rectified on a later appeal, or (b) affected the basic structure of the proceeding in a pervasive and unusual manner. Applicant was barred from making such a showing.

The Appeal Board has consistently held as a matter of law that the mere erroneous admission of a contention does not pervasively affect the structure of a proceeding for purposes of obtaining directed certification. Virginia Electric Power Company (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 (1983) Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 464 (1982). The Appeal Board has made no distinction when the contention claimed to be erroneously admitted was late-filed. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1758 and n.7 (1982); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113 (1982). Even prior to the Marble Hill decision, the Appeal Board consistently held that the mere erroneous admission of a contention did not warrant interlocutory review. Project Management Corporation/Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-330, 3 NRC

613, 618 (1976); Project Management Corporation/Tennessee Valley Authority (Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406, 417 (1976).

Moreover, the Appeal Board has consistently held that the mere burden of having to litigate an issue because of Licensing Board error does not constitute irreparable injury for purposes of obtaining directed certification. Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-805, 21 NRC 596, 599-600 (1985); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992-93 (1984); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1113-14 (1982); Pennsylvania Power & Light Company (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 552 (1981); Public Service Electric and Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980). The cases cited above in regard to the lack of irreparable harm for stay purposes are equally applicable here.

This well-settled NRC jurisprudence is fully consistent with federal law, which holds that the burden of having to litigate an issue does not justify the grant of interlocutory relief. Renegotiation Board v. Bannercraft Co., 415 U.S. 1, 24 (1974); Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51 (1938); Public Utility Commissioner of Oregon v. Bonneville Power Administration, 767 F.2d 622, 630-31 (9th Cir. 1985); Frey v. Commodity Exchange Authority, 547 F.2d 46, 49 (1977). Indeed, a

number of the NRC decisions cited above have relied on this body of federal law. The Three Mile Island, Midland and Barnwell decisions, supra, relied on Bannercraft, and the Uranium Mill decision, supra, relied on Meyers and on Hornblower & Weeks-Hemphill Noyes, Inc. v. Csaky, 427 F. Supp. 814 (SDNY 1977).

In view of this well-settled and long-standing body of law, it would have been frivolous for the Applicant to seek Appeal Board review of the propriety of the Licensing Board's balancing of the five factors.

3. On the Basis of the Facts Known at the Time, Applicant Could Not Have Obtained Directed Certification on the Grounds of Irreparable Harm.

The Commission majority also faults Applicant for not arguing before the Appeal Board that the Licensing Board's erroneous admission of the QA contention threatened it with irreparable harm, under the Marble Hill standard. Applicant has explained above that the mere erroneous admission of the contention would not satisfy this test. Appli ant agrees with the Commission's judgment that this standard would be satisfied if the Licensing Board's error threatened to delay the date on which Applicant would otherwise be able to load fuel in Braidwood Unit 1. (Order at 8.) On July 9, 1985, however, when Applicant filed its motion with the Appeal Board, this possibility was not

sufficiently definable to constitute a threat of serious and irreparable injury.[1/]

When Applicant filed its petition with the Commission on September 23, 1985, the threat of serious and irreparable harm was still indeterminate. It is true that Applicant knew by that time that the litigation of the QA contention would seriously disrupt its project construction activities, thereby delaying project construction on the order of 3 or 4 months.[2/] (Affidavit of Michael [illegible]. Wallace, pp. 2 and 16, attached to Petition For Review of Appeal Board Decision.) However, Applicant only pointed to the disruptive effect of the litigation on project construction to show the error of the Appeal Board majority's view that the Licensing Board had done nothing more than admit another run-of-the-mill contention. (Petition For Review of Appeal Board Decision, p. 4.)

1/ The Commission majority suggests that because Applicant received Intervenors' first set of interrogatories 5 days before filing its Motion for Directed Certification, it "had an opportunity to judge how extensive and time-consuming the litigation of QA might be." (Order at 8.) The simple fact is that these 5 days were insufficient to evaluate meaningfully the extent of the effort that would be necessary to respond to the interrogatories fully and, in particular, the extent to which key personnel at the project would be required to devote significant time to the effort.

2/ The Commission majority unaccountably states that "Applicant's September 1985 filing before the Commission included no quantification whatever of the delay which litigation of QA would cause." (Order at 8.)

The Commission majority appears to misapprehend Applicant's argument. Applicant was not urging Commission review of the Appeal Board's order denying directed certification on the independent ground that litigation of the contention would delay project construction to the extent of irreparable injury. This Applicant could not do because it could not demonstrate that the delay in project construction testified to by Mr. Wallace would result in a delay of Applicant's fuel load date.[3/] As the affidavit of Mr. Wallace explained, Applicant was then -- September 23, 1985 -- in the process of revising its fuel load estimate. (Wallace Affidavit, p. 15.) It was only in December 1985, when the budgeting and schedule review was complete, that the estimated fuel load date of September 30, 1986 was established. At that time it appeared that the litigation of the QA contention could be concluded by September 30, 1986. However, when the hearing schedule was finalized by a ruling of the Licensing Board rendered during a prehearing conference on January 27, 1986, it became apparent that this date was jeopardized. This view was presented to the Commission at the

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3/ The Commission majority suggests that it would have been meaningful for Applicant to alert the Appeal Board "that there was at least the possibility that QA litigation would delay--to an extent not yet quantifiable--completion of the plant." (Order at 8.) This, however, would have been a meaningless exercise, because this possibility would not have been a cognizable basis for granting directed certification. Connecticut v. Massachusetts and State of New York v. NRC, supra.

earliest opportunity. (Brief of Commonwealth Edison Company on the Five Late-Filed Factors, dated April 3, 1986, pp. 39-40.)

Thus, in September 1985, Applicant knew that the litigation of the contention would delay construction but it did not know whether for unrelated reasons the finally determined fuel load date might not extend sufficiently into the future to accommodate any delay in project construction attributable to litigation of the QA contention. In short, Applicant reasonably believed on July 9, 1985 and again on September 23, 1985 that it could not demonstrate to the Appeal Board that it was threatened with immediate and irreparable injury from the erroneous admission of the QA contention because the fuel load date projected at that time was undergoing revision and the new date was not yet determined. No showing of irreparable injury could have been made until the date was known. Connecticut v. Massachusetts and State of New York v. NRC, supra.

4. There Was No Reason For Applicant to Accelerate Its Corrective Action Programs Prior to the Filing of Intervenors' QA Contention.

The Commission majority also criticizes Applicant for not scheduling its Braidwood corrective action programs more expeditiously prior to the filing of Intervenors' amended QA contention. The majority suggests that because Intervenors' March 1985 contention was almost identical to a draft contention submitted to Applicant's counsel in April 1984, Applicant was on

notice for a year that some of these programs would be put in issue in litigation. (Order at 7.) The Commission majority has misapprehended the facts. The Affidavit of Michael J. Wallace attached to Applicant's December 19, 1985 Answers to Questions Posed by the Commission explained that the March 1985 contention, which was rejected by the Licensing Board, did not put any corrective action programs in issue. (Wallace Affidavit, ¶ 10.) That was done for the first time by the May 1985 amended contention admitted by the Licensing Board. Applicant had no prior notice that these issues would be raised, and in particular could not have anticipated that Intervenors would raise issues contained in old Staff inspection reports which had been in the public record for a considerable time and with respect to which Intervenors had taken no action. (Wallace Affidavit, ¶¶ 10-11.)

Nor did Applicant have any other reason to accelerate the schedule of the corrective action programs in question. These programs had not been scheduled for early completion because they were not critical path items in the construction schedule. (Wallace Affidavit, ¶ 5-6.) Moreover, because the NRC Staff was monitoring these programs during their implementation, little additional Staff review would have been required at program completion, and it was reasonable to anticipate fairly quick NRC closure on some efforts completed shortly before fuel load. (Wallace Affidavit, ¶ 8.)

On the basis of the uncontradicted facts testified to by Mr. Wallace, the Commission majority had no basis for

criticizing Applicant's scheduling of its corrective actions. The majority assumes that Applicant should have changed its project priorities because it was on notice that some corrective action programs would have to be litigated if the Licensing Board were to admit a QA contention. As demonstrated, there is no basis for this assumption because nothing put forward by Intervenors before May 1985 gave any indication that these programs would be put in issue in any QA contention that might be admitted. There was thus no reason for Applicant to interfere with its project schedule by deferring critical path items to complete these programs more expeditiously.

5. Both Sound Considerations of Managing the NRC's Adjudicatory Process and Basic Fairness to Applicant Compel Reformation of the March 20, 1986 Order.

The foregoing discussion demonstrates that Applicant's course of conduct in seeking appellate relief from the erroneous decisions of the Licensing Board was entirely reasonable and in accordance with well-settled principles of Commission jurisprudence. Under the applicable law, Applicant could not have obtained a stay of the Keppler deposition. Similarly, it could not have obtained directed certification from the Appeal Board on the issue of whether the five factors had been properly balanced or on the ground that it would be irreparably injured by the Licensing Board's decision. The Commission majority's suggestions to the contrary are inconsistent with the

Commission's own regulations and decisional law. The majority appears to confuse the latitude of the Commission's own powers to supervise erring licensing boards with the rather limited procedural remedies granted under Commission law to a party aggrieved by a licensing board action.

The conduct for which the Commission majority faults the Applicant did not result from inadvertence, nor was Applicant resting on its remedies. Rather, Applicant's attempts to seek appellate relief from the Licensing Board's actions were conducted with a principled regard for the Commission's regulations and decisional law. In particular, Applicant was mindful that the Appeal Board has roundly criticized parties for filing what it perceives as insubstantial motions for directed certification. In Arizona Public Service Company (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 384 (1983), the Appeal Board complained of the number of such motions which it had had to review and commented that they had the unfortunate effect of diverting attention from licensing proceedings, wasting the Appeal Board's time and causing profligate expenditure of the time and resources of the parties. The Commission majority's comments suggesting that Applicant was at fault for its restraint in this regard have no basis in law and merely invite parties to file frivolous pleadings with the Commission and its adjudicatory tribunals. Indeed, the majority's comments are bound to create considerable confusion as to the state of NRC law on

interlocutory review, both on the part of parties to Commission proceedings and on the part of the Appeal Board.

Moreover, this is not the only consequence of the Commission majority's dicta. When Edison requests the Illinois Commerce Commission to include the cost of the Braidwood facility in its rate base, it will be required under Illinois law to submit to an "audit" of the prudence of its expenditures in detail. Ill. Rev. Stat., Ch. 111-2/3, par. 30.1. These audits retrospectively review a utility's decisions underlying management, construction and supervision of construction. They are a new aspect of Illinois state regulation of utilities caused by significant cost increases and schedule delays in completing nuclear power plants. BPI, who represents Intervenors before this Commission in the Braidwood licensing proceeding, was an intervenor in the rate case in which Edison requested that the cost of the Byron facility be included in its rate base. Byron Unit 1 was the first power plant to be subjected to a Section 30.1 audit. BPI took the position that the Licensing Board's denial of the Byron operating license, an erroneous decision which BPI had helped to procure, caused a delay in plant operations, and that the costs of that delay should be charged to Edison's shareholders rather than being included in rate base. Other intervenors before the Illinois Commerce Commission argued that other NRC Staff inspection findings and Applicant's programs to correct those findings were based on unreasonable decisions by Applicant. Accepting these arguments in part, the Illinois

Commerce Commission deducted $101.5 million from Byron 1 rate base as representing unreasonable costs, needlessly incurred by Applicant during the course of licensing the facility.

In this proceeding, it is clear that the Illinois Commerce Commission will look to official decisions of the NRC for guidance in determining whether Applicant's management of the licensing process before the NRC was reasonable. And it is foreseeable that BPI will argue that the Commission's March 20, 1986 Order constitutes an NRC finding that the Applicant has caused unreasonable delay in the licensing process by its misguided conduct of the litigation. BPI is likely to take the position that this has resulted in additional costs which should not be borne by Edison's rate payers. In that context, what are merely dicta in the Commission's Order may carry weight in determining reasonable costs under Illinois law. Given the lack of legal basis for the Commission's comments demonstrated above, Edison submits that if the Commission's majority opinion is not amended, it runs the risk of significantly prejudicing the Applicant in this future proceeding before the Illinois Commerce Commission.

6. The Commission Should Entertain This Motion.

Applicant is filing this motion pursuant to 10 CFR § 2.730, and is seeking post-judgment relief analogous to that available under Federal Rule of Civil Procedure 60(b)(6). The

Commission has recognized that such motions are cognizable by analogy to Rule 60(b)(6), although they are disfavored and require a showing of "extraordinary circumstances." Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-78-15, 8 NRC 1, 2 (1978). Applicant submits that extraordinary circumstances exist here. As shown above, while the Commission majority's comments are dicta for Commission purposes, they may significantly prejudice Edison in future proceedings before the Illinois Commerce Commission. See Donnelly v. United States, 228 U.S. 708 (1913) (Supreme Court denies rehearing, but withdraws language of its opinion not necessary to decision and which may have consequences for important collateral interests.) Section 2.730 does not set a time within which motions must be filed. Applicant submits that under the analogy to Rule 60(b)(6), motions for post-judgment relief must be filed within a reasonable time. This is the case for the instant motion since it is being filed within a short time after issuance of the Commission's final order on interlocutory review of the admission of the QA contention, dated April 24, 1986.

Applicant is aware that 10 CFR § 2.786(b)(7) contains a provision governing the submission of petitions for reconsideration. Specifically, the regulation provides that the Commission will not entertain petitions for reconsideration of Commission decisions denying review of an Appeal Board decision. The rationale of 10 CFR § 2.786(b)(7) is that at some point there must be an end to litigation. 42 Fed. Reg. 22128-29 (May 2,

1977). Applicant submits, however, that this regulation is not applicable to the present motion. This is not a petition for reconsideration because Applicant is not asking the Commission to vacate or modify its decision. Applicant is simply requesting that the Commission reform or amend certain language in the majority opinion announcing the decision. As demonstrated above, this language is immaterial to the Commission's decision. Thus, because Applicant is not seeking to disturb the finality of the Commission's decision, Section 2.786(b)(7), a regulation of repose, is not applicable.

III. CONCLUSION

For all these reasons, the Commission should reform its Order of March 20, 1986 by amending certain language in the majority opinion identified by the Applicant in its foregoing

arguments. Attachment A to this Motion is a copy of the majority opinion amended in accordance with Applicant's request.

Respectfully submitted,

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Date: May 5, 1986

Attachment A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

SERVED MAR 21 1986

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

ORDER

On December 5, 1985, the Commission issued an order in which it posed seven questions to the parties to this proceeding to help it determine whether it would be productive for the Commission to take review of ALAB-817. In that decision, the Appeal Board, by a divided vote, denied applicant Commonwealth Edison Company's motion for directed certification of certain actions of the Licensing Board relating to the admission of a quality assurance contention submitted by the intervenors.

For the reasons set forth below, the Commission has determined that the Licensing Board's actions in this proceeding warrant intervention, but on an issue which applicant did not raise before the Appeal Board, and which is therefore not before us on review of ALAB-817. That issue is the correctness of the Licensing Board's balancing of the five factors governing admission of late-filed contentions. Although applicant and staff have, in their responses

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to the Commission's questions, stated their views on this question, the matter has not formally been briefed to the Commission. Accordingly, as we shall describe in greater detail below, the Commission by this order is directing the parties to submit briefs on the issue of whether the five-factor test for submission of a late-filed contention is satisfied by the intervenors' amended quality assurance contention. First, however, a discussion of the circumstances that brought about this controversy is in order.

~~[A review of the pertinent facts reveals that the Board, the staff, the intervenors, and the applicant all bear responsibility for the present situation.]~~ The intervenors in this proceeding, Bridget Little Rorem, et al., first raised their quality assurance concerns in the spring of 1984. In August, 1984, they notified counsel for the other parties of their intention to introduce a late-filed quality assurance contention into the proceeding. Yet the intervenors did not file their contention until March, 1985. In response to one of the questions posed in our December, 1985 order, intervenors state that initially they hoped that the Braidwood corrective action program would be sufficient to resolve quality assurance concerns at the plant, and that they elected to file a contention only when it became apparent to them that that program would not satisfy their concerns. Thus the decision to forego litigation of quality assurance was, according to the intervenors, a deliberate choice, and the decision to file a QA contention reflected the fact that they had changed their minds.

It might seem, based on the foregoing, that intervenors would be hard put to demonstrate that they had met the five-part test for judging a late-filed contention, in view of the fact that good cause for lateness is one of the factors to be examined. But the Licensing Board found, on a weighing of the factors, that the standards for admission would be met if the contention were

resubmitted with appropriate revisions. The Board dismissed the contention before it, finding that it would fail to meet applicable standards of specificity and basis even if it had been timely filed, and set forth a schedule for resubmission of an amended QA contention. The Licensing Board also established criteria against which such a contention would be judged.

The Licensing Board did not stop there. Notwithstanding the provisions of 10 CFR 2.740, by which discovery is limited to matters admitted into controversy by the Board, and 10 CFR 2.720(h)(2)(i), by which a particular named NRC employee may be deposed only upon a finding of "exceptional circumstances" by the Board, the Licensing Board authorized the intervenors to take the deposition of Mr. James Keppler, NRC's Region III Administrator. The Licensing Board explained that certain public comments of Mr. Keppler on QA problems at Braidwood were of interest to it, and that it would have considered whether Mr. Keppler's statements warranted taking up the quality assurance issue sua sponte if intervenors had not raised the issue.

Both the applicant and the NRC staff filed objections with the Licensing Board to the Board's order, ~~but neither sought Appeal Board or Commission intervention prior to the Keppler deposition, although the Licensing Board had stated, weeks before the Keppler deposition, that no ruling would be made on the objections until after the Keppler deposition had taken place.~~

In the aftermath of the Keppler deposition, an amended contention was filed and was admitted by the Licensing Board. ~~Not until then did~~ The applicant then file its motion for directed certification with the Appeal Board. The NRC staff ~~then expressed its~~ supported ~~for~~ the applicant's position.

~~For reasons best known to the applicant, its motion to the Appeal Board specifically stated that the question on which it sought review was "not whether Intervenors' amended quality assurance contention satisfies the basis~~

~~and specificity requirements of 10 CFR §2.714(b), nor whether Intervenors should prevail [redacted] ing of the factors governing admission of late-filed contentions under 10 CFR §2.714(a)." Motion for Directed Certification, p. 1.~~]

~~Rather,~~ Applicant sought review of 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." [~~Id. at 2.~~] Motion for Directed Certification, p. 2.

No. 3 The applicant's motion stated, correctly, that the threshold test which a moving party must meet in order to obtain Appeal Board review of an interlocutory order of this type is that set out in the Marble Hill decision. Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977). That decision provides that to obtain review of the merits of the interlocutory decision below, the moving party must demonstrate that the decision either (a) threatens the moving party with immediate and serious irreparable harm, not capable of being rectified on later appeal, or (b) affects the basic structure of the proceeding in a "pervasive and unusual manner." The applicant, in its motion to the Appeal Board, did not allege that the Licensing Board's admission of the quality assurance contention would result in any harm to it, immediate and irreparable or otherwise. The applicant argued to the Appeal Board that the "pervasive and unusual effect" standard was met because the Licensing Board was on a "collision course" with the Commission's regulations, and because the Licensing Board had adopted a different role from that of an impartial arbiter, using the intervenors as surrogates to pursue its own areas of concern.

The Appeal Board, by a divided vote, found that the threshold test for directed certification of the admission of a contention had not been met. The Appeal Board reasoned that while "it may be" that the Licensing Board had violated the Commission's regulations by authorizing discovery against the NRC staff after dismissing the intervenors' original quality assurance contention, it was not prepared to find a "pervasive and unusual effect" from this action, "especially where the staff itself did not find the matter sufficiently disruptive to seek relief from us in its own right." ALAB-817 at 7, n. 17. The Appeal Board therefore did not reach the issue on which applicant had sought review. Nor did it address sua sponte the issues on which applicant explicitly did not seek review.

As the applicant recognized, the Commission's rules bar appeals to the Commission from Appeal Board decisions on motions for directed certification. Accordingly, when the applicant filed a petition for Commission review of the Appeal Board's action, it was accompanied by a motion asking for an exemption from the regulation (10 CFR § 2.786(b)(1)) barring such appeals. [~~In its petition to the Commission, the applicant for the first time alleged that the admission of the quality assurance contention would cause it harm. According to the applicant, litigation of the amended quality assurance contention has delayed, and would continue to delay, completion of the Braidwood facility. Applicant explained that it had made no such allegation to the Appeal Board because at the time, it could not quantify the extent of the delay which litigation of QA would cause. Although applicant had received intervenors' first set of interrogatories before it filed its motion with the Appeal Board, it was only on completing the responses to those interrogatories, applicant said, that it was able to predict the harm that would result from litigating the quality assurance contention.~~]

[In deciding whether to intervene in an ongoing licensing proceeding, particularly in a situation in which to do so means to deviate from the Commission's own procedural rules, it is necessary for us to ask whether the party seeking relief has truly been aggrieved by the actions of others, or has in significant measure brought its difficulties on itself. In the present case, we are constrained to say that the applicant must share a significant part of the blame for the predicament in which it finds itself. To make this observation is not by one whit to minimize the blame which attaches to the intervenors, for what we view as their unjustified dawdling in the filing of their quality assurance contention, or to the licensing Board, for what appears to us a flagrant disregard for the plain and unambiguous text of the Commission's regulations.

In the present case, the applicant elected not to seek Appeal Board or Commission intervention prior to the Keppler deposition. Nor did the NRC staff seek such intervention, although the Licensing Board's authorization of the Keppler deposition was in plain conflict with a regulation designed to prevent unwarranted burdens from being placed on the NRC staff. When the applicant did seek Appeal Board relief, it framed the issues in such a way as to exclude from consideration the issue of whether the Licensing Board correctly balanced the factors for a late-filed contention. As a result, that issue would not be before the Commission if it were to take review of ALAB-817.[1]]

[1 Although the staff informs us that it "argued, albeit unsuccessfully, before the Licensing and Appeal Board ... [that] the late-filed amended contention should have been rejected because the Licensing Board concluded erroneously that, on balance, the factors listed in 10 CFR §2.714(a)(1)

[Footnote Continued]]

[Moreover, the applicant has previously asserted (in arguing to the Licensing Board that the quality assurance contention should not be admitted, through an affidavit attached to its June 7, 1985 filing) that if it had known in late 1984 that a quality assurance contention would be filed, it could have had its corrective action program completed by October 1, 1985. (Affidavit of Braidwood Project Manager Michael J. Wallace at 4-5.) Assuming this statement to be correct, we are at a loss to understand why the applicant, having the capacity to complete its corrective action program by October 1, 1985, elected to proceed so much more slowly.

In addition, in its filing in response to our seven questions, applicant volunteers that intervenors stated on August 6, 1984 their intention to file a quality assurance contention, and applicant also complains that the contention ultimately filed (on March 7, 1985) was "almost identical to the [draft] contention submitted to Counsel for Applicant and Staff in April 1984." In other words, the applicant knew that the intervenors might file a quality assurance contention, had seen a draft contention "almost identical" to the one which intervenors finally filed, and yet took its time about completing a corrective action program which could have been completed by October 1, 1985. We are not persuaded by applicant's assertion that at the time that intervenors filed their contention, on March 7, 1985, applicant "had no basis for speculating about what issues Intervenors would attempt to raise in any

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[Footnote Continued]

militated in favor of admitting the contention," our review of the pleadings before the Appeal Board indicates that the Appeal Board was never asked to address the correctness of the Licensing Board's balancing of the five factors. Rather, the Appeal Board was merely informed by the staff that staff had argued to the Licensing Board that the five-factor test weighed against admission of the contention.]

[contention they proposed," and that any acceleration of its construction schedule would therefore have been "rash."

Finally, we are not persuaded by applicant's explanation of its failure to alert the Appeal Board to the possibility that litigation of the QA contention might delay completion of the Braidwood plant -- an argument which if made to the Appeal Board and found meritorious might well have satisfied the "immediate and irreparable harm" test of the Marble Hill doctrine. According to applicants, they were unable to quantify the extent of the delay until they finished responding to the intervenors' first set of interrogatories, and therefore raised the issue for the first time before the Commission. We see several problems with this explanation. First, applicant already had the first set of interrogatories in hand, and thus had an opportunity to judge how extensive and time-consuming the litigation of QA might turn out to be. Second, applicant's September 1985 filing before the Commission included no quantification whatever of the delay which litigation of QA would cause.[2] Third, none of this explains why the applicant did not advise the Appeal Board in July 1985 that there was at least the possibility that QA litigation would delay -- to an extent not yet quantifiable -- completion of the plant. In short, we see no reason to revise our earlier conclusion that the applicant, through its petition to the Commission, was seeking an exemption from the Commission's rules in order to make an argument which it could have made, but failed to make, to the Appeal Board.]

[[2]See the affidavit of Michael J. Wallace, attached to the petition to the Commission: "In my judgment, the completion schedule for these critical path activities will be adversely impacted in a significant manner by the continued litigation of the QA contention. The major mechanism by which the Project

[Footnote Continued]]

~~[The foregoing suggests that the applicant bears primary responsibility for its failure to take appropriate steps to avert the consequences of the Licensing Board's errors. It must be emphasized, however, that it was the Licensing Board which erred in the first place. Not even the intervenors, in their response to the questions posed by the Commission in its December 5, 1985 order, attempt to justify the Board's refusal to abide by the plain language of the Commission's regulations.]~~

start → [The issue here is not whether quality assurance is or is not an important issue at Braidwood -- no one disputes that it is an important issue -- but rather whether the Commission's rules of general applicability may be ignored when the members of a Licensing Board happen to believe that the public interest warrants ignoring them. Our insistence that Commission procedures be followed is not a reflection of bias for or against applicants or intervenors. Rather, it is a reflection that before administrative agencies, just as before courts, f[illegible]ess demands that one set of rules should apply to all particip[illegible] In the present case, as the Board and all parties were aware, the rejection of the intervenors' first contention did not bar the intervenors from submitting an amended contention, if it could satisfy applicable standards. Likewise, the Board and all parties were aware that even if the intervenors were unable to sustain the admission of a QA contention, the Licensing Board was not precluded from raising the issue sua sponte, provided that the Commission's stringent standards for raising issues sua sponte could be met. See Louisiana Power & Light Co. (Waterford Steam Electric Station,

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[Footnote Continued]

will be affected is through a significant diversion of the time and attention of the key leaders and decisionmakers of the project." Affidavit at 16.

Unit 3), CLI-86-1, Jan. 30, 1986, 23 NRC ___, Slip op. at 8. But what the rules do not countenance is a Board's deciding that to satisfy the Board's own concerns on a particular issue, a party shall be allowed to conduct discovery on a rejected contention, the better to be able to redraft that contention and secure its admission. In our view, this procedure is indistinguishable in substance from the conditional admission of a contention, a practice barred by the Catawba decision in language which leaves little room for misunderstanding: "[A] licensing board is not authorized to admit conditionally for any reason, a contention that falls short of meeting the specificity requirements ... Stated otherwise, neither Section 189a of the Act nor 2.714 of the rules permits the filing of a vague, unparticularized contention followed by an endeavor to flesh it out through discovery against the Applicant or Staff." Duke Power Company (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 467-68 (emphasis in original).

~~[If the issue before us were simply one of whether the applicant had shown itself entitled to relief, it would not be difficult to answer that question in the negative, in view of the substantial responsibility which the applicant bears for the present situation. But that is not the only issue before us. The broader issue is whether~~] The Commission's own interest in the assurance of a properly conducted adjudicatory process is such that it cannot ~~allow it to~~ stand idly by while the Commission regulations and Commission precedents are flouted. ~~[The answer is that our inherent supervisory authority over the conduct of NRC adjudications implies a responsibility to the adjudicatory process as a whole, and to the parties to all our proceedings, which must take precedence over the question of how capably a particular party conducted an individual case. There are times when the Commission must take action not because of a party's submissions, but in spite of them.~~]

At this time, the Keppler deposition is a matter of record. It would serve no useful purpose to try to turn the clock back and pretend that it never took place. What is far from clear to us, however, is whether, even with the Keppler deposition, the intervenors' amended contention satisfied the five-part test set forth in 10 CFR § 2.714 for evaluating late-filed contentions. That issue, not having been raised before the Appeal Board, has not formally been briefed to us. We accordingly direct the parties to submit briefs, to be in the hands of the Secretary of the Commission no later than close of business on April 3, 1986, addressing the question of whether the amended contention meets the five-part test.

The five-part test is ordinarily prospective, calling for predictions as to the probable effect on a proceeding of adding one or more proposed contentions to those already admitted. In particular, the presiding officer must make judgments on the probable contribution which the contention would make to the development of a sound record, and on the extent to which admission of the contention will broaden or delay the proceeding. In the present case, we have more than mere prediction on which to base a judgment. The record of the proceeding before the Licensing Board, since the admission of the amended quality assurance contention, offers the most probative evidence on the extent of the intervenors' ability to contribute to the proceeding, and on the extent to which admission of the contention means broadening and delay of the proceeding.

Accordingly, the parties should address two questions:

(1) Did the Licensing Board apply the five-part test correctly in admitting the intervenors' amended quality assurance contention?

(2) If the intervenors' contention were to be rejected, and then were to be resubmitted today, would the contention satisfy the five-part

test, if it were judged in light of all the information which has developed in the course of the proceeding to date?

The petition for review of ALAB-817 is therefore DENIED. The Commission has decided that it will exercise its inherent supervisory authority to consider whether the amended quality assurance contention meets the five-part test of 10 CFR § 2.714 for the evaluation of late-filed contentions. It is not the Commission's intent that the proceeding before the Licensing Board be stayed during the pendency of its consideration of this issue.

Chairman Palladino and Commissioner Asselstine disapproved this order and have separate views attached.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC
this 20th day of March, 1986.

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of COMMONWEALTH EDISON COMPANY'S MOTION FOR REFORMATION OF COMMISSION ORDER was served persons listed below by deposit in the United States mail, first-class postage prepaid, this 5th day of May 1986.

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