UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Herbert Grossman, Chairman
Richard F. Cole
A. Dixon Callihan

In the Matter of	Docket Nos. 50-456-OL 50-457-OL
COMMONWEALTH EDISON COMPANY	ASLBP No. 79-410-03-OL
(Braidwood Station, Unit Nos. 1 and 2)	September 18, 1986

MEMORANDUM AND ORDER
(Authorizing Fuel Loading and Precriticality Testing)

Applicant, Commonwealth Edison Company, filed a motion, pursuant 10 C.F.R. § 50.57(c), requesting this Board to authorize the Director of Nuclear Reactor Regulation, upon making the applicable findings required by 10 C.F.R. § 50.57(a), to issue a license to Applicant to load fuel and conduct certain precriticality testing of the Braidwood Station, Unit 1. Applicant relies upon supporting affidavits to the effect that the Applicant will carry out its fuel loading and precriticality testing activities in a manner that will insure that the

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facility remains subcritical without any reliance on electrical systems or circuitry under accident and transient conditions.

Staff supports Applicant's request and adds its own affidavits indicating that Staff has evaluated Applicant's ability to perform fuel loading and precriticality testing without reliance upon the electrical equipment for protection of the health and safety of the public. Staff's affidavits indicate that the only threat to public health and safety in the performance of the proposed fuel loading and precriticality testing arises from an inadvertent criticality in the core and that this inadvertent criticality will not occur if a boron concentration of 2,000 ppm in the core coolant is maintained. Applicant has committed itself to special administrative procedures that will assure that the boron concentration does not go below 2,000 ppm, to be included as a license condition to any fuel loading and testing license, and to be monitored by the NRC Staff.

Intervenors, Bridget Little Rorem, et al., however, oppose Applicant's motion to load fuel and conduct precriticality testing on the ground that their quality control contention asserts that the quality of the Applicant's electrical installations is indeterminate, and that since Applicant must utilize its electrical system in these operations, albeit not necessarily to safely conduct these operations,

Intervenor's contentions are "relevant to the activity to be authorized" under 10 C.F.R. § 50.57(c), and the Board must make findings specified in 10 C.F.R. § 50.57(a). Included in 10 C.F.R. § 50.57(a) are findings that construction of the facility and its operation have been, or will be, in conformity with the construction permit and application, and that there is reasonable assurance that the activities authorized by the operating license can be conducted without endangering the health and safety of the public and in compliance with the regulations in Part 50. Intervenors further contend (Opposition at 8-10) that they are entitled to a hearing on the matters to be found under 10 C.F.R. § 50.57(a) and that the nature of the issues to be heard would be no different from the issues on the merits of Intervenor's contentions. Intervenors state that, as a practical matter, the evidence to be adduced in the main hearing and any § 50.57(c) hearing might be identical, and that separate hearings would only be duplicative, although Intervenors would not oppose separate hearings if Applicant can show that they would not be duplicative and wasteful. Id. at 10.

We grant Applicant's motion and authorize the Director of Nuclear Reactor Regulation to make appropriate findings on the matters specified in 10 C.F.R. § 50.57(a) and to issue a license for the requested operation within the parameters specified by Applicant in its motion and supporting affidavits, and by Staff in its response and supporting affidavits.

MEMORANDUM

Section 50.57(c) allows an applicant in a contested OL proceeding to move the licensing board to authorize the issuance, by the Director of Nuclear Reactor Regulation ("Director"), of a license permitting activities short of full power operation, notwithstanding the pendency of safety contentions before the licensing board. The regulation was promulgated to provide explicitly for early consideration of facility testing in the event of a contested hearing on the issuance of a license for full power operation. 36 Fed. Reg. 8862 (May 14, 1971). Thus the regulation affords relief to an applicant when the pendency of hearings before a licensing board threatens to delay the applicant's fuel loading and testing schedule. That is the situation in which the Applicant in this proceedings finds itself at the present time. Applicant is scheduled to begin loading fuel in Braidwood Unit 1 on September 30, 1986 (O'Connor at Tr. 10,102); and it has become clear that on the present hearing schedule an initial decision cannot issue by that date.

Section 50.57(c) provides that when no party to the proceeding opposes the motion, the licensing board shall issue an order authorizing the Director to make the requisite findings under § 50.57(a) and to grant a license for the requested operation. The board's issuance of such an order is not automatic, however, when a party contests the motion. Section 50.57(c) provides that the licensing board's actio

on the motion shall be taken "with due regard to the rights of the parties to the proceedings, including the right of any party to be heard to the extent that his contentions are relevant to the activity to be authorized." To safeguard these rights, any party may oppose the motion by asserting that the § 50.57(a) findings cannot be made for the requested authority because its contention is relevant to those operations and must therefore be resolved prior to the issuance of the § 50.57(c) license.

In that case, the licensing board must determine whether the contention is in fact relevant to the requested operation, and if it finds that the contention is relevant, § 50.57(c) provides that the board itself make those § 50.57(a) findings "as to which there is a controversy" because of the pendency of a relevant contention. The Director is still responsible for making the other § 50.57(a) findings. If the licensing board finds that the admitted contentions are not relevant to the requested operation, and therefore need not be resolved before the requisite § 50.57(a) findings can be made, the board does not make any § 50.57(a) findings, but authorizes the Director to do so. 10 C.F.R. § 50.57(c); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233 (1981); see also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-83-27, 18 NRC 1146, 1149-50 (1983).

It is thus apparent that the regulatory scheme set forth in § 50.57(c) preserves, but does not expand, the existing rights of the parties and the existing jurisdiction of the licensing board. The right of an intervenor to contest the issuance of an operating license is defined by the contentions already admitted by the licensing board. The board's jurisdiction is limited to determining the admitted contentions and any additional issues which the board raises sua sponte through the procedures specified by the Commission.

To the extent that a party's admitted contentions are relevant to the requested operation, § 50.57(c) requires the licensing board, at that party's request, to resolve them before authorizing the Director to issue the limited operating license. Matters not raised by existing contentions concerning the motion for limited operation are outside the scope of the proceeding, and § 50.57(c) provides that the Director make the necessary findings on such matters. Thus a § 50.57(c) motion is not an opportunity for the admission of new contentions aimed at the limited operation sought by the Applicant. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 362 (1981); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 801 n.72 (1983); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226 (1981).

Since Intervenors have opposed Applicant's motion, the Board must determine whether Intervenors' contentions are relevant to the activity to be authorized and, if so, make findings on the matters specified in § 50.57(a) as to which there is a controversy.

We begin our consideration with Applicant's assertion (Motion at 10) that its affidavits demonstrate conclusively that Applicant will carry out its fuel loading and precriticality testing activities in a manner that will insure that Braidwood Unit 1 remains subcritical without any reliance on electrical systems or circuitry under accident and transient conditions. Therefore, Applicant further states, Intervenors' QC inspector harassment contention is wholly irrelevant to the activities for which the Applicant is seeking authorization.

But, according to Intervenors (Opposition at 4), the threshold of relevance under § 50.57(c) is not merely whether, as Applicant suggests, the pending contention is relevant to the safe conduct of the proposed activity. Instead, Intervenors further suggest, the relevance concern is broader: whether the pending contention is relevant to the conduct of the proposed activity. Since the proposed activity would make use of the electrical system, the pending contention, which asserts that the electrical system is indeterminate, must be relevant to the proposed fuel loading and precriticality testing activities, according to Intervenors.

In making their argument that Applicant's mere use of the electrical system in the contemplated activity makes Intervenors' quality control contention relevant, Intervenors rely heavily (id. at 5) on the nature of the findings that the Board might have to make under § 50.57(a). The crux of their argument is their statement that "those findings are not limited only to 'safety'" (emphasis in original). Intervenors point out that certain of the findings specified in 10 C.F.R. § 50.57(a), do not specifically mention safety: e.g., construction of the plant and its operation must be found to be in conformity with the construction permit and the application as amended. Similarly, Intervenors argue that Applicant must meet certain General Design Criteria of Appendix A of Part 50 and Technical Specifications prepared in accordance with requirements of 10 C.F.R. § 50.36, and that Intervenors are entitled to a hearing on whether those General Design Criteria and Specifications have been met.

We do not agree with Intervenors that the findings that the Board must make under 10 C.F.R. § 50.57(a), or with regard to the General Design Criteria or Technical Specifications, are not limited to safety. As we understand the legislative and regulatory requirements, all of the Board's findings under 10 C.F.R. Part 50 are in the context

of the public health and safety. [1/] If, for example, we were to determine that Applicant's construction or operation of the plant departs from the requirements of the construction permit, application as amended, General Design Criteria, or Technical Specifications, but does not depart in any manner that has an adverse impact on the public health or safety, our ultimate findings would be that the plant's construction or operation is in substantial conformity with the requirements. As we understand it, any deviation from these requirements, to the extent that they do not affect the public health or safety, would have no adverse consequence on the granting of the operating license.

In the view of the Board, the test for relevancy, under § 50.57(c) as in general, is whether, if the matters were heard, they could result in a finding adverse to the other party -- in this case under § 50.57(a). Since only matters inimical to the public health or safety can be decided adversely to Applicant under § 50.57(a), and Intervenors have made no showing that their admitted contention raises a safety matter with regard to fuel loading and precriticality testing, they have failed to establish that the contention is relevant to the requested license.

1/ We do not consider in this discussion findings that might be required by 10 C.F.R. Part 51 relating to the National Environ-

[FOOTNOTE CONTINUED]

Stated another way, Intervenors have raised no matters with respect to the proposed fuel loading and precriticality testing on which, if the matters are taken to be proven, the Board could make findings under § 50.57(a) adverse to Applicant.

We have given due consideration to Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-84-4, 19 NRC 1154 (1984), in making our determination. Had Intervenors here made some showing that the use of an indeterminate electrical system in the fuel loading and precriticality testing would depart in some manner from the General Design Criteria or Technical Specifications that might have an adverse impact upon the public health or safety, we might have been persuaded that Applicant should be required to apply for an exemption from those requirements under 10 C.F.R. § 50.12(a), before we could make our determination under § 50.57(c) that its contention is not relevant to the activity to be authorized. Presumably, such a showing was made in Shoreham, 2/ either in the oral argument or in the written filings that preceded and followed the oral arguments.

[FOOTNOTE CONTINUED]

mental Policy Act of 1969, since no environmental contentions have been admitted in this proceeding.

2/ In Shoreham the § 50.57(c) application involved a request for a low power operating license rather than a mere request for fuel loading and precriticality testing.

See 19 NRC at 1155. No such showing was made here and we need not require that Applicant pursue the exemption route under § 50.12(a).

O R D E R

For all of the foregoing reasons and based upon a consideration of the entire record in this matter, it is, this 18th day of September, 1986,

ORDERED:

(1) That the Director of Nuclear Reactor Regulation is authorized to make all appropriate findings required under 10 C.F.R. § 50.57(a) with regard to Applicant's (Commonwealth Edison Company's) request for a license permitting Applicant to load fuel in Braidwood Unit 1 and conduct precriticality testing of the unit,

(2) That the Director is authorized to issue a license for the requested operation, subject to his findings and within the parameters established by Applicant in its Motion for Authorization, and supporting affidavits, dated August 18, 1986, and in NRC Staff's Response to Applicant's Motion, and supporting affidavits, dated September 9, 1986,

(3) That the granting of a license as herein authorized shall have no bearing on Applicant's right to any further license under 10 C.F.R. §§ 50.56 or 50.57,

(4) That this Order become effective immediately, and

(5) That any party may take an appeal of this Order within ten (10) days after service thereof by filing a notice of appeal and following the briefing schedule prescribed by 10 C.F.R. § 2.762.

THE ATOMIC SAFETY AND LICENSING BOARD

Herbert Grossman, Chairman
ADMINISTRATIVE JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

A. Dixon Callihan
ADMINISTRATIVE JUDGE

Bethesda, Maryland.
September 18, 1986.