

March 22, 1986

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of :

COMMONWEALTH EDISON COMPANY

(Braidwood Nuclear Station,
Units 1 and 2

No. 50-456
50-457

INTERVENORS' ANSWER TO APPLICANT'S MOTION
FOR LEAVE TO FILE RESPONSE
REGARDING SUMMARY DISPOSITION

Intervenors Bridget Little Rorem, et al., have no objection to the filing and consideration of Applicant's March 11, 1986, Motion for Leave to File Response to Intervenors' Answer Opposing Summary Disposition, notwithstanding the provisions of CFR § 2.749(a) that such response shall not be entertained.

We trust that the Board will readily conclude from a review of the principal moving papers themselves that the points argued in Applicant's March 11 Response are unfounded, and that no further answer by Intervenors is warranted.

Suffice it to say, here, only the following with respect to Edison's two fundamental points:

1. (T)he Intervenors have made a very serious misrepresentation concerning the content of Applicant's motion for summary disposition.

Motion at 2.

Applicant's acknowledgement of "its burden to demonstrate

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that the quality assurance deficiencies set forth in the contention do not represent a pattern of deficiencies that would call Applicant's quality assurance program in question," March 11 Motion at p.4, sheds little additional light on the remedy sought by its summary disposition motion. Applicant originally argued that "only the cumulative effect of uncorrected (its emphasis) quality assurance deficiencies can form the basis" for Intervenor's claim of Braidwood quality assurance breakdown, Motion for Summary Disposition at 11. This argument prompted us to question the fundamental foundation for Applicant's summary disposition motion. Intervenor's Answer of February 18, 1986, pp. 2-3. We believe, as the Board itself advised Applicant and Staff, that "effective corrective and remedial action" must be programmatic in scope, extending beyond the mere correction of the individual deficiencies targetted by summary disposition to corrective action which targets their "cumulative effect." Memorandum and Order Admitting Rorem, et al. Amended Quality Assurance Contention, LBP-85-20, 21 NRC 1732, 1744 (June 21, 1985).

The height of Applicant's hyperbole should not obscure its continued failure to heed the Board's advice that proof of effective programmatic corrective actions are essential to Applicant's case "i.e., even if Braidwood did experience the QA deficiencies alleged, effective corrective and remedial action has been taken." Id

2. (M)any of Intervenor's arguments are based on an erroneous application of federal court precedents to the admissibility of evidence in Commission proceedings.

The Appeal Board has not hesitated to apply to NRC practices the federal case law and interpretations of summary judgement practice under Rule 56, Federal Rules of Civil Procedure, where in (t)he same considerations call for similar treatment of Motions for summary disposition under our own Rules of Practice." Cleveland Electric Illuminating Company, et al (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741-754 (1877).

Applicant disingenuously argues that "portions of Rule 56 which were omitted by the Commission in promulgating the rule may not be read back into it". Applicant cites to no case to support this proposition. That is so, because there is no case law that supports Applicant's disingenuous attempt to rewrite NRC law. 1/ Moreover, it is well settled in NRC law that resort may be made to the federal counterpart to Section 2.749 in considering the propriety of certain evidence submitted in NRC proceeding. id.

1/ Interestingly, a reading of the case Edison most often cites, Virginia Electric And Power Company (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451 (1980), makes it clear that resort may be made to the Federal rule in that the opinion itself, cites Federal case law.

Applicant, for the first time, intimates that the affiants of the affidavits are experts. Applicants Reponse to Intervenor's Answer, p. 6.

Applicant is too late, as Section 2.746(b) indicates:

Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matter stated therein (emphasis added).

Applicant cannot magically repair its deficient affidavits by now asserting that these affiants are experts when applicant did not comply with Rule 2.749(b) in the first instance.

Intervenor's do challenge the competence of Applicant's affiants. A brief perusal of "Intervenor's Answer Opposing Summary Disposition" shows numerous instances where Intervenor's do challenge failure to meet the requirement that on the face of the affidavit competence is affirmatively demonstrated.

It is not that intervenor's seek to inappropriately "graft onto the Commission's administrative proceedings rules applicable to eyewitnesses". However, when applicants' affiants testify to specific facts such as what happened, when, and where, there is a requirement that the affiant has personal knowledge of the facts to which he testified. F.R.E. 602.

Intervenor's do not argue with the proposition that a duly qualified expert may testify based on information made known to him by others. F.R.E. 703. Also, Intervenor's do not quibble with whether an expert may give an opinion on an ultimate issue at hearing. However, in an affidavit seeking summary disposition where the opposing party has no opportunity to challenge the underlying foundation of

those opinions, it is quite inappropriate. F.R.E. 704 and Notes.

Finally, Applicants cites Intervenor's acknowledgement that Section 2.749 has no express requirement that all documents referenced in a Summary Disposition affidavit be provided with the affidavit. While this is true in the abstract, failure to serve a critical document imposes undue burdens upon intervenors to controvert the document, or an affiant's analysis which is based on that document. For example, certain of Edison's affiants claim to rely on "comprehensive reviews" to support material facts, yet the comprehensive reviews referred to have been neither appended to the affidavits nor completely disclosed to intervenors in discovery, so as to allow intervenors to either accept or reject the material facts which they support.

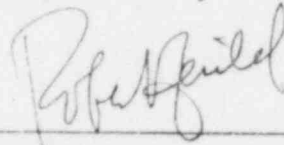
Intervenor's urge that these "considerations" call for application of the Federal Rule 56(e) requirements here in the important instances identified in our summary disposition answer. Perry, Supra. Curiously, in the very case cited by Edison to the contrary (North Anna, 11 NRC at 460, Motion, p.7) the 61 page document describing proposed spent fuel pool modifications was supplied by applicant in support of summary disposition along with the affidavit by "the engineer responsible for the designs and installations of the new racks" who "averred that he was familiar with the content" of the document. Id., 11 NRC at 453

Applicant's evidentiary submissions supporting summary disposition fail to measure up to even the standards cited in its own pleading.

CONCLUSION

Intervenors have no objection to the filing and consideration of Applicant's March 11, 1986, Response. For the reasons advanced in our February 18, 1986, Answer. Intervenors urge the Board to deny Applicant's Motion for Summary Dispositons.

Respectfully submitted,



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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of:)

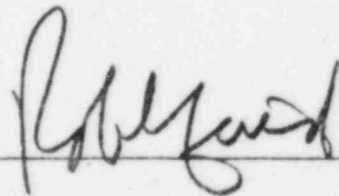
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(Braidwood Nuclear Station,)
Units 1 and 2))

NRC Dockets 50-456
50-457

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of Intervenor's
Answer To Applicant's Motion For Leave To File Response 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
March, 1986.



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