3934

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'87 JUL -2 P4:48

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

MOTION TO REOPEN THE RECORD TO ADMIT
LATE-FILED CONTENTION ON FINANCIAL QUALIFICATIONS

Intervenors Rorem, et al., pursuant to 10 CFR §§2.417 and 2.734, by their undersigned attorney, move the Licensing Board to admit the attached late-filed contention concerning the financial qualifications (FQ) of the potential new co-licensees of Braidwood. In the alternative, pursuant to 10 CFR 2.758, Intervenors ask the Board to certify to the Commission the question of whether the Commission rule barring consideration of financial qualifications of regulated untiities in licensing hearings should not be applied in the special circumstances of Edison's proposed new arrangement for the ownership and financing of Braidwood.

BACKGROUND

On May 6, 1987, before Edison had filed any application with the NRC to amend its operating license for Braidwood to reflect Edison's proposed new ownership and financial structure for the units, Intervenors filed, in effect, an anticipatory motion to admit a late-filed contention on financial qualifications, based

D503

on Edison's April 16 application to amend the operating license for Byron 2.

Edison opposed Intervenors' motion, arguing in part that the Board had no jurisdiction because Edison had made no application to amend its Braidwood license.

On May 28, however, Edison did apply for an amendment to its Braidwood license. On May 29, Edison's counsel wrote a letter so advising the Board and stating that the application "invalidates this jurisdictional objection and it is hereby withdrawn." On June 3, Edison's counsel wrote a further letter to the Board, enclosing copies of the application.

However, these letters were apparently not received by the Board by June 10. On that date, the Board denied Intervenors' Motion for lack of jurisdiction. The Board relied, in part, on its mistaken belief that Edison had not yet applied for an amendment to its Braidwood license. (Mem. and Order, June 10, 1987, at 3.)

Based on this sequence of events, Intervenors have recently asked the Board to reconsider its June 10 Order. However, in case the Board continues to deny the May 6 Motion (Edison and Staff also opposed the May 6 Motion on additional grounds), Intervenors are also filing this Motion to cure any alleged defects in the May 6 Motion. Finally, in case the Board believes that jurisdiction has now passed to the Appeal Board (to which Intervenors on June 1 appealed from the May 19 Initial Decision), Intervenors are also filing an alternative Motion requesting identical relief from the Appeal Board.

JURISDICTION.

This Board (or, if not, the Appeal Board, as discussed below) has jurisdiction over Intervenors' proposed late-filed contention (Attachment A hereto). The original Notice of Hearing in this docket was generally worded. 43 Fed. Reg. 58659 (Dec. 15, 1978). The Licensing Board was thereby conferred with jurisdiction "over all portions of the license application . . ." Duke Power Co. (Catawba), 22 NRC 785, 791-92, ALAB-825 (1985). As noted earlier, Edison's proposed amendment is now a part of its licensing application. Accordingly, the Board has jurisdiction. Id.; see also Philadelphia Electric Co. (Limerick), 19 NRC 645, 650-51, ALAB-765 (1984) (Licensing Board has jurisdiction over matters "integral" to the project).

This is not a case like Carolina Power, relied on in the Board's June 10 Order at pp. 2-3. Here, the Board is not attempting to control the scope of a future proceeding by requiring that a particular issue be specified in a future notice of hearing. Instead, the Board is asked merely to act within the scope of an existing proceeding to address an amendment already applied for by Applicant, and over which Applicant's counsel (by his letter of May 29) has already conceded that the Board has jurisdiction.

There remains the question of whether jurisdiction over this motion has passed to the Appeal Board, since Intervenors filed their Notice of Appeal from this Board's Initial Decision on June 1, 1987. In general, jurisdiction over a motion to reopen the record passes to the Appeal Board if the motion is filed after a

notice of appeal has been filed. Metropolitan Edison Co. (Three Mile Island), 16 NRC 1324, 1326-27, ALAB-699 (1982). However, where the motion to reopen concerns a contention not previously litigated before the Licensing Board, jurisdiction over the motion remains with the Licensing Board. Cincinnati Gas & Electric (Zimmer), 18 NRC 640, 646, LBP-83-58 (1983). Accordingly, this Board retains jurisdiction over the instant motion.

THE CONTENTION

The proposed FQ contention (Attachment A hereto) is based on Edison's May 28, 1987 application to amend its Braidwood operating license. Essentially Edison proposes to transfer ownership of Braidwood (and Byron 2) to a newly created, wholly owned subsidiary, whose sole assets would consist of these three nuclear units. Implicitly recognizing the new subsidiary's lack of sufficient financial qualifications of its own, Edison proposes that it join the subsidiary as co-licensee of the Braidwood units for NRC purposes.

The contention alleges, in essence:

. that the new subsidiary lacks reasonable assurance of the financial qualificaions required to operate Braidwood safely,

. that even if Edison itself has reasonable assurance of such financial qualifications, both the terms of the proposed agreement and Illinois law would prohibit Edison from subsidizing the new owner of Braidwood,

. that under Edison's proposal, no regulatory body would continue to assure recovery of the costs of Braidwood, as assumed in the NRC regulations generally waiving FQ review for regulated utilties, so that neither proposed co-licensee any longer qualifies as an "electric utility" within the meaning of the FQ regulations, 10 CFR 50.2(x), and

. that consequently Edison has failed to demonstrate reasonable assurance that the co-licensees have the financial qualifications to operate Braidwood safely in accordance with the law.

REOPENING THE RECORD

The three applicable criteria for reopening the record under 10 CFR §2.734(a) are that the motion be timely, that it address a significant safety issue, and that it be capable of or likely to produce a materially different result. Even though these criteria may be applied more strictly on a motion to reopen, their substantive scope overlaps the criteria for filing late filed contentions. Accordingly, they are discussed below in connection with the motion to admit the late-filed contention.

With respect to the affidavit requirement of 10 CFR §2.734(b), an affidavit of counsel, a "competent individual with knowledge of the facts alleged," is attached hereto as Attachment B.

LATE-FILED CONTENTION

The five criteria for admitting late-filed contentions under 10 CFR §2.714 are good cause for late filing (which embraces "timeliness" for purposes of reopening the record), lack of other means or other parties to pursue the concerns, contribution to a sound record (in which we shall discuss the significance of the safety issue and the likely altering of the result), and broadening and delay.

1. Good Cause For Late Filing (Timeliness)

Both Edison and this Board have expressed the view that this Board had no jurisdiction over the proposed contention prior to May 28, 1987, when Edison filed an application to amend its Braidwood license. Thus Intervenors could not possibly have properly filed earlier than that date.

Intervenors did not learn of Edison's application until on or about June 2, upon receipt of Edison counsel's letter of May 29, and did not receive Edison's application until on or about June 8, upon receipt of Edison counsel's letter of June 3.*/

In the three weeks since June 8, in addition to conducting legal research on issues of NRC jurisdiction, lining up expert witnesses (see below), and preparing these motions and letters to NRC Staff considering the application, Intervenors' counsel have actively participated in the Illinois Commerce Commission (ICC) proceedings in which, at present, the proposed restructuring of the ownership and financing of Braidwood is being shaped.

---

*/ Edison's letters were mailed from Washington, D.C.; Intervenors' counsel is in Chicago.

Intervenors therefore have shown good cause for late filing and are timely. Moreover, Edison has no cause for complaint. It initially presented its proposal to the ICC on February 3, 1987. Inexplicably, it waited until May 28 to apply to the NRC for an amendment of the Braidwood operating license. The instant motion could have been filed months earlier if Edison had not unnecessarily waited so long to file its application with the NRC.

2. and 4. Other Means, Other Parties.

There is no other forum in which to raise Intervenors' NRC FQ concerns. The ICC is concerned with state regulatory issues - protection of ratepayers, and fair treatment of shareholders - and has neither jurisdiction nor inclination to intrude upon the federal regulatory issue of whether the proposed co-licensees meet NRC FQ standards. Clearly no other party represents Intervenors' FQ concerns. The Staff has so agreed. (NRC Staff Response, May 26, 1987, p. 14.)

3. Contribution To A Sound Record; Significant Safety Issue; Likely Altering of Result.

If neither co-licensee has the requisite FQ to operate Braidwood safely, the license must be denied. (See Attachment C hereto, pp. 6-8.) Under Edison's proposal for Braidwood, the basic premise of the NRC's FQ rule - that some regulatory entity undertakes to assure cost recovery - is absent. (See generally id., pp.2-6.)

The Edison proposal covers basically two periods: the first five years, and thereafter.

In the first five years, Edison is to receive $660 million per year for the three units. However, actual receipt of these funds is entirely contingent upon the actual level of performance achieved by the units. If the units fail to generate electricity at the target levels, ratepayers are entitled to pro rata reductions, up to the full amount of the $660 million. (Attachment D hereto, Exhibit A thereto, p. 8.) Thus, contrary to the assumpton in the NRC FQ regulations, cost recovery is explicitly not assured. During the first 5 years, cost recovery depends entirely on whether the Units achieve their target capacity factors.

Thereafter, two long-term options are provided, Options A and B (setting aside Option C, which is merely a three-year delay in choosing between A and B). Under option A, the Subsidiary has no assured market for its power, no "service territory," and no regulatory assurance of cost recovery. Edison so admits. (Attachment D hereto, Attachment 2 thereto.) The subsidiary's financial situation will be entirely dependent upon market price and demand, on the one hand, and its operating, backfit and other costs, on the other. As Intervenors' experts will testify (see below), given reasonable projections for these variables, the subsidiary is a candidate for serious financial difficulties in the 1990s.

Under option B, the same is true - i.e., the Units are "in the market" with no assured market or market price - through at least the year 2000 for all of Braidwood 2, and for as much of Braidwood 1 as the ICC in 1992 chooses not to direct Edison to

purchase on a longterm basis. (Attachment D hereto, Exhibit A thereto, pp. 11-12.)

Thus, under either option, the underpinning of the NRC FQ rule is simply not applicable: no regulatory agency will have undertaken to assure cost recovery for Braidwood. Its future is at the mercy of the market, and under reasonable market projections the owner of the plant - the subsidiary - will be in serious financial difficulty.

This risk is so serious that Edison was forced to offer itself as a co-licensee. In addition, Edison's proposal expressly contemplates the event that the subsidiary may become insolvent. (Attachment D hereto, Exhibit D thereto, p. 10.)

In the event of such financial difficulties, Edison will not be able to bail out the subsidiary, for two reasons. First, the proposal requires that Edison "insure that no subsidy flows from or to the Subsidiary." (Attachment D hereto, Exhibit A thereto, p. 1.)

In responding to Intervenors' May 6 motion, Edison contended that this provision merely prohibits subsidies using ratepayer funds; Edison contended that it would remain free to subsidize the subsidiary with its shareholders' funds. That, however, is not what the provision says. It prohibits subsidies, period.

Moreover, there is good reason to read the language to mean what it says, and not what Edison would have it say. Depletion of Edison's financial strength, even though the funds directly involved are shareholders', indirectly impacts ratepayers adversely. This is because shareholder losses adversely affect

Edison's cost of capital, and hence the earned return Edison is entitled under state law to be paid by ratepayers. Any claim that the earned return could simply be reduced to account for such depletion is too simplistic; it would be very difficult to measure the depletion effect reliably. Thus the only sure protection for ratepayers is to prohibit the subsidy in the first place, as Edison's proposal before the ICC necessarily does.

Moreover, even if the proposal itself did not so require, Illinois law, for the same reasons, already compels the same result. (Ill.Rev.Stat., ch. 111-2/3, §§7-101 and 7-102.) Those provisions, governing transactions between a public utility (such as Edison) and an affiliated interest (such as the subsidiary) expressly prohibit a public utility from improperly diverting "any of its moneys" - not merely its ratepayer funds, as Edison contends - to the non-regulated entity. (Section 7-102(g) and (h); emphasis added.)

In sum, the subsidiary lacks the requisite FQ to operate Braidwood safely, because its financial future is troubled, and Edison lacks the requisite FQ because both its own proposal and Illinois law prohibit Edison, a regulated utility, from subsidizing the operation of Braidwood by its proposed new owner, an unregulated subsidiary.

Intervenors will be prepared to present at least three expert witnesses to substantiate their contention. Stephen Moore, Public Counsel of Illinois, will testify concerning the proper interpretation of the subsidy prohibition in the agreement, and on the independent Illinois statutory prohibitions

of any subsidies. Charles Komanoff, a consultant in electric utility economics, will testify on reasonable projections of future demand and costs of the the subsidiary's operations. James Rothschild, a financial consultant, will testify on financial projections for the subsidiary, given Mr. Komanoff's economic projections. (Mr. Komanoff's vitae and Mr. Rothschild's qualifications are attached hereto as Attachments E and F respectively.)

Depending on the particular arguments and evidence advanced by Edison and Staff, Intervenors will also be prepared to present additional expert witnesses.

For all these reasons, Intervenors' case will contribute to the development of a sound record. Moreover, it will be a sound record on an issue important to safety (Attachment C hereto, pp. 6-8), and which could materially alter the result reached in the Board's Initial Decision, either by leading to outright denial of the license for lack of the requisite FQ, or to the imposition of material conditions on any license.

5. Delay and Broadening.

Concededly litigation of a new contention at this stage will delay and broaden the proceeding. However, as noted earlier, this delay results from (a) the unavoidable fact that the new Edison proposal was not devised until after the close of the record in this case, and (b) the avoidable fact that Edison, with no apparent explanation, waited nearly four months after filing its proposal with state regulators (before whom it is still

pending), before filing its proposal with the NRC in the Braidwood docket.

It should further be noted that even now, the terms of Edison's proposal are not fixed but remain "moving targets," with numerous modifications having been recommended by the ICC Staff and ICC Hearing Examiners, and no final ICC decision presently expected prior to July 6, 1987. (Attachments G and H hereto.)

Summary of the Five Factors.

All five factors except the fifth, broadening and delay, weigh in favor of admitting the late filed contention. The balance of the factors therefore favors admission, especially since Edison's own delay of several months in filing for NRC approval is a major cause of any delay that would result from admission of the contention.

EXCEPTION UNDER 10 CRF §2.758

For the reasons stated in Attachment C hereto, pp. 4-5, the NRC rule barring consideration of the financial qualifications of "electric utilities" in operating license hearings does not apply in this case, because neither Edison nor the subsidiary would be an "electric utility" with respect to Braidwood under Edison's proposed license amendment.

In opposing Intervenors' May 6 Motion, Edison argued that both itself and the subsidiary would remain "electric utilities" because they would continue to "recover the cost of electricity through rates established by separate regulatory authority." (Edison Response, p. 7.)

Edison's claim is simply factually incorrect. As noted above, during the first five years, Edison might or might not recover its costs for Braidwood and Byron 2, depending on whether those units achieve their target capacity factors. Thereafter, FERC would - as Edison suggests - set rates for Braidwood's power, but FERC would not undertake to assure recovery of the costs of Braidwood and Byron 2 through those rates. Whether or not those costs are recovered will depend simply upon the success of these units in the marketplace.

Edison attempts to dismiss this "distraction" in a footnote, arguing, "It is of course true that no regulatory commission can ever guarantee that customers will be available to buy power at the prices the Commission sets." (Edison Response, p. 9 n.9.)

That argument misses the point. While it is indeed true that commissions cannot "guarantee" that customers will in fact buy electricity, the entire premise of traditional cost-based rate regulation by utility commissions is that they set rates based on projected costs and demands in exclusive service territories, in an effort to ensure cost recovery. That is precisely why the Commission's FQ rule generally abandoned case-by-case FQ review for regulated utilities.

Here, in contrast, the subsidiary would have no defined service territory, and no regulatory commission would undertake to assure that the costs of Braidwood and Byron 2 can be recovered. This new situation is thus fundamentally different from the cost-recovery rate regulation contemplated by the Commission's FQ rules.

Given that those rules, neither by definition nor by intent, apply to this new situation, the burden remains on Edison to show that it has the requisite FQ. The burden is not on Intervenors, as both Edison (Response, p. 9) and Staff (Response, p. 7) appear to suggest.

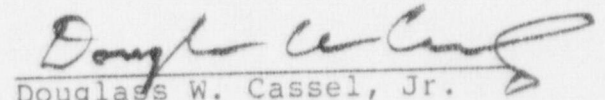
Nonetheless, Intervenors do not, as Staff suggests, rely on "mere speculation on the consequences of the possible unwillingness of customers to buy power . . . " (Id.) Rather, Intervenors contend that on reasonable economic and financial projections, the subsidiary does not have reasonable assurance of having the financial resources necessary to operate Braidwood safely.

Even if, despite all this, the Board were to rule that each of the proposed co-licensees remains an "electric utility" within the meaning of 10 CFR 50.2(x), an exception should therefore be made to the rule, pursuant to 10 CFR 2.758. As set forth in Attachment C hereto, p. 6, the rule should not be applied because, in the special circumstances of Edison's new proposal, the reason underlying the rule - that regulatory commissions undertake to assure cost recovery - is not applicable to this case.

CONCLUSION

The record should be re-opened to admit Intervenors' late-filed FQ contention. The rule barring case-by-case FQ adjudication does not apply here, because under the proposed license amendment, neither Edison nor the subsidiary would qualify as an "electric utility" within the meaning of the rule. In the alternative, if the Board believes that both co-licensees are "electric utilities," Intervenors urge the Board to certify to the Commission, pursuant to 10 CFR 2.758, whether an exception should be made, and litigation of FQ in this case permitted, because of the special circumstances of Edison's new proposal for ownership and financing of Braidwood.

Respectfully submitted,



Douglass W. Cassel, Jr.
One of the attorneys for
Intervenors Rorem, et al.

Douglass W. Cassel, Jr.
Robert Guild
Robert L. Jones, Jr.
Business and Professional People
for the Public Interest
109 North Dearborn Street
Suite 1300
Chicago, Illinois 60602
(312) 641-5570

ATTACHMENT A

INTERVENORS' REVISED FINANCIAL QUALIFICATIONS CONTENTION

On May 28, 1987, Commonwealth Edison filed an application for an amendment to the operating license for Braidwood units 1 and 2. A copy of that application is filed herewith as Attachment D.

Pursuant to the proposed amendment, Edison would transfer ownership of Braidwood units 1 and 2, as well as of Byron 2, to a new, wholly owned subsidiary. If Edison's proposal is approved by the Illinois Commerce Commission (ICC), before which it is pending as of June 30, 1987, Edison could receive a rate increase of $660 million effective in July of 1987 for the three units. Thereafter, for a period of five years, Edison could receive no further rate increases (except in certain limited situations), although the ICC would retain its full authority to impose rate reductions. Even before any rate reductions, Edison would write off some $550 million of its investment in the three units.

The subsidiary would have no other assets, and its sole income would derive from sale of the electricity generated by the three units. During the initial five-year period, any power generated by the units would be sold to Edison.

After the first five years, the ICC would select one of three options. Option A would place all three units in the marketplace. The subsidiary would have no exclusive service territory and no assured market for its power. Although its rates would have to be filed with the Federal Energy Regulatory

Commission, no regulatory agency would set rates for the purpose of assuring recovery of the costs of the units. Instead, rates for power from the units would be determined by the market.

Under Option B, Edison would enter into a long-term power purchase contract for Byron 2. However, Braidwood 2 would be left in the marketplace, as under Option A, for the eight years from 1992 until the year 2000, at which time the ICC could choose either to leave it permanently in the marketplace, as under Option A, or to require Edison to purchase the unit. Under Option B, the ICC could choose whether to leave all or part of Braidwood 1 in the marketplace, or instead to require Edison to purchase all or part of Braidwood 1.

Option C merely provides for a three-year delay in the choice between Options A and B.

The foregoing is only a brief summary of Edison's proposal, which is more completely described in Attachment D filed herewith. However, that Attachment is no longer complete or current. The Staff and Examiners of the ICC have recommended various amendments to the Edison proposal, some of which Edison has agreed to. A decision by the ICC on whether to approve Edison's proposal, and on what amendments to require, is presently expected during the week of July 6, 1987.

The effect of these amendments is generally to increase the risks to Edison and the subsidiary, and to decrease potential revenues from the three units. For example, the ICC Staff has proposed, and Edison has conditionally accepted, an external decommissioning fund for the units. During the first five years alone, Edison projects that this fund will set aside over $170

million (1987 $) of the revenues from the units, thus rendering these funds unavailable for current use.

Recognizing that the subsidiary has financial qualifications (FQ) difficulties, Edison proposes that itself and the subsidiary be co-licensees of Braidwood units 1 and 2 (and, similarly, of Byron 2).

Neither the subsidiary, nor Edison with respect to these three units, is an "electric utility" within the meaning of the NRC rule generally barring litigation of FQ for "electric utilities," because under the proposal no regulatory entity would undertake to set rates designed to recover the costs of the units. Nor would Edison or the subsidiary have any such power, as more fully set forth below. In addition, for the reasons set forth below, neither Edison nor the subsidiary can demonstrate reasonable assurance of the FQ needed to operate Braidwood safely and in accordance with the Atomic Energy Act.

Specifically:

- During the first five years, there is no assurance that Edison will actually receive its proposed $660 million revenue increase for the units. Unlike typical ratemaking, the proposal explicitly ties the level of revenues to the level of output of the units; if the units fail to generate electricity, Edison receives no revenues for them. Likewise if the level of output is significantly below projections, Edison's revenues for the units will be proportionately reduced. In addition, regardless of how the units operate, the ICC retains full

authority to reduce Edison's rates for independent reasons.

- Under Option A, neither Edison or the subsidiary has any regulatory assurance of cost recovery for the units.
- Under Option B, the same is true for Braidwood 2 during 1992 to 2000 and thereafter unless the ICC directs Edison to contract for the unit in the year 2000.
- Under Option B, the same is true for Braidwood unit 1, except to the extent the ICC directs Edison to contract for some or all of the unit in 1992.
- Thus, under both Options A and B, there is no regulatory assurance of cost recovery for Braidwood. Under reasonable projections of load growth and costs, there is no assurance that market prices for Braidwood's power would allow for cost recovery, or that the subsidiary would retain sufficient financial resources to operate the units safely.
- Because the three units are the subsidiary's sole assets and sole source of revenue, the subsidiary would face especially serious financial difficulties in the event one or more of the units were shut down, or failed to operate at significant levels, for a prolonged period.
- In the event of financial difficulties by the subsidiary, Edison cannot "bail out" the subsidiary, because both Edison's proposal and Illinois law, Ill.Rev.Stat. ch. 111 2/3, §§7-101 and 7-102, prohibit the regulated utility (Edison) from subsidizing the unregulated affiliate (the subsidiary), regardless of whether the subsidy funds are

obtained from ratepayers or shareholders. Although Edison may advance costs of operating the units, the subsidiary must reimburse Edison fully for those costs. If the subsidiary cannot do so, Edison may not subsidize the costs.

For the foregoing reasons, neither Edison nor its proposed subsidiary possesses the financial qualifications necessary to operate and maintain, backfit and decommission Braidwood units 1 and 2 safely and in accordance with the Atomic Energy Act, 10 U.S.C. §§2133(b) and 2232(a) and 10 CFR 50.33(f), 50.40(b) and 50.57(a)(4).