UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-237
COMMONWEALTH EDISON COMPANY	)	50-249
	)	50-254
(Dresden Station, Units 2 and 3, and Quad Cities Station, Units 1 and 2)	)	50-265

LOCAL PDR

STATE OF ILLINOIS RESPONSE TO NRC STAFF MOTION FOR RECONSIDERATION OF APRIL 19, 1979 MEMORANDUM AND ORDER...AND APPLICANT'S MOTION FOR RECONSIDERATION OR...CLARIFICATION AND REFERRAL.

On April 19, 1979 the Licensing Board convened in the above-captioned matter issued an ORDER FOLLOWING SPECIAL PREHEARING CONFERENCE in which it admitted into controversy in this proceeding certain contentions. On May 4, 1979 and May 7, 1979 the NRC Staff and Commonwealth Edison (Applicant) respectively issued motions for reconsideration and/or clarification and referral of Contentions 6 and 11 which were admitted by the Board's Order. The State of Illinois (Intervenor) opposes reconsideration or referral of the question to the Appeal Board and therefore moves the Licensing Board to deny the Staff and Applicant Motions.

RECONSIDERATION

Intervenor will not here dispute the Board's right to reconsider its April 19, 1979 Order, however such reconsideration is deemed inappropriate in this instance. The decision to admit

Contentions 6 and 11 under the rule of 10 C.F.R. §2.714 was based on the Board's determination that the contentions in question were relevant to the proceeding and satisfied the necessary elements of basis and specificity as required by the regulations. If the Board believes that the contentions require redefinition or rewording in order to become less "ambiguous", there are ample procedures available authorized by 10 C.F.R. §2.752, during which the Board may consider "simplification, clarification and specification of the issues".

Alternatively, should the Staff and Applicant maintain that there is no need for the Board to hear evidence regarding Contentions 6 and 11, they may properly move for summary disposition under 10 C.F.R., §2.749.

Additionally, discovery concerning the contentions in question may lead to resolution of certain of the issues prior to hearing; however a reconsideration which would eliminate the contentions in their present form from proceeding would unfairly deprive the Intervenor of its rightful discovery.

The Staff's argument that the Board's interpretations of certain NRC policies were erroneous and that a similar contention from another proceeding is better written for purposes of exploring sabotage questions is irrelevant to the decision to admit these contentions. That the Board chose to find against the Staff's position that Contentions 6 and 11 were challenges to NRC regulations is not grounds for reconsideration.

There is no viable claim for irreparable injury for failure to reconsider*, nor has the board been asked to assess any new information which might constitute the basis for re-examination of their original decision. See Public Service Company of New Hampshire (Seabrook Station (Units 1 and 2), ALAB-356, 4 NRC 525 (1976).

For all of the above stated reasons, Intervenor urges the Board to deny the motions for reconsideration and to apply the proper regulations which have been promulgated if clarification of Contentions 6 and 12 be deemed necessary.

CERTIFICATION AND REFERRAL

Standards for interlocutory review of Board orders are very clear. As a general rule, interlocutory appeals during a pending proceeding are not permitted. Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2) ALA-370, 5 NRC 131 (1977); Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3) ALAB-433 6 NRC (1977). 10 C.F.R. §2.720(f) allows such appeals only when, in the judgment of the presiding officer, "prompt decision is necessary to prevent detriment to the public interest or unusual

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*Applicant's claim that time lost in hearing constitutes irreparable injury is not credible. See discussion on a similar claim by the Appeal Board in Project Management Corp. (Clinch River Breeder Reactor Plant) ALAB-330, 3 NRC 613, 617-618).

delay or expense". Even where the presiding officer determines that certification may be had, the Appeal Board is obliged not to consider questions until the Licensing Board has been given a reasonable opportunity to decide the certified issue itself unless there is an emergency situation requiring an immediate final determination of the issue. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Unit 1) ALAB-297, 2 NRC 727 (1975).

Directed certification, although an available procedure under 10 C.F.R. §2.718 (i) "is to be resorted to only in 'exceptional circumstances'." Consumer Power Co. (Midland Plant, Units 1 and 2) ALAB-382, 5 NRC 603 (1977).

The Appeal Board in Public Service Co. of Indiana (Marble Hill Station) ALAB-405, 5 NRC 1190 (1977) stated the standards for certification.

> Almost without exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact, which, as a practical matter could not be alleviated by later appeal or (2) affected the basic proceeding in a pervasive or unusual manner. 5 NRC at 1192.

It is not sufficient for a party to show merely that the Licensing Board ruling sought to be certified is at variance with rulings of other boards, unless some special circumstances makes immediate elimination of the decisional conflict imperative. Public Service Co. of New Hampshire, (Seabrook Station, Units 1 and 2) ALAB-271, 1 NRC 478 (1975).

Most important for the instant motion, the Appeal Board does not favor certification on the issue of whether a contention should have been admitted. Puerto Rico Water Resources Authority, (North Coast Nuclear Plant, Unit 1), ALAB-286, 2 NRC 213 (1975). The Appeal Board has ruled that where a licensing board ruling admitting a contention is not clearly on a "collission course" with governing legal principles, certification may be denied. Project Management Corp.,(Clinch River Breeder Reactor Plant), ALAB-326, 3 NRC 406 (citing Ecology Action . A.E.C., 492 F 2d. 998, 1001-2 (2d Cir. 1974); reconsideration denied, ALAB-330, 6 NRC 613; reversed in part on other grounds CLI-76-13, 4 NRC 67 (1976).

As to direct certification to the Commission as suggested by Applicant, (Applicant's Brief at 9, f.n. 8), the standards are no less stringent than those required for certification to the Appeal Board. And in an area such as determination of contentions it is especially inappropriate, for although the Commission can supplant the Licensing Board as the fact finder, it may do so only in the most extraordinary cases. Washington Public Power Supply System, (WPPSS Nuclear Project Nos. 3 and 5) CLI-77-11, 5 NRC 719, 722 (1977).

Given the standards outlined above the Board is obliged to deny the Applicant's motion to refer the question of Contentions 6 and 11 to the Appeal Board. It is an inappropriate question for appeal; there is no threat to the public interest; no special

circumstance or emergency situation mandates an immediate decision; failure to make an immediate judgment will prejudice no one as there is no imminent threat of irreparable harm to any of the parties; the presence of these contentions will not unduly skew the proceeding in a pervasive or unusual manner; and testimony on these subjects will not be so labored and overbearing as to cause unnecessary delay. Particularly because there still exist within the procedures of the Commission ample means by which the contentions can be refined and restricted, the notion that inclusion of these contentions in this proceeding constitutes "irreparable harm" is clearly absurd.

As to the argument that the contentions should be referred to the Commission as challenges under 10 C.F.P. §2.758(d), the Board has considered that proposal and rejected it. The Board's decision was not erroneous. By the Staff's own admission other Boards have allowed similar contentions; therefore concern with sabotage does not of itself constitute a challenge to the NRC regulatory scheme.

The necessary conclusion is that this Board in fulfilling its obligations under law must deny the Applicant's motions to certify and refer the questions at hand to either the Appeal Board or to the Commission.

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RESPECTFULLY SUBMITTED,

SUSAN N. SEKULER
Assistant Attorney General
Environmental Control Division