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April 29, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

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

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APPLICANT'S OBJECTIONS TO BOARD ORDER

Pursuant to Section 2.751a(d) of the Commission's regulations, Commonwealth Edison Company ("Applicant") hereby files objections to the Special Prehearing Conference Order issued by the Atomic Safety and Licensing Board on April 17, 1985. By Order of April 22, 1985, the Licensing Board granted Applicant an extension of time, until April 29, 1985, within which to file these objections. Applicant moves the Licensing Board to reconsider its determination to admit Neiner Contention 4 as an issue in this proceeding and its determination to allow Intervenors Rorem et al. to submit an amended quality assurance contention by May 20, 1985.

NEINER CONTENTION 4

Neiner Contention 4 states:

> Intervenors contend that the proximity of the Illinois Central Railroad to the plant site and the use of the rail system to transport explosive materials from the Joliet, Illinois arsenal and other plants or depositories creates an unacceptably hazardous condition not considered by the Atomic Safety and Licensing Board, which issued the partial initial decision on environmental and site suitability matters for the Braidwood Station (LBP-75-1, 8 AEC 1197 (January, 1975)).

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At the construction permit stage the analysis of the probability of an explosion was inadequate in that:

a) the six-month period during 1974 for which the traffic from the Joliet arsenal was analyzed is not representative of other traffic periods in the past and may not be representative of the traffic to be expected in the future.

b) the analysis of the traffic was based on peacetime traffic only.

c) only the probability of accidental or inadvertent explosions were assessed and the probability of sabotage or purposefully caused explosions were not explored.

The Licensing Board rejected the arguments of the Applicant and the Staff that this contention should be barred because it was litigated in the Construction Permit proceeding. Applicant does not now challenge that determination. However, it has become clear to Applicant that the entire contention was erroneously admitted as an issue in the Construction Permit proceeding because it constitutes an impermissible challenge to the Commission's regulations. Therefore, regardless of the Board's consideration of the issue in the prior proceeding, it is barred from consideration in this Operating License proceeding. Applicant requests that the Licensing Board reconsider its decision on that basis.

Section 50.13 of the Commission's regulations, 10 CFR § 50.13, provides as follows:

> An applicant for a license to construct and operate a production or utilization facility, or for an amendment to such license, is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility

> by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

This regulation bars the entire contention, because the postulated accident, whether accidental or caused by an act of sabotage, would stem from the deployment of weapons incident to U.S. defense activities. In addition, subparagraph (c) of the contention is barred because it postulates an act of sabotage directed against the Braidwood facility.

The portion of Section 50.13 dealing with deployment of American weapons has been addressed in two licensing board decisions, which make clear that the regulation bars consideration of Neiner Contention 4 in this proceeding. In Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423 (1982), the Licensing Board rejected a contention postulating an accidental explosion of an American nuclear device. The Board found that any such event would involve the deployment of weapons by the United States. "Hence, that risk is explicitly barred by 10 CFR § 50.13." 15 NRC at 1500. In Cleveland Electric Illuminating Co., (Perry Nuclear Power Plant, Units 1 & 2), 14 NRC 842 (1981), the Licensing Board similarly rejected a contention postulating an American missile silo accident, noting that it was "explicitly barred from consideration by § 50.13" because it flowed from the deployment of weapons by the United States. 14 NRC at 845. Neiner subcontentions 4(a) and 4(b) postulates an accidental explosion of munitions

being shipped to or from a federal arsenal. Neiner subcontention 4(c) postulates an act of sabotage causing such an explosion. It seems clear that in either case such munitions are weapons and that their shipment by rail to or from the arsenal is an initial stage of their deployment incident to U.S. defense activities. Hence, consideration of this contention is barred by the regulation.

Subparagraph 4(c) is barred for the additional reason that it postulates an act of sabotage, which may not be considered under the regulation. The statement of basis and purpose published by the Commission when it promulgated the regulation indicates that protection against the threat of sabotage is not the responsibility of a licensee and that the Commission does not inquire into such questions:

> The protection of the United States against hostile enemy acts is a responsibility of the Nation's defense establishment and of the various agencies having internal security functions. The power reactors which the Commission licenses are, of course, equipped with numerous features intended to assure the safety of plant employees and the public. The massive containment and other procedures and systems for a rapid shutdown of the facility included in these features could serve a useful purpose in protection against the effects of enemy attacks and destructive acts, although that is not their specific purpose. One factor underlying the Commission's practice in this connection has been a recognition that reactor design features to protect against the full range of the modern arsenal of weapons are simply not practicable and that the defense and internal security capabilities of this country constitute, of necessity, the basic "safeguards" as respects possible hostile acts by an enemy of the United States.

32 Fed. Reg. 13445 (Sept. 26, 1967). This regulation was sustained by the District of Columbia Circuit in Siegel v. Atomic Energy Commission, 400 F.2d 778 (1968). The court found that the Commission's decision to refrain from inquiry into these matters was consistent with the Congressional concerns embodied in the Atomic Energy Act in the phrases "the common defense and security" and "the public health and safety." 400 F.2d at 784.

There are two possible arguments that the postulated act of sabotage is not one contemplated by the regulation, but substantial NRC case law shows them to be invalid. First, it could be argued that the act of sabotage postulated here need not be carried out by an enemy of the United States. Second, it could be argued that an act of sabotage against the railroad need not be directed "against the facility", but could nonetheless damage it. Similar arguments, however, have been consistently rejected in the NRC case law.

In Consolidated Edison Co. (Indian Point Station, Unit No. 2), ALAB-202, 7 AEC 825 (1974), the Appeal Board held that Section 50.13 barred a contention that postulated attacks and destructive acts by a trained band of saboteurs which was not "an enemy of the United States." The Board reasoned that:

> ...it would appear that the rationale of the Commission's approach (in 10 CFR § 50.13) in not requiring an applicant to protect against the

> effects of enemy attacks and destructive acts would also apply to an armed band of trained saboteurs. As in the case of defending against the threat of an attack by an enemy of the United States, it seems that an applicant should be entitled to rely on settled and traditional governmental assistance in handling an attack by an armed band of trained saboteurs. Without such reliance, each facility could indeed become an armed camp.

7 AEC at 830. See also Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit No. 1), ALAB-400, 5 NRC 1175, 1234 (1977).[1/] In any case, an act of sabotage against a federal munitions train would necessarily be performed by "an enemy of the United States," even if its ultimate objective was to damage the Braidwood facility.

The scope of the phrase "directed against a facility" was explained by the Licensing Board in Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), 14 NRC 842 (1981). There intervenors attempted to introduce a contention regarding the disruptive effect on plant operation of electromagnetic pulses (EMPs) resulting from detonation of a nuclear device. Intervenors argued that this contention was not barred by Section 50.13 because an explosion at 200 miles above ground level caused by an attack on Canada or

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1/ By contrast with Section 50.13, which deals with design features of the facility, a contention postulating an act of sabotage against the plant itself may put in issue the adequacy of Applicant's security plan under Part 73 of the Commission's regulations. It is clear, however, that the present contention, postulating an act of sabotage against the railroad, does not raise questions about the Braidwood security plan.

Mexico would not be "directed against the facility by an enemy of the United States" but would cause the plant serious disruption. The Board rejected this subjective test requiring it to "inquire into the mind of the attacker and decide whether the act was intentional or merely incidental to some other purpose." 14 NRC at 844. The Board held that the act of detonating a nuclear device was "directed against the facility" if damage to the facility was a reasonably foreseeable result of the act. Id. See also Washington Public Power Supply System (WPPSS Nuclear Project No. 1), LBP-83-66, 18 NRC 780 (1983).

It is clear, therefore, that the act of sabotage postulated in Neiner subcontention 4(c), no matter who it is performed by and whether its ultimate object is the munitions train or the Braidwood facility, is barred from consideration as an issue in this proceeding by Section 50.13.

Applicant acknowledges that it should have raised this objection at an earlier stage in the proceedings. Applicant submits, however, that the Board should not find that it has waived this objection, which goes to the Board's jurisdiction to admit the contention as an issue in this proceeding. The cases cited and numerous others have held that such a contention constitutes an impermissible attack on the Commission's regulations. See, e.g., Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), LBP-82-16, 15 NRC 566 (1982) (EMP contention on impermissible challenge to Commission regulation 10 CFR § 50.13).

Such challenges are prohibited by Section 2.758 of the Commission's regulations, which provides that any rule or regulation of the Commission "shall not be subject to attack...in any adjudicatory proceeding involving initial licensing subject to this subpart..." (Emphasis added). The only exception to this prohibition is a provision allowing a party to petition for a waiver of the regulation on the ground that special circumstances are such that application of the regulation would not serve the purposes for which it was adopted. Even if the Licensing Board determines that such a petition makes a prima facie showing, it does not have jurisdiction to admit the contention. Rather it must certify the matter directly to the Commission. 10 CFR § 2.758(d).

Unlike some other objections, which may be waived by failure to assert them in a timely fashion, objections to the Board's jurisdiction should always be entertained, because if they are valid, the Board lacks the power to render a decision on the merits. The Federal Rules of Civil Procedure provide that whenever it appears, by suggestion of the parties or otherwise, that the court lacks jurisdiction over the subject matter, it shall dismiss the action. F.R.C.P. 12(h). In any case, the litigation of this issue is still in its preliminary stages, and Intervenors have not yet engaged in discovery. Any inconvenience to the parties should therefore be de minimis. Applicant regrets any inconvenience

it may have caused the Licensing Board in issuing its Order.

ROREM CONTENTION ON QUALITY ASSURANCE ISSUES

Applicant also asks the Licensing Board to reconsider its decision to allow Intervenors Rorem et al. to resubmit what the Board finds to be a defective quality assurance contention after obtaining discovery against the NRC Staff. Although the Licensing Board does not use the term, this resolution is no different from the conditional admission of the contention, which the Licensing Board recognizes is prohibited by the decision of the Appeal Board in Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460 (1982).

The QA contention was late-filed, and the Licensing Board therefore engages in a lengthy analysis of the five factors governing the admission of untimely contentions set forth at 10 CFR § 2.714(a)(1). The Board's discussion recognizes that provided the contention otherwise meets the basis and specificity requirements of Section 2.714, balancing of the five factors will determine whether it should properly be admitted as an issue in the proceeding. The Board discusses the five factors seriatim, but never engages in the final balancing to determine whether, overall, the factors weigh in favor of admission or exclusion of the contention. More importantly, the entire discussion of the five factors is

immaterial because the Board expressly determines that the late-filed QA contention lacks the specificity requisite for the admission even of a timely contention: "The contention's language is so broad and the lack of specificity so damaging that it cannot be admitted under traditional contention-admissibility criteria." Order at 41.

On this basis the Board states that it is "in effect" rejecting the Contention (Id.), but in fact it does nothing of the sort. What the Board does instead is to "accomodate Intervenors' need to provide specificity to develop what we believe may become an important part of the record, by permitting Intervenors to depose Mr. Keppler before submitting an amended contention." Order at 38. Thus the Licensing Board has not rejected the contention which it finds fatally defective. What it has done, "in effect," is to admit Intervenors' QA contention conditionally, subject to later specification upon receipt of additional information. There is no substantive difference between the conditional acceptance of a QA contention, an action proscribed by Catawba, and the "rejection" of such a contention with the right to replead after additional discovery. Under Section 2.740(b)(1) of the Commission's regulations, discovery is only available after a contention is admitted. Thus the Board's grant of discovery rights is necessarily predicated on conditional admission of the contention.

Despite the clear prohibition of Catawba, the Licensing Board would allow Intervenors to amend their QA contention in accordance with designated requirements because of "the Board's cognizance of the important function served by an adequate QA/QC program within the safety context" of the Commission's regulatory program. Order at 41. Applicant does not quarrel with this statement of policy in the context of the Commission's overall regulatory responsibilities. However, the Commissioners and their technical and enforcement staffs are charged with this responsibility. The Licensing Board's responsibility is limited to deciding issues in controversy among litigants,[2/] and as Catawba makes clear, licensing boards are to apply the Commission's rules governing the admission of contentions vigorously. Policy considerations cannot serve to overrule that mandate.

The Board, of course, can in an appropriate case exercise its sua sponte powers to inquire into a matter. It is clear from the Board's order that it found a basis for concern in the testimony of Mr. Keppler referred to by Intervenors. The Board explains that because Mr. Keppler is a high NRC official having specific regulatory responsibility for the QA programs at Applicant's nuclear facilities, it

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2/ See 10 CFR § 2.104(c); Notice of Opportunity for Hearing (Braidwood Station Operating License), 43 Fed. Reg. 58659-60, December 5, 1978.

finds reason for concern in his testimony. The Board notes that had Intervenors not included this testimony as part of the basis for their QA contention, the Board would have itself obtained detailed information from the Staff about Mr. Keppler's testimony. The Board states: "Our efforts to gain a more complete understanding of Mr. Keppler's statements would have enabled us to determine if the facts and data undergirding his comments merited our raising a QA/QC issue on a sua sponte basis at an evidentiary hearing." Order at 37. Applicant does not question the Licensing Board's authority to obtain further information from the Staff on this point. Moreover, should the information thus obtained warrant it, the Board could admit a proper QA contention as an issue in the proceeding sua sponte on notice to the Commissioners. 10 CFR § 2.760a; Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981). However, the Board is without authority to use Intervenors as its surrogate to conduct an inquiry preliminary to deciding whether it should exercise its sua sponte powers. All the more, the Board is without authority to use Intervenors as a surrogate to conduct such an inquiry and then permit them to amend their contention, rather than exercising its sua sponte powers at all.

CONCLUSION

For these reasons, Applicant moves the Licensing Board to reconsider its Special Prehearing Conference Order to determine that Neiner Contention 4 is inadmissable as a challenge to the Commission's regulations and to vacate its Order of April 17 insofar as it permits the taking of depositions by Intervenors of Mr. Keppler and others and permits Intervenors the opportunity to replead its late-filed QA contention, and to dismiss Intervenors QA contention with finality.

In addition, should the Licensing Board rule adversely to Applicant on the QA contention issue raised herein, Applicant requests that the Licensing Board refer the ruling promptly to the Commission under Section 2.730(f) of the Commission's regulations. Applicant submits that prompt decision would be necessary to prevent detriment to the public interest because the Licensing Board's decision would contravene the efficacy of the Commission's regulations as interpreted by Catawba.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of APPLICANT'S OBJECTIONS TO BOARD ORDER were served on the persons listed below and identified with an asterisk by Federal Express, except Mr. Cassel was served by hand delivery, and the remaining persons listed below by deposit in the United States mail, first-class postage prepaid, this 29th day of April, 1985.

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