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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

DOCKETED
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In the Matter of
COMMONWEALTH EDISON COMPANY
(Braidwood Nuclear Power Station
Units 1 and 2)

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Docket Nos. 50-456^{OL}
50-457

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NRC STAFF RESPONSE TO APPLICANT'S MOTION
FOR DIRECTED CERTIFICATION

Janice E. Moore
Counsel for NRC Staff

July 23, 1985

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NRC STAFF RESPONSE TO APPLICANT'S MOTION FOR
DIRECTED CERTIFICATION

I. INTRODUCTION

On July 8, 1985, Commonwealth Edison Company (Applicant) filed a motion with the Atomic Safety and Licensing Appeal Board (Appeal Board) requesting that the Appeal Board direct certification of certain procedures employed by the Atomic Safety and Licensing Board (Licensing Board) in the admission of a quality assurance contention filed by Intervenors Bridget Little Rorem, et al. (Intervenors). "Motion for Directed Certification" at 1, (July 8, 1985) [hereinafter Motion]. In its Motion Applicant seeks certification of the question of whether the Rules of Practice sanction a Licensing Board permitting an intervenor to obtain discovery on a contention, which the Board has found deficient, under guidelines and a schedule set by the Board and to resubmit an amended contention. Motion at 1-2. The Staff of the Nuclear Regulatory Commission (Staff) supports Applicant's Motion on the ground that the issue requested to be certified is appropriate for appellate review at this time. Applicant has also requested that the Licensing Board's Order of June 21, 1985 be vacated, that Intervenors' quality assurance contention be

dismissed, and that the deposition obtained by Intervenor be stricken from the record. Motion at 2. The Staff supports Applicant's request for relief on the ground that the Licensing Board's course of action is inconsistent with the Commission's regulations.

II. BACKGROUND

On March 7, 1985, Intervenor moved the Licensing Board to admit a late-filed contention challenging the overall adequacy of the construction quality assurance and quality control (QA) programs at the Braidwood Nuclear Station. "Motion For Leave To File Additional Contention". Both the Applicant and the Staff opposed the admission of the contention on the grounds that the contention lacked the basis and specificity required by 10 C.F.R. § 2.714(b) of the Commission's regulations, and that a balancing of the five factors of 10 C.F.R. § 2.714(a) governing the admission of late-filed contentions weighed against the contention's admission. "Commonwealth Edison Company's Answer To Intervenor's Motion For Leave To File Additional Contention" (March 25, 1985); "NRC Staff Response To Bridget Little Rorem, Et Al. Motion For Leave To File Additional Contention" (April 1, 1985). The Licensing Board in its Special Prehearing Conference Order found that the contention as submitted lacked the specificity required even for the admission of a timely contention. "Special Prehearing Conference Order" at 24 (April 17, 1985) [hereinafter SPCO].

The Licensing Board went on to find, however, that Intervenor should be given an opportunity to file an amended contention and adopted extraordinary procedures for the resubmittal of a QA contention. On the

one hand the Board imposed a very high threshold of specificity for the resubmitted contention; ^{1/} then in order to satisfy this very stringent standard for specificity, the Licensing Board permitted Intervenors to depose Mr. James G. Keppler, Regional Administrator of NRC Region III and possibly other members of the Staff before submitting an amended contention. Id. at 38-39. The Board cited as its reason for this course of action the importance of quality assurance to safety, and the unavailability of other means for Intervenors to obtain direct information about the Staff's concerns. Id. The Board also pointed out that it could gain information from the Regional Administrator in order to determine whether the Board should raise a sua sponte issue. SPCO at 37.

Both the Applicant and the Staff moved the Licensing Board for reconsideration of its rulings concerning the procedures developed by the Board to allow Intervenors to amend their contention. "Applicant's Objections To Board Order" (April 29, 1985) [hereinafter Applicant's Objections]; "NRC Staff's Objections To and Motion for Reconsideration of Licensing Board Special Prehearing Conference Order" Dated April 17, 1985 LBP-85-11 (May 6, 1985) [hereinafter Staff's Objections]. Applicant

^{1/} "[W]e require Intervenors to provide much greater specification for their contention if they chose to submit an amended petition. . . . [T]hey must submit a highly detailed petition tailoring their allegation and the underlying data. . . . SPCO at 32. Intervenors' amended contention must set out the exact basis for each allegation asserted. At a minimum this includes a precise specification of each occurrence of an alleged QA/QC deficiency, the data on which each alleged deficiency is premised . . . , the particular overall unacceptable pattern(s) purported to exist when the allegedly related individual incidents are aggregated and an explanation of why each specified deficiency supports the overall unacceptable pattern under which it has been grouped." Id. at 41.

argued, among other things, that the Licensing Board's action was tantamount to the conditional admission of a contention, a course of action prohibited by the Appeal Board. Duke Power Company (Catawba Nuclear Power Station, Units 1 and 2) ALAB-687, 16 NRC 460 (1982); Applicant's Objections at 9. The Staff also argued that the Licensing Board's action was inconsistent with the Commission's regulations. Staff's Objections at 6-8. Both Applicant and the Staff pointed out that the Licensing Board could have raised the quality assurance issue as a sua sponte issue, but that it was inappropriate for the Board to use Intervenor as its surrogate in gathering information to determine if it wished to do so. Applicant's Objections at 11-12; Staff's Objections at 8. Finally, Applicant sought referral of the Licensing Board's ruling to the Appeal Board pursuant to 10 C.F.R. § 2.730(f). Applicant's Objections at 13.

On May 20, 1985, Intervenor deposed James G. Keppler and Robert F. Warnick, Branch Chief, Reactor Projects and Branch I, Region III on the subject of QA/QC at Braidwood. ^{2/} Tr. 1-245. A follow-up telephone deposition on May 23, 1985 afforded Applicant's counsel an opportunity to question Mr. Keppler on his responses in the May 20, 1985 deposition. Tr. 246-296.

^{2/} In response to Intervenor's request, the Staff made James Keppler, Administrator, NRC Region III available for deposition. Intervenor identified a list of headquarters, Region I, Region III and contractor personnel for possible deposition with Mr. Keppler. In response to this further request, the Staff determined to make available Robert F. Warnick, the Branch Chief from Region III who

On May 24, 1985, Intervenor submitted an amended quality assurance contention. "Motion To Admit Amended Quality Assurance Contention" (May 24, 1985). Both Applicant and the Staff opposed the amended contention asserting that the contention lacks the necessary basis and specificity and that there was no pattern to be construed from Intervenor's list of deficiencies as required by the Licensing Board's SPCO. "Applicant's Response In Opposition To Intervenor's Motion To Admit Amended Quality Assurance Contention" (June 7, 1985) [hereinafter Applicants Response]; "NRC Staff Response To Bridget Little Rorem, Et Al. Motion To Admit Quality Assurance Contention" (June 7, 1985) [hereinafter Staff Response]. They also argued that the five factors weighed against the admission of the amended contention. Applicants Response at 44; Staff Response at 5.

On June 21, 1985, the Licensing Board ruled on Applicant's and Staff's objections to the Special Prehearing Conference Order, and on the admissibility of the amended contention. "Memorandum and Order Admitting Rorem Et Al. Amended Quality Assurance Contention" (June 21, 1985) [Order]. The Licensing Board found no basis to change either the reasoning or the conclusions set forth in its Special Prehearing Conference Order. Order at 2. The Board explained first that its ruling was not tantamount to a conditional admission of the contention, since it

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

supervised the Braidwood inspection program from March 18, 1984 to April 1, 1985. Mr. Warnick supervised all the Region III personnel identified by Intervenor.

had rejected the contention in the SPCO. Order at 3-4. In addition, the Board set forth its view that its action was supported by 10 C.F.R. § 2.714(a)(3) of the Commission's Regulations. Order at 5. Finally, the Board expressed its view that inherent in its duty to conduct a fair hearing

"...[m]ust lie the power to exercise the discretion to permit amendments to defective initial pleadings when the ends of justice or, as in this case, the integrity of the hearing process and reasonable assurance of the health and safety of the public would be better served by doing so. Order at 6.

With respect to Intervenor's amended contention, the Licensing Board found that, with the exception of paragraph 2, it met the basis and specificity requirements of 10 C.F.R. § 2.714(b), and that the late-filed contention criteria have been satisfied. Order at 2, 25. ^{3/} It is against this background that Applicant has filed its Motion for Directed Certification. For the reasons set forth below the Staff contends that Applicant's arguments are well founded and that directed certification should be granted, the depositions of Mr. Keppler and Mr. Warnick should

^{3/} Subparts A and B of Paragraph 2 were rejected by the Board as lacking specificity. Ruling on Subpart C of Paragraph 2 was deferred. The Licensing Board gave Intervenor an opportunity to provide further specification of Paragraph 2C by requiring them to file a list of their witnesses on this Subpart of the contention by July 12, 1985. Order at 13-14. Intervenor has made two filings in accordance with the Board's directive, and the Applicant has responded. "Motion To Admit Claims Of Intimidation And Harassment Of Comstock Quality Control (QC) Inspectors And Motion For Protective Order", July 13, 1985; Supplemental Filing, July 17, 1985 "Applicant's Opposition To Admission Of Intimidation And Harassment Issues", July 18, 1985. This part of the contention is expected to be discussed at the Pre-hearing Conference on July 23, 1985. The Staff will inform the Appeal Board of any actions taken by the Licensing Board with respect to paragraph 2C.

be stricken from the record, and the Licensing Board should be directed to dismiss the quality assurance contention.

III. DISCUSSION

A. Standards for Directed Certification

The Commission's regulations grant the Appeal Board the authority to direct the certification of questions initially raised before the Licensing Board. 10 C.F.R. § 2.718(1); 10 C.F.R. § 2.785(d). The Appeal Board has noted that this authority is to be exercised only in exceptional cases. Consumers Power Company (Midland Plant, Units 1 and 2), ALAB- 382, 5 NRC 603 (1977). The Appeal Board has asserted that it will grant directed certification sparingly. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-514, 8 NRC 697, 698 (1978). Since the grant of directed certification results in the interlocutory review of Licensing Board rulings, it is disfavored and thus will be undertaken only in the most compelling circumstances. Arizona Public Service Company (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 (1983).

In determining when directed certification should be granted, the Appeal Board long ago determined that it would engage in interlocutory review ". . . [w]here 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 structure of the proceeding in a pervasive or unusual manner." Public Service Company of Indiana (Marble Hill Nuclear Generating Station) ALAB-405 5 NRC 1190, 1192 (1977). The Appeal Board

has determined that where the question of which review is sought concerns the admission or rejection of a contention by the Licensing Board, the Appeal Board will be reluctant to interject itself. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988 (1984); Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371 (1982); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (1982); Project Management Corporation, et al. (Clinch River Breeder Reactor Plant) ALAB 330, 3 NRC 613 (1976). It has also been determined that rulings admitting contentions which should have been rejected have a low potential for meeting the Marble Hill standards. Catawba, Supra, ALAB-687 16 NRC at 464.

Nevertheless, the Appeal Board is not reluctant to direct certification in appropriate circumstances. It is instructive to examine those instances where interlocutory review has been granted. The Appeal Board has granted certification of legal questions of generic applicability which, as a practical matter, will escape appellate scrutiny. Catawba, supra ALAB-687, 16 NRC at 465. The Appeal Board also recognized that interlocutory review could be appropriate in circumstances where a Licensing Board's actions seemed to be on ". . .[a] collision course with governing legal principles." Clinch River, supra, 3 NRC at 617. See, United States Energy Research And Development Administration Project Management Corporation Tennessee Valley Authority (Clinch River Breeder Reactor Plant) CLI-76-13, 4 NRC 67, 75 (1976). The Appeal Board has also noted that it might be appropriate to interject itself into the licensing process where the Licensing Board engaged in a course of action which the Appeal Board considered highly unusual and even unprecedented. South

Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1) ALAB-663, 14 NRC 1140, 1162 (1981). As discussed below, the issue in question here is a legal issue of importance which has potential applicability to other proceedings, the Licensing Board appears to be on a "collision course" with governing legal principles and is engaged in a course of action which is highly unusual, and which has not been brought squarely before the Appeal Board. Therefore, this issue is an appropriate issue for interlocutory review.

B. Applicant Has Demonstrated That The Question Which Is The Subject Of The Request For Directed Certification Is Appropriate For Appellate Review

In its Motion Applicant puts forth a number of arguments in support of its position. Motion at 12. Applicant's first argument is that the course of action taken by the Licensing Board in this proceeding has a pervasive or unusual effect on this proceeding. Motion at 12-14. The Staff agrees.

In this proceeding the Licensing Board, while paying lip service to the traditional criteria for admitting a contention has, in fact, departed from these criteria. In fact, when faced with a contention that lacked the requisite specificity, the Licensing Board fashioned an extraordinary procedure in order to aid Intervenors in obtaining that specificity. See SPCO at 38-42. As part of that procedure, the Licensing Board allowed Intervenors to depose high-ranking NRC officials. A review of Intervenors' amended contention demonstrates that, except for a portion of paragraph 2 relating to harassment and intimidation, the basis and specificity provided for their amended quality assurance

contention came from documents available to them in the public domain before they filed their original contention. It appears, therefore, that Intervenor first began to utilize the data from publicly available NRC inspection reports to particularize their concerns in their preparation to depose Messrs. Keppler and Warnick. By developing the extraordinary procedures in its SPCO; the Licensing Board allowed Intervenor to shirk their burden to uncover all publically available information diligently, and to apply that information to the prompt formulation of contentions admissible pursuant to 10 C.F.R. § 2.714 of the Commission regulations in the first instance ^{4/} and still be able to engage in discovery and resubmit an amended contention on a quality assurance issue. Such action by the Licensing Board already has had and will continue to have a pervasive and unusual effect on this proceeding. The Licensing Board's action has resulted in the substantial unanticipated commitment of Staff resources to the litigation of an issue which would, but for the Board's action, have been dealt with in the normal course of the Staff's inspection process. The Staff does not deny that there have been QA problems at Braidwood. In fact these problems were identified in NRC inspection reports and caused NRC officials in Region III to require the Applicant to develop and implement corrective actions with regard to the QA problems. Litigation of the amended contention will require a substantial commitment of Staff resources for hearings on the past inspection efforts of

^{4/} Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2) CLI-83-19, 17 NRC 1041, 1048 (1983).

the NRC Staff. ^{5/} These Staff resources could be used more productively in monitoring Applicant's ongoing corrective actions. The Licensing Board's actions in this proceeding appear to be motivated by its view that potential QA/QC problems present serious concerns that could bear heavily on the issuance of a license to operate a nuclear facility. The Staff shares these views. However, as discussed below, the Licensing Board could have pursued its concerns pursuant to its sua sponte authority in accordance with Commission regulations. Rather than pursue such course of action, the Licensing Board chose to fashion the extraordinary procedures in its order of April 17, 1985. Ibid. The Staff agrees with Applicant that the course of action taken by the Licensing Board is as much of a departure from traditional Commission practice as the situation presented in Summer, supra. ^{6/}

The Applicant next argues that this issue is one which has generic implications. Motion at 12. The Staff also agrees with Applicant on this point. The basic issue here is whether a Licensing Board may

^{5/} For example, when directed by the Licensing Board to list the witnesses they intend to call to prove their claims, the Intervenor's listed as their only named witnesses eight NRC regional employees including Mr. Keppler, Regional Administrator, and an unquantified number of Construction Assessment Team (CAT) members. See "Witnesses To Be Called By Intervenor's Rorem Et Al." (July 12, 1985).

^{6/} In Summer, the Licensing Board stated that it wished to hire its own independent seismic experts without finding the Applicant's and Staff's testimony to be inadequate, and giving them an opportunity to correct any inadequacies perceived by the Licensing Board. Summer, Supra, ALAB-663, 14 NRC 1140, 1142-1143.

purport to reject a contention and yet allow an Intervenor to conduct discovery and submit the contention again for Board consideration under guidance and on a schedule set forth by the Board. The admission of contentions is a task faced by every Licensing Board which involves a strong element of judgement on the part of the Board as to the specificity of a given contention. Such a method as that employed by the Licensing Board in this proceeding is one which could be used by any Licensing Board. In fact, other Licensing Boards have considered admitting contentions conditionally and allowing their specification after discovery. Catawba, supra, ALAB-687, 16 NRC at 463. In Catawba the Appeal Board found this conditional admission to be impermissible. Catawba, supra, 16 NRC at 468. Therefore, it is important for the Appeal Board to expressly address and resolve the question of whether such a course of action is permissible in Commission practice. It is also very likely that if the Appeal Board does not accept review of this issue at this time, it will not come under Appeal Board scrutiny, the issue would be, for all practical purposes, mooted by litigation of the contention.

The Staff also agrees with Applicant's argument that the Licensing Board appears to be taking steps which are inconsistent with the governing legal principles set forth in the Commission's regulations and case law. See, Motion at 14-16. As Applicant points out, the Licensing Board's action, despite its view to the contrary, is tantamount to the conditional admission of a contention to be fleshed out by discovery. Such an action is, as discussed above, specifically prohibited by Catawba.

The Licensing Board in its decision to admit the amended contention states that Catawba is inapplicable because the Board clearly rejected

the original contention. Order of June 21, 1985 at 4. The Licensing Board seemed to rely for its view on the fact that it would evaluate the amended contention, if it were submitted, anew for basis and specificity. However, it should be noted that the Licensing Board did not conduct a final balancing of the five factors in rejecting the original contention, but noted that it would consider a list of witnesses useful in helping to weigh the third factor when the amended contention was considered. SPCO at 43. The Licensing Board's actions do not appear consistent with its words, and one must conclude that it is the effect of what the Board has done which must be controlling here. The practical effect of the Licensing Board's actions is no different than that proscribed in Catawba. Thus, interlocutory review is both necessary and appropriate in the present proceeding to insure that the actions of the Licensing Board are conformed to the Appeal Board's ruling in Catawba.

The Licensing Board's action also appears to be inconsistent with § 2.740(b)(1) of the Commission's regulations concerning discovery. The regulation states that in an Operating License Proceeding, discovery is limited to the matters in controversy. If the original contention was rejected, there could be no discovery on quality assurance matters under this section of the regulations. An Appeal Board ruling on whether the Licensing Board's action is inconsistent with this section of the regulations would be important to the Licensing Board's conduct of this proceeding.

Finally, the Applicant argues, and the Staff agrees that the Licensing Board has abused the discretion given to it under the Commission's regulations in this matter. The regulations set out the

standards against which a Licensing Board must evaluate each contention contained in a petitioner's supplement to its petition to intervene. 10 C.F.R. § 2.714(b). The regulations also set forth the standards governing late-filed contentions. 10 C.F.R. § 2.714(a)(i-v) of the regulations also limit what matters may be decided by a Licensing Board in an Operating License Proceeding. Unlike a Construction Permit Proceeding, the Licensing Board is limited to deciding the matters in controversy. Matters are placed into controversy by the admission of contentions which meet the requirements of 10 C.F.R. § 2.714(b) and, if filed late, the requirements of § 2.714(a)(i-v). The regulations do not provide the Licensing Board with a mechanism for aiding intervenors in the development of adequate contentions to become matters in controversy.

The Licensing Board does have authority to influence the issues to be litigated in an Operating License Proceeding through raising sua sponte issues. 10 C.F.R. § 2.760(A). This regulation states in pertinent part:

" . . . Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists. "

Such action is to be taken by the Licensing Board, and not by Intervenors acting in lieu of the Licensing Board. The Staff does not dispute the Licensing Board's authority to raise quality assurance as an issue in this proceeding, if it believes the facts warrant the exploration of such an issue, and to notify the Commission of that intention. "Memorandum, Chilk to Rosenthal, Cotter and Bickwit, Raising of Issues Sua Sponte in Adjudicatory Proceedings", dated June 30, 1981.

The Licensing Board in overruling the Staff's and Applicant's objections to its Special Prehearing Conference Order relies on 10 C.F.R. § 2.714(a)(3) of the Commission's regulations, and on its inherent authority to conduct fair hearings, regulate them, and to serve the integrity of the hearing process and the health and safety of the public. Order at 6. It is difficult to ascertain from the Licensing Board's ruling in what way the Licensing Board's actions relate to the integrity of the hearing process. If the Licensing Board has public health and safety concerns, the method for the Board to ensure that they are explored is through the gathering of facts on its own and, if appropriate, through the raising of a sua sponte issue. The Staff agrees with Applicant that 10 C.F.R. § 2.714(a)(3) does not provide the Licensing Board with the discretion to aid Intervenors in amending their contentions. It provides a vehicle for reviewing Intervenors' affirmative attempts to amend their petitions for leave to intervene. Therefore, the Staff does not believe that this section of the regulations is applicable.

In summary, the Staff believes that the question posed by the Applicant is appropriate for interlocutory review and should be decided in Applicant's favor. The issue is one which has a pervasive effect on the structure of this proceeding, requires an interpretation of the Commission's regulations, and is of generic importance.

C. The Relief Sought By Applicant Is Appropriate

Applicant has requested that the Appeal Board strike the deposition of Messrs Warnick and Keppler from the record, vacate the Licensing

Board's Order admitting the amended contention, and direct the Licensing Board to dismiss the contention. Motion at 20. Since it is the Staff's position that the Licensing Board abused its discretion in allowing discovery for the purpose of providing more specificity to a contention, the order admitting a contention amended through the use of such a procedure should be vacated and the Licensing Board should be directed to dismiss the amended contention. ^{7/} Applicant's requested relief is, therefore, appropriate.

IV. CONCLUSION

For the reasons set forth above, the Staff supports Applicant's Motion for directed certification in its entirety.

Respectfully submitted,



Janice E. Moore
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 23rd day of July, 1985

^{7/} The Staff has taken the position, and still maintains the position, that the amended contention even if submitted without resort to the Board's extraordinary procedure, would not survive a balancing of the five factors for a late-filed contention. See, Staff Response at 4-12.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO APPLICANT'S MOTION FOR DIRECTED CERTIFICATION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by (*) through deposit in the Nuclear Regulatory Commission's internal mail system, this 23rd day of July, 1985:

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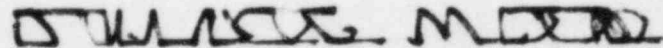
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