

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

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

Docket Nos. 50-456
50-457

OFFICE OF SECRETARY
REGULATING & SERVICE
BRANCH

APPLICANT'S OPPOSITION TO ADMISSION OF INTIMIDATION
AND HARASSMENT ISSUES

Commonwealth Edison Company ("Applicant") hereby responds to the Motion To Admit Claims of Intimidation And Harassment of Comstock Quality Control (QC) Inspectors And Motion For Protective Order of Intervenor Rorem et al. Intervenor's Motion to Admit fails to identify specific incidents of harassment and intimidation tending to show the existence of a pattern of such behavior at the Braidwood Station. Intervenor has also materially failed to identify the witnesses they will present and the subject of each witness's testimony to support each particular specified instance of alleged harassment. Intervenor thus has not satisfied the requirements set by the Licensing Board in its Order of June 21, 1985, and has not framed an admissible issue. In addition, they have not demonstrated that they can contribute meaningfully to a sound record on this issue, and therefore have not satisfied the balancing test for the admission of late-filed contentions. For these reasons, Intervenor's motion should be denied. Intervenor's Motion for Protective Order should likewise be denied because it is

merely another attempt to gain further time in which to develop a litigable issue.

INTRODUCTION

Intervenors' Amended Quality Assurance Contention raised, for the first time, certain allegations about harassment and intimidation of Braidwood site employees. Intervenors asserted that certain present and former site employees had approached them in confidence to express concerns about quality at Braidwood, to voice fears of retaliation from Edison and its contractors for the expression of such concerns and to complain of incidents of harassment. They also asserted that at least five quality control inspectors employed by L. K. Comstock Company, the Braidwood electrical contractor, had complained of harassment and intimidation. They attached a letter from one such inspector, John D. Seeders, expressing a medley of complaints about his job. They also attached an NRC Staff inspection report (IR 50-456/84-34, 50-457/84-32) regarding the September 21, 1984 meeting between the Staff and Seeders and the other four Comstock inspectors. The Staff inspector concluded that the five individuals had provided no specific examples or records substantiating intimidation or harassment.

In its Order of June 21, 1985, the Licensing Board rejected the majority of Intervenors' allegations for two reasons. They lacked the bases and specificity required even

for a timely contention. All the more, they failed to meet the Licensing Board's requirement that "Intervenors set forth the specific instances which form the bases of each of their allegations of a pattern of QA deficiencies." (Order of June 21 at 12-13.) The Board observed that at this late date generalized allegations did not "inform the Board or the parties of the specifics which Intervenors would seek to litigate or whether there [was] any basis to pursue such litigation." (Id.)

With respect to the letter by Mr. Seeders, however, the Licensing Board found that, contrary to the summary of the meeting with Mr. Seeders in the NRC inspection report, the letter did contain specific allegations of intimidation and harassment. The Board therefore deferred ruling on this portion (paragraph 2C) of the Amended QA Contention. The Board permitted Intervenors to provide additional specificity by including the other alleged examples of harassment and retaliation against Comstock inspectors which were only vaguely alluded to by Intervenors and in the referenced inspection report. (Order of June 21 at 13.) In addition, the Licensing Board found that in order for Intervenors to provide assurance that they could contribute to a sound record on this issue, they would have to "specify the witnesses they will present and the subject of each witness' testimony to support each particular specified instance of alleged harassment of L.K. Comstock inspectors." (Order of June 21 at 14.)

In a telephone conference call among the Licensing Board and the parties held on July 11, 1985, the Board further explained its Order of June 21, 1985. The Board Chairman explained that in allowing Intervenorors to provide additional specificity regarding their allegations of incidents of intimidation and harassment of Comstock inspectors, the Board did not contemplate or permit that Intervenorors would discover such incidents from Applicant or the Staff. (Tr. 81.)

Rather the Board recognized the possibility that there was at least one specific incident alleged in the letter of Mr. Seeders and drew from the wording of the amended contention the inference that Intervenorors were in contact with other individuals who could testify to other specific incidents. (Tr. 81-82.) The Board also recognized, however, that the one instance alleged by Mr. Seeders "would not be enough to litigate meaningfully an allegation of a pattern, particularly since the contention itself or the documents it referenced, discussed the corrective action as to that one instance."

(Tr. 82.) The Chairman observed that had the Board believed that Intervenorors were in possession of no additional specific information, the Board would have "rejected the contention outright for lack of specificity and failure on the balance of the late-filed contentions." (Tr. 82.)

ARGUMENT

1. Intervenors Fail to Supply Adequate Specificity and Basis.

Intervenors' attempt to flesh out their allegations of intimidation and harassment falls far short of supplying the additional specificity and basis required in the Licensing Board's Order of June 21. The Board's order contemplated that Intervenors would supply, from information in their possession, additional allegations regarding instances of harassment of other Comstock QC inspectors. To support an admissible issue, such allegations should be at least as specific as those of Mr. Seeders and sufficient to indicate a pattern of harassment and intimidation within the Comstock organization. Intervenors have not done this. Instead they have relied on vague assertions that widespread abuses exist, while failing to particularize them on the excuse that the individuals involved are afraid to come forward.

Intervenors have attempted to provide the additional specificity required by the Board in two numbered paragraphs. The first paragraph retails essentially the same information that was provided in Intervenors' amended contention. Intervenors repeat the allegation about the harassment of Mr. Seeders. Although they attach an affidavit by Mr. Seeders, the affidavit does not refer to this alleged harassment, the basis for which appears to be the letter attached to Intervenors' amended contention. Applicant continues to believe

that the letter does not supply sufficient specificity and basis for a litigable issue, and Intervenors have not supplemented it in Mr. Seeders' affidavit.

Intervenors do not attempt to supply additional specificity regarding the other four Comstock inspectors referred to in their amended contention and the attached NRC inspection report. They do attempt, however, to elaborate on their earlier statement that "[a] large number of other Comstock QC inspectors supported their concerns regarding Comstock management in meetings with the NRC." (Motion to Admit Amended Contention, p. 24.) Intervenors now allege that more than 25 Comstock inspectors complained to the NRC about harassment and intimidation. They characterize these complaints in general terms. Conspicuously absent, however, is any allegation about a single specific instance of harassment. Intervenors have thus singally failed to satisfy the requirements set in the Order of June 21.

Intervenors attempt to remedy this obvious deficiency by two means. They state that Mr. Seeders has knowledge of incidents of harassment and they plead that the limitation of their own present knowledge is attributable to the fact that other dissatisfied inspectors are afraid to come forward and cooperate with them. (Motion, pp. 3-4.) Neither is sufficient. Allegations that Mr. Seeders has

knowledge that might serve as the basis for an admissible issue do not serve their cause, for their obligation was to frame such an issue in this pleading. Even if Mr. Seeders had specified some of these alleged incidents for Intervenor, their burden would not have been met. Mr. Seeders' knowledge of such matters would be second-hand. It was Intervenor's obligation to present specific instances based on personal knowledge.

Nor does Intervenor's assertion that their knowledge is limited because other inspectors are fearful of coming forward remedy this deficiency in their pleading. Intervenor had already sounded this theme in paragraph 2A of their amended contention, stating that site employees had approached them in confidence and expressed fear of retaliation for expressing quality concerns. The Board found such unspecified allegations inadmissible. Had Intervenor been aware of specific instances of harassment, they could have presented them to the Board and the parties without disclosing the identities of the individuals involved. At least at this stage of the proceeding, that would have satisfied their burden. The individuals could, for example, have been designated by letters or numbers, a procedure adopted by the Staff for its confidential informants in the Comanche Peak proceeding. See Texas Utilities Generating Company (Comanche Peak Steam Electric station, Units 1 and 2), ALAB-714, 17 NRC 86 (1983). If the issue were admitted for litigation,

Intervenors could then have sought an appropriate protective order, as necessary. The situation conveyed in Intervenors' motion, however, is quite different. They merely state that they believe there are individuals at the site whose statements could serve as the basis for an admissible contention, and they seek the Board's help in obtaining such statements by issuing a protective order now.

Intervenors' second numbered paragraph presents an allegation of harassment regarding Worley O. Puckett, a former Comstock inspector. Applicant agrees that this allegation provides the kind of additional specificity regarding instances of alleged harassment required by the Licensing Board. It is clearly not sufficient, however, to meet Intervenors' burden. The Board Chairman made plain on July 11, 1985 that had the Board known that the incident involving Mr. Seeders was the only one known to Intervenors the Board would have rejected the issue outright. Intervenors have now come up with one other colorable allegation. At this late date, Intervenors' one additional allegation is insufficient to inform the Board or the parties of the specifics which Intervenors seek to litigate in this proceeding. Intervenors have done no more than allege two isolated instances of harassment. They have not demonstrated that there exists any basis to litigate a pattern of harassment and intimidation of Comstock inspectors at Braidwood.

2. Intervenors' Request for a Protective Order is Unwarranted.

The crux of Intervenors' pleading is their request for a protective order. They ask that the Licensing Board issue an order permitting the identification of witnesses and the presentation of testimony in camera on the theory that this may encourage some Comstock inspectors to cooperate with Intervenors and present testimony on their behalf. Intervenors' request for a protective order is merely a substitute for an admissible contention, intended to remedy their inability to provide specific allegations. Intervenors in effect admit that they have not presented an admissible issue and seek the Board's help to allow them to do so in the future. On July 11, 1985, the Licensing Board denied Intervenors' motion to compel discovery from the Staff for the purpose of developing their contention. Their motion for a protective order should be denied for the same reason. Intervenors are asking the Board for extraordinary relief so that they will have a fourth opportunity to develop an admissible issue. The Licensing Board should not countenance this attempt.

Intervenors' citations to Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86 (1983), and to the Commission's Statement of Policy; Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36032 (Sept. 13, 1984), are inapposite. In referring to the policy of encouraging individuals to put

their information before the Commission, the Appeal Board in Comanche Peak was not referring to the issuance of a protective order for the benefit of intervenors. Rather, the Appeal Board was explaining the rationale for the Staff's assertion of privilege with respect to the identities of informants cited in a Staff investigative report. Similarly, the Commission's policy statement dealt with accommodating the Staff's need to preserve the confidentiality of its informants in ongoing investigations with a Licensing Board's need to know their identities to develop a full record on an issue in litigation.

Intervenors also cite Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-84-24, 19 NRC 1418 (1984). In that case an intervenor asserted that the applicant's actions had made employees at the site unwilling to cooperate with the intervenor. The Licensing Board denied the intervenor's request for relief to encourage such cooperation. On the eve of hearing, the intervenor repeated its assertions and cited statements from the prefiled testimony of one of its witnesses and two of the applicant's witnesses which, in the Board's view, indicated that an atmosphere of harassment and intimidation might exist at Catawba. Intervenor sought a hearing on this issue. The Licensing Board did not want to disturb the established schedule, but in view of its conclusion that some "chill" on employee cooperation probably had occurred, the Board ordered a notice posted at the site, inviting individuals with personal knowledge to submit a confidential statement to the Board and appear as Board witnesses. 19 NRC at

1428-30. A similar notice was ordered to be posted by the Licensing Board in Carolina Power and Light Company (Shearon Harris Nuclear Power Plant), Memorandum and Order (Ruling on Certain Safety Contentions and Other Matters), Slip. Op., January 14, 1985, after the Board had admitted a limited contention alleging harassment and intimidation.

Whatever the propriety of the Licensing Board's course of action in these cases, the situation in this case is not comparable. The Catawba Board refused to aid the intervenor in developing its contention or finding witnesses to support it. Only when the Board became convinced on the basis of the record before it that an atmosphere of intimidation probably existed at the plant did it take action. Rather than litigate the existence of such an atmosphere, the Board took a procedural short cut by inviting employees to become confidential Board witnesses. In this case, under the Licensing Board's Order of June 21, the burden is on Intervenor to show that a protective order is necessary and they have not adequately done so. Intervenor were obligated to obtain statements directly from individuals with personal knowledge. If those individuals requested to remain anonymous, there would be grounds for a protective order. The general statement in Mr. Seeders' affidavit about the state of mind of certain individuals he has talked to is not a reliable substitute for this. Without having more to go on, the Licensing Board should not issue a protective order.

3. Intervenors' List of Witnesses is Inadequate.

Intervenors' list of potential witnesses and the subjects of their testimony also fails to satisfy the requirements of the Order of June 21. The Licensing Board's requirement that Intervenors specify witnesses and indicate the substance of their testimony reinforced its requirement that they specify particular instances of harassment. Failing to identify such instances, they have necessarily failed to identify the witnesses whose testimony could support each instance. Intervenors have stated that Mr. Seeders and Mr. Worley will testify regarding the allegations that they were harassed and intimidated. Intervenors also state that these witnesses will testify about allegations that other Comstock employees were harassed and intimidated. As yet, however, such allegations have not been brought forward, and in any case, Mr. Seeders and Mr. Worley could not offer probative evidence, since their testimony would consist of hearsay.

Intervenors also assert that they will call to the stand "30 or more present or former Comstock QC inspectors known to John D. Seeders," but this claim is disingenuous. (Motion, p. 5.) Mr. Seeders states in his affidavit that 10 (not 30) Comstock inspectors have expressed to him their willingness to testify "about harassment and intimidation." (Seeders Affidavit, p. 2.) In the absence of specific allegations, however, Intervenors' claim that they will call these unidenti-

fied individuals as witnesses is meaningless. Once again, if Intervenor had identified specific incidents of harassment, withholding the names of the witnesses at this point might be appropriate. As matters stand, however, Intervenor, let alone the Board and the parties, do not know whether these purported witnesses will testify to specific incidents of harassment from personal knowledge. All that Intervenor is really asserting is that there are employees at the site who might have something to testify about if the Board were to issue a protective order.

The remaining witnesses listed by Intervenor are managerial personnel employed by the Applicant or Comstock and an NRC resident inspector. Naming these witnesses in no way helps meet the burden imposed on Intervenor by the Order of July 21. The purpose of this requirement was to assure the Board that Intervenor could contribute meaningfully to the development of a sound record on this issue by identifying witnesses who could support specific allegations of harassment by factual testimony based on personal knowledge. Intervenor has identified only two such witnesses who could testify to two incidents of harassment. They have thus not shown that they could contribute to the development of a sound record and they therefore cannot satisfy the balancing test necessary for the admission of a late-filed contention.

CONCLUSION

For these reasons, the Motion to Admit Claims of Intimidation and Harassment of Comstock Quality Control (QC) Inspectors and Motion for Protective Order of Intervenor Rorem et al. should be denied. Intervenor's subcontention alleging harassment and intimidation of quality control inspectors should be dismissed as lacking in specificity and basis and as failing to satisfy the test for the admission of late-filed contentions.

Respectfully submitted,

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