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July 18, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

RESPONSE OF INTERVENORS BRIDGET LITTLE ROREM, ET AL. IN OPPOSITION TO COMMONWEALTH EDISON COMPANY'S MOTION FOR DIRECTED CERTIFICATION

Intervenors Bridget Little Rorem, et al., by their undersigned counsel, hereby respond in opposition to Applicant Commonwealth Edison Company's July 8, 1985, Motion For Directed Certification.

Applicant's Motion For Directed Certification should be denied. In substance, Applicant seeks merely to challenge by impermissible interlocutory appeal the Licensing Board's June 21, 1985, Memorandum and Order Admitting Rorem et al. Amended Quality Assurance Contention. Such an interlocutory appeal - from an order admitting a contention - is barred by 10 CFR §§2.714(a) and 2.730(f).

Moreover, to the limited extent that Applicant's Motion seeks any relief other than its effort to oust an admitted contention, the Motion is neither timely nor supported by grounds sufficient to warrant directed certification.

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In its Motion at page 1, Applicant characterizes the purported subject of directed certification as "the procedures adopted by the Atomic Safety and Licensing Board in this proceeding that led to the admission of the quality assurance contention of Intervenors Bridget Little Rorem, et al." While Applicant disclaims any interest in the Licensing Board's "basis and specificity" or late-filing-factor "balancing" decisions leading to the admission of Intervenors' QA contention, the true target of Applicant's attack appears in its requested relief which sweeps broadly to include "vacat[ing] the order of June 21, 1985 [admitting Intervenors' amended QA contention] and instruct[ing] the Licensing Board to dismiss Intervenors' amended quality assurance contention." Motion at p. 2.

As expressly provided by Commission Rules of Practice, 10 CFR §2.714(a), interlocutory appeals from Licensing Board decisions admitting or excluding contentions are permissible only under the limited circumstances, not present here, where the decision could have the effect of entirely excluding the intervenor from the proceeding. See, South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 884 FN. 3 (1981); Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469, 470 (1980); Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-329, 3 NRC 607, 610 (1976) ("As we have previously held, Section 2.714a excepts from the general prohibition against interlocutory appeal only those orders which are directly concerned with the grant or denial of status as an

intervenor." Id.) A challenge limited to the admission or exclusion of some but not all contentions, such as that attempted by Applicant here, is impermissible. Even in a case where, unlike here, the appeal is "meritorious," it is nonetheless "premature, i.e., its assertion to us must await the rendition of an initial decision." River Bend, supra, 3 NRC at 611. As noted in Virgil C. Summer, supra, no appeal by Intervenors from the Licensing Board's June 21, 1985, decision rejecting aspects of Intervenors' quality assurance claims could be prosecuted at this time. Intervenors must await the rendition of the Licensing Board's initial decision to press any interlocutory complaints we may have. This prohibition against interlocutory appeals applies with equal force to bar Edison's complaints here.

What, then, remains of Edison's request for the extraordinary device of directed certification? Excluding the impermissible subject of contention admissibility, Applicant has left only the much narrower question regarding the propriety of the Licensing Board's April 17, 1985, Special Prehearing Conference Order permitting Intervenors to depose the NRC Region III Administrator, James G. Keppler. At that time, the Board authorized Intervenors to take Mr. Keppler's deposition in order to identify the "serious quality assurance questions at Braidwood" to which he had alluded in earlier sworn testimony. April 17, 1985, Order at p. 36.

The Board explained why it saw such a device as necessary under these unusual circumstances:

> The Board's own concern with the QA/QC matters here, together with the importance of Mr. Keppler's testimony and the position he holds at the NRC, and the apparent lack of other means available to Intervenors to more specifically explain this portion of their proposed contention, encourages us to view Mr. Keppler's deposition as imperative if an important part of Intervenors' QA/QC allegations are to be adequately composed and addressed.

April 17 Order at 38-39.

The ruling, then, setting forth the procedure from which Edison only now seeks appellate review, was issued April 17, 1985. Intervenors (and the NRC Staff and Applicant) took Mr. Keppler's deposition May 20, 1985. Indeed, Applicant fully participated in the Keppler deposition, which was reconvened on May 24, 1985, in order that Applicant could question Mr. Keppler in detail regarding his knowledge of QA problems at Braidwood. Although Applicant had previously moved for reconsideration of the April 17 Order, and in its motion had asked the Licensing Board, in the event it ruled against Applicant, to refer its ruling to the Commission, Applicant made no effort to bring its objection to the deposition before the Appeal Board during the month-long period between issuance of the April 17 Order and the May 20 deposition. It was during this period that effective relief was available to prevent the deposition of which Applicant now purportedly complains. Yet Applicant proceeded to participate in the deposition, even though the Licensing Board had informed Applicant, in a conference call ten days prior to the deposition, that the Board did not intend to rule on Applicant's request for reconsideration until after the deposition.

Before pressing any appellate complaint whatever, Applicant chose not only to await the results of the deposition in which it had participated fully but, further, to await both the subsequent submission of Intervenors' amended quality assurance contention and, finally, the Licensing Board's June 21, 1985, Order admitting the amended contention. Applicant simply chose to bide its time until it knew of the Licensing Board's ultimate decision on contention admissibility. Finally, not until an additional 17 days later did Applicant file its appellate motion supposedly to avert the Licensing Board from its "collision course" with the Commission regulations it ostensibly had long since transgressed. Motion at p. 7.

In sum, to the extent Applicant seeks interlocutory review of the May 20-24 deposition rather than of the admission of Intervenors' QA contention, Applicant's Motion is untimely in the extreme and should not be entertained.

Even if Applicant had timely sought relief on a matter permitted to be the subject of interlocutory appeal, its Motion fails to satisfy the traditional stringent standards for directing certification set out in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977), Motion, p. 7. Applicant claims no legally cognizable irreparable harm from the Board's deposition ruling, and argues only weakly that the Board's ruling so departs "from the normal course" as to pervasively affect the basic structure of the proceeding. Motion at p. 14.

Applicant's principal argument is rather that the extra-

ordinary device it invokes and relief it seeks is necessary "to settle a legal point of general applicability" in order to provide guidance for other Boards in future cases. Motion at p. 8. Such a claim is pure hyperbole.

Wisely, this Appeal Board has eschewed the rendering of "essentially advisory" opinions, particularly on narrowly fact-dependent issues which are not of "demonstrably recurring importance." Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 390 FN. 3 (1983). The unique and special factual circumstances which prompted the Licensing Board action complained of here provide far too narrow a foundation for general policy guidance to be applied in recurring circumstances.

Since the Keppler deposition complained of by Applicant has already been taken, an opinion on its propriety would be only "essentially advisory" in character. Moreover, subsequent procedural developments in this very case underscore the unlikelihood of these unusual facts possessing "demonstrably recurring importance." On two later occasions this same Licensing Board has rejected requests by Intervenors for further use of the deposition device to obtain factual information needed to further specify our QA contention. As described in Intervenors' May 24, 1985, Motion To Admit Amended QA Contention, pp. 13-14, Intervenors sought and were refused Board permission to depose other NRC Staff persons who were knowledgeable about Braidwood QA problems. Again, on July 11, 1985, in an on-the-record telephone conference call Intervenors sought the

opportunity to take the deposition of an NRC Staff member on the subject of QC inspector harassment in order to further specify a portion of our QA contention now pending before the Board. This request was likewise refused by the Board, which reiterated the unique circumstances under which it had permitted the earlier Keppler deposition.

The circumstances underlying the April 17 Order are clearly so narrow that they are demonstrably unlikely to recur even in this particular case, let alone affording a sufficient basis for an extraordinary decision by this Appeal Board to enunciate guidance of general and recurring importance.

CONCLUSION

For the foregoing reasons, Intervenors Bridget Little Rorem, et al., respectfully request that Commonwealth Edison Company's Motion For Directed Certification be denied.

July 18, 1985

Respectfully submitted,

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NUCLEAR REGULATORY COMMISSION

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In the Matter of	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket No. 50-456
	)	50-457
(Braidwood Nuclear Power Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of Response of Intervenors Bridget Little Rorem, et al. In Opposition To Commonwealth Edison Company's Motion For Directed Certification on all parties to this proceeding as listed on the attached Service List, by having said copies placed in envelopes, properly addressed and postaged (first class), and deposited in the U.S. mail at 109 North Dearborn, Chicago, 60602, this 18th day of July, 1985.

Douglas W. Cooper

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