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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

Before Administrative Judges:

Lawrence Brenner, Chairman
Dr. A. Dixon Callihan
Dr. Richard F. Cole

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In the Matter of

COMMONWEALTH EDISON COMPANY

(Braidwood Nuclear Power Station,
Units 1 and 2)

Docket Nos. 50-45602
50-45702

August 14, 1985

MEMORANDUM AND ORDER REGARDING APPEALABILITY
OF BOARD DECISIONS BY NEINER FARMS

As a result of the Licensing Board's approval of the settlement of Neiner Farms Contention 4 on August 12, 1985, this Board's order issued earlier on August 12 granting Commonwealth Edison's motion for summary disposition of Neiner Farms Contention 1 has the effect of terminating the participation of Neiner Farms in this case. This is because Neiner Farms has no remaining admitted or pending contentions.

There are admitted contentions advanced by another intervenor which remain in this case, and the one exception to interlocutory appeals set forth in 10 C.F.R. § 2.714a does not by its terms apply to summary disposition rulings. However, the Appeal Board previously has held that an order granting summary disposition against an intervenor of that

intervenor's only remaining contentions is not interlocutory since the consequence is intervenor's dismissal from the proceeding. Such a summary disposition order is, therefore, appealable upon issuance, within the time provided by 10 C.F.R. § 2.762. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-629, 13 NRC 75, 77 n.2 (1981). ^{1/} Moreover, such a ruling would also trigger the time for Neiner Farms to appeal any earlier rulings in this case.

We are issuing this order to advise Neiner Farms and the Appeal Board of the following:

1. Since the August 12 summary disposition order presented only our conclusion, and stated that a future memorandum will set

^{1/} The Allens Creek holding was certainly within the broad language of an earlier case that the "practical" test for "finality" is met, inter alia, where a licensing board's ruling terminates a party's right to participate. Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 758 (1975). In Allens Creek, supra, none of the parties contended that an appeal was not ripe. Therefore, there was no extended analysis of the point. Query whether in most circumstances, including the one before us, the same rationale which bars an intervenor from immediately appealing an adverse decision on the merits of only some of its contentions (which are not otherwise a "major segment" of the case) should also apply to an adverse decision on the merits of the last of a particular intervenor's contentions, where there are still other contentions pending in the case. In both situations, future action on other contentions still in the case could result in an initial decision which would render moot the need for an intervenor to appeal some or all of any earlier adverse rulings.

forth the rationale for our ruling, we do not deem our action on the motion for summary disposition to be complete for appeal purposes until at least the issuance of the memorandum. It is manifest that until we issue that memorandum, Neiner Farms will not know whether, and in what ways, it disagrees with our reasoning. Moreover, other possible rulings in the memorandum, such as the imposition of operating license conditions, could cause the Applicant or the Staff to file an appeal. ^{2/} If the Appeal Board disagrees with us on this procedural point, we respectfully suggest that it should so advise the parties.

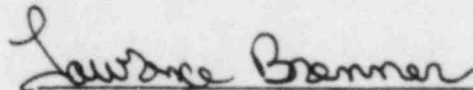
2. Upon the issuance of our future memorandum on summary disposition of Neiner Contention 1, parties who believe they are aggrieved and wish to appeal should regard Allens Creek as presently applicable precedent. Such a party should, therefore, file an appeal upon the issuance of the memorandum pursuant to the procedure and schedule of 10 C.F.R. § 2.762. In the alternative, if a party desires to wait for the completion of the entire proceeding before the Licensing Board before deciding whether to

^{2/} We offer no opinion on when any appeal of our memorandum by these parties would be ripe; their participation in the case has not been terminated.

file an appeal, the party should seek an extension of time from the Appeal Board promptly after the issuance of our memorandum.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD


Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
August 14, 1985