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RELATED CORRESPONDENCE

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BOOKETED  
USNRC

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)

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Docket Nos. 50-456

50-457

September 4, 1985

INTERVENORS' MOTION TO COMPEL DISCOVERY  
FROM APPLICANT AND THE NRC STAFF

Pursuant to 10 CFR 2.740(f) Intervenor Bridget Little Rorem, et al., hereby move for an order compelling discovery from the Applicant Commonwealth Edison Company and the Nuclear Regulatory Commission Staff with respect to certain of Intervenor's July 2, 1985, Quality Assurance Interrogatories and Requests to Produce, for which there remains a failure to respond, evasive or incomplete answers, or outstanding, but improper, objections. Notwithstanding efforts by counsel for all parties to resolve these discovery disputes, and substantial agreement on matters formerly disputed which agreement is reflected in the recently filed Status Report, Intervenor now seek an order of the Board compelling discovery and responsive answers and production of documents from Applicant with regard to Interrogatories 1-9, 17, 19, 50, 51, 52, 57, 58 and 59, and from the NRC Staff with regard to Interrogatories 17 and 57.

As recited in the September 3, 1985, Status Report, Applicant has filed objections and six partial responses to

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Intervenors' Interrogatories and Requests to Produce over the period July 29 through August 27, 1985. Further partial answers are expected at least through September 6, 1985. Each answer has appended an index to numerous documents now exceeding seven file drawers in volume. These documents are described as either reflecting the answers sought or otherwise relating to such answers. Some of these documents, as indicated on the index, have been provided with the answers. The bulk of these indexed documents have been made available for inspection and copying at the offices of Applicant's counsel. Intervenors' counsel have undertaken substantial review of these documents. The NRC Staff has filed objections and two partial responses to Intervenors' discovery. Further partial answers are expected at least through September 10, 1985.

Intervenors move, at this time, to compel discovery of these matters which are believed necessary for a fair and thorough adjudication and which are now ripe for Board decision. Certain other matters remain the subject of efforts at compromise and settlement or are the subject of outstanding commitments for response. Further, the NRC interposed objections to Interrogatories 9, 11, 13, 14, 16, 19, 20, 22, 32, 33, 34, 35, 40, 43, 44, 56, 58, 59, 61 and 62 on grounds, generally, that the information sought was reasonably obtainable from Applicant. Of these Interrogatories further partial responses are expected from Applicant regarding Nos. 13, 14, 16, 19, 20, 32, 33, 34, 35, 40 and 61. In addition a review of Applicant's responses is continuing. The validity of the NRC Staff objections on these

grounds is not fully discernible at this time. Intervenor do assert that such an objection is invalid with regard to Interrogatory 20 and seek an order compelling an answer by the NRC Staff at this time.

In the following argument Intervenor discuss the nature of the information sought and its intended purpose, the answer or objection given and the authority supporting discovery. The interrogatories in dispute are grouped by subject matter or nature of objection, as follows: I. Theories of Defense: Mixed Fact/Law, (Nos. 1-9, 17 and 57); II. Access To Persons With Knowledge of Facts, (Nos. 19, 51, 52 and 58); III. Documents As or In Lieu of Answers, (Nos. 58 and 59); and IV. Scope Objections, (Nos. 50 and 52).

### ARGUMENT

#### I. THEORIES OF DEFENSE: MIXED FACT/LAW QUESTIONS

(Nos. 1-9, 17 and 57)

1. Do you agree that the Braidwood Quality Assurance (QA) Program must comply with each of the criteria of Appendix B to 10 CFR Part 50 in order to establish Applicant's entitlement to the licenses sought in this proceeding?
2. If the answer to No. 1 is negative, please describe in detail the respects in which such compliance is not required and explain fully the factual and legal basis for your position.
3. Does the Braidwood Quality Assurance Program comply with each of the criteria of Appendix B to 10 CFR Part 50?
4. What are the bases for your responses to Nos. 1-3? Please identify all documents, physical evi-

dence, testimony or oral statements by any person and legal authority on which you rely in support of your position.

5. Does workmanship in the actual design, fabrication, construction and testing of safety-related structures, systems and components meet or exceed all applicable standards?
6. Please identify all sources of standards (e.g., FSAR, ASME Code) applicable to the actual design, fabrication, construction and testing of safety-related structures, systems, and components.
7. If the answer to No. 5 is negative, please describe in detail the respects in which such workmanship does not meet or exceed all applicable standards or is indeterminate, and explain fully the factual and legal basis for your answer.
8. What are the bases for your responses to Nos. 5-7? Please identify all documents, physical evidence, testimony, or oral statements by any person and legal authority on which you rely in support of your position.
9. Please identify each deficiency in design and construction as defined in 10 CFR Section 50.55(e) and for each indicate: the classification of its significance (i.e., classified under which subsections, 50.55(e)(i)(i-iv); the 10 CFR Part 50 Appendix A, General Design Criteria, to which each relates and the respects in which it reflects noncompliance; the report number, and date, if any; the names, titles, addresses, and telephone numbers of each person responsible for the deficiency, its discovery, its reporting, and its corrective action; a detailed description of the deficiency and its safety implications; a detailed description of its corrective action.
17. Please describe in detail the circumstances and procedures, if any, under which Quality Control inspection criteria may be waived.
57. In what respects are NRC requirements understood to be either minimum or maximum requirements with regard to the design and construction of Braidwood? Please explain in detail and identify any documents which reflect this answer.

These questions, generally, seek to establish the Applicant's position (and that of the NRC Staff on Nos. 17 and 57)

with regard to important matters anticipated to be involved in the defense to Intervenor's quality assurance contention. While each interrogatory includes mixed questions of law and fact, such opinion questions are rooted in the facts of this case and call for either factual information or an application of legal position, opinion or contention to the facts of Braidwood quality assurance deficiencies. Intervenor's assert that responses to these interrogatories will significantly advance the conduct of this proceeding by focusing and narrowing the issues in dispute and apprising Intervenor's of the cases of Applicant and the NRC Staff at an early stage.

While Applicant interposed objections to Intervenor's 1-9, 17 and 57, the NRC Staff provided responsive answers to Nos. 1, 2, 3, 4, 5 and 6. Intervenor's submit that the Applicant should, likewise, be compelled to either answer these interrogatories on the basis of present knowledge or commit to providing such answers in the near future. Applicant's objections to Nos. 7, 8 and 9 and the objections of the Staff to Nos. 17 and 57 should be overruled and responsive answers compelled.

Applicant objects to Nos. 1, 2, 3, 4, 7, and 8 on grounds that the questions call for a legal conclusion or for privileged attorney work product.

While questions which seek "pure law" responses may be objectionable, the modern view no longer shields legal opinion applied to the facts of the case from the scope of discovery. Moore's Federal Practice ¶33.17, p. 33.90. Such mixed fact/law discovery questions are now proper where the responses will aid



in focusing the issues in the case in advance of trial. As the Advisory Committee Note explained:

As to requests for contentions or other inquiries which in some measure call for legal conclusions, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery .... On the other hand, interrogatories may not extend to issues of 'pure law,' i.e., legal issues unrelated to the facts of the case.

Rule 33(b), Federal Rules of Civil Procedure now explicitly excuses interrogatories seeking such "application of law to fact" from the outmoded objection on grounds that the answer involves a legal conclusion:

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact ...

This principle of the scope of discovery now embodied in the analogous Federal Rules should be applied in interpreting the scope provisions of the Commission Rules, 10 CFR 2.740(b)(1), and Applicant's "legal conclusion" objections should be overruled. As the analogous Federal Rule 33(b) further provides, such answers may, upon order, be deferred until completion of discovery or otherwise. Intervenors have no objection to the deferral of such answers by Applicant as was claimed by the Staff if such deferral is necessary and if the deferral is for a reasonable term.

Interrogatories 1, 2, 3, and 4 seek the positions of the Applicant and NRC Staff on the applicability of and compliance by

the Braidwood quality assurance program with the Commission's eighteen quality assurance criteria provided for in 10 CFR Part 50, Appendix B. Violations of these Appendix B criteria have formed the factual basis for such extraordinary measures as an order immediately halting safety-related construction issued by the Commission itself. Cincinnati Gas & Electric Company (William H. Zimmer Nuclear Power Station), CLI 72-33, 16 NRC 1489 (1982).

The factual existence of such lack of compliance with Appendix B at Braidwood, as inquired of in Interrogatory 3, is obviously relevant and discoverable. The respects in which Applicant contends such compliance is not required to establish entitlement to an operating license is of central importance in anticipating the defenses by Applicant and the Staff. Such positions bear directly on the significance to be attached to historical quality assurance violations at Braidwood and the standards for measuring the design, implementation and results of the various corrective action programs which Applicant may present as substitutes or supplements to Appendix B compliance.

Interrogatories 5, 6, 7 and 8 inquire into the standards which apply to measure the construction of the Braidwood facility and the respects in which workmanship fails to meet such standards or in which such workmanship is of indeterminate acceptability. Intervenor's submit that the existence of such workmanship deficiencies may preclude the grant of an operating license. Union Electric Company (Callaway Plant, Unit 1), ALAB-740, 18 NRC 343 (1983). In order to measure the effectiveness of Applicant's

corrective action programs responses to these interrogatories should be required to identify important measurement objectives and workmanship targets. Applicant's scope objections should be overruled, since it is acknowledged that these interrogatories may be read as limited to the subject matter areas cited in the contention. Applicant's legal conclusion objections should be overruled as previously argued. The NRC Staff provided responsive answers, without objection, to No. 6 by identifying applicable standards and Nos. 5 by stating that while workmanship at Braidwood did not meet such applicable standards, reasonable assurance of safe operation may be established otherwise.

Interrogatory 9 seeks identification of and specific information regarding significant deficiencies at Braidwood as defined in 10 CFR 50.55(e). Applicant's scope objection should be overruled, since it is acknowledged that this interrogatory may be read as limited to the subject matter areas cited in the contention.

Interrogatory 17 seeks information regarding the waiver of the objective inspection criteria at Braidwood. As Applicant and the Staff have been informed, the term "inspection criteria" is employed here in the same manner in which like terms are used in 10 CFR Part 50, Appendix B, e.g., Criterion V, X. Quality Control (QC) inspection criteria are applicable under site programs and procedures to most if not all the safety-related work which is the subject of Intervenor's Quality Assurance contention. The stringency with which such criteria are applied and, conversely, the circumstances and procedures for waiver of such criteria, are



plainly relevant and discoverable subjects. The NRC Staff's independent knowledge and position on this question is sought. Its objection that Edison has direct knowledge should be overruled. Answers to No. 17 by Applicant and the NRC Staff should be compelled.

Interrogatory 57 seeks information on the respects in which NRC requirements are understood at Braidwood by Applicant and the NRC Staff to be either minimum requirements - below which workmanship is unacceptable - or, conversely, maximum requirements - below which workmanship may fall and yet still meet some other acceptance criteria. In essence the question asks for a description of the margin of error for deficient workmanship between acceptable and required and the relationship between site-imposed acceptance criteria and NRC requirements, where different. One might expect, for example, deficient workmanship to be excused on the grounds that while it failed to meet the more stringent Braidwood site acceptance criteria the less stringent NRC requirements were met or exceeded. Intervenors are entitled to probe this anticipated defense through discovery. Applicant and Staff relevance and scope objections should be overruled.

## II. ACCESS TO PERSONS WITH KNOWLEDGE OF FACTS

(Nos. 19, 51, 52, and 58)

19. Please provide the names, titles, addresses, telephone numbers and date of employment for all persons who have been employed in or responsible for the Quality Assurance and Quality Control Programs of Edison and of each contractor,

including but not limited to all quality control inspectors and supervisors. For each such person no longer employed in Quality Assurance/Quality Control, indicate the reason for termination. For each such person involuntarily terminated, describe in detail the circumstances of termination.

51. In Inspection Report 83-09, at page 4, the NRC observed that Commonwealth Edison and the NRC Region III Staff discussed during enforcement conferences or otherwise, "CECo Personnel and organizational changes to strengthen the construction project management team and to increase the emphasis on quality assurance." Please describe in detail any such changes made at that time or since. Identify specifically the names, job titles and duties, qualifications, and objective performance evaluations for all persons involved in such "personnel and organizational changes," including those both before and after such changes were made. Please identify any documents which reflect these answers.
52. Have any quality assurance weaknesses or deficiencies at Braidwood been caused by management action or inaction? If so, please describe in detail. Have any adverse personnel actions (for example, termination, demotion, transfer or suspension) been taken by Commonwealth Edison and/or its contractors against any person(s) because of QA deficiencies or weaknesses? If so, please identify the circumstances and persons involved, including names and addresses, and identify any documents reflecting such instances and their resolution.
58. For each quality assurance violation or unresolved or open item referred to by Intervenor in their amended quality assurance contention (served upon all parties May 24, 1985), please describe in detail the circumstances involved, including the name and address of each person involved, the manner in which such deficiency was identified, the manner in which the deficiency was investigated and evaluated for significance, root cause and generic implications, the manner in which the deficiency was remedied and corrected, including any corrective action taken with regard to the existence of other related deficiencies. Set forth any facts upon which you rely to show that the deficiency and its root cause have been

effectively corrected. Please identify any documents which reflect these answers.

Applicant has impermissibly sought to hamper and restrict Intervenor's access to persons employed by Commonwealth Edison Company or Braidwood site contractors identified as knowledgeable about discoverable matters. Applicant has refused to provide the non-Braidwood site home addresses and telephone numbers sought by Interrogatory No. 19 with respect to the persons identified in that question and in Interrogatory Nos. 51, 52 and 58. Instead Applicant persists in the position that it may properly restrict Intervenor's access to these potential witnesses by limiting contact to the general Braidwood site address and Commonwealth Edison Company site telephone number:

With regard to requests for addresses and telephone numbers of individuals employed by Commonwealth Edison or its contractors, onsite personnel can be located by contacting Braidwood Nuclear Power Station, Braceville, Illinois 60407 (phone 815-458-2801). Other Commonwealth Edison personnel can be located by contacting 72 W. Adams St., P.O. Box 767, Chicago, Illinois 60690 (phone 312-294-4321).

Applicant's Sixth Partial Response to Rorem's First Set of Quality Assurance Interrogatories and Requests to Produce, p. 2, August 27, 1985. Such restrictions on Intervenor's access to non-party potential witnesses is improper and has already hindered and delayed Intervenor's ability to investigate and prepare for hearing. The "identity and location of persons having knowledge of any discoverable matter" is information plainly discoverable under Commission rules. 10 CFR 2.740(b)(1). Applicant's "evasive or incomplete" answers to these names, addresses and

telephone number questions should be treated as failures to respond and full and complete answers should be compelled. 10 CFR 2.740(f).

Applicant has asserted no legal objections to answering these witness location questions, nor has any protective order been sought to limit such a response as is required by 10 CFR 2.740(f), if such failure to respond is on the grounds that such discovery is objectionable. No privacy objection, for example, appears to be contemplated since Applicant has provided the last known home address and telephone number for terminated employees in answer to No. 19. Applicant asserts the prerogative to screen Intervenor's access only to present Edison or Braidwood contractor employees.

As Intervenor's understand Applicant's position no assertion is made that these persons generally are "parties" or clients of Applicant's counsel. The asserted restrictions on access are, thus, not founded upon the prohibitions against communicating with an adverse party as provided in Disciplinary Rule 7-104 of the American Bar Association Code of Professional Responsibility. Just as well, for such assertions that employee-witnesses were "parties" or "clients" of corporate counsel by virtue of their employment status and thus amenable to such restrictions on access by adverse counsel were rejected by the Commission in Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI-83-21, 18 NRC 1303 (1983). There, the Licensing Board's order permitting free access by intervenor's counsel to employee witnesses "to seek their cooperation," id., 18 NRC at 1304, was upheld by the

Commission in rejecting the Applicant's efforts to screen such access. Citing Vega v. Bloomsburgh, 427 F.Supp. 593 (D. Mass. 1977), the Commission acknowledged "the well-established principle that counsel should be at liberty to approach witnesses for an opposing party." Id., 18 NRC at 1305.

Applicant's position appears to be that merely identifying such potential witnesses is sufficient response with access by Intervenor's limited to such formal means as depositions at which Applicant's counsel would be present and participating. Such limited, formal questioning is no adequate substitute for free informal access. As the court in Vega, supra, observed:

... there is an important difference between the nature of informal interviews and more formal procedures such as the taking of a deposition .... (citation omitted) A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case, and to explore the witnesses' knowledge, memory, and opinion - frequently in light of information counsel may have developed from other sources.

Id., 427 F.Supp. at 595.

The Licensing Board in Catawba earlier rejected just the sort of restrictions on access to site employees as are pressed by Applicant here. In an unpublished Memorandum and Order (Concerning Palmetto Alliance's Contacts With Applicant's Employees) of April 6, 1983, a copy of which is attached hereto, the Catawba Board rejected the Applicant's asserted prerogatives to screen contact with these potential witnesses in favor of affirming intervenor's free access to these persons through use of home addresses and telephone numbers. Id., Slip. op., p. 3.



The Catawba Board expressed the principle of free access as follows:

As to the matter of access, Palmetto is free to contact the Applicants' QA and other identified employees by any reasonable means, and at any reasonable times, including telephone, mail, or knocking on the door. In our Order of April 6, 1983, we rejected certain proposed restrictions on such contacts. By providing for free access, we take the most practical approach open to us - that of ensuring opportunities for employees to hear both Applicants and Intervenor on whether to become involved in the proceeding.

17 NRC at 679.

As Intervenor have stated to Applicant's counsel in attempting to resolve this dispute, Intervenor are prepared to make a factual showing that the restricted access to site employees through the site telephone number and address has already impaired Intervenor's ability to communicate freely with these potential witnesses and in at least one instance the attempt to reach a site employee by telephone on the job has "chilled" that employee's willingness to cooperate with intervenors. Such a result of these restrictions should not come as a surprise to any observer. Particularly under the circumstances involved in the Comstock QC inspectors harassment and intimidation claims, see, e.g., Joint Stipulation and Motion for Confidential Treatment, it is simply beyond reasonable dispute that the victim of alleged harassment would be reluctant to discuss his knowledge of harassment on the telephone in the presence of his supervisor on the job or to even be identified by his supervisor as having communicated with Intervenor. Such access as is contemplated by Applicant is virtually meaningless and serves

only to thwart Intervenor's ability to prepare its case. These restrictions should be rejected in favor of free access for Intervenor. Applicant should be compelled to respond to these interrogatories by providing names, home addresses and home telephone numbers for these site employee-prospective witnesses.

Intervenor has no interest in unnecessary dissemination of personal addresses and telephone numbers of site employees and are, therefore, willing to accept such reasonable restrictions on disclosure as may be necessary or proper. This position has been communicated to counsel for Applicant.

### III. Documents As, or In Lieu of Answers

(Nos. 58 and 59)

58. For each quality assurance violation or unresolved or open item referred to by Intervenor in their amended quality assurance contention (served upon all parties May 24, 1985), please describe in detail the circumstances involved, including the name and address of each person involved, the manner in which such deficiency was identified, the manner in which the deficiency was investigated and evaluated for significance, root cause and generic implications, the manner in which the deficiency was remedied and corrected, including any corrective action taken with regard to the existence of other related deficiencies. Set forth any facts upon which you rely to show that the deficiency and its root cause have been effectively corrected. Please identify any documents which reflect these answers.
59. With respect to the deficiencies referred to in Interrogatory 58 above, identify in detail all documentation and hardware changes or re-work undertaken in the course of remedial or corrective actions including numbers of items changed or reworked. Please identify any documents reflecting these answers.

These interrogatories seek comprehensive information regarding the cause and correction of the Braidwood quality assurance deficiencies cited in the contention. Applicant's "evasive or incomplete answer or response," 10 CFR 2.740(f), frames the need for clarification and specificity in understanding the narrative answers and accompanying references to documents which are purported to relate to such answers. Applicant's answers to Interrogatories 58 and 59, served August 27, 1985, are, indeed extensive: it treats each sub-part of Intervenor's contention (reflecting a separate quality assurance deficiency) in a separate narrative answer, to which is attached a list of documents identified as "References" and a list of persons and employees identified as "Names and Addresses." This narrative answer with these lists comprises some 300 pages. Further, a listing of documents is provided by number, date, source, type, and from/to comprising some 400 additional pages containing a dozen entries per page and indexed only to Interrogatories "58" or "59."

Although Applicant has been cooperative and helpful in informally explaining its document indexing system and in tracking the indexed documents available for inspection and copying, Intervenor's believe that further formal clarification and specification should be required of Applicant in order that the Board and all parties may know the significance of the responses provided and may ascertain the information sought from the identified documents.

Applicant's Sixth Partial Response of August 27, 1985, which

provides the Interrogatory 58 and 59 responses, contains no discernible explanation of the accompanying document index, nor of the document "references" or "names and addresses" listing. One looks in vain to the July 30, 1985, First Partial Response for the needed clarity:

Each document identified in Applicant's response or incorporated by reference into Applicant's response has been identified with a number. In addition, Applicant has provided indices for these documents organized by interrogatory number, which identify for each numbered document the date, author, recipient, and type of document. The indices will be updated with each partial response submitted by Applicant.

Documents which are incorporated by reference to answer interrogatories are being provided to all parties. Documents which are simply identified in answers to interrogatories, but not incorporated by reference, are available for inspection and copying. Documents for which Applicant is asserting privilege have not been provided, and an indication can be found on the indices as to whether the attorney client ("AC") or attorney work product ("WP") privilege is being asserted.

This characterization tells us, without more, that some indicated documents are "incorporated by reference to answer interrogatories" and others are "identified in Applicant's response." The "incorporated by reference" documents are to have been supplied. However, no documents at all have been supplied in answer to Interrogatories 58 and 59. One is left simply to speculate as to the significance of the document "References" accompanying the sub-parts of Applicant's answer, as well as the identification of the undifferentiated thousands of documents "indexed" as related to Nos. 58 and 59. Further explanation and specification of the document references and indexing should be

required of Applicant.

The principle to be applied in the specification of documents in answer to interrogatories is provided in the 1980 Amendment to Rule 33(c), Federal Rules of Civil Procedure, "Option to Produce Business Records":

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

The duty of detailed specification of documents from which answers are to be ascertained is designed to foreclose the abuse of "directing the interrogatory party to a mass of business records ..." and to "prevent the answering party from offering the raw data from which an answer may be extracted when the same information is available in a more direct and economical form." Moore's Federal Practice, ¶33.25[5], p. 33-149.

Whether Applicant has, indeed, chosen the "business records option" provided for in Rule 33(c) in whole, in part, or not at all, the explanation of what has been identified and what has been provided by way of documents and by narrative answer should be



further specified and explained. An order compelling such further answer should be issued.

Further confusion and lack of clarity is created by the ambiguous and evasive caveats asserted in the introduction to Applicant's answer to Interrogatories 58 and 59:

Not all specific responses describe the manner in which the deficiency was investigated and evaluated for significance, cause and generic implications; nor are all the facts set forth on which CECO relies to show that the deficiency and its cause have been effectively corrected. Similarly, the corrective actions taken with respect to related deficiencies are not set forth in every specific response. For certain of the deficiencies, specific information on these subjects is lacking and CECO's general programs addressing those subjects, which are discussed in this introduction, are applicable.

One is left to wonder whether Applicant's answer is, indeed, fully responsive. If "all the facts ... on which CECO relies" are not set forth although presently known to Applicant, a complete and responsive answer should be compelled. If all known facts are set forth, the answer should so state. Further, if, as stated, information sought by the interrogatories is omitted - such as "the manner in which the deficiency was investigated and evaluated [and] corrective actions taken," an answer providing such information should be compelled if such information is known to Applicant. At the least Applicant should be required to clarify this ambiguous and evasive response and to specify in which specific instances information sought has been omitted and for what reason.

Taken together with the lack of clarity in describing docu-

ment references, as argued above, this ambiguous introductory caveat leads one to search hundreds of pages of answer and thousands of documents simply to determine the extent of omissions. Even so, one is left to speculate as to the basis for such omission.

While there is a general failure to clarify the identification of documents regarding all of Applicant's answers, such lack of clarity is particularly damaging with respect to Interrogatories 58 and 59 since the information sought (and perhaps provided) is of such central significance to the litigation of the QA contention. Moreover, the effective usefulness to the Board and all parties of Applicant's own considerable commitment of resources in providing these answers would be significantly enhanced through compelling the clarification sought.

#### IV. SCOPE OBJECTIONS

(Nos. 50 and 52)

50. In a February 1, 1984 Chicago Tribune article, NRC Region III Administrator James G. Keppler said, in part, with regard to Commonwealth Edison and Braidwood: "One has to question whether the workload has become unmanageable for the staff they have, and I've raised that for management to consider. But I have to be concerned that they are spread thin at the top ...." Did Mr. Keppler or the NRC raise this matter with Commonwealth Edison? Or did Edison otherwise identify such deficiencies? If so, please describe in detail the circumstances, Commonwealth Edison's response and any corrective action taken and the results. Please identify any documents which reflect the answers to these questions.
52. Have any quality assurance weaknesses or deficiencies at Braidwood been caused by management

action or inaction? If so, please describe in detail. Have any adverse personnel actions (for example, termination, demotion, transfer or suspension) been taken by Commonwealth Edison and/or its contractors against any person(s) because of QA deficiencies or weaknesses? If so, please identify the circumstances and persons involved, including names and addresses, and identify any documents reflecting such instances and their resolution.

These important questions focus on the possible identification of management deficiencies and weaknesses by the NRC and Applicant as causes of the known quality assurance failures at Braidwood. No. 50 recites such a posited management weakness at Edison expressed by NRC Region III Administrator James G. Keppler and quoted in the Chicago Tribune newspaper. Further, No. 50 and No. 52 seek information regarding the facts of such management-related causes of QA deficiencies. No. 52 seeks details of any adverse personnel actions taken against persons as a consequence of the QA deficiencies. The information sought by these interrogatories is plainly relevant to the subject matter and discoverable. 10 CFR 2.740(b)(1). No privilege objections are asserted by Applicant. Moreover, Mr. Keppler's expressed view that Edison is "spread thin at the top" and his assertion that he raised such questions "for management to consider" compellingly argue for the materiality of responsive answers to these questions. Perhaps no such management weaknesses were identified. Perhaps Edison never did consider Mr. Keppler's observation. Such facts are important to understanding the cause and significance of the QA deficiencies at Braidwood.

Applicant interposes scope and relevance objections to these

interrogatories. As to No. 52, Applicant chooses to read it as limited, apparently, to only the Comstock harassment claims where no such limitation is expressed in the interrogatory or fairly implied:

Applicant has objected to the scope of Specific Interrogatory 52 and its response is limited accordingly. The causes of the quality assurance weaknesses or deficiencies are addressed in the answer to Specific Interrogatory 58. The response to Specific Interrogatories 19 and 20 describes the "adverse personnel actions" taken because of "QA deficiencies or weaknesses" exhibited by Comstock employees.

Applicant's Fifth Partial Response, August 13, 1985. Thus, Applicant does not assert a relevance objection to the question per se, but claims only that its scope should be artificially narrowed to the Comstock claims. A complete and responsive answer should be compelled which is coextensive in scope with the deficiencies asserted in the QA contention. Such a scope limitation has been agreed to by Applicant and Intervenor with respect to numerous interrogatories.

Applicant's scope objection to No. 50 is equally artificial and without merit. Applicant asserts "this interrogatory impermissibly seeks information beyond the scope of the Amended QA Contention, by inquiring as to the subject matter of a Chicago Tribune article which the Licensing Board specifically refused to admit as a part of the Contention. Order at 7, n. 3."

Applicant's Objections, July 29, 1985. The Board's omission of the Chicago Tribune Keppler quote from the actual contention itself, June 21, 1985 Order at p. 7, n. 3, hardly reflects a specific refusal to admit the article, let alone any ruling at

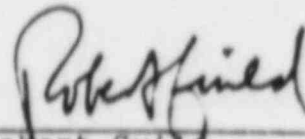
all on the relevance of the article's subject matter to the quality assurance contention. The newspaper article is cited simply for the sake of clarity and attribution. It is Mr. Keppler's observation, and the underlying facts of management weaknesses at Edison which are of importance as premises for the interrogatory. Responsive answers should be compelled to Interrogatories 50 and 52.

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WHEREFORE, for the above-stated reasons, Intervenors urge that the Licensing Board grant Intervenors' Motion To Compel Discovery From Applicant and the NRC Staff in its entirety.

DATED: September 4, 1985

Respectfully submitted,



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9/4/85

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 Intervenor's Motion To Compel Discovery From Applicant and the NRC Staff on all parties to this proceeding 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, Illinois, on this 4th day of September, 1985; except that Administrative Judges Grossman, Brenner, Cole, and Callihan and NRC Staff Counsel Elaine Chan were served via Federal Express and Edison counsel Michael Miller was served personally, also on September 4, 1985.

Don V. Long

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50-456/50-457 OL

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

DOCKETED

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BEFORE ADMINISTRATIVE JUDGES

James L. Kelley, Chairman  
Dr. A. Dixon Callihan  
Dr. Richard F. Foster

SERVED APR 07 1983

In the Matter of

DUKE POWER COMPANY, ET AL.

(Catawba Nuclear Station,  
Units 1 and 2)

Docket Nos. 50-413  
50-414

ASLBP No. 81-463-010L

April 6, 1983

MEMORANDUM AND ORDER  
(Concerning Palmetto Alliance's Contacts  
with Applicants' Employees)

Pursuant to our Order of February 9, 1983, the Applicants have written a proposed affidavit designed to prevent the unwarranted disclosure of sensitive information about certain of their employees and former employees. This information is being sought by Palmetto Alliance in connection with its Contention 7 concerning management capabilities. Paragraph 5 of the proposed affidavit provides as follows:

5. I will not contact, or cause to be contacted, any of the employees or former employees identified in the protected information except as follows:

(a) I will prepare a letter to be used to contact any such employee and/or former employee, to be reviewed and agreed to by Duke Power Company. If such an agreement cannot be reached, such letter and Duke Power Company's objections will be submitted to the Board for resolution.

*DA*  
*8304080161*

(b) I will send the approved letter to such employees or former employees identified in the protected information as I choose, and will provide counsel for Duke Power Company with a copy of such letter.

(c) If any of the subject employees or former employees respond to my letter and indicate a willingness to discuss with me matters relevant to Palmetto Alliance Contention 7, I will contact such persons and pursue the subject. All contacts with such employees or former employees will only be made by me and/or the one other person who has executed an identical affidavit.

(d) I will not send follow-up letters to any employee or former employee who did not respond to my letter; I will not telephone or in any other way contact any employee or former employee who did not respond to my letter.

Palmetto objects to proposed paragraph 5 and asks us to order its deletion. With one exception, noted below, we think Palmetto's objection is well taken, and so order.

We have received and considered memoranda on this question from Palmetto, the Applicants and the NRC Staff. We agree in all essential respects with the Staff's analysis. Proposed paragraph 5, although not labeled as such, must be treated as a motion under 10 CFR 2.740(c) that discovery only be had under specified conditions. Such a motion must be supported by a showing of good cause. The burden, of course, is on the movant. See Consolidated Edison Co. (Indian Point Station), 5 NRC 13, 14 (1977). The only justification proffered by the Applicants for paragraph 5 is that some of their employees have been contacted in the past by Palmetto and that "some of those employees did not appreciate the contact, were bothered by it and have expressed concern to Duke." Assuming that this accurately describes the reactions of the Applicants' employees to such contacts (we have no proof, by affidavit or otherwise)

this hardly establishes a case of harassment, or anything else warranting remedial relief. Unsolicited and frequently unwanted contacts, particularly telephone calls, are something we all accept as a fact of everyday life. We see no reason why employees of a nuclear facility, some of whom may be receptive to an intervenor contact, should be specially shielded from it, absent a strong showing of harassment.

Recognizing that they have not shown harassment, the Applicants nevertheless ask us to establish "guidelines" for contacts with their employees as a matter of "prudence" and to expedite future discovery. This request overlooks the fact that proposed paragraph 5 would represent a substantial restriction on a party's legal right to contact by any reasonable means "persons having knowledge of any discoverable matter." 10 CFR 2.740(b)(1).<sup>\*</sup> For Palmetto's purpose of seeking employee cooperation, there is a large difference between an informal and confidential telephone call (which they would otherwise be free to make) and a form letter approved by and copied to the Applicants, pursuant to proposed paragraph 5. We have no basis under any legal theory for restricting contact in the manner proposed.

One part of proposed paragraph 5, however, the last sentence of subparagraph (c) (quoted above), should be retained. If contacts

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<sup>\*</sup> The cases cited by the Applicants do not justify the proposed restrictions on contact. Other authorities indicate that the right to freely contact witnesses known only to one's adversary is generally assumed. See Wright & Miller, Federal Practice and Procedure, § 2013.




are not restricted in this manner, we believe that a substantial risk will be created of unnecessary disclosure of sensitive information. We also anticipate that the number of persons whose names are to be released pursuant to this affidavit will be relatively small, at least small enough that two people could make any desired contacts in a matter of weeks.

Except for the sentence just discussed, paragraph 5 of the proposed affidavit shall be stricken. The Board understands that Palmetto and the Applicants have resolved any remaining language differences in the proposed affidavit. Accordingly, Palmetto should revise, execute and serve the affidavit promptly, and the Applicants should thereupon turn over the relevant information. There has already been considerable delay in resolving disagreement over this nondisclosure affidavit. Should any additional problem develop in that regard, Palmetto and the Applicants should contact the Board Chairman forthwith.

We are in receipt of Palmetto's filing of March 30, 1983, requesting certain remedial measures in light of the Applicants' earlier communications with its employees. The Board requests the Staff's views on the remedial measures proposed at pp. 9-11 of Palmetto's pleading, as well as any other measures the Staff may consider appropriate in the circumstances of this case (e.g., a letter posted by the Staff on company bulletin boards to inform employees of their rights). We also request the Staff's views on the propriety of the letters sent by the Applicants to its employees, particularly the identification by name of two former employees who are members of Palmetto Alliance. The Staff's views should be served by April 13.

Pursuant to our request in our Memorandum and Order of April 1, 1983, the Staff has served the Board with copies of NUREG-0966, a Safety Evaluation Report concerning steam generator design modification at Catawba Unit 1 and several other facilities. To the extent that (1) this document may contain new information applicable to Catawba and (2) CESC or other parties may wish to file new or modified contentions based on that information, pursuant to ALAB-687 and this Board's applicable prior rulings, such contentions should be filed by May 11, 1983, representing the customary 30 days, plus 5 days for service by mail of this Order. Any opposition pleading will be due on May 27, 1983.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
James L. Kelley, Chairman  
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland,  
this 6th day of April, 1983.