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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

REPLY TO MOTIONS TO REVISE
HEARING SCHEDULE AND SANCTIONS

Commonwealth Edison Company ("Applicant") files this timely reply to Intervenors Rorem, et al. ("Intervenors") motions to revise the hearing schedule and to impose sanctions. These motions were served on January 11, 1986. Applicant had previously served its motion to revise the hearing schedule on January 9. Although Intervenors acknowledge its receipt (Intervenors' Motion, p. 7), they offer no direct response except to proffer a different schedule. Applicant will demonstrate below that the Intervenors' proposed schedule is unreasonable, the Applicant's proposed schedule should be adopted and the requested sanctions rejected.

I. Schedule

A. Intervenors' Proposed Schedule Does Not Represent the Needs of the Parties.

Applicant filed its Motion for Summary Disposition on December 20, 1985. By Board order memorializing agreement among the parties the time for replies by the NRC Staff and

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Intervenors is January 31, 1986. Notwithstanding these facts, Intervenors propose February 10 as the date for filing motions for summary disposition on the Q.A. Contention, March 10 for replies and April 10 as an estimated date for a Licensing Board ruling. This schedule is superfluous since Applicant does not intend to file any further motions for summary disposition 1/ and neither Intervenors nor the NRC Staff intend to file such motions. Counsel (Joseph Gallo) was advised in separate conversations, by Mr. Guild in December and Mr. Treby in January, that they do not intend to file motions for summary disposition. Hence, the inclusion of summary disposition procedures in any revised hearing schedule is unnecessary.

B. Intervenors' Proposed Schedule Is Unreasonable.

The parties have previously agreed with respect to earlier schedules to an estimated 45-day period for the conduct of hearings, 55 days (as prescribed by the Rules of Practice) for the filing of findings of fact and conclusions of law and an estimated 60 days for the issuance of a Licensing Board decision. These time intervals still appear reasonable and Applicant has not proposed to shorten them in the schedule proposed by its motion of January 9, 1986. On the other hand, Intervenors propose a schedule only to the commencement of

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1/ Intervenors' lack of any prior knowledge on this point is immaterial since they are seeking a sanction prohibiting Applicants from filing further motions for summary disposition.

hearings, May 20, 1986. No dates or time intervals are suggested for concluding the hearings, filing findings of fact and conclusions of law and Board decision-making. However, if the previously agreed time intervals are applied to the Intervenors' proposed hearing start date of May 20, 1986, the target date for a Licensing Board decision would compute to October 27, 1986, twenty-seven days beyond the estimated fuel load date for Braidwood, Unit 1. Thus, assuming a favorable initial decision by the Licensing Board, the Intervenors' proposed schedule would cause almost a one-month delay in loading fuel for Unit 1 with the inevitable effect of increasing project costs, assuming that Unit 1 is otherwise ready to load fuel on September 30.

Applicant is mindful that this Licensing Board views estimated fuel load dates with skepticism. However, in this case two factors support a judgment that the presently estimated fuel load date of September 30, 1986 for Braidwood, Unit 1 is reasonably attainable. First, in November, 1985, the Applicant completed a comprehensive re-evaluation of its fuel load dates for Braidwood Station. This evaluation consisted of a thorough cost and budget review and a realistic examination of the time needed to complete construction. A revised cost estimate of $5.05 billion was established for the construction of Units 1 and 2. September 30, 1986 was selected as a reasonable basis for the conclusion of construction and fuel load which would support an in-service date of May, 1987 for Unit 1.

Secondly, Applicant has recently submitted a proposal to the Illinois Commerce Commission offering to impose a ceiling on the cost of Braidwood Station for rate case purposes. In essence, Applicant has proposed that it will not seek a return through rate increases for amounts expended on Braidwood construction over the self-imposed cost ceiling. The proposed ceiling is $5.05 billion, the same amount established by Applicant's most recent cost and schedule review. The Licensing Board can take official notice that schedule slippages have a significant effect on construction cost growth. Thus, substantial confidence in the Braidwood fuel load dates undergirds Applicant's decision to propose a ceiling on Braidwood costs tied to its cost and schedule review. Applicant's proposal to the Illinois Commerce Commission does provide that the ceiling would not apply to cost increases due to regulatory delay in considering the operating licenses for Braidwood Station. BPI has opposed this proposal and has instead proposed the cancellation of the Braidwood units, asserting that they are unnecessary and so costly as to be uneconomic. BPI has further proposed that no costs of Braidwood incurred after November 30, 1985 be borne by the rate payers.

An alternative to the potential for incurring needless additional costs because of a delay in loading fuel would be to unduly abbreviate the time needed for hearing the evidence, for filing findings of fact and for decision-making. We are uncertain whether the Intervenors favor truncating these steps

in the hearing process or simply increasing project costs by delay. In any event, the Applicant does not favor either a hearing schedule that creates the potential of adding millions of dollars to the cost of Braidwood, Unit 1 or one that unduly abbreviates the time needed to hear and decide the issues. Intervenors' proposed schedule does not attempt to balance these competing interests. Applicant's proposed schedule balances the time needed to fully and fairly hear the issues in this case against the highly desirable objective of achieving a licensing decision prior to readiness to load fuel.

All of the relevant corrective action reports (including the 82-05 report) have now been filed with the Licensing Board and the parties. Applicant's witnesses are being identified tomorrow. A schedule has been set for the completion of summary disposition procedures. All that remains prior to the commencement of hearings is the conclusion of discovery (mainly depositions) and the filing of testimony. Intervenors' proposed date for completion of discovery is the milestone that unduly extends the hearing schedule. Intervenors propose April 15 as the date for conclusion of all depositions. Discovery has been ongoing since June 21, 1985. 2/ Thousands of pages of documents have been made available to Intervenors. Extensive answers have been submitted in response to two sets of interrogatories and 17 depositions have been taken, 11 by

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2/ Memorandum and Order Admitting Rorem, et al Amended Quality Assurance Contention, dated June 21, 1985.

Intervenors. Given this record, it is unreasonable to expect an additional 3 months to complete depositions as suggested by Intervenors. Rather, the February 24 deadline proffered by Applicant is more than ample to complete depositions.

Intervenors are correct that prior schedule extensions have been necessary because of Applicant's internal schedule for completing certain corrective actions which will be key evidence in the hearings. Intervenors suggest that Applicant is attempting to manipulate the process slowing it down and speeding it up, as seems advantageous. It would seem obvious that time necessary for the Applicant to prepare to meet its burden of proof stands on a somewhat different footing than other aspects of setting of a schedule. Intervenors have given no indication to date of having any direct testimony of their own. Accordingly, their preparation time mainly involves discovery, in which they have been engaged since July and cross-examination, for which they will have prepared direct testimony in advance of the hearing. Applicant has shouldered significant burdens in committing to a hearing which begins April 1. Additional time for Intervenors is simply not necessary. Indeed, Intervenors suggestion that the hearings will be more efficient if their schedule is adopted is devoid of any substance. Given the mumber and complexity of the issues to be adjudicated, the most efficient course is to expedite remaining discovery and begin the evidentiary hearing.

Applicant is aware that with one exception Intervenors have declined to notice depositions during January and have refused to participate in depositions noticed by Applicant during January. Apparently, Intervenors believe they can excuse their inaction with the assertion that they were busy responding to Applicant's motion for summary disposition. In Applicant's view, Intervenors have chosen not to participate in the deposition process during January because they believe the Board will accept without question their "summary disposition" excuse, and adopt Intervenors' schedule. Applicant knows of no reason why one of the three lawyers representing Intervenors in this case could not have participated in the discovery process during January. 3/ Intervenors should be required to explain themselves to determine whether, as Applicant believes, they have been intentionally dilatory in conducting discovery in this case.

II. SANCTIONS

Intervenors are seeking several sanctions because of an alleged breach of scheduling agreements among the parties. Specific reference is made to schedule discussions held on December 6, 1985. Intervenors assert that substantial agreement

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3/ Applicant anticipates that Intervenors' counsel will plead the unavailability of Messrs. Cassel and Wright as an excuse for their nonparticipation. Such an assertion, if true, does not relieve Intervenors and their counsel from its hearing obligations. Statement of Policy On Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453-54 (1981).

was reached on December 6, the agreement was reaffirmed on December 17 and it was thereafter breached by Applicant. These assertions are untrue.

Counsel for the Applicant (Joseph Gallo) held extended discussions concerning a revised hearing schedule with Messrs. Guild and Treby during the morning of December 6, 1985. The Applicant's proposed schedule is the typed portion of Appendix B to Intervenor's motion. Gallo and Guild were together at the Chicago offices of Isham, Lincoln & Beale participating in a deposition of a NRC Staff witness. The deposition was delayed while a discussion concerning a revised schedule proposal suggested by Gallo was discussed. Mr. Treby participated by telephone from his Washington office.

No agreement could be reached on the revised schedule because of a disagreement concerning the scheduling of the filing date for summary disposition motions. Gallo offered a January 15 date as the deadline for filing such motions. Messrs. Guild and Treby favored January 27. Mr. Guild's objection to January 15 was based on his unwillingness to have the time for filing replies to motions for summary disposition run concurrently for 9 days with the time for answering a yet-to-be-filed third round of interrogatories.

Gallo attempted to break the impasse by suggesting that since the deposition process was proving to be an effective discovery tool, all parties could agree to refrain from filing further interrogatories. This proposal was unacceptable to Mr.

Guild. Gallo then proposed that Applicant would accept and respond to Intervenors' third round of interrogatories but that it would waive its right to file further interrogatories if Guild would abide by January 15 as the date for filing motions for summary disposition. Guild responded that such a proposal was acceptable provided the Staff also agreed to waive its right to file further interrogatories. Mr. Treby was not willing to do so. In addition, Mr. Treby was not willing to commit to a date when the Staff would file its response to the Applicant's 82-05 report, a key milestone for further hearing activities.

After several unsuccessful attempts were made to reconcile the viewpoints, Gallo rested on January 15 and Guild and Treby on January 27. The twelve days in controversy multiplies into a full two-weeks of delay time if the schedule is played out to a projected date for an initial decision in this case. These two weeks are the difference between some assurance that a Board decision could be issued prior to fuel load of Unit 1 (by approximately 2 weeks) and none at all.

When it became clear during these discussions that the impasse could not be reconciled, Gallo announced on behalf of the Applicant that "no schedule existed." It is true that no dispute existed with regard t other parts of the schedule. Indeed, those dates were acceptable to Applicant provided an agreement could be reached on all facets of the schedule. It defies credulity, however, to believe, as the Intervenors urge, that Applicant's counsel agreed to hearing schedule milestones

that occurred late in the process while disagreement still existed with respect to an initial critical path milestone, namely, the date for filing motions for summary disposition.

The facts are that Gallo advised Guild and Treby on December 6 that no schedule existed. This fact was recognized by Mr. Guild when he sought confirmation from Michael Miller on December 17, 1985 that the file date for summary disposition motions was an obstacle to a schedule agreement. Miller also pointed out that Staff unwillingness to agreed to a date for its written response to Applicant's 82-05 report was an additional obstacle to agreement on a schedule. While Miller acknowledged in the telephone conversation with Guild that there had been prior discussions on schedule which included a start for hearings within a range of dates from mid-April to early May and that Guild could make such representations in his brief to the Commission, there was no agreement on a schedule in that conversation. Indeed, in other conversations, Guild has asserted that up to 4 weeks has to be added to any schedule to account for the diversion of his attention in responding to the Commission's December 5 order. Thus, the added interpretation by Mr. Guild of the December 17 telephone call that Miller nevertheless confirmed an agreement reached on schedule milestones December 6 is simply not true. Miller's view was identical to that of co-counsel's. This continuing theme was reiterated by Gallo at a deposition on December 18, 1985, when in response to a question by Mr. Guild, Gallo stated that no

schedule existed among the parties. If such an agreement on schedule had in fact existed, it would have been submitted to the Board promptly for its consideration.

The foregoing explanation eliminates the central basis for Intervenors' claim for sanctions -- since no agreement existed with respect to the revised hearing schedule, none could be breached. Intervenors also plead a breach of an agreement that they would be accorded full discovery on all relevant corrective action programs (Intervenors' Motion, p. 9). Applicant has not breached this agreement. Applicant believes that ample time remains under its proposed schedule to complete full discovery on all relevant corrective action programs. Indeed more than sufficient time would have existed had not Intervenors frittered away the month of January in order to enhance their scheduling arguments before this Licensing Board.

Intervenors' claim that the filing of a second set of interrogatories is also a breach of an agreement or a sharp and vexations litigation tactic is similarly belied by the facts. These interrogatories are substantially identical to a first set of interrogatories served on Intervenors in August, to which singularly uninformative answers were provided. Intervenors refused to informally commit to providing supplemental answers to these interrogatories and never bothered to respond to a January 3 letter which inquired whether supplemental answers would be filed. Similarly, the scheduling of depositions in

January was required by the exigencies of concluding depositions and preparing Applicant's direct case in a timely fashion. Applicant's efforts to informally agree with the Intervenors on scheduling these depositions sometime in January have been rebuffed. */

Intervenors also complain that sanctions should issue because counsel departed from established customs of courtesy and practice without prior notice. (Intervenors' Motion, p. 2). Intervenors fail to identify the established custom it believes was contravened by Applicant's counsel. In fact, none exists. Moreover, reliance on DR 7-106(c)(5) of the Code of Professional Responsibility is misplaced since the Code was superseded over two years ago by the Model Rules of Professional Conduct. Significantly, paragraph (5) was not carried forward in the Model Rules.

Finally, Intervenors' counsel levies general accusations of sharp practice against Applicant's counsel. This claim has no substance and should be rejected out of hand. As set forth above there had been no agreement on schedule and no discussions of that subject were initiated after December 6. The Commission itself in its December 5 order, indicated some

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*/ The depositions are those of Comstock QC inspector. For those inspectors who are currently employed at the Braidwood site, the depositions have been postponed until January 28 to allow the Board to consider whether they need to be rescheduled. One deposition, of an ex-Comstock employee who must travel from the St. Louis area, is going forward on January 27.

concern over the effect of its review of the contention on the pace of the hearing. Moreover, all prior schedules had established the date for filing summary disposition motions as a "deadline", clearly indicating that earlier filings were acceptable. Staff and Intervenor requests for extensions of time to respond to that motion were agreed to readily. Similarly, by an extraordinary effort, Applicant improved the date of an important schedule milestone, the issuance of the 82-05 report, by over one week. Improvement of the schedule in this manner was a matter which was solely within Applicant's control. Finally, Applicant presented its proposed schedule in the form of a motion to the Board, hardly a "sharp practice." Intervenors confuse initiative and spirited advocacy by Applicant's counsel with "sharp practice." It appears that this is not the first time that Mr. Guild has been unable to distinguish the two. In Catawba, 4/ Mr. Guild, citing the Commission's Statement of Policy On Conduct of Licensing Proceedings, accused the utility's counsel of misrepresenting and misleading the licensing board. The Catawba Licensing Board found that Mr. Guild's reliance on the Policy Statement to support a request for sanctions was erroneous. It rejected Mr. Guild's request for sanctions

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4/ Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-83-56, 18 NRC 421, 432 (1983).

noting that "partisan advocacy is an inherent part of the process, not a basis for sanctions." Similarly, this Board should reject Mr. Guild's request for sanctions as frivolous.

III. Conclusion

For the reasons stated, Intervenors' proposed schedule should be rejected, and Applicant's proposed schedule of January 9 accepted. The request for sanctions should be rejected.

Respectfully submitted,

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Dated: January 23, 1986

CERTIFICATE OF SERVICE

I, Michael I. Miller, do hereby certify that a copy of the foregoing REPLY TO MOTIONS TO REVISE HEARING SCHEDULE AND SANCTIONS was served on all persons on the attached service list by deposit in the United States mail, first class (or by expedited means, as shown) this 23rd day of January, 1986.

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