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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Herbert Grossman, Chairman
Richard F. Cole
A. Dixon Callihan



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In the Matter of

COMMONWEALTH EDISON COMPANY

(Braidwood Station, Unit Nos. 1 and 2)

Docket Nos. 50-456-OL
50-457-OL

ASLBP No. 79-410-03-OL

January 31, 1986

MEMORANDUM AND ORDER

(Accepting for Litigation Intervenor's Offer of Proof
Issues 2, 3, 4 and 6, as Restricted to the Material Facts
Contained in Intervenor's Reply of January 21, 1986)

MEMORANDUM

Roem Contention 1(a) states:

Intervenor contends that an adequate emergency
plan for the Braidwood Station should include the
following:

(a) a program for informing the public
within 10 miles of the station of the means
for obtaining instructions for evacuation
or other protective measures in the event
of a radiological emergency originating at
the Station.

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On August 12, 1985, Applicant issued its emergency plan. On August 15, 1985, it moved to particularize Rorem Contention 1(a). Applicant pointed out that the contention could refer to either or both of two distinct activities:

- (1) A public education and information program to be implemented prior to an accident; and
- (2) The notification of the public at the time of an accident.

Applicant requested that we particularize the contention to encompass only the first area, educating the public before an accident occurs.

Thereafter, Applicant's motion was held in abeyance while the parties attempted to arrive at a stipulation that would particularize the contention. After a lengthy period of negotiation, a proposed stipulation, drafted by NRC Staff and Applicant, was submitted to Intervenor Rorem. See Staff's Motion for Approval of Stipulation, with attached stipulation (executed only by Staff), dated August 28, 1985. By a telephone conference call on September 30, 1985, with the Board and the parties, it became apparent that no agreement could be reached on the proposed stipulation and Applicant indicated that it would renew its motion. It did so by letter dated October 2, 1985. Because of the imminence of the hearing on this issue, set for October

29, 1985, the Board directed a response by Intervenor by October 11, 1985. Mrs. Rorem replied by letter dated October 8, 1985, opposing the motion to particularize.

On October 18, 1985 the Board issued a Memorandum and Order granting Applicant's motion to particularize the contention and restricted the contention to the education of the public before an accident. Our main basis for restricting the contention to that area was that Mrs. Rorem had not met her obligation to disclose her case, to the extent that it might have encompassed information dissemination during an accident, to the opposing parties and the Board during discovery, at the prehearing conferences, or by the deadline for offering prefiled direct testimony.

Because of Mrs. Rorem's unfamiliarity with legal requirements concerning the disclosure of the case, however, we made our ruling expressly subject to reconsideration only if Mrs. Rorem would come forward with significant issues concerning public information programs other than at the pre-accident stage, prior to the hearing scheduled for October 29, 1985.

Mrs. Rorem filed her motion for reconsideration in the form of an offer of proof within the time limit set by the Board, by October 25, 1985. In it she raised seven specific issues, denominated as offer of proof issues 2-8. No evidentiary basis was given for any of these

issues and it appeared from the discussion at the October 29, 1985 session of hearing that Mrs. Rorem was unfamiliar with much of the factual background to these issues, as contained in Applicant's emergency plan.

The Board decided (with Judge Callihan dissenting) that it would entertain written responses by Staff and Applicant to Intervenor's motion to reconsider (which had been submitted in the form of an offer of proof), which responses would be in the nature of motions for summary disposition on the merits of the particular items raised by Mrs. Rorem; that the parties would be required to confer thereafter with a mind to resolving or clarifying the substantive issues raised; and that, thereafter, Mrs. Rorem would be required to reply to Staff and Applicant's responses to her motion to reconsider.

The parties have now complied with the Board's schedule, as subsequently modified, and Mrs. Rorem has withdrawn three issues (offer of proof issues 5, 7, and 8) of the seven issues presented. Furthermore, she had raised highly specified factual allegations of inadequacies in Applicant's emergency plan to support each of the remaining four issues.

We now reconsider and modify our Order of October 18, 1985, particularizing Rorem Contention 1(a), and include in her contention, to be heard at the forthcoming hearing session scheduled for March 11,

1986, the four offer of proof issues she continues to assert, as restricted to the specific factual allegations contained in her reply dated January 21, 1986.

D I S C U S S I O N

Contrary to Staff's assertions (Tr. 383-423; Staff's Reply to Motion for Reconsideration, 2-6), the issues stated in Intervenor's offer of proof need not meet the test of 10 C.F.R. § 2.714 with regard to timing or specificity. Intervenor's original Contention 1(a) was presented to the Board in a timely fashion and admitted as meeting the specificity requirements of the Commission's rules. And, notwithstanding what might appear to be generalized language in that originally-admitted contention, the Licensing Board's admission of the contention was not in error. At that point in time, the emergency plan had not yet issued and no contention directed towards the plan need have been any more specific than the total absence of a plan would necessitate.

Once Intervenor's contention had been admitted as meeting the requirements of Section 2.714 with regard to timeliness and specificity (in light of the information then available), it was no longer subject to being tested by those requirements. Thereafter, however, Intervenor became subject to other obligations with regard to further defining her position preparatory to hearing. Intervenor, like the

other parties in the proceeding, became subject to the Commission's Rules on discovery and to the management of the proceeding by the Licensing Board.

After Applicant issued its emergency plan on or about August 12, 1985, it, the Staff, and the Board were entitled to discover Intervenor's specific positions with regard to alleged deficiencies in that plan so as to prepare themselves adequately for a hearing on those issues. Applicant's filing of the motion to particularize Intervenor's Contention 1(a) was a step in that direction. Coming, as it did, only three days after the issuance of the emergency plan, Applicant's motion could not be expected to elicit an immediate response that would be at all meaningful. Apparently for that reason, the motion was not actively pursued and Applicant and Staff attempted to reach some agreed focusing of the contention through stipulation with Intervenor. When that endeavor appeared fruitless and the hearing became imminent, Applicant renewed its motion on October 2, 1985. Because of the imminence of the hearing scheduled for October 29, 1985, at the request of Applicant, the Board shortened Intervenor's time to respond to this renewed motion by approximately one week, to October 11, 1985. She filed her response on October 8, 1985.

At that point in time, it became incumbent upon Mrs. Rorem to disclose the substance of her case with regard to any alleged inadequacies in the emergency plan other than relating to pre-emergency

dissemination of information to the public. All during the prehearing proceedings -- on deposition, in informal discussions between the parties, at prehearing conferences, and in negotiating the proposed stipulation -- Mrs. Rorem had mentioned no issues other than pre-accident information programs, notwithstanding the repeated efforts of the other parties to discover her case. Much of this occurred within the context of the filing of Applicant's motion to particularize, which focused on the dichotomy between pre-accident and contemporaneous-with-accident information dissemination to the public.

Instead of disclosing the substance of her case, Mrs. Rorem's response of October 8, 1985 merely opposed Applicant's motion to particularize on the grounds that her contention, which was already admitted, was broad enough to include contemporaneous-with-accident information dissemination, that Applicant had not moved for summary disposition so that the meaning of her already-admitted contention could not be restricted, and that the stipulation as originally proposed by Applicant's counsel was not as "exclusionary" as intended.

It is clear from Mrs. Rorem's reply and from the subsequent discussions at the hearing session of October 29, 1985, that she did not understand her obligations to disclose her case fully at that time. Even though she had satisfied the requirements for the admission of her contention in the first instance, she had not met the further requirements imposed by the Commission's regulations and the Board in

disclosing and focusing her case sufficiently for a meaningful hearing for which the other parties could adequately prepare. Accordingly, the Board granted Applicant's motion to particularize but, taking into account the pro se Intervenor's lack of trial experience and appreciation of her obligations to the Board and parties, permitted her to move for reconsideration of the Board's ruling through the proffer of an "Offer of Proof" that would clearly delineate issues in the area excluded by the Board and disclose her means of presenting them. This document was to be in the hands of Applicant and Staff by the close of business on Friday, October 25, 1985, prior to the Tuesday, October 29, 1985 hearing. Mrs. Rorem timely filed her offer of proof.

As the discussion at the hearing indicated (Tr. 377-434), Intervenor's offer of proof did not focus the issues raised in the area excluded by the Board's ruling sufficiently to conduct a meaningful hearing. For one thing, it appeared that there were elements in the emergency plan with which Mrs. Rorem was unfamiliar that might have resolved certain of the issues that she raised. Furthermore, the issues were phrased too broadly and were offered too close to the hearing to permit a focused presentation of evidence by the parties. The Board did not wish to preside over an interminable fishing expedition.

Accordingly, we established a schedule under which Applicant and Staff could file their written oppositions to Intervenor's offer of

proof in which they would present their respective positions on the merits of the issues raised by Intervenor in the nature of motions for summary disposition. On the basis of those factual presentations by Applicant and Staff, the parties were ordered to confer with the view towards resolving or narrowing the issues where possible. Mrs. Rorem would then file her reply, going to the merits of the remaining issues. (Tr. 433-34, 457-58.)

The parties timely briefed the issues and conferred, pursuant to the Board's schedule as later amended. We commend counsel for Applicant, George L. Edgar, Esq., for his sustained efforts in arranging to confer with Mrs. Rorem.

As a result, we have before us four relatively focused issues, specifying their respective factual underpinnings, in place of the seven broad ones contained in the offer of proof. We believe that, in the form presented, these issues are subject to proof in a relatively succinct manner in a well-focused hearing. We make no determination as to the legal sufficiency of these issues. Any attack on their legal sufficiency can be offered in motions to strike filed before the scheduled hearing and/or in posthearing briefings.

We accept the issues for hearing at this juncture as a matter of Board discretion. We recognize that Intervenor failed to disclose these issues adequately in the two weeks before hearing from October

11, 1985 to October 25, 1985 in response to Board directions, or to request extensions of time and postponement of the hearing if she were unable to respond adequately within the time constraints imposed by the Board. We see no other formal obligation that might have been breached by Mrs. Rorem prior to that time frame that would otherwise permit our limiting her contention more narrowly than as originally filed. We recognize, also, that the time limits we imposed upon her during October of 1985 were shorter than are normally imposed under the Rules, although they were established within the authority of the Licensing Board to modify the otherwise prescribed time limits, and may not have afforded her sufficient time to delineate her case. Had Mrs. Rorem been familiar with her obligations at that point and requested additional time, we would be in no different position than we are now in accepting her newly-particularized issues. Finally, our initial examination of these issues indicates that, on their faces, they appear significant enough to be heard.

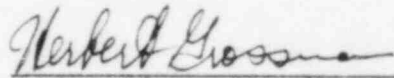
O R D E R

For all of the foregoing reasons and based upon a consideration of the entire record in this matter, it is, this 31st day of January, 1986,

ORDERED,

- (1) That Intervenor Rorem's offer of proof issues 2, 3, 4 and 6, as restricted to the material facts contained in her reply of January 21, 1986, are accepted for litigation in the forthcoming session of hearing set for March 11, 1986;
- (2) That Applicant and Staff may raise objections to the legal sufficiency of these issues in the form of motions to strike to be filed prior to the hearing (although they do not waive their rights to otherwise challenge these issues on legal grounds by not so filing); and
- (3) That any requests for an extension of time for filing direct testimony or for a postponement of hearing, needed by Applicant or Staff to respond to these newly-delineated issues, will be liberally granted.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD


Herbert Grossman, Chairman
ADMINISTRATIVE JUDGE

January 31, 1986,
Bethesda, Maryland.