

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
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OFFICE OF
DOCKETING & SERVICE
BRANCH

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

SERVED DEC 5 1985

In the Matter of
COMMONWEALTH EDISON COMPANY
(Braidwood Station, Units 1 and 2)

Docket Nos. 50-456 OL
50-457 OL

ORDER

On September 23, 1985, applicant Commonwealth Edison Company filed a motion with the Commission seeking an exemption from 10 C.F.R. § 2.786(b)(1), the provision of the Commission's Rules of practice which bars parties from seeking review of Appeal Board decisions on requests for directed certification. The applicant asks that we grant the exemption and take review of ALAB-817, in which the Appeal Board denied the applicant's request that it review whether the Licensing Board committed procedural errors in the conduct of the Braidwood operating license proceeding.

The particular actions of the Licensing Board that were complained of by the applicant were its grant of discovery against the NRC staff for the purpose of allowing intervenor Bridget Little Rorem to flesh out and resubmit a contention which initially failed to meet applicable criteria, and its authorization of discovery against a named member of the NRC staff.

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The Commission has repeatedly made clear its conviction that a stable and predictable regulatory process requires that licensing boards adhere to both the letter and the spirit of the Commission's procedural regulations and the authoritative case law which has applied those regulations. See, e.g., Texas Utilities Generating Company (Comanche Peak), CLI-81-36, 14 NRC 1111 (1981); Duke Power Company (Catawba), CLI-83-19, 17 NRC 1041 (1983). The Commission regards departures on the part of licensing boards from these well-established principles as highly regrettable, and as a general matter deserving of close scrutiny on review. Such actions by a Commission adjudicatory panel cannot normally be condoned. At the same time, judging from the record thus far compiled, this proceeding apparently presents anything but "normal" circumstances.

In the present case, the Licensing Board apparently exceeded its authority in permitting discovery against a named NRC employee regarding a contention which it had rejected. However, we note that the request for review of the Licensing Board's actions was made by the applicant only after the deposition of Mr. Keppler had been taken, as authorized by the Licensing Board, and after a revised contention had been submitted by the intervenor and accepted by the Licensing Board. Nor did the NRC staff present its objections to the Appeal Board prior to the deposition of Mr. Keppler and the admission of the revised contention. We note as well that the applicant, which in its petition to us asserts, as one reason for an exemption from the Commission's rules, that litigation of quality assurance/quality control issues has already delayed and will further delay the completion of the Braidwood facility, made no such claim in its petition to the Appeal Board. The Commission, as a general matter, considers it highly regrettable as well when litigants seek exemption from the Commission's

rules to ~~make~~ arguments which they could have made, but failed to make, to a subordinate tribunal.

Under these circumstances, to determine whether it would be productive for the Commission to undertake the review of ALAB-817 requires that we receive from the parties the answers to the following questions, those answers to be in the hands of the Docketing and Service Branch, Office of the Secretary, U.S.N.R.C., Washington, D.C. 20555, no later than two weeks from the date of this order:

1. Why, given the apparent violation of 10 CFR 2.720(h) and 2.740(b), did applicant or staff not seek, before the amended QA/QC contention was admitted, Appeal Board or Commission review of the Licensing Board's Order (LBP-85-11) allowing the deposition of Mr. Keppler?
2. Is the reliance on the Keppler deposition the only claimed basis for error in the Licensing Board's admission of the amended Rorem QA/QC contention? What is the response of applicant and staff to Rorem's statement in her October 7, 1985 filing that the amended QA/QC contention is not based on the Keppler deposition, but on other publicly available materials?
3. If the answer to the first part of Question 2 is yes, why does error in allowing the deposition necessarily lead to rejection of the contention?

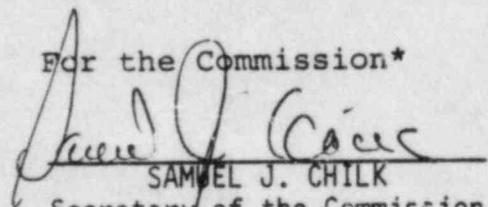
Are applicant and staff arguing for the use of some exclusionary rule, like the much criticized one used in criminal cases, whereby error in allowing discovery bars admission of a contention based

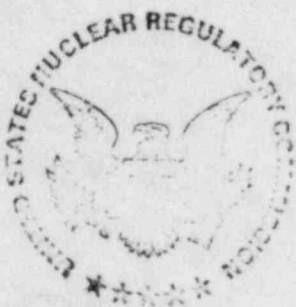
on that discovery, and if so, what is the support for this argument?

4. If the answer to the first part of Question 2 is no, what other errors are asserted that could lead to rejection of the amended QA/QC contention?
5. If the amended QA/QC contention is rejected because of its use of the Keppler deposition, could intervenor Rorem support admission of the contention based on other available information?
6. If the answer to Question 5 is yes, how would Commission review at this time affect the scope or timing of the QA/QC hearing?
7. Could greater diligence by applicant or intervenor Rorem have led to earlier litigation of QA/QC issues in this proceeding?

Commissioner Asselstine disapproved this order. The additional views of Commissioner Roberts and the separate views of Commissioner Asselstine are attached.

For the Commission*


 SAMUEL J. CHILK
 Secretary of the Commission



Dated at Washington, D.C.

this 5th day of December, 1985.

* Commissioner Roberts was not present for the Affirmation of this order, if he had been present he would have approved it.

Additional Views of Commissioner Roberts

The Licensing Board erred both in granting discovery prior to admitting the QA/QC contention and in granting discovery of a particular named NRC employee without the showing of exceptional circumstances mandated by our Rules of Practice.

As we stated in CLI-81-36, a Board has limited authority to shape the issues in a proceeding. 14 NRC 1111 (1981). We alone, not our Boards, have supervisory authority over the Staff's resolution of issues that are not already admitted to a proceeding. A Board's desire to monitor the Staff's progress in identifying and/or evaluating potential safety issues does not authorize it to exercise its sua sponte powers. Id. Nor does it allow a Board inventively to circumvent our Rules of Practice in assisting a party to a proceeding to amend an inadmissible contention that the Board itself may wish to admit but that is inadmissible in its current state. Contrary to the Licensing Board's apparent belief, it lacked authority to require the Staff to submit information to enable it to determine whether to raise a QA/QC issue sua sponte. Only after making an affirmative finding on the basis of information already in its possession that a serious safety, environmental, or common defense and security issue does indeed exist may a Board exercise its sua sponte powers. It has no authority to "bootstrap" itself into a position to exercise those powers. Id. Regardless of whether we ultimately take review of ALAB-817, these points concerning a Board's limited authority to shape the issues in a proceeding warrant reemphasis and should be understood by all who participate in our proceedings.

SEPARATE VIEWS OF COMMISSIONER ASSELSTINE

The proponent of a motion for directed certification has the burden of establishing that he is entitled to prevail. Neither the staff nor the applicant has made its case here. I see no basis for giving them a second opportunity to do so.