December 19, 1985

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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COMMONWEALTH EDISON COMPANY'S ANSWERS
TO QUESTIONS POSED BY THE COMMISSION

Applicant, Commonwealth Edison Company, hereby responds to the Commission's Order of December 5, 1985, directing that the parties to this proceeding answer seven questions posed by the Commission.

1. Why, given the apparent violation of 10 CFR 2.720(h) and 2.740(b), did applicant and 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?

On April 17, 1985, the Licensing Board entered its Special Prehearing Conference Order directing that Mr. Keppler be deposed by Intervenors and encouraging Intervenors to resubmit an amended QA/QC contention on the basis of the deposition and in accordance with other detailed directions set out in the Order. The Applicant's remedy for these violations of the Commission's regulations was to file objections to the Board's order under the provisions of 10 CFR

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§ 2.751a(d). After obtaining an extension of the five-day period provided in the regulation, Applicant filed such objections on April 29, 1985. Applicant pointed out that the Licensing Board had violated the Commission's regulations and requested that the Board vacate its order and dismiss Intervenors' contention. Applicant also requested that if the Licensing Board ruled adversely to it in this matter, the Board refer its ruling promptly to the Commission under 10 CFR § 2.730(f).

The Licensing Board, by deferring its ruling on Applicant's objections until after Mr. Keppler's deposition had been taken on May 20, 1985, effectively negated any opportunity for appellate review until after that time. No motion for directed certification based on an asserted pervasive impact on the proceeding by reason of the Board's ruling could be made until the Board had acted on Applicant's objections. The Board waited until June 21, 1985, when it issued its order admitting Intervenors' amended QA/QC contention. In that order the Licensing Board rejected Applicant's arguments that it had violated Commission regulations and declined to refer the matter to the Commission. Applicant thereafter sought directed certification from the Appeal Board on the ground that the Licensing Board's course of conduct had pervasively affected the basic structure of the proceeding.

During the interval when Applicant's objections and request for referral were pending before the Licensing Board,

Applicant had no means of preventing the deposition from being taken. The only avenue open to Applicant in this situation would have been to seek a stay of the Licensing Board's deposition order pending appeal under the provisions of 10 CFR § 2.788. Such a stay could have been sought either from the Licensing Board or the Appeal Board. In either case, however, Applicant would have been required to show that it would be irreparably injured unless the stay were granted.

Applicant believed that it would be significantly injured if the Licensing Board's conduct led to the erroneous admission of an amended QA/QC contention. Applicant would be forced to spend time, effort and money in litigating an issue which should never have been admitted to the proceeding. Later review would provide no remedy for this injury. Nonetheless, Applicant was aware that NRC jurisprudence had established that the injury which Applicant would suffer was not "irreparable" for purposes of obtaining interlocutory review. The Appeal Board has consistently held that the mere burden of having to litigate a contention because of Licensing Board error does not constitute irreparable injury.[1/]

1/ Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1756 (1982); Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-641, 13 NRC 550, 551-52 (1981).

Applicant therefore concluded that under the case law it could show irreparable injury only if the Licensing Board's action in allowing Mr. Keppler's deposition triggered the admission of a contention whose litigation would delay the issuance of an operating license beyond the date that Applicant estimated it would otherwise load fuel in the reactor. At that point Applicant would begin to experience serious financial loss because of the Board's error. At the time of the Licensing Board's order in April 1985, the Applicant's estimated fuel load date for Unit 1 at Braidwood was April 1986. It would have been premature to speculate that the taking of the deposition ordered by the Board would lead to the admission of a contention of such complexity that its litigation would jeopardize this date, given that it was a full year in the future. Applicant therefore concluded that under applicable precedents it could not demonstrate that it was entitled to a stay of the Board's order.

Thus, the Applicant availed itself of the only remedy available to it for the Licensing Board's violation of the regulations--the filing of objections. The remedy of a stay was unavailable because one of the prerequisites-- the threat of irreparable injury--could not be met.

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?

(a) The Licensing Board's Error

The Licensing Board's reliance on the Keppler deposition as a basis for admitting the amended QA/QC contention is not the only error of which the Applicant complains. The Licensing Board's violation of 10 CFR § 2.740, in allowing discovery on a rejected contention, was only one manifestation of the Board's violation of the provisions of 10 CFR § 2.714, which resulted in a gross distortion of the basic scheme of the regulations governing the admission of contentions. A Licensing Board's function under the regulations is to apply objectively the contention-admissibility standards of 10 CFR § 2.714 to whatever contention may be submitted to it by an intervenor. The Licensing Board's conduct in this case was not consistent with this regulatory scheme.

The Licensing Board fashioned an ad hoc procedure, which it was without power to do under 10 CFR § 2.714. Only one element of this procedure involved the granting of the prohibited discovery against the NRC Staff. In addition, the Board set a date for resubmission of an amended contention and set forth elaborate ground rules directing Intervenors how to

formulate a QA contention that it would admit. The Board provided explicit guidance as to both the degree of basis and specificity it would find acceptable and the showing which would convince it to admit the contention even though it was years out of time. Furthermore, compounding its violation of the Commission's rules, while Intervenors deposed Mr. Keppler and framed a new contention, the Licensing Board impermissibly tolled the five factors governing the admission of late-filed contentions. The Board treated the new contention as a supplement to the original, as evidenced by its not requiring Intervenors to demonstrate anew that the amended contention satisfied the late-filed factors analysis.[2/]

This course of conduct was a violation of Section 2.714 that fundamentally altered the Board's proper function of deciding the admissibility of the late-filed contention in accordance with the rules - Section 2.714 - fashioned by the Commission. The Licensing Board should have simply rejected the original contention as lacking in basis and specificity and stopped there. Instead, it engaged in rulemaking,

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2/ The Board thus substantiated Applicant's position in its objections that the Board had in fact not rejected the contention but admitted it conditionally, in violation of Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460 (1982). Applicant's Objections to Board Order, pp. 10-11.

grafting its ad hoc procedures (including the prohibited Keppler deposition) onto Section 2.714 and imposing them for the first time on Applicant. Thus, the Applicant's fundamental complaint is that it has been denied administrative due process because the Board did not apply the version of Section 2.714 promulgated by the Commission but rather imposed its own and new formulation of Section 2.714. Applicant is entitled, as a matter of law, to have its application for an operating license governed by regulations promulgated by rulemaking under the Administrative Procedure Act and thereafter consistently applied.[3/] The Licensing Board's action contravened both these legal principles.

3/ For example, in Pacific Molasses Co. v. FTC, 356 F.2d 386 (5th Cir. 1966), the court held that the FTC's failure to comply with its Rules of Practice constituted a denial of administrative due process. Because the FTC violated its rule requiring the examiner to conduct the proceedings in accordance with agreements reached at a prehearing conference, the court reversed the FTC's decision. The court commented:

> When an administrative agency promulgates rules to govern its proceedings, these rules must be scrupulously observed. See Service v. Dulles (1957), 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403. This is so even when the defined procedures are "* * * generous beyond the requirements that bind such agency * * *." Vitarelli v. Seaton, (1959), 359 U.S. 535, 547, 79 S.Ct. 968, 3 L.Ed.2d 1012 (Justice Frankfurter dissenting). For once an agency exercises its discretion and

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The Licensing Board's action in exceeding its authority to shape the issues in a proceeding also circumvented 10 CFR § 2.760a, governing the Board's authority to raise issues sua sponte. The Licensing Board resorted to unauthorized procedures for keeping alive a contention which it had "rejected" because the Board itself felt some concern about Applicant's QA program at Braidwood on the basis of testimony given by Mr. Keppler in a different proceeding. The Board thus assisted Intervenors in formulating and submitting what it regarded as an admissible contention in order to satisfy this concern of its own. For a licensing board to make an intervenor its surrogate to satisfy its own concerns contravenes its jurisdictional limits and circumvents the

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> creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules. United States ex rel. Accardi v. Shaughnessy (1954), 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681. If an agency in its proceedings violates its rules and prejudice results, any action taken as a result of the proceedings cannot stand. Sangamon Valley Television Corp. v. United States, 106 U.S.App.D.C. 30, 269 F.2d 221 (D.C. Cir. 1959), cert. denied (1964) 376 U.S. 915, 84 S.Ct. 665, 11L.Ed.2d 611.

See also Nader v. NRC, 513 F.2d 1045, 151 (D.C. Cir. 1975) (To be sure, an administrative agency is bound not only by the precepts of its governing statute but also by those incorporated into its own regulations.).

express direction of the Commission for the exercise of its sua sponte powers.[4/]

(b) The Amended Contention Is Based On The Deposition

Despite the disclaimer by Intervenors, the deposition of Mr. Keppler was indeed a basis for the Licensing Board's admission of the amended QA/QC contention. In admitting the amended contention, the Board noted that Intervenors had provided three bases: "statements made by Mr. James Keppler when he testified in the Byron operating license proceeding and during his more recent deposition, as well as extracts from various NRC Staff inspection reports."[5/] Although the Licensing Board did not admit Mr. Keppler's statements as actual issues for litigation, it clearly relied on them as a basis for admitting the contention. In particular, the deposition was a significant basis for the admission of Intervenors' first and most fundamental allegation-- that Applicant had been ineffective in overseeing the quality of its on-site construction contractors' safety-related work.[6/] In addition, the questioning of Mr. Warnick and the documents

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4/ Memorandum, "Raising Of Issues Sua Sponte In Adjudicatory Proceedings," June 30, 1981.

5/ Memorandum and Order Admitting Rorem et al. Amended Quality Assurance Contention, LBP-85-20, June 21, 1985, slip op. at 9, __ NRC __ (citations omitted).

6/ See Deposition of Keppler and Warnick, dated May 20, 1985, pp. 91-105.

produced in connection therewith served as a basis for Intervenors' issue concerning allegations of harassment and intimidation of a contractor's QC inspectors.[7/]

Indeed, the Licensing Board confirmed this position subsequently in ruling on a discovery dispute. Intervenors propounded an interrogatory to Applicant inquiring into statements of Mr. Keppler quoted in a newspaper article that Intervenors had questioned Mr. Keppler about in his deposition and that they had incorporated in their contention on that basis. Applicant objected to the interrogatory on the ground that it inquired into a matter which the Licensing Board had refused to admit as a part of the QA contention. The Board disagreed that it had "rejected" this portion of Intervenors' proposed contention: "Rather, the Order [admitting the contention] recognized the illustrative nature of the statement and its utilization for the purpose of fleshing out the basis of the contention."[8/] The Board therefore required Applicant to answer the interrogatory.

7/ Deposition, pp. 160-184, 201-205.

8/ Memorandum and Order Ruling on Intervenors' Motion to Compel Discovery, September 27, 1985, slip op. at 6-7.

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?

As Applicant explained in response to Question 2, allowing Intervenors to take Mr. Keppler's deposition is not the only Licensing Board error of which the Applicant complains. Applicant's fundamental complaint is that the Board's entire course of conduct culminating in its admission of the amended QA contention violated 10 CFR § 2.714 and denied Applicant's administrative due process rights. Dismissal of the contention is the only effective remedy for this error. Nothing else will afford any relief to Applicant. Nothing else will adequately vindicate the Commission's concern for a stable and predictable regulatory process. Regulatory reform will never bear fruit if atomic safety and licensing boards are free to ignore and circumvent the Commission's regulations as the Braidwood Board did, and fashion their own more lenient rules to facilitate the admission of late-filed contentions.

Applicant does not believe that the exclusionary rule applied in criminal cases furnishes an apt analogy to this remedy. Applicant is not attempting to suppress evidence that was obtained by illegal or improper methods, should that

evidence later become relevant to an issue properly admitted to the proceeding. For example, were the Intervenors to use the Keppler deposition for impeachment purposes, Applicant would have no objection. Applicant does maintain, however, that the deposition may not be used to supply basis for the amended contention, because the taking of the deposition formed an integral part of the unauthorized procedures through which the contention was erroneously admitted. Applicant submits that a more apt analogy than the "exclusionary rule" exists in traditional administrative and judicial remedies for violations of procedural rules on the part of tribunals. For example, 10 CFR § 2.760a sets strict limits on the power of a licensing board to admit an issue to a proceeding sua sponte. If a licensing board exceeds its authority under this regulation, the Commission dismisses the issue from the proceeding.[9/]

Even under the liberal pleading rules of the federal courts, the appellate courts will dismiss pleadings that have been improperly filed, or amended in violation of Federal Rule of Civil Procedure 15. For instance, in Strauss v. Douglas Aircraft Co., 404 F.2d 1152 (2nd Cir. 1968), the appellate

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9/ Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-36, 14 NRC 1111, 1114 (1981); Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 16 NRC 109 (1982), clarified on rehearing, 17 NRC 75 (1983).

court held that the district court had abused its discretion in permitting a defendant to amend its answer, and remanded the entire action for a retrial. The court found that the amendment, which had added a defense not previously pled, was unduly prejudicial to the plaintiff. Accordingly, the defendant was foreclosed from raising that defense on retrial.

Similarly, courts that review administrative decisions disregard evidence that was considered by an administrative agency in violation of its own regulations. In Kelly v. Railroad Retirement Board, 625 F.2d 486 (3rd Cir. 1980), the Railroad Retirement Board received and considered evidence relating to a claim without notifying the claimant. Because this failure to notify was in violation of the Board's own regulations, the appellate court found that the evidence was to be given no effect. The court reasoned that where an agency admits evidence in violation of its own regulations, it may not be permitted to rely on that evidence in making its decision.[10/] In this case, Applicant submits that because the Licensing Board violated Commission regulations in allowing Intervenors to supply basis for their contention, the Board may not be allowed to rely on the basis so supplied in admitting the contention.

10/ Id. at 492.

Dismissal of the amended QA/QC contention is the only means by which this Commission can give the Licensing Board the incentive to comply with the rules and regulations established by the Commission. It is only by exacting such compliance that the Commission can maintain a regulatory scheme that comports with the norms of administrative due process.

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?

Applicant has responded to this question in the affirmative. The "other errors" are discussed in the answer to Question 2.

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?

Under the Applicant's reasoning, the amended QA contention should not be rejected simply because it is based in part on the Keppler deposition. Rather it should be rejected because its admission depended upon a course of unauthorized conduct on the part of the Licensing Board that violated the Applicant's rights under the Commission's regulations. Nonetheless, the Commission appears to ask whether,

if it struck the deposition and rejected the admitted contention because of the Licensing Board's violation of the discovery rule, Intervenors could simply refile the contention and secure its admission by the Board.

Applicant disagrees with the Appeal Board majority[11/] that the Licensing Board would admit the amended QA/QC contention a second time if it properly applied the Commission's rules. Applicant submits that under a proper interpretation of the Commission's regulations, Intervenors could not support readmission of the amended QA/QC contention with regard either to basis or to the requisite showing under the five factors governing the admission of late-filed contentions set forth in 10 CFR § 2.714. The basis for the contention remaining beyond the Keppler deposition[12/] is

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11/ ALAB-817, slip op. p. 8, n. 21.

12/ As a result of the Licensing Board's unauthorized action, Intervenors have obtained massive, wide-ranging discovery on each of the over 65 subcontention items which were admitted improperly. At this point in time, Intervenors could undoubtedly resubmit the identical contention based on these discovery documents which describe the same items of noncompliance as the NRC inspection reports previously cited in support of the amended QA/QC Contention.

The foregoing suggests that Commission review of the Licensing Board's actions in admitting the contention could be a fruitless exercise. However, we believe that the Commission can fashion a remedy here which will both effectuate the policy reasons underlying the rules governing the admission of contentions, promote a fair

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largely a heterogeneous collection of findings from NRC Staff inspection reports that have issued over the years. This laundry list of deficiencies in quality assurance, most of which occurred in 1982 and 1983, does not provide the necessary basis for an admissible contention. Intervenors have simply pointed out that the NRC Staff, in its ongoing oversight function, has identified a number of QA problems at Braidwood, most of which by now have been resolved to the NRC Staff's satisfaction. Thus, Intervenors have identified nothing new, but have merely requested a hearing on the basis of old information developed by the NRC Staff, which the Staff itself has been pursuing with the Applicant.

Moreover, a proper balancing of the factors to be considered under 10 CFR § 2.714(a)(i) favors rejection of the late-filed amended QA/QC Contention. In order to gain admission of a late-filed contention an intervenor must address

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and predictable regulatory scheme, and not penalize any party for the Licensing Board's violation of the rules. Should Intervenors choose to resubmit the identical contention, an evaluation of its admissibility should rest on its basis and specificity, as well as the evaluation of the five factors, as if the ensuing discovery against Applicant and Staff had not taken place.

This remedy would be consistent with the legal principles articulated in response to Question 3 above. Although Intervenors could use the evidence obtained on discovery, like the Keppler deposition, to litigate a subsequent contention properly admitted to the proceeding, they could not use this evidence to supply basis for the admission of such a contention.

these five factors and affirmatively demonstrate that, on balance, they favor admission of the contention.[13/] The five factors to be weighed under Section 2.714(a)(i) are:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The Licensing Board already found that there was no good cause for the late filing of Intervenors' QA/QC contention.[14/] Intervenors, therefore, could not hope to show good cause for the resubmitted QA/QC contention. Because they cannot prevail in showing good cause, Intervenors' burden under the other four factors is substantially increased.[15/]

13/ See Maine Yankee Atomic Power Co. (Maine Yankee Atomic Power Station), LBP-82-4, 25 NRC 199, 201 (1982).

14/ Special Prehearing Conference Order, slip op. at 26-28.

15/ See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 2), ALAB-384, 5 NRC 612, 615 (1977); Project Management Corp. (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 382, 389 (1976); Virginia (Footnote Continued)

Although Applicant conceded that the second factor favored Intervenors in its arguments before the Licensing Board in opposition to the late-filed amended QA/QC contention, it seems clear that with respect to any refiling of the contention Intervenors would not now prevail under this factor. Intervenors' only interest is in being assured that the Braidwood facility is constructed in accordance with applicable quality criteria set forth in the Commission's regulations. The only thing that Intervenors know to the contrary, as reflected in their existing contention, is that the Staff has from time to time identified certain noncompliances with these criteria at Braidwood. However, for these instances, which are all that Intervenors allege, their interest is protected by the continuing oversight exercised by the Staff in assuring that any deficiencies identified are resolved before issuance of an operating license.

Intervenors would not prevail under the third factor, concerning the extent to which their participation may be expected to assist in developing a sound record. Intervenors made no affirmative showing on this issue in their Motion to Admit the Amended QA/QC Contention.

(Footnote Continued)
Electric and Power Co. (North Anna Station, Units 1 & 1), ALAB-289, 2 NRC 395, 398 (1975).

One way in which an intervenor can make such a showing is by identifying the witnesses he intends to call and the subjects that would be addressed in their testimony.[16/] In its Special Prehearing Conference Order, which encouraged Intervenors to submit an amended QA contention, the Licensing Board suggested that Intervenors make such a showing in order to prevail on this factor.[17/] Intervenors failed to take advantage of the offered opportunity. Despite the lack of any showing by Intervenors, the Licensing Board assumed that they would contribute to the development of a sound record. The Board attempted to support this assumption by asserting that the law firm representing Intervenors in this proceeding had helped develop a full record in the Byron proceeding, but the Board did not specify how they had done so.

The Board also noted that the failure to identify witnesses and specify the subjects of their testimony did not absolutely preclude an intervenor from prevailing on this factor because he could contribute to the development of a sound record through cross-examination by his counsel.[18/] This statement, however, was merely speculative, because the

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16/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 399-400 (1983).

17/ Slip op. at 42.

18/ Memorandum and Order Admitting QA/QC Contention, Slip op. at 18-19.

Board did not attempt to draw any connection between the general principle and the likelihood of effective cross-examination by Intervenors' counsel in this proceeding. A relevant consideration in this regard is whether Intervenors will have expert assistance in their cross-examination.[19/] Intervenors made no showing that they would have such expert assistance.

The error of the Board's assumption is further underlined by the nature of the amended QA contention itself. Intervenors have not raised any new issues and have not provided a plausible theory suggesting that the aggregation of inspection report findings they point to indicates the existence of significant quality problems at Braidwood. Indeed, with the exception of one issue involving harassment of one contractor's QC inspectors, Intervenors' entire contention consists of extracts, generally verbatim, from NRC Staff inspection reports. A contention consisting of old information developed by the regulatory staff does not give any promise that Intervenors will contribute to the development of a sound record. Applicant does not concede that Intervenors, through cross-examination by their counsel, will explore the

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19/ Duke Power Co. (Atlanta Nuclear Station, Units 1 and 2), LBP-84-24, 19 NRC 1418, 1586 n. (1984).

deficiencies identified by the Staff better than the Staff itself will do.

Thus the Licensing Board's assumption that Intervenors had prevailed on the third factor was erroneous because the Board refused to rely on accepted touchstones for an intervenor's ability to contribute to the development of a sound record--the identification of witnesses and the specification of the subjects of their testimony, or at least an indication from the contention itself that Intervenors had significant issues to bring to the Commission's attention. Ignoring these, the Board erroneously relied on the unsupported assumption that Intervenors' counsel had made a significant contribution in a prior proceeding.[20/] Applicant submits that if Intervenors resubmitted a contention, they could not prevail on this factor consistent with the Commission's regulations.

Intervenors would likely prevail with respect to the fourth factor, because their interest would likely not be represented by other parties to the operating license proceeding.

20/ Judge Smith, in the Byron case, complained that BPI, the law firm representing Intervenors here, had "rais[ed] every conceivable issue" and then failed to act affirmatively to litigate them, instead expecting the Board to "untangle it." May 30, 1984 Byron Transcript at 8173-8180.

Finally, Intervenors certainly could not prevail on the fifth factor, concerning the extent to which their participation would broaden the issues or delay the proceeding. Intervenors' QA contention is 31 pages long, alleges multiple violations of 12 of the Commission's 18 quality assurance regulations and will require an examination of the adequacy of some of Applicant's extensive corrective action programs. Moreover, this proceeding will consist almost entirely of litigation of this contention. In this respect, any refiling by Intervenors would expand and delay the proceeding even more clearly than the filing of their amended contention in May 1985. Aside from Intervenors' QA contention, there now remains nothing to litigate in this proceeding except one limited emergency planning issue. There could be no clearer case where the admission of a contention materially expands the issues and delays the proceeding.

In admitting Intervenors' amended QA contention, the Licensing Board erroneously found in Intervenors' favor on this fifth factor by once again violating the provisions of 10 CFR § 2.714. In analyzing the fifth factor, the Board found it necessary to balance the expansion of issues and delay to the proceeding that admission of the QA contention would cause against the potential significance of the issue that the contention raised. On the basis of Mr. Keppler's statements the Board concluded that any expansion and delay was

outweighed by the potential significance of the issue.[21/] But 10 CFR § 2.714(a)(1) does not permit a licensing board to discount the expansion of issues and delay to the proceeding that a contention will cause by concluding that the contention may raise significant issues. In finding in Intervenors' favor on the fifth factor, therefore, the Licensing Board again abused its discretion and violated the Commission's regulations. The Board also concluded that it could mitigate any delay by announcing its intention to maintain the pre-established hearing schedule. The Board, however, engaged in no analysis to determine whether in fact it was possible to litigate the QA contention under that schedule. Had the Board done so, the ineffectiveness of its announcement would have become apparent. On any refiling of the contention, Intervenors clearly could not prevail on the fifth factor consistent with the Commission's regulations.

On balancing the five factors, the inescapable conclusion is that Intervenors could not support admission of a refiled QA contention. Of the five factors required to be considered by the Licensing Board under 10 CFR § 2.714(a)(1), four favor dismissal of the contention. Only the fourth factor, whether Intervenors' interest would be repre[illegible]d by

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21/ Memorandum and Order Admitting QA Contention, Slip op. at 21 and Special Prehearing Conference Order, Slip op. at 35-37.

other parties to the proceeding, weighs in favor of admitting the contention. It is well established in Commission jurisprudence that this factor is of little weight in determining whether a late-filed contention may be admitted.[22/] The three controlling factors are the first, the third, and the fifth.[23/] The Intervenors could not prevail on any of these with respect to a refiled contention. In particular, as the Licensing Board already found, their delay in filing the contention would be inexcusable, making their burden on the other factors much heavier. Moreover, there could be no clearer case in which admission of a contention would expand the issues and delay the proceeding. The Licensing Board only found to the contrary by violating the regulation, and the case against Intervenors on refiling would be even heavier.

In sum, the refiled QA contention would have to be rejected under the Commission's regulations. Any decision to the contrary by the Licensing Board would be an abuse of discretion similar to that found by the Appeal Board in South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station,

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22/ Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2) ALAB-707, 16 NRC 1760, 1767 (1982); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730-31 (1982); South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1) ALAB-642, 13 NRC 881, 884-85 (1982).

23/ Id.

Unit 1), ALAB-642, 13 NRC 881 (1981). There the Appeal Board reversed a licensing board's grant of an untimely intervention petition, reasoning that inexcusable lateness in filing coupled with an expansion of the scope of the proceeding required denial of the late-filed petition, even though the petitioner had made some showing of an ability to contribute to the record. The Appeal Board held that the Licensing Board had abused its discretion under 10 CFR § 2.714(a)(1).[24/]

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?

As indicated above, Applicant believes that if the Amended QA Contention were rejected, Intervenors could not support its admission a second time. Assuming that they could, however, Applicant believes that Commission review at this time would have no effect on the scope or timing of the QA/QC hearing because during any Commission review the proceedings before the Licensing Board will go forward without interruption.

Assuming, then, that the Commission rejected the contention and the Licensing Board subsequently readmitted the

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24/ See also South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-643, 13 NRC 898, 900 (1981).

contention,[25/] there would clearly be a delay in the proceeding between those dates, a delay of perhaps two months. Intervenors would be obliged to file any resubmission expeditiously on pain of compounding their lack of good cause for late filing. The balance of the delay would be consumed by the time needed to submit responses and to render a decision. The Applicant believes that the Commission, in the circumstances of this case, could consider and decide the admissibility of a refiled contention more expeditiously than the Licensing Board and thereby lessen the delay. For this reason, Applicant urges the Commission to retain jurisdiction of this matter. There should be no other delay in the proceeding, since the hearing record already developed in the present case would be applicable and adopted in connection with the litigation of the resubmitted contention.

It should be noted that the presently approved hearing schedule for the litigation of Intervenors' Amended QA/QC Contention which called for hearings to begin March 17,

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25/ Intervenors, of course, could file and the Licensing Board could admit a QA/QC contention different from the amended contention provided it did not rely on the discovery which has taken place. The filing of a different late-filed QA/QC Contention is permitted under 10 CFR § 2.714 at any time in a proceeding. The scope of operating license proceedings is always subject to expansion due to the filing of a late-filed contention under 10 CFR § 2.714. For this reason, the potential for filing new and different QA/QC contentions should not influence Commission action in its consideration of Applicant's petitions.

1985, is obsolete. Although the Applicant is filing a motion for summary disposition contemporaneously with this response in an attempt to reduce the number of issues which will be the subject of an evidentiary hearing and thereby improve the hearing schedule, it is likely that a revised schedule will result in the issuance of a decision on the license application on a date virtually coincident with Applicant's currently estimated date of September 30, 1986 for loading fuel in Braidwood Station, Unit 1. The September 30, 1986 fuel load date is an estimate based on the Applicant's most recent budget review of the schedule of engineering and construction and preoperational testing for Unit 1.[26/] Of course, if the resubmitted contention were rejected in accordance with the analysis presented in response to Question 5, the fuel load date would not be impacted by the hearing process since the litigation of the only other issue in the case would be completed well in advance of September 30, 1986.

26/ See Mr. Cordell Reed's November 18, 1985 letter to Mr. Harold R. Denton, which was enclosed with Applicant's Licensing Board notification letter of November 18.

7. Could greater diligence by applicant or intervenor Rorem have led to earlier litigation of QA/QC issues in this proceeding?

Greater diligence by Intervenors could certainly have led to earlier litigation of QA/QC issues in this proceeding. As discussed in response to Question 5, above, Intervenors were inexcusably late in filing their contention, and the Licensing Board so found. The Board found that "at the very latest, Intervenors could have filed the contention immediately subsequent to August 1, 1984, when testimony was given [in the Byron proceeding] by [Mr. Keppler,] the NRC Region III Director pointing out QA/QC problems at Braidwood."[27/] Indeed, most of the Staff inspection reports which form a basis for the contention were issued in May 1984 and earlier, which makes Intervenors' filing even more untimely.

In fact, Intervenors not only had this information available, but actually formulated a QA/QC contention and announced their intention to file it in early 1984. This announcement was repeated at intervals over a one-year period:

- On March 27, 1984, Intervenors, through their counsel BPI, who was representing them on QA matters only,

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27/ Special Prehearing Conference Order, slip op. at 27.

announced that they would file revised contentions by April 26, 1984.[28/] On April 26, Intervenors proposed 10 contentions, including construction and design QA contentions to counsel for the Applicant and the NRC Staff in an effort to effect a stipulation among counsel admitting the QA contention to the proceeding. When counsel rejected the proposal, Intervenors made no attempt to introduce the contentions by filing a proper motion with the Licensing Board.

- On August 6, 1984, Intervenors reiterated their intent to file a QA Contention.[29/] No QA contention was filed in August or September 1984.

- On October 17, 1984, Intervenors requested that a schedule be established for, among other things, an opportunity to file a QA Contention.[30/] No QA Contention was filed in October, November or December 1984, or January 1985.

- On February 28, 1985, Intervenors announced they were preparing a QA Contention, and such a Contention was finally filed on March 7, 1985. It was almost identical to

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28/ See Letter dated March 30, 1984 from counsel for Applicant to the Licensing Board.

29/ See August 6, 1984 letter from BPI counsel to the Licensing Board.

30/ See October 17, 1984 letter from BPI counsel to the Licensing Board.

the Contention submitted to counsel for Applicant and Staff in April 1984.

This history suggests more than a lack of diligence on the part of Intervenors. It suggests deliberate delay for tactical reasons. Intervenors are fully aware of the role of delay in furthering their goals in this proceeding.[31/]

Applicant does not believe that any greater diligence on its own part could have resulted in earlier litigation of QA/QC issues in this proceeding. Certainly since the submission and admission of the QA contention, Applicant has exercised all possible diligence in responding to it. In opposing admission of Intervenors' amended QA contention, Applicant argued that litigating the issues raised by Intervenors would delay the proceeding because it would necessitate litigating the adequacy of various corrective action programs that would not be complete by the hearing date of October 1, 1985 which the Licensing Board had then established. Applicant explained that had it been aware six months

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31/ While representing Ms. Rorem in the Braidwood operating license proceeding, BPI has simultaneously been litigating a case which it instituted before the Illinois Commerce Commission, requesting that the Commission order cancellation of Braidwood. (Ill. C.C. Docket No. 82-0855.) That decision will turn on the relative costs of completing and cancelling the facility, a subject on which BPI has presented expert testimony. BPI knows full well that delays in issuing an operating license will add to the cost of the facility, thus enhancing its position before the Commerce Commission.

earlier of the need to complete those programs to meet the hearing schedule, it would have scheduled the conduct of these programs differently. Any resulting delay, therefore, was caused by Intervenors' delay in filing their contention.[32/] The Licensing Board expressed skepticism on this point. The Board reasoned that Applicant should have scheduled the corrective action programs more expeditiously to facilitate its then-projected fuel load date of April 1986. The Board also noted that Applicant had been aware for some time that Intervenors intended to move to have a late-filed QA contention admitted as an issue in the case.[33/]

Contrary to the Licensing Board's apparent view, Applicant does not believe it was guilty of any lack of diligence in scheduling its corrective action programs. As the attached affidavit of Michael J. Wallace (Exhibit A) explains, Applicant carefully scheduled what it regarded as an optimal path in sequencing the many activities necessary to achieve its projected fuel load date. The corrective action programs implicated by the contention were not critical path items and therefore were not scheduled for early

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32/ Applicant's Response In Opposition To Intervenors' Motion To Admit Amended Quality Assurance Contention, June 7, 1985, pp. 42-43 and attached affidavit of Michael J. Wallace.

33/ Memorandum and Order Admitting QA Contention, slip op at 8-9.

completion.[34/] Contrary to the Licensing Board's view, Applicant's belief that the NRC Staff would approve those programs before the anticipated fuel load date was reasonable. Because the Staff was reviewing the various programs as they progressed, there was little need for additional review on program completion, and it was reasonable to anticipate fairly quick Staff approval.[35/]

Moreover, Applicant was on notice only in a general way that Intervenors intended to file some kind of QA contention at some time in the future. At that time, Applicant had no basis for speculating about what issues Intervenors would attempt to raise in any contention they proposed. It therefore had no basis for attempting to accelerate any specific corrective action program in order to respond to an issue that the Licensing Board might later admit for litigation. Indeed, in view of Intervenors' practice of crying wolf at frequent intervals over the previous year, Applicant would have been rash to alter its construction schedule even if Intervenors had threatened to raise specific issues implicating certain corrective action programs. In particular, Applicant had no reason to believe that Intervenors would raise issues contained in old Staff inspection reports which

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34/ Wallace Affidavit, ¶¶ 5-6.

35/ Wallace Affidavit, ¶ 8.

had been in the public record for a considerable time and with respect to which Intervenors had taken no action.[36/]

8. Additional Answer

In addition to the seven questions that the Commission poses, the Commission notes that on July 9, 1985, when Applicant requested the Appeal Board to direct certification of the procedures under which the Licensing Board had admitted the amended QA/QC contention, it did not argue that admission of the contention would delay completion of the Braidwood facility. On September 23, 1985, however, Applicant submitted, with its petition to the Commission, an affidavit demonstrating that litigation of the contention had seriously disrupted Applicant's project construction activities and would continue to do so. The Commission expresses regret because it believes Applicant could have made this argument before the Appeal Board but failed to do so. However, as Applicant explained in its petition, the specific effect on project construction of litigating the QA contention was not raised with the Appeal Board because it only became reasonably quantifiable at the end of August 1985, as Applicant completed its responses to Intervenors' first set of interrogatories. Those interrogatories were filed on July 2, 1985, only five days before the Applicant's Motion For Directed Certification

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36/ Wallace Affidavit, ¶¶ 10-11.

was filed with the Appeal Board. In sum, there was new information when Applicant filed its petition with the Commission.

CONCLUSION

The answers given above, and the accompanying affidavit of Michael J. Wallace, represent Applicant's attempt to provide full and fair responses to the seven questions propounded by the Commission.

Respectfully submitted,

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