

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD



In the Matter of)

COMMONWEALTH EDISON COMPANY)

(Byron Station, Units 1 and 2))

Docket Nos. 50-454
50-455

APPLICANT'S RESPONSE TO NRC STAFF'S
MOTION FOR DIRECTED CERTIFICATION

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APPLICANT'S RESPONSE TO NRC STAFF'S
MOTION FOR DIRECTED CERTIFICATION

Pursuant to the Atomic Safety and Licensing Appeal Board's ("Appeal Board") "Order", dated July 11, 1983, Commonwealth Edison Company ("Applicant"), by its attorneys, hereby responds to the NRC Staff's Motion For Directed Certification, moves this Appeal Board to accept certification, render a decision and certify its decision for final review and determination by the Nuclear Regulatory Commission pursuant 10 CFR 2.785(d).

I. BACKGROUND

On April 27, 1983, after completion of the evidentiary sessions on quality assurance matters,^{1/} the

^{1/} The hearing record on the QA issue comprises over 640 pages of direct testimony, and over 1000 pages of cross-examination, the Licensing Board's examination, as well as all exhibits. The evidentiary sessions on quality assurance were completed on April 11, 1983. However, at the time of Intervenor's motion to reopen the evidentiary record and admit the testimony of John Hughes the record was being held open for the limited purpose of allowing joint intervenors the opportunity to present rebuttal testimony.

Rockford League of Women Voters and DAARE/SAFE ("joint intervenors") moved the Licensing Board to reopen the evidentiary record on quality assurance and admit the testimony of John Hughes^{2/}. In support of this motion, joint intervenors submitted Mr. Hughes' sworn statement which alleged improper inspector qualification and testing, improper inspection documentation, and improper welding during construction of the Byron Nuclear facility.^{3/} On May 26, 1983, the Licensing Board presided over the deposition of Mr. Hughes in order to determine the safety significance of these allegations.

On June 21, 1983, the Licensing Board issued two companion decisions. In its "Memorandum and Order Ruling On Intervenor's Motion To Admit Testimony of John Hughes," the Licensing Board concluded that contrary to its preliminary ruling (Tr. 7211-12), Mr. Hughes' sworn statement and deposition testimony had raised significant safety questions about the Hatfield Electric Company's QA inspector training, certification, and testing procedures. The Licensing Board reached this conclusion despite extensive testimony by the

^{2/} Mr. Hughes was an employee of Pittsburgh Testing Laboratories, a quality assurance contractor at Byron, assigned to the Hatfield Electric Company.

^{3/} Mr. Hughes also alleged he was dismissed for refusing to sign fraudulent documents.

Applicant concerning its ongoing inspection and recertification program that had been initiated in response to the findings of the NRC's Construction Appraisal Team. Prepared testimony of Mr. Walter J. Shewski at p. 35; Testimony of William Forney, Tr. 3658; NRC Inspection Report No. 50-454/8205, 50-455/8204, introduced into evidence as Applicant's Exhibit No. 8 on June 24, 1982. Nevertheless, the Licensing Board held that Mr. Hughes' testimony to the extent it addressed these matters would be admitted into the evidentiary record.

In the companion decision, "Memorandum and Order Reopening Evidentiary Record", the Licensing Board broadened the scope of issues to be considered on the reopened record to include testimony on the NRC Staff's investigations of Hatfield Electric Company's quality assurance program. The Licensing Board took this action noting that it had been informed that the Nuclear Regulatory Commission's Office of Investigations possessed material related to Mr. Hughes' allegations which was being used in that Offices' ongoing investigation into the criminal implications of Mr. Hughes' sworn statement. Id. at 2. Further, the Licensing Board also pointed to the direct testimony of Region III which reported that certain allegations made by three confidential sources concerning quality assurance work performed by the Hatfield

Electric Company were being evaluated by both the Office of Investigations and Region III.^{4/} Id. at 3.

In light of this information, and after reviewing Mr. Hughes' allegations, deposition record, and earlier NRC Staff testimony, the Licensing Board concluded:

that it would be an improper delegation of the Board's adjudicatory responsibilities to leave the resolution of the problems raised in the reports to the Staff's enforcement program.

Therefore the Board directs the parties to present a full evidentiary showing and explanation of the pertinent investigations of Hatfield Electric's quality assurance program and the subsequent reinspections. Id. at 3.

During telephone conference calls conducted on June 29 and 30, the Licensing Board, in response to Staff inquiry concerning the scope of testimony to be submitted at the reopened evidentiary session, stated that it expected the presentation to address all aspects of the Hatfield Electric Company's quality assurance program, including but not limited to QA training, certification and testing. During these conference calls the NRC Staff also informed the Licensing

^{4/} The direct testimony of the Region III witnesses on quality assurance reported that the allegations concerning the Hatfield Electric Company's quality assurance work involved the areas of records, hardware, design and drawing control, corrective action, housekeeping, inspector independence, as well as inspector qualification and certification.

Board that as a matter of policy it would not disclose detailed information about allegations that are the subject of ongoing inspections and investigations (including those of the Office of Investigations),^{5/} and requested the Licensing Board to refer to the Appeal Board its directive to the Staff to prepare testimony on and produce documents concerning ongoing investigations.

The Licensing Board orally denied the Staff's request for referral since the Staff (1) had not provided the Licensing Board with sufficient information to enable the Licensing Board to evaluate the Staff's assertion of privilege, (2) had not provided the Licensing Board with the requisite knowledge necessary for the Licensing Board to determine whether the information being used in the ongoing investigations is relevant and material to the Licensing Board's decision, and (3) had failed to explain or even discuss why traditional procedures such as in camera hearings and protective orders would not serve to protect the effectiveness of the Staff's investigations and inspections.

On July 1, 1983 the Licensing Board issued its "Memorandum and Order" memorializing the rulings made during the course of the conference calls. In addition, the Board

^{5/} The NRC Staff agreed to present testimony with respect to completed investigations documented in written inspection reports.

directed the Staff to produce all documents relevant to the confidential investigations in advance of the reopened hearing, which is currently scheduled for August 9, 1983. Thereafter, on July 8, 1983, the NRC Staff filed its Motion For Directed Certification ("Motion").^{6/}

II. DISCUSSION

A. The Appeal Board Should Accept Certification And Certify Its Decision To The Commission For Final Review And Determination

The NRC Staff's Motion For Directed Certification should be granted but on a basis other than that advanced by the NRC Staff. Moreover, for reasons explained below, the Appeal Board should consider the issues raised on certification, render a decision and certify this matter for final review and determination by the Nuclear Regulatory Commission pursuant to 10 CFR 2.785(d).

^{6/} The NRC Staff also filed a "Notice of Appeal and List of Exceptions To The Licensing Board Memorandum and Order of July 1, 1983." The Staff filed both the appeal and the motion for directed certification apparently because of the uncertainty respecting the appealability of the Licensing Board's order. In the circumstances of this case, it does not appear necessary to resolve the appealability question. Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC ___, (February 24, 1983).

The Appeal Board has the authority to direct certification and accept review of legal issues raised in proceedings still pending before the Licensing Board. The Commission's regulations provide for certification either at the discretion of the Licensing or Appeal Boards or at the direction of the Commission. 10 CFR 2.718(i) and 2.785(b).

At a minimum, the party seeking directed certification to the Appeal Board must establish that interlocutory review under 10 CFR 2.730(f) would have been proper. Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483 (1975). The Appeal Board clarified the criteria governing interlocutory review in Public Service Company of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190 (1977). There, the Appeal Board stated that interlocutory review is appropriate where "the ruling below (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner." Id. at 1192.

The NRC Staff appears to ground its motion for certification on the first of the two criteria enumerated in Marble Hill, namely immediate and serious irreparable impact. Motion at pp. 10-18. However, the Staff showing of irreparable impact is insufficient to warrant the grant of its

Motion. No affidavits were furnished concerning the existence or the confidential nature of the pending investigations. Indeed, despite the Licensing Board's pointed suggestion, none of the alleged privileged information was furnished in camera to the Licensing Board for its exclusive review and determination that such information was entitled to privilege protection and appropriately withheld from public disclosure. The NRC Staff would deprive the Licensing Board and the Appeal Board of these normal adjudicatory processes, and instead have them rely on the representations of its lawyers. Such representations are not by themselves of sufficient weight to warrant invocation of the Appeal Board's interlocutory review procedures. Nevertheless, other reasons exist to warrant acceptance of the Staff's Motion.

If certification is denied and in the absence of Commission intervention, the Staff must either comply with the Licensing Board's order or subject itself to the disciplinary action as discussed in Comanche Peak, supra. Seemingly, therefore, no harm would accrue to Applicant's interest to complete action on its license application for the Byron Station in a timely and reasonable manner. Such is not the case, however.

Office of Investigations ("OI") is not a party to the Byron proceeding and more importantly, both the Licensing Board and Appeal Board are powerless to subject OI to their jurisdictions. Thus, OI is free to decide that its

enforcement function is of paramount importance to that of the public hearing process and respectfully decline to cooperate because, as its view has been characterized by counsel for the NRC Staff, to do otherwise would prematurely disclose and consequently compromise pending investigations.

Thus, NRC's enforcement mission as interpreted and implemented by OI could conflict with the agency's equally important mission of concluding the public hearing process for pending operating license applications in a timely and reasonable manner. This conflict, aside from its generic implications, threatens the basic structure of the Byron proceeding in a pervasive and unusual manner. Moreover, not only is OI free to frustrate the adjudicatory process, it appears that in any event it is not prepared to project any completion date for its investigations because of "severe manpower constraints." Motion at p. 15.

Thus, without Appeal Board review and subsequent certification to the Commission, further consideration of the Byron application would be indefinitely stalled. It would appear that so long as the information requested by the Licensing Board is unavailable for whatever reason, the Board will further delay the issuance of its initial decision in this case thereby jeopardising the currently projected fuel load date of December 1983 for Unit 1.

It is possible that OI may, contrary to present indications, in fact cooperate and voluntarily disclose the

information surrounding the pending investigations. But that possibility should not cause the Appeal Board to decline certification because the relative importance of the adjudicatory process and the enforcement function of OI should be decided by the one authority that has jurisdiction over both functions, namely the Commission.

Finally, this matter should be certified for determination by the Commission since the lack of policy direction on the relationship of the agency's investigatory role with the public hearing process is causing licensing delays and is highly likely to cause such delays in the future. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-681, 16 NRC 146, 148 (1982); See also, Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452-57 (1981). The Applicant in the Comanche Peak case was the first to experience a disrupted licensing proceeding due to intra-agency differences on the proper role of agency investigations in the licensing process. Now this case has been caught up in the controversy. The problem is sure to proliferate to other licensing cases given the recurring nature of QA issues in licensing proceedings. The time has come for the agency to put its house in order and to reconcile the conflicting internal policy objectives. Only the Commission can fashion a timely and effective remedy. The request for certification should be granted.

B. The Appeal Board Should Recognize the
Law Enforcement Investigative Privilege

The NRC Staff's objection to testifying concerning allegations the subject of ongoing Staff investigations is based on potential harm to investigative efforts. The Staff asserts this privilege without the benefit of citation to any authority or prior precedent that would support the existence of the privilege being asserted. Applicant's research disclosed, however, an appropriate basis for asserting privilege with respect to the early disclosure of pending investigations.

The concept of privilege is not new to NRC Licensing proceedings. Northern States Power Company (Monticello Nuclear Generating Plant) ALAB-10, 4 AEC 391, affirmed, 4 AEC 409 (1970). The Commission's regulations have long reflected the recognition of the need for certain protections. Section 2.790 and Part 9 contain several exceptions to the Commission's rule that final NRC records and documents shall not be exempt from public disclosure. 10 CFR 2.790(a)(1-9), 10 CFR 9.5.—^{7/} Several of these exceptions are specifically designed to protect the integrity of the Staff's investigatory

^{7/} Part 9 of the Commission's Regulations codify the Freedom of Information Act, 5 U.S.C. 552, which governs the public's access to the records of federal agencies. The exemptions in Part 9 parallel the exceptions contained in 10 CFR 2.790(a). See 10 CFR 9.5.

efforts.—^{8/} Section 2.790(a)(7) excepts from public disclosure "investigatory records" compiled for law enforcement purposes.—^{9/} Also, Section 2.790(a)(5) protects documents which memorialize the agency's deliberative process, commonly referred to as the "executive privilege." See, Consumers Power Company (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117 (1980). ^{10/} Further protection of the investigatory process is provided by the so-called informers' privilege, which keeps informants' identity confidential in order to encourage their full

^{8/} Indeed, the Staff objects to the production of the documents concerning the allegations the subject of ongoing Staff investigations on the basis of 10 CFR 2.790(a)(7).

^{9/} Importantly, this is not a blanket exception. Section 2.790(a)(7) only exempts investigatory records to the extent their production would, inter alia, interfere with enforcement proceedings, deprive a person of the right to fair trial or an impartial adjudication, constitute an unwarranted invasion of privacy, and disclose a confidential source of information. 10 CFR 2.790(a)(7). Also, as will be addressed below, this privilege is not absolute. The Licensing Board has the authority under 10 CFR 2.744 to evaluate allegedly privileged documents in camera and order their production if necessary to a proper decision.

^{10/} Again, as with 10 CFR 2.790(a)(7), the executive privilege will yield to the Licensing Board's need to reach a proper decision. Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974) (Commission required disclosure of ACRS internal memoranda and opinions in light of material's important safety significance and Licensing Board determination that material was necessary to a proper decision).

cooperation during investigations. Houston Lighting and Power Company (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469 (1981).

The privileges recognized by the Commission have been articulated in the regulations. However, the privileges which the Commission has afforded the Staff have not been limited strictly to the "records and documents" contemplated by 10 CFR 2.790. For example, the Commission has extended the "informer's privilege" to testimony concerning informants identity in the interest of protecting material contained in the investigatory documents. South Texas, supra. Likewise, Section 2.790 (a)(7)(i) could serve as the bases for protecting facts which would compromise an ongoing investigation if disclosed to the public. Courts have used this reasoning to create a "law enforcement investigative privilege". Black v. Sheraton Corp. of America, 47 F.R.D. 263 (D.D.C. 1969), affirmed, 564 F.2d 531, 543 (D.C. Cir. 1977); United States v. Winner, 641 F.2d 825, 831 (10th Cir. 1981) (Appeal Court favorably cited Black v. Sheraton Corp. of America for the existence of the "law enforcement investigative privilege").

In Black v. Sheraton Corp. plaintiff had requested files from an FBI investigation to support his claim for damages allegedly caused by an illegal eavesdropping operation. The Attorney General objected to this production arguing that agency intelligence purposes would be undermined,

and that disclosure would reveal the name of a confidential informant, reveal intra-agency recommendations, disclose the FBI's investigatory techniques, and unfairly harm third parties. ^{11/} 564 F.2d at 531. Judge Sirica accepted the FBI's assertion of privilege, holding "the public interest in protecting the results of their investigations from scrutiny, outweighs the defendants' interest in their production." 50 F.R.D. 130, 132 (D.D.C. 1970) (quoting City of Burlington, Vermont v. Westinghouse Electric Corp., 246 F.Supp. 839, 846-47 (D.D.C. 1965)) The Court of Appeals affirmed Judge Sirica's application of privilege, noting "Congress recognized the necessity for such a privilege in the Freedom of Information Act, which contains an exemption for certain types of investigatory records compiled for law enforcement purposes." 564 F.2d at 546.

10 CFR 2.790 (a) (7) (i) parallels the FOIA provision protecting investigatory records compiled for law enforcement purposes referenced by the Appeal Court in Black v. Sheraton Corp., and therefore provides the Commission with the regulatory bases for extending the "law enforcement investigative privilege" to testimony concerning agency

^{11/} In Black v. Sheraton Corp., the Appeal Court held that the district court should review the requested file in camera to evaluate whether the privilege was properly asserted and whether the privilege should yield to plaintiff's need. 564 F.2d at 547.

investigations. Compare 10 CFR 2.790 (a)(7)(i) with the Commission regulations implementing FOIA, 10 CFR 9.5 (a)(7)(i); also 5 U.S.C. 552 (b)(7).

C. NRC Staff Has Impermissibly Exercised Authority Properly Vested With The Licensing Board

It is clear that in the context of the public hearing process, NRC's adjudicatory tribunals, and not the NRC Staff, have the authority for determining whether information should be extended privileged treatment, and if privileged, whether the privilege should yield to the public interest. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469 (1981); Northern States Power Company (Monticello Nuclear Generating Plant), ALAB-10, 4 AEC 391, affirmed, 4 AEC 409 (1970). In Monticello, the Appeal Board held:

The Licensing Board has the authority and the responsibility to direct the course of a proceeding so that it will accomplish its ends, giving due consideration to all pertinent matters, including privileges which are asserted. The Licensing Boards are in the most favorable position to judge, in a particular instance, the proper scope of discovery. No other conclusion would result in a workable adjudicatory process in view of a Licensing Board's responsibilities for the conduct of a proceeding and the nature of its role therein as set forth in the Commission's Rules of Practice, 10 CFR Part 2.

While ... items which are privileged are not normally discoverable, this does

not mean that non-disclosure is to follow under all circumstances in a licensing proceeding If such a controversy arises, the Licensing Board must weigh the detrimental effects of disclosure against the demonstrated need for production. (emphasis added). Monticello, 4 AEC at 398.

This allocation of authority to determine questions of privilege is consistent with the judicial treatment of privilege claims asserted by federal investigative agencies, see, e.g., Bristol-Myers Company v. FTC, 424 F.2d 935 (D.C. Cir. 1970) (district court has responsibility for determining FTC assertion of FOIA exemption); Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600 (5th Cir. 1966) (court determined privilege asserted by Deputy Director National Labor Relations Board), including the decisions which recognized the possibility of a "law enforcement investigative privilege." United States v. Winner, 641 F.2d 825 (D.C. Cir. 1981) (controversy resolved by Office of Attorney General agreeing to presentation of allegedly privileged material from ongoing grand jury investigation in an in camera session, with determinations as to disclosure lying with court); ^{12/} Black

^{12/} The court noted, however, that it would have been possible for the Deputy Attorney General to have asserted the law enforcement investigative privilege without submitting the matter to an in camera inspection had "the responsible official in the department ... lodge[d] a formal claim of privilege, after actual personal consideration, specifying with particularity the information for which protection is sought, and why the information falls within the scope of the privilege." 641 F.2d at 831. Since the Deputy Attorney General had not satisfied these requirements, the Attorney General's Office had to submit the material to an in camera inspection.

v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1976) (FBI to present files on eavesdropping investigation which it claimed were privileged to attorney requesting production of files and court in an in camera session, with the court to make determination as to need for disclosure.)

The principles that privileges against public disclosure are neither automatically extended nor absolute, and that determinations concerning claims to privilege are within the province of the NRC adjudicatory tribunals, have been consistently adhered to in NRC administrative proceedings. See, e.g., Virginia Electric and Power Station, (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974) (Commission affirmed Licensing Board's decision ordering disclosure of ACRS documents despite Staff's claims of executive privilege); Houston Lighting & Power Company (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469 (1981) (Appeal Board determined Staff's assertion of "informers privilege" should be accepted in light of intervenors' poor showing of need for informants' names).

Indeed, the regulations which govern the licensing boards' review and determinations concerning material claimed to be privileged by the NRC Staff reflect these principles and grant the NRC adjudicatory tribunals the authority they need to both protect the Staff's interests and arrive at sound and

timely decisions. 10 CFR 2.744 ^{13/} provides, in pertinent part:

(c) If the Executive Director for Operations objects to producing a record or document, the requesting party may apply to the presiding officer, The record or document covered by the application shall be produced for the "in camera" inspection of the presiding officer, exclusively, if requested by the presiding officer, and only to the extent necessary to determine

- (1) The relevancy of that record or document;

- (2) Whether the document is exempt from disclosure under § 2.790;

- (3) Whether the disclosure is necessary to a proper decision in the proceeding;

- (4) Whether the document or the information therein is reasonably obtainable from another source.

(d) Upon a determination by the presiding officer that ... the relevancy of the record or document [has been demonstrated and if exempt] under § 2.790 ... [that] its disclosure is necessary to a proper decision in the proceeding, ... he shall order the Executive Director of Operations, to produce the document.

(e) In the case of requested documents and records ... exempt from disclosure under § 2.790, but whose disclosure is found by the

^{13/} Applicant acknowledges that Staff has asserted two privileges. Staff has objected to the production of documents on the basis of Section 2.790(a)(7), which falls squarely within the purview of Section 2.744(c)(d) and (e). Staff has also asserted a new investigative privilege which flows from 2.790 (a)(7)(i) See, Discussion, Supra at pp. 11-15 which should be exercised in accordance with 10 CFR 2.744.

presiding officer to be necessary to a proper decision in the proceeding, any order to the Executive Director of Operations to produce the document or records ... May contain such protective terms and conditions (including affidavits of non-disclosure as may be necessary and appropriate to limit the disclosure)" 10 CFR 2.744 (c) (d) and (e).

Although Staff properly notes the disparate roles of the Licensing Board and Staff, it would usurp the Licensing Board's responsibilities. Staff attempts to exercise a blanket privilege to withhold documents and testimony on allegations the subject of ongoing investigations without having given the Licensing Board the opportunity to rule on whether the material sought to be withheld is (1) relevant to the proceeding, (2) within the scope of the privileges asserted, (3) necessary for a proper decision, and (4) proper for limited disclosure subject to appropriate protective measures. These are decisions which only the Licensing Board can make after having been apprised of the substance of the allegations in an in camera evidentiary session. 10 CFR 2.744 (c). ^{14/}

^{14/} 10 CFR 2.744 (c) explicitly provides for an in camera session, exclusive of all other parties, if ordered by the presiding officer, to enable the Licensing Board to determine whether the material claimed to be privileged is relevant, privileged, and necessary for a proper decision. The in camera procedure is used by courts to evaluate claims of privilege asserted by investigative agencies. Kerr v. United States District Court, 426 U.S. 394, 405-406 (1975). See also, Black v. Sheraton Corp., 564 F.2d 531 (D.C. Cir. 1977). Staff has not addressed why it is unwilling to disclose information concerning the subject allegations in an in camera session attended only by the Licensing Board.

Staff also incorrectly assumes the Licensing Board's role as the ultimate arbiter of whether the privilege, if properly asserted, should yield to the Licensing Board's need to reach a proper decision and the public's interest in full disclosure. Staff has decided that the balance favors withholding information due to its speculative nature and the potential threat to the NRC investigations, writing:

However, balancing the needs of the Licensing Board to know now the nature of the allegations in order to timely conclude the adjudicatory proceedings and the imperative of preserving the confidentiality of the allegations so inspections and investigations are not compromised, the Licensing Board's approach of disclosure now is not desirable. Moreover, at this early stage of the inspection process, there is little value to the hearing process and the adjudicatory resolution of the allegations in disclosing detailed information about bare allegations and the status of inspection and investigation by Region III and OI. (footnote deleted) Motion at p. 13.

The Staff has overreached its authority by making this determination. It is the Licensing Board's prerogative to determine whether privilege should yield to the need for a sound decision. 10 CFR 2.744(c). The Licensing Board, and not the Staff, decides whether information is relevant and material to its decision and the Staff cannot "be permitted to leave the presiding body ... in the dark" Duke Power

Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973). ^{15/}

The Staff justifies its conclusion based on another judgment it is not entitled to make, that in camera disclosure of information regarding the allegations would compromise the Staff's investigations regardless of the protective measures fashioned by the Licensing Board. Furthermore, the Staff has not supported this conclusion. The Staff has not demonstrated that the various protective measures available to the Licensing Board could not be used to protect the integrity of the Staff's investigations while simultaneously resolving the Licensing Board's concerns.

The regulations contemplate turning sensitive matters over to parties in NRC proceedings Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980) (access to sanitized version of plant security plan provided to intervenors) and the Licensing Board may fashion whatever protective measures it feels are necessary to protect the

^{15/} McGuire stands for the clear statement of law that "any uncertainty regarding the relevancy and materiality of new information should be determined by the presiding board." 6 AEC at 625, fn. 15. This is reflected in 10 CFR 2.744(c) which provides that the presiding officer in a proceeding should determine the relevancy of material claimed to be privileged be the Executive Director of Operations.

Staff's investigative interests. The Licensing Board could protect the Staff's interest through the use of protective orders. See, Diablo Canyon, 11 NRC at pp. 775-77. The Licensing Board could instruct, inter alia: (1) the parties to sign affidavits of non-disclosure, (2) allow Staff to file sanitized versions of testimony excluding material not relevant to the reopened QA issue; (3) limit the access of information to parties' attorneys and named representatives of the parties; and (4) hold an in camera evidentiary session.^{16/}

Despite the Staff's claims to the contrary, an in camera evidentiary session would protect the Staff's

^{16/} The Staff notes in its motion that an attempt to hold an in camera evidentiary session pertaining to ongoing NRC Staff investigations would likely be challenged pursuant to the open meeting provision of the "Government in the Sunshine Act", 5 U.S.C. 552b. See Motion at p. 12, fn.15. Similar challenges have previously been filed in federal court by the ACLU and the local newspapers to prevent an in camera session on related Byron QA/QC issues. Id. The Staff fails to recognize, however, that the mandate for open meetings or hearings contained in the Sunshine Act has been held not to apply to adjudicatory hearings before Atomic Safety and Licensing Boards. Hunt v. Nuclear Regulatory Commission, 611 F.2d 332, 335-336. (10th Cir. 1979), cert. denied, 445 U.S. 906 (1980). Moreover, even if Licensing Board hearings were properly governed by the Sunshine Act's open meeting requirements, safeguards similar to those contained in the Commission's public disclosure regulations including 10 CFR 2.790, 2.744 and 10 CFR Part 9, are included in the Act to preclude public disclosure or observation of confidential material and information. 5 U.S.C. 552b (c) (1)-(10).

investigative interests. The possibility of an in camera evidentiary session was recently noted by the Appeal Board. Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2) ALAB-714, 17 NRC ____, motion for stay denied, ALAB-716, 17 NRC ____, review accepted and stay granted, CLI-83-6, 17 NRC ____ (1983). See also, Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 893, vacated as moot, ALAB-658, 14 NRC 981 (1981) (Administrative Judge noted that had he not ruled privilege should yield to need for public disclosure, allegedly privileged matter could have been received into evidence in camera). In camera proceedings are often used by the courts to accommodate claims of governmental privilege. See, e.g., United States v. Winner, 641 F.2d 825 (D.C. Cir. 1981) (Court approved in camera hearing); See generally, In re United States, 565 F.2d 19, 23 (2d Cir. 1977).

Staff opposes an in camera evidentiary session, arguing that "it is a risk ... even if information about the allegations is disclosed in camera, because once the information is disclosed to individuals other than the Staff, that information could be communicated, either inadvertently or otherwise, to individuals who are the target of the investigation or inspection." Motion at p. 12. Staff's claim ignores the Licensing Board's authority to require those attending the in camera session to pledge secrecy and sign

affidavits of non-disclosure. See, Diablo Canyon, 11 NRC at 776-77. See also, United States v. Winner, 641 F.2d at 832 (defendant and his counsel were allowed to attend in camera session provided they did not communicate to others information disclosed at hearing to which law enforcement investigatory privilege was claimed). Staff has not asserted any indication that the parties to this proceeding will not abide by the terms of a protective order issued on behalf of the Staff. Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1404 (1977). Thus, the Staff's objections to the use of in camera proceedings to protect information determined by the Licensing Board to be subject to the investigative privilege should be rejected.

D. A New Policy Should Be Fashioned To Reconcile The
Conflicting Interests Of The Agency's Missions To Issue
Timely Licensing Decisions And To Conduct Investigations

Two conflicting policies must be reconciled to avoid the impasse that exists between the positions of the NRC Staff and the Licensing Board. On one hand, the Commission has recognized that, in the first instance, licensing boards have the responsibility to resolve matters pertaining to the health and safety of the public "openly and on the record, after giving the parties ... an opportunity to comment or otherwise be heard." Consolidated Edison Company of New York (Indian Point, Unit 3), CLI-74-28, 8 AEC 7, 8-9 (1974). The individual

adjudicatory boards have been instructed to expedite the pursuit of their responsibilities and avoid or reduce licensing delay whenever measures are available that do not compromise the Commission's commitment to a fair and thorough hearing process. Statement of Policy on Conduct of Licensing Proceedings, CLI-81-1, 13 NRC at 453.

On the other hand, the NRC Staff has been recognized as the appropriate entity within the Commission for dealing with issues of regulatory compliance, especially where matters are continuing in nature and are not susceptible to a one-time resolution by adjudication.^{17/} Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB 356, 4 NRC 525 (1976). Further, the Commission, in its regulations has explicitly recognized the need for protecting the NRC Staff's independent investigatory and enforcement role. 10 CFR 2.790; Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Units 1, 2, 3 and 4), CLI-80-12, 11 NRC 514, 516 (1980).

^{17/} The NRC precedent and regulations cited in this paragraph address the investigative and enforcement activities of the Division of Inspection and Enforcement, a part of the NRC Staff. The investigative functions of the Office of Investigations, an organization that reports directly to the Commissioners, is beyond the reach of these regulations and precedent unless they are made a party to a licensing proceeding.

It is likely that, in the instant case, the Licensing Board will be able to fully pursue the allegations subject to the ongoing investigations by Region III and OI without adversely impacting the December 1983 fuel load date. This risk should not be imposed on the Applicant or any other license applicant. In such a situation, there must be sufficient procedural flexibility to achieve compliance with the Commission's intent that licensing proceedings be conducted expeditiously while at the same time preserving the integrity of the agency's investigatory processes.

One solution to this dilemma is to exclude the subject matter of ongoing investigations, whether by I&E or OI, from the purview of licensing proceedings. Licensing boards would issue initial decisions in licensing proceedings notwithstanding ongoing investigations potentially involving issues before it. This does not mean that safety questions arising out of such investigations would be ignored. Information developed by these investigations would be used by the NRC Staff to take appropriate enforcement actions. Indeed, the NRC Staff is statutorily obligated to address all safety-related violations that may arise out of the on-going Staff investigations. The Staff is equipped with sufficient authority to remedy any health and safety concern that may ultimately arise out of the pending investigations once completed. 10 C.F.R. 2.202 (Order to Show Cause). In fact, under Section 2.202, if the Staff finds that the public

interest so requires, its order to show cause (to modify, suspend or revoke a license) may be made temporarily effective pending further order. 10 C.F.R. 2.202(f).

A recent Commission decision provides precedent for establishing a policy of separating the functions of licensing boards with respect to licensing proceedings and the investigatory organizations of the NRC. In Cincinnati Gas and Electric (Wm. H. Zimmer Nuclear Power Station, Unit 1), CLI-82-20, 16 NRC 109 (1982), the Commission directed the licensing board to issue its initial decision despite ongoing investigations by the NRC Staff of matters related to the QA contentions in controversy.. In explaining their reasoning in support of the majority decision, Commissioners Ahearne and Roberts stated:

We disagree with the Board - not because of "legal niceties" but because of our views on the proper role of the Board and of the staff. We believe the primary role of the Board is to adjudicate issues in dispute raised in the hearing process. We do not believe the role of the Board is to address as a technical review body every potential problem. The large technical staff of the NRC is charged with reviewing, monitoring, inspecting and enforcing actions for nuclear power reactors. The taxpayer provides a very large amount of funds (over \$450 million per year) to support over 3000 staff members of the NRC whose primary function is to insure that the health and safety of the public

are protected in the use of commercial nuclear power.

In a case like this where serious issues have been raised with regard to a plant involved in the Review process for an operating license, the NRC Staff devotes a large amount of time and effort to resolving those issues. Region III is doing that. . . . This is as it should be. The allegations will be fully addressed [by the Staff] and the appropriate and necessary action taken. A Board is not needed in this case. 16 NRC at 114.

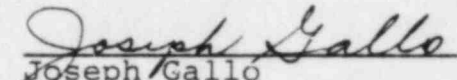
The approach taken by the Commission in the Zimmer proceeding is equally applicable to the present situation. This is particularly true where no determination can be made as to whether the unsubstantiated allegations under investigation will contribute to the development of information that is relevant and material to the Byrnn licensing proceeding. To allow the Licensing Board to hold the issuance of its decision in abeyance pending the completion of Region III's and OI's as yet inconclusive investigations would, in the absence of in camera Commission proceedings, violate the Commission's oft-stated policy of avoiding unwarranted delays in the licensing process. Moreover, redundant review of safety issues -- first by Region III and OI and then the Licensing Board -- would result in an unnecessary and wasteful diversion of agency and applicant resources with marginal, if any, value to the public health and safety. The Appeal Board should recommend that the

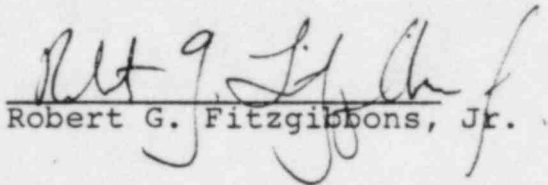
Commission establish a policy whereby the intra-agency responsibility for pending investigations and subsequent licensing action rests solely with the NRC Staff and beyond the purview of licensing proceedings.

III. Conclusion

The Appeal Board should grant the Staff's motion for certification, render a decision and certify that decision to the Commission for review and determination. The Appeal Board's decision should (i) order the NRC Staff to demonstrate in an in camera session before the Licensing Board that the information sought should be accorded privileged treatment, and request the Commission to impose similar direction on the Office of Investigations; (ii) assuming that the investigatory information should be accorded privileged treatment, order the Licensing Board to fashion appropriate protective remedies necessary for the consideration of the merits of such matters in in camera proceedings; and (iii) recommend that the Commission reconcile conflicting policy considerations by assigning the NRC Staff the sole responsibility for considering and initiating licensing action from a health and safety standpoint matters arising out of ongoing investigations.

Respectfully submitted,


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July 19, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)

COMMONWEALTH EDISON COMPANY)

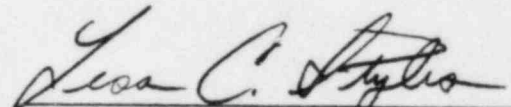
(Byron Station, Units 1 and 2))

) Docket Nos. 50-454
) 50-455
)

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney hereby enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Lisa C. Styles

One of the Attorneys for
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Dated at Washington, D.C.
this 19th day of July, 1983



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)

COMMONWEALTH EDISON COMPANY)

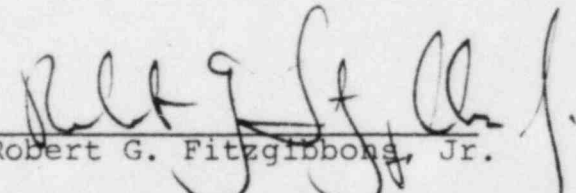
(Byron Station, Units 1 and 2))

) Docket Nos. 50-454
) 50-455
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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney hereby enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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this 19th day of July, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of)

COMMONWEALTH EDISON COMPANY)

(Byron Station, Units 1 and 2))

) Docket Nos. 50-454
) 50-455
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S RESPONSE TO NRC STAFF'S MOTION FOR DIRECTED CERTIFICATION and NOTICE OF APPEARANCE OF ROBERT G. FITZGIBBONS, JR. AND LISA C. STYLES" in the above-captioned docket have been served on the following by deposit in the United States mail, first class, or as otherwise indicated by hand delivery, this 19th day of July 1983.

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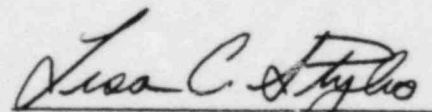
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