

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

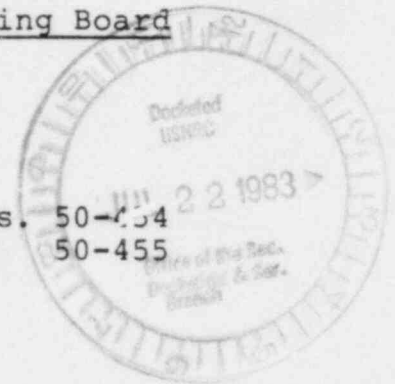
Before the Atomic Safety and Licensing Board

In the Matter of)

COMMONWEALTH EDISON COMPANY)

(Byron Station, Units 1 and 2)

Docket Nos. 50-454
50-455



APPLICANT'S RESPONSE IN OPPOSITION TO
NRC STAFF'S APPLICATION FOR STAY
OF LICENSING BOARD'S JULY 1, 1983
MEMORANDUM AND ORDER

Pursuant to the Atomic Safety and Licensing Board's ("Board") "Memorandum and Order", dated July 13, 1983, Commonwealth Edison Company ("Applicant"), by its attorneys, hereby responds in opposition to the NRC Staff's Application For Stay Of Licensing Board's July 1, 1983 Memorandum and Order ("Application For Stay").

The NRC Staff's reluctance to comply with the Board's directive to produce documents and testimony on allegations concerning the Hatfield Electric Company's quality assurance program, the subject of ongoing NRC investigations, is described in Applicant's "Response To NRC Staff's Motion For Directed Certification", dated July 19, 1983 ("Response"). Response at pp. 1-6.

As noted in Applicant's Response, the Board ruled during conference calls conducted on June 29 and 30 that presentations in the reopened evidentiary session should address all allegations concerning the Hatfield Electric

Company's quality assurance program, including those the subject of ongoing NRC investigations. The Board also orally denied the Staff's request for referral of this directive since the Staff (1) had not provided the Licensing Board with sufficient information to enable the Board to evaluate the Staff's assertion of privilege, (2) had not provided the 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 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 integrity of the Staff's investigations.

The Board memorialized the rulings made during the course of the conference calls in its "Memorandum and Order" dated July 1, 1983. In its Order, the Board also directed the Staff to produce all documents relevant to the ongoing investigations in advance of the reopened hearing. Thereafter, on July 8, 1983, the Staff filed a "Motion For Directed Certification" and "Notice of Appeal and List of Exceptions To The Licensing Board Memorandum and Order of July 1, 1983."

On July 11, 1983, the Staff filed its Application For Stay which requested the stay of the Board's directive pending the Atomic Safety and Licensing Appeal Board's review of the Staff's Motion For Directed Certification and Notice of Appeal. By conference call held on July 21, the Staff

requested the stay to extend until completion of any Commission review on this matter.

ARGUMENT

The NRC Staff's Application For Stay should be denied. In passing upon the merits of a stay, the Board must evaluate the four factors set forth in 10 CFR 2.788(e).

Portland General Electric Co. (Trojan Nuclear Plant), ALAB-524, 9 NRC 65, 69 (1975). Section 2.788(e) provides:

In determining whether to grant or deny an application for stay,... the Atomic Safety and Licensing Board ... will consider:

- (1) whether the moving party has made a strong showing that it is likely to prevail on the merits;
 - (2) whether the party will be irreparably injured unless a stay is granted;
 - (3) whether the granting of a stay would harm other parties; and
 - (4) where the public interest lies.
- 10 CFR 2.788(e).

The most crucial factor to be evaluated is whether the NRC Staff will be irreparably injured unless a stay is granted. See, Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527 (1978); See also Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-716, 17 NRC __, __ fn. 1, motion for review and stay granted, CLI-83-6, 17 NRC __ (June 30, 1983).

The Staff's showing of irreparable harm is insufficient to warrant the issue of a stay. The Staff has only asserted a generalized harm to its alleged investigations which might result from the disclosure of information related to its alleged ongoing investigative efforts. The Staff has not furnished affidavits concerning either the existence or the confidential nature of the pending investigations. Indeed, as noted in Applicant's Response, the Staff would have the Board rely on its lawyers' generalized representations of harm without ever having given the Licensing Board the opportunity to review the allegedly privileged material in camera. Such representations are not by themselves sufficient to establish the possibility of irreparable harm.

Further, the Licensing Board fashioned its July 1 "Memorandum and Order" in a manner which would eliminate all threat of irreparable harm. In its "Memorandum and Order", the Board made clear that its directive to the Staff to make an evidentiary presentation did not prohibit the Staff from either asserting privileges or seeking appropriate protective orders. Memorandum and Order at p. 4. Thus the Board has explicitly protected the Staff's investigative processes by continuing to hold open to them the opportunity to present the allegedly privileged material and assert their concerns in an in camera session. The Staff is unwilling to avail itself of these protective measures. Thus it cannot now be heard to complain of irreparable injury which, if true, would be self-induced.

Also, the NRC Staff has not demonstrated that it is likely to prevail on the merits. Staff expends its entire effort advancing policy arguments in support of its position. Application For Stay, at pp. 5-6. The Staff ignores the more significant issues, which are the reasons the Staff has improperly attempted to exercise authority properly vested with the NRC's adjudicatory tribunals and why the protective measures afforded by the regulations to protect privilege material would not serve to protect the Staff's investigative interests. As explained in Applicants' Response at pp. 15-24, the Licensing Board, not the Staff, is the proper forum to consider whether the information sought to be protected is entitled to such treatment, and if so, to fashion appropriate protective measures consistent with a balancing of the competing interests. No contrary argument of any significance has been presented. Thus, the Staff is not likely to prevail on the merits.

With respect to the third factor, Applicant will be prejudiced by the granting of the stay. As noted previously, issuance of the stay will undoubtedly impede the progress of this operating license proceeding. Staff would ignore this possibility, writing:

The timing of an initial decision will not be affected by the grant of the stay because of the delay which already will result from the reopened hearing for August 9. In addition, the fuel load date for Byron,...has been postponed until December 1983 such that some delay in final adjudicatory resolution of all QA/QC matters may be accommodated.

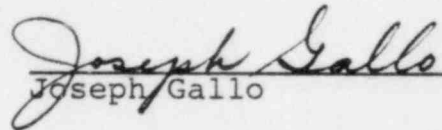
Finally, this motion seeks a stay...only for the period of time necessary to complete the investigations into those allegations. Application For Stay at p. 8.

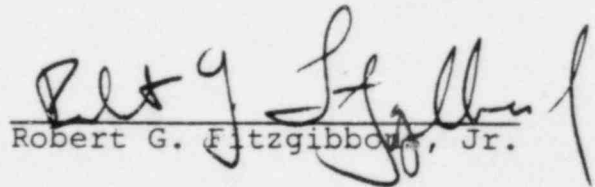
Staff's reasoning that the delay likely to be caused by the granting of a stay can be accommodated without jeopardizing the currently projected fuel load date is fallacious. First, postponing the completion of the hearings beyond the end of August, as the granting of a stay would require, will itself further delay the issuance of the operating license. Second, Staff's statement implies that the NRC Staff's investigations will be completed by a date certain. Staff has not supported this assertion. There is no indication as to when the Staff's investigations will be completed. Counsel for the NRC Staff cautiously characterizes Region III's position as believing "that many, if not all, of the allegations" would be resolved by December 1983, but that no date could be suggested for completion of the investigations being pursued by the Office of Investigations because of "severe manpower constraints". Motion For Directed Certification at p. 15, fn. 21. Thus, contrary to the Staff's assertion, if the stay is granted the Licensing Board will not be able to fully pursue the allegations the subject of the ongoing investigations without adversely impacting the December 1983 fuel load date.

Finally, the public interest will not be served by granting the requested stay. The Staff improperly claims that its attempt to insulate allegedly privileged material protects

the "public interest". Staff advances this claim by citing to its desire to protect the Staff's investigative efforts. Staff has not asserted an interest within the meaning of "public interest", however, since it has been unwilling to use in camera procedures to demonstrate to the Licensing Board that disclosure of the "allegedly" privileged material will in fact compromise the Staff's ongoing investigations. Rather, the public interest lies in a sound and timely decision, and the public will not be served by further delaying this proceeding. Accordingly, the Board should deny the NRC Staff's Application For Stay.

Respectfully submitted,


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