

September 16, 1985

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

Dockets 50-456  
50-457

COMMONWEALTH EDISON COMPANY'S RESPONSE IN OPPOSITION  
TO INTERVENORS' MOTION FOR CONFIDENTIAL  
TREATMENT OF PROSPECTIVE QUALITY ASSURANCE WITNESSES

On September 4, 1985, Intervenor filed their Motion for Confidential Treatment of Prospective Quality Assurance Witnesses. The motion seeks to protect from public disclosure the identities of both present and potential quality assurance witnesses for Intervenor. Given the plain insufficiency of the factual showing made by Intervenor in support of confidential treatment for the 11 Comstock quality control inspectors referred to in Intervenor's August 2, 1985 motion on that subject, there is simply no basis for carte blanche confidential treatment of Intervenor's witnesses in the future. At a minimum, a particularized motion demonstrating the need for confidentiality, properly supported by affidavit, is necessary. Accordingly, Commonwealth Edison Company ("Edison") opposes the Intervenor's motion on several grounds.

Intervenor has plainly failed to allege a sufficient factual basis on which to sustain their motion. Despite

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the passage of over 60 days since the admission of the contention alleging harassment and intimidation of Comstock quality control inspectors, there is no factual basis for entry of the protective order Intervenor seek, except for the representation of Intervenor's counsel and the unexecuted affidavit of John Seeders, which itself is based on hearsay reports of fears of harassment by other, unidentified quality control inspectors. It can only be concluded that Intervenor seek to obviate illusory risks of retaliation and unsubstantiated claims of intimidation. Moreover, the requested protective order would defeat the strong public interest which mandates that NRC proceedings be conducted openly and subject to full public scrutiny. Finally, as a practical matter, Edison will need to disclose the identities of these Intervenor witnesses to management personnel at Comstock in order to effectively prepare a defense against Intervenor's allegations and to respond to ongoing discovery. Therefore, the Intervenor request for a protective order limiting disclosure on a "need-to-know" basis would not stop this information from flowing to the very personnel from whom Intervenor fear harassment and retaliation.

Intervenor have failed to demonstrate the necessary basis for a protective order. The applicable requirements were summarized by the Appeal Board in Kansas Gas and Electric Company (Wolf Creek Nuclear Generating Station, Unit No. 1),

ALAB-327, 3 NRC 408 (1976). There the Appeal Board adopted a four-part analysis, holding that a party seeking to protect information from public disclosure must show: (1) that the information in question is of a type customarily held confidential by its originator; (2) that a rational basis exists for holding the information confidential; (3) that the information has in fact been kept confidential; and (4) that the information cannot be found in public sources. 3 NRC at 417. With respect to the required rational basis, the Appeal Board went on to state that only a "concrete indication" of some risk of "significant harm" would justify withholding information from full public scrutiny. 3 NRC at 417. Other Boards have reached the same conclusion. See Pennsylvania Power and Light Company and Alleghany Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 323 (1980) (moving party must show "good cause" for protective order); Houston Lighting and Power Company (South Texas Project, Units 1 and 2), LBP-80-11 11 NRC 477, 480 (1980) (moving party should provide "factual basis for its view that the protective order is warranted").

Intervenors cite past allegations of harassment and intimidation by disgruntled Comstock quality control inspectors. Edison does not dispute that these allegations are part of Intervenors' quality assurance contention.

However, the mere admission of a quality assurance harassment issue in a licensing proceeding is not sufficient to provide a factual basis for issuance of a protective order. Intervenors have not provided a single affidavit asserting a fear of retaliation. Nor have such affidavits been offered to the Board on an in camera basis. Rather, Intervenors offer only the unsubstantiated representations of the Intervenors' attorney regarding the inspectors' need for confidentiality. Significantly, those representations are contrary to representations made to the NRC Staff when the alleged incidents of harassment took place. See p. 2, April 5, 1985 memorandum, Weil to Norelius, attached to Supplement to July 12, 1985 motions regarding harassment and intimidation of Comstock Quality Control (CQC) Inspectors dated July 15, 1985. The sole documentation supplied is an unexecuted affidavit of John Seeders. Mr. Seeders has apparently refused to sign the affidavit, despite the fact that his identity is now public knowledge, because he has "become fearful" that he will be fired if he takes any further "voluntary affirmative steps" in this proceeding.

Intervenors' excuse for failing to provide any shred of factual support for the requested protective order is patently insufficient. Mr. Seeders' identity and his allegation of personal harassment are matters of public record and have been extant for some time. He asserts no

further harassment as a result of the submission of the unexecuted affidavit, but only an unspecified fear if he executes it. The assertions defy credulity and utterly fail to provide the type of "concrete indication" of risk which justifies placing a "veil of secrecy" over an NRC proceeding. Wolf Creek, 3 NRC at 417.

The bare assertion of the Intervenor's attorney that he is aware of certain inspectors who fear retaliation is totally insufficient. An analogous factual situation was presented in Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377 (1979). There an argument was made by an organization seeking to intervene that, rather than identifying one of its members for purposes of determining standing to intervene, the organization's attorney would submit an affidavit attesting to the proper standing. Despite assertions that disclosure of the members' identity would lead to harassment and retaliation, the Appeal Board rejected the argument, noting that such a procedure would ignore the fact that both the Board and the other parties were "entitled to be provided with sufficient information to enable them to determine for themselves, by independent inquiry if thought warranted, whether a basis existed for a formal challenge to the truthfulness of the assertions." 9 NRC at 393 (emphasis in original). The Appeal Board was unwilling to accept the

attorney's "conclusionary assertions not susceptible of verification by either other litigants or the adjudicatory tribunal." 9 NCR at 393.

Intervenors seek to bar the public from this discovery process on the strength of their conclusionary assertions alone. They have pointed to no concrete factual basis to support their motion because none exists. Indeed, Intervenors' very premise--that if certain witnesses' identities are disclosed, some form of retaliation will ensue--defies common sense.<sup>\*/</sup> As observed by the Licensing Board, it is highly unlikely that retaliation would occur amidst the publicity which surrounds the Intervenors' contentions and in the face of the strong legal protections which allegeders are accorded. (Tr. 241) Yet Intervenors would have this Board close its doors to the public on the strength of nothing more than the assertion of the attorney who has prepared the motion. This Board should reject such a proposition as did the Appeal Board in a similar context in Allens Creek: "We know of no authority for such a novel and unattractive proposition, which to us runs counter to fundamental concepts of procedural due process." 9 NRC at 393.

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<sup>\*/</sup> Any threat of retaliation and harassment has been significantly diminished by an extraneous event. The contention on that issue identified only Comstock management personnel as the source of alleged harassment. As Intervenors noted in their August 12, 1985 motion for confidential treatment, Comstock no longer employs quality control inspectors. For the electrical scope of work, that function has been taken over by Bestco.

In addition, Intervenor's "broad, vague, and essentially unsupported allegations" should not be allowed to override the "strong public interest" in NRC proceedings which are as open as possible to full public scrutiny. Houston Lighting and Power Company (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC at 377, 399 (1979). As the Appeal Board has noted: "That interest would most assuredly be disserved were a licensing board . . . to place a veil of secrecy over some aspect of licensing proceeding in the absence of a concrete indication that it was necessary to do so to avoid significant harm to a competing, equally cognizable interest." Kansas Gas and Electric Company (Wolf Creek Nuclear Generating Station, Unit No. 1), ALAB-327, 3 NRC at 408, 417 (1976).

Intervenor's cite Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC 775 (1980) in support of their position that the public interest in scrutinizing the proceedings of the NRC should give way to their demand for confidentiality. The Diablo Canyon decision, however, involved the disclosure of security plans of a nuclear facility. It is therefore so readily distinguishable from the instant motion as to render it completely inapposite. In a decision endorsed by the Commission, 11 NRC at 777, the Diablo Canyon Appeal Board had noted the uniquely sensitive nature of the information

sought to be protected: "the security plan is very sensitive information. Severe consequences to the public safety may result from its compromise. Accordingly, precautions must be taken to safeguard the plan." Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 746 (1980). Clearly, no concerns of this magnitude are implicated by Intervenor's motion.

Edison's objections are also based on practical considerations and fundamental fairness. Intervenor has alleged harassment and retaliation on the part of the management of Comstock. Obviously, for Edison to effectively prepare to defend against these allegations, it will be necessary to discuss their specifics with the very officials who stand accused. Indeed, it will not even be possible to respond to discovery propounded by Intervenor without full disclosure to Comstock management. Thus the identities of Intervenor's witnesses must be disclosed to the very officials from whom Intervenor fears retaliation and harassment. Intervenor attempts to camouflage this fundamental weakness in their argument by conceding that disclosure may take place on a "need-to-know" basis. Since Comstock officials will certainly need to know, the only result of granting Intervenor's motion is the withholding of witness identities from the public at large.

Intervenor has placed in the public light very serious contentions of harassment, intimidation and retaliation.

The Board should not countenance the inequity of allowing the Intervenor to air contentions of intimidation and harassment without fully disclosing the complete factual basis for the contentions, including the identity of persons having knowledge of the facts. A public accusation is properly examined in public, with all the procedural safeguards which public scrutiny affords.

For all the foregoing reasons, Intervenor's motion should be denied.

Respectfully submitted,

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DATED: September 16, 1985

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter Of: )

COMMONWEALTH EDISON COMPANY )

(Braidwood Station, Units 1 )  
and 2) )

Docket Nos. 50-456  
50-457

CERTIFICATE OF SERVICE

I, Rebecca J. Lauer, one of the attorneys for Commonwealth Edison Company, certify that the following persons have been served in the above-entitled matter with copies of "Applicant's Response To Intervenor's Motion To Compel Discovery From Applicant And The NRC Staff" and "Commonwealth Edison Company's Response In Opposition To Intervenor's Motion For Confidential Treatment Of Prospective Quality Assurance Witnesses" and that service has been executed in the manner indicated.

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- \* Messenger delivery on September 16, 1985.
- \*\* Federal Express on September 16, 1985 for delivery on September 17, 1985.
- \*\*\* Deposit in United States mail on September 16, 1985.