

CASE No. 3-1999-049



**United States
Nuclear Regulatory Commission**

Report of Investigation

BYRON NUCLEAR GENERATING STATION

**Discrimination Against a Licensed Senior Reactor Operator
for Raising Safety Concerns**

Office of Investigations

Reported by OI: RIII

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FOIA- 2000-0243

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Title: BYRON NUCLEAR GENERATING STATION

**DISCRIMINATION AGAINST A LICENSED SENIOR REACTOR OPERATOR
FOR RAISING SAFETY CONCERNS**

Licensee:

**Commonwealth Edison Company
1400 Opus Place, Suite 500
Downers Grove, IL 60515**

Docket No.: 50-454

Case No.: 3-1999-049

Report Date: October 30, 2000

Control Office: OI:RIII

Status: CLOSED

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SYNOPSIS

This investigation was initiated by the U. S. Nuclear Regulatory Commission, Office of Investigations (OI), Region III (RIII), on November 24, 1999, to determine whether a licensed Senior Reactor Operator (SRO) at the Byron Nuclear Generating Station was discriminated against after acknowledging to station management that the SRO had written a Problem Identification Form (PIF) on July 28, 1999, concerning the compromise of test material during a simulator training exam. The SRO alleged discrimination in that shortly after writing the PIF, a letter was placed in the SRO's personnel file documenting a missed day of training; the SRO did not receive the same salary increase as other SROs with the same length of service, grade and performance rating; and the SRO was not selected for the Shift Manager Program.

In addition, the SRO alleged that approximately 6 years ago, he failed to receive shift premium pay in retaliation for raising a safety concern involving intoxicated control room operators.

OI was also asked to provide assistance to the staff in obtaining information regarding a chilling effect after the SRO was labeled a "whistleblower."

Based upon the evidence developed during the investigation, OI:RIII did not substantiate the allegation that the SRO was discriminated against for identifying a safety concern and documenting that concern in a PIF on July 28, 1999.

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LIST OF INTERVIEWEES

Exhibit
No.

BAKER, Randolph T., Licensed Senior Reactor Operator, Byron	2
LOPRIORE, Richard P., Station Manager, Byron	7
SNOW, Marseyne, former Operations Manager, Byron	9
[REDACTED] Byron	8

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DETAILS OF INVESTIGATION

Applicable Regulations

10 CFR 50.5: Deliberate Misconduct

10 CFR 50.7: Employee Protection

Purpose of Investigation

This investigation was initiated by the U. S. Nuclear Regulatory Commission (NRC), Office of Investigations (OI), Region III (RIII), on November 24, 1999, to determine whether Randolph T. BAKER, a licensed Senior Reactor Operator (SRO) at the Byron Nuclear Generating Station (Byron), was discriminated against after acknowledging to station management that he had written a Problem Identification Form (PIF) on July 28, 1999, concerning the compromise of test material during a simulator training exam. BAKER alleged that he was discriminated against in that shortly after writing the PIF, he had a letter placed in his file documenting a missed day of training; he did not receive the same salary increase as other SROs with the same length of service, grade and performance rating; and he was not selected for the Shift Manager Program. In addition, BAKER alleged that approximately 6 years ago, he failed to receive shift premium pay in retaliation for raising a safety concern involving intoxicated control room operators. OI was also asked to provide assistance to the staff in obtaining information regarding a chilling effect after BAKER was labeled a "whistleblower."

Background (Exhibit 1)

On November 24, 1999, OI Case No. 3-1999-049 was opened to determine whether BAKER, SRO, was discriminated against by [REDACTED] after [REDACTED] placed a letter in BAKER's file documenting the fact that BAKER had missed a day of training. EX7C

BAKER was interviewed by OI on October 19, 1999, in regards to OI Case No. 3-1999-036. During the interview, BAKER acknowledged that he wrote PIF #B1999-02673 on July 28, 1999, which documented a potential compromise of test material prior to a training evaluation scenario that occurred on July 27, 1999. BAKER stated that he wrote the PIF and subsequently discussed the issue at length within the next few days with [REDACTED], who was the [REDACTED], BAKER's immediate supervisor, Donald G. McDERMOTT, the Shift Operating Supervisor (SOS); Marseyne SNOW, Operations Manager; and Rich LOPRIORE, Station Manager. EX7C

Within approximately 1 week, [REDACTED] notified BAKER that he was placing a letter in BAKER's MARC file documenting the fact that BAKER had missed a day of training. According to BAKER, the missed day of training had occurred during a previous training cycle. EX7C

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which was several months prior. BAKER admitted that he had missed the day of training because he mistakenly thought he had the day off, but that another operator [REDACTED] had missed training that same week and did not receive a similar letter. BAKER told LOPRIORE that he felt that the letter was in retaliation for writing the PIF on July 28, 1999. BAKER stated that LOPRIORE denied the assertion (addressed as Allegation 1). EX7C

Agent's Note: An employee's MARC file is a separate file maintained by the employee's immediate supervisor, which would include actions related to job performance, either negative or positive in nature. MARC is an acronym for Management Action Response Checklist, which comes from a style of management embraced by the Commonwealth Edison Company (ComEd). The employee's personnel file, which is maintained in Human Resources, may or may not include information which would be included in an employee's MARC file.

BAKER stated that the licensee raised his position, along with other individuals, from a Level 6 to a Level 8 in approximately September 1999. BAKER alleged the licensee did not raise his salary the same amount as others in his group (addressed as Allegation 2). In addition, after writing the PIF, licensee management did not select him for the Shift Manager Program, although others selected were more recent hires than BAKER (addressed as Allegation 3).

BAKER also alleged that in a previous incident 6 years ago, he and another individual (not further identified) did not get shift premium for filling in for the work control position, although those who performed the job before and after BAKER received the pay. BAKER alleged that he and the other individual had raised a safety concern involving intoxicated control room operators reporting for duty to their supervisor prior to the discrepancy in pay (addressed as Allegation 4).

On November 22, 1999, the RIII Division of Reactor Safety (DRS) reviewed BAKER's interview and determined that he had engaged in protected activity. On November 24, 1999, an Allegation Review Board (ARB) requested OI initiate an investigation to determine if BAKER had been discriminated against in violation of 10 CFR 50.7 and 50.5.

OI was also asked to provide assistance to the staff in obtaining information regarding a chilling effect after BAKER alleged that he has now been labeled a "whistleblower" because he had made allegations to the NRC on previous occasions (addressed as Allegation 5).

Interview of BAKER (Exhibit 2)

On October 19, 1999, BAKER was interviewed regarding the allegation that he had been discriminated against. BAKER provided substantially the following information:

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BAKER stated that he is a licensed SRO who has worked at Byron for the past 22 years in a variety of positions, including equipment attendant, reactor operator, and licensed requalification training instructor. For the past 6 years, BAKER has worked as an "in-plant supervisor" (Exhibit 2, pp. 4-5).

BAKER recalled that he wrote a PIF on Tuesday, July 28, 1999, because he felt that a simulator exam had been compromised when the SOS coached the crew just prior to the exam on the specific scenario on which the crew was subsequently tested. BAKER stated that he met with station management, including LOPRIORE and SNOW, to discuss the concerns included in the PIF (Exhibit 2, pp. 8-13, 18-20; Exhibit 6).

Agent's Note: The allegation concerning the deliberate violation of compromising the integrity of the SRO simulator test was investigated under OI Case No. 3-1999-036. During BAKER's interview regarding this concern, he raised an allegation of discrimination.

BAKER alleged that as a result of writing the July 28, 1999, PIF, a letter was placed in his file concerning a day of training he had missed in a previous training cycle. BAKER's explanation regarding the missed training day was that he had been working a straight midnight shift and assumed that he had the next day off. BAKER stated that he left for vacation and discovered that he was supposed to be at work. He returned to work and made up the missed training on his own time. BAKER alleged that others had missed training, but had not received letters in their files. BAKER alleged that he was the first person to have a letter placed in his file for missing a day of training (Exhibit 2, pp. 31-33).

BAKER stated that during a meeting with LOPRIORE, he discussed this matter and the PIF. He told LOPRIORE that he thought that the letter had been placed in his file because he was a "whistleblower." BAKER stated that LOPRIORE would not agree with him. BAKER explained that the letter was similar to a letter of reprimand. He also felt that if you received several letters, it could result in disciplinary action (Exhibit 2, pp. 33-34).

BAKER also provided information concerning a pay increase for his group in approximately September 1999, from Level 6's to Level 8's. BAKER stated that he went from an overtime position to a non-overtime position, from the highest Level 6 to the lowest paid Level 8. BAKER stated that he felt that his position, salary and performance evaluation before the increase was similar to other employees. BAKER stated that after the increase, he was making approximately [REDACTED] and [REDACTED] was making approximately [REDACTED]. BAKER stated that the pay increase occurred shortly after he wrote the PIF, and [REDACTED] was responsible for the pay increases. BAKER stated that he spoke to his supervisor about the discrepancy in pay

EX-7C

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and his supervisor explained that [REDACTED] is a control room supervisor (also known as WEC, work execution center supervisor), while BAKER was a field supervisor. BAKER stated that he fills in as a control room supervisor as needed (Exhibit 2, pp. 36-40). EX7C

Agent's Note: [REDACTED] whom BAKER alleged to have compromised the exam on July 27, 1999. This was the subject of the PIF BAKER wrote on July 28, 1999 (Exhibit 2, pp. 5-13). EX7C

BAKER also alleged that he was not selected for the Shift Manager Program in August 1999, but felt that he was more qualified than those selected to participate. BAKER stated that he indicated on his evaluation that he was interested in the program but was not selected (Exhibit 2, pp. 42-44).

BAKER further alleged that approximately 6 years ago, after raising a safety concern about control room operators coming in drunk to work, he had his shift premium pay cut. BAKER stated that he was unable to obtain or provide any pay records which would substantiate this allegation (Exhibit 2, pp. 47-49).

Coordination with Regional Staff

BAKER was interviewed by OI on October 19, 1999, concerning OI Case No. 3-1999-036, at which time he alleged he was discriminated against. On November 22, 1999, RIII:DRS reviewed BAKER's transcript and determined that he had engaged in protected activity. At an ARB held on November 24, 1999, NRC:RIII requested that OI initiate an investigation to determine whether BAKER had been discriminated against for raising safety concerns. In addition, OI was asked to provide assistance to the staff in obtaining information regarding a chilling effect.

Coordination with the Regional Counsel

On September 26, 2000, Bruce A. BERSON, Regional Counsel, was furnished a copy of BAKER's transcript for review to determine whether a prima facie case of discrimination had been established. On September 27, 2000, BERSON advised that EX5

DOL Information

During his October 19, 1999, OI interview, BAKER stated that he had not filed a discrimination complaint with the U.S. Department of Labor (DOL). BAKER was provided with information concerning filing a discrimination complaint with DOL in a letter from James HELLER, RIII

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Office Allegation Coordinator, dated November 24, 1999. On September 26, 2000, BAKER confirmed via e-mail that he had not filed a complaint with DOL (Exhibit 3).

Review of Documentation

On September 25, 2000, LOPRIORE faxed to OI a copy of the letter of "coaching" concerning BAKER's "Missed Scheduled Work," which was documented on June 18, 1999, by [REDACTED] EX 7C. The letter indicates that BAKER missed 2 days (June 14 and 15, 1999) of Licensed Operator Requalification Training without contacting anyone. "A missed training notification was completed with his absence as unexcused." The letter documented that BAKER was coached concerning this unacceptable behavior, and indicated that this letter would be placed in BAKER's MARC file "... for a period long enough to demonstrate no adverse trends or behavior in Randy's work absences" (Exhibit 4).

On October 13, 2000, ComEd Attorney Robert E. HELFRICH provided documentation indicating that on July 12, 1999, proposed salary recommendations were submitted from [REDACTED] to SNOW for Byron employees. The proposed salary for BAKER on July 12, 1999, was [REDACTED] (Exhibit 5). EX 7C

On October 26, 2000, HELFRICH provided a bar chart and table identifying the number of Condition Reports (CRs) (formerly known as PIFs) generated by the Operations Group (to which BAKER belonged) and by Byron in total, from March through December 1999 (Exhibit 12), and January through October 2000 (Exhibit 13).

HELFRICH also provided documentation on October 26, 2000, indicating that four candidates were selected for the Shift Manger Program on May 10, 1999. Four additional candidates were selected for the program in May 2000 (Exhibit 14).

Documentation was also provided on October 26, 2000, reflecting that [REDACTED] sent a memo on June 9, 1999, advising Gary L. WOLFE (not further identified) of a conflict with training on June 18, 1999. On June 17, 1999, [REDACTED] completed a Licensed Requalification Training Absence Notification Form and requested June 18, 1999, as a day off from training. That request was approved on June 17, 1999 (Exhibit 15). EX 7C

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Allegation 1: Discrimination Against a Licensed SRO by Placing a Coaching Letter in His File Documenting a Missed Day of Training

Evidence

1. Protected Activity

On July 30, 1999, BAKER contacted the NRC and reported that McDERMOTT, the SOS, discussed a steam generator tube rupture event on Tuesday, July 27, 1999, during the weekly requalification training introduction. Prior to discussing the scenario, McDERMOTT asked all training personnel to leave the classroom. McDERMOTT discussed the steps involved in the steam generator tube rupture procedure, the anticipated plant response, methods for shortening communications and various other items that would allow the crew to meet the NRC required tube rupture response times and to ensure that none of the SROs failed the simulator exam. BAKER alleged that the simulator exam was compromised and he subsequently wrote PIF #B1999-02673, dated July 28, 1999 (Exhibit 6).

2. Knowledge of BAKER's Protected Activity

LOPRIORE, [REDACTED] and SNOW all acknowledged to OI that they became aware on or after July 28, 1999, that BAKER had written PIF #B1999-02673 (Exhibit 7, pp. 6-7; Exhibit 8, pp. 7-8; Exhibit 9, pp. 9-11, 26). EX 7C

On September 25, 2000, LOPRIORE provided a copy of the "coaching letter" that was placed in BAKER's file concerning the missed day of training. The letter indicates that there were actually 2 days of missed training which occurred on Monday, June 14, and Tuesday, June 15, 1999. The letter further indicates that BAKER was counseled by his supervisor, [REDACTED] on Friday, June 18, 1999. The facts obtained in the coaching letter corroborate the details of the events as provided to OI by BAKER (Exhibit 4). EX 7C

Agent's Analysis

The coaching letter which was placed in BAKER's MARC file in June 1999 could not have been in retaliation for the PIF that BAKER would later write on July 28, 1999. There is no nexus between coaching BAKER on June 18, 1999, for the missed days of training on June 14-15, 1999, and the writing of the PIF, which did not occur for almost a month afterward. BAKER did indicate during the OI interview that he might be mistaken about the dates of this incident (Exhibit 2, p. 33).

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Additionally, documentation was obtained verifying that on June 9, 1999, had advised the station of a conflict with training on June 18, 1999. On June 17, 1999, completed an absence notification form for the next day, June 18, 1999, which was approved. BAKER's absence was not an excused absence (Exhibit 15). EX7C EX7C

Conclusion

Based upon the evidence, the allegation that the SRO received a letter of coaching in retaliation for protected activity was not substantiated.

Allegation 2: Discrimination Against a Licensed SRO by the SRO Not Receiving A Salary Increase Commensurate to other SROs

Evidence

1. Protected Activity

On July 30, 1999, BAKER contacted the NRC and reported that McDermott, the SOS, discussed a steam generator tube rupture event on Tuesday, July 27, 1999, during the weekly requalification training introduction. Prior to discussing the scenario, McDermott asked all training personnel to leave the classroom. McDermott discussed the steps involved in the steam generator tube rupture procedure, the anticipated plant response, methods for shortening communications and various other items that would allow the crew to meet the NRC required tube rupture response times and to ensure that none of the SROs failed the simulator exam. BAKER alleged that the simulator exam was compromised and he subsequently wrote PIF #B1999-02673, dated July 28, 1999 (Exhibit 6).

2. Knowledge of BAKER's Protected Activity

LOPRIORE, [REDACTED] and SNOW all acknowledged to OI that they became aware on or after EX7C July 28, 1999, that BAKER had written PIF #B1999-02673 (Exhibit 7, pp. 6-7; Exhibit 8, pp. 7-8; Exhibit 9, pp. 9-11, 26).

Documentation provided on October 13, 2000, during the OI interview with SNOW indicates that on July 12, 1999, [REDACTED] submitted the recommendations for EX7C proposed salary increases to SNOW. That document indicates that the proposed salary for BAKER on July 12, 1999, was [REDACTED] (Exhibit 5; Exhibit 9, pp. 15-16, 20-22). EX7C

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Agent's Analysis

BAKER told OI he actually received a salary increase to [REDACTED] in approximately September 1999. There is no nexus between BAKER's salary increase, which was calculated on July 12, 1999, and his protected activity, which occurred on July 28, 1999. While the proposed salary figures went through several levels of management review, the original proposed salary for BAKER remained unchanged from July 12, 1999. BAKER's proposed salary increase was based upon input on his performance from [REDACTED] and the recommendation of [REDACTED] along with other management levels of review. While it was true that [REDACTED] both received higher salary increases than BAKER, there was no evidence to indicate that BAKER's salary increase was tampered with as a result of writing a PIF on July 28, 1999. If BAKER's salary was not commensurate to other SROs, it was for reasons other than his engaging in protected activity on July 28, 1999 (Exhibit 5; Exhibit 8, pp. 21-22; Exhibit 9, pp. 15-16, 20-22). EX7C EX7C

Conclusion

Based upon the evidence, the allegation that the SRO's salary increase was adjusted as a result of his protected activity was not substantiated.

Allegation 3: Discrimination Against a Licensed SRO by the SRO Not Being Selected to Participate in the Shift Manager Program

Evidence

1. Protected Activity

On July 30, 1999, BAKER contacted the NRC and reported that McDermott, the SOS, discussed a steam generator tube rupture event on Tuesday, July 27, 1999, during the weekly requalification training introduction. Prior to discussing the scenario, McDermott asked all training personnel to leave the classroom. McDermott discussed the steps involved in the steam generator tube rupture procedure, the anticipated plant response, methods for shortening communications and various other items that would allow the crew to meet the NRC required tube rupture response times and to ensure that none of the SROs failed the simulator exam. BAKER alleged that the simulator exam was compromised and he subsequently wrote PIF #B1999-02673, dated July 28, 1999 (Exhibit 6).

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2. Knowledge of BAKER's Protected Activity

Documentation provided by ComEd indicated that the selection for candidates in the Shift Manager Program occurred in May 1999. Four candidates were selected on May 10, 1999, with two employees already enrolled in the program, for a total of six candidates participating in the program in 1999 (Exhibit 14).

SNOW stated that BAKER never indicated to her that he was interested in the Shift Manager Program. She stated that she has known BAKER for approximately 20 years and believed that BAKER would have felt comfortable speaking to her if he had been interested in, or had a concern about, the program. She further explained that the initial recommendation to participate in the Shift Manager Program is made by the Operations Manager and the SOS, and that recommendation is reviewed by the Station Manager. SNOW stated that BAKER's name never came up as being strongly recommended by his supervisors to participate in the program. SNOW stated that of approximately 40 qualified SROs (of which BAKER was one), only four or five are selected to participate in the program at any time (Exhibit 9, pp. 18-19, 22-25).

[REDACTED] stated he recalled BAKER making offhand remarks about what it takes to become a Shift Manager, but BAKER had never expressed any strong interest in the program (Exhibit 8, pp. 31-32). EX 7C

LOPRIORE had no knowledge of whether BAKER had ever expressed an interest in participating in the Shift Manager Program. LOPRIORE did provide documentation indicating that BAKER has recently expressed an interest in becoming a Shift Manager, but that information was obtained in June 2000 during a discussion BAKER had with his supervisor, James PRINTZ, concerning BAKER's individual development and future career plans (Exhibit 7, pp. 32-33; Exhibit 10, p. 4).

Agent's Analysis

The 1999 candidates for the Shift Manager Program were selected on May 10, 1999, months before BAKER wrote the PIF on July 28, 1999. Therefore, the fact that BAKER was not selected as a candidate for the program was not in retaliation for his protected activity, since the selection happened months prior (Exhibit 14).

The 2000 candidates for the Shift Manager Program were selected in May 2000, prior to BAKER acknowledging that he was interested in the Shift Manager Program in June 2000. LOPRIORE provided documentation indicating that BAKER has recently expressed an interest in becoming a Shift Manager, but that information was obtained on June 6, 2000, during a discussion BAKER

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had with his supervisor, James PRINTZ, concerning BAKER's individual development and future career plans (Exhibit 7, pp. 32-33; Exhibit 10, p. 4; Exhibit 14).

Conclusion

Based upon the evidence, the allegation that the SRO was not selected for the Shift Manager Program in retaliation for his protected activity was not substantiated.

Allegation 4: Discrimination Against a Licensed SRO for Reporting a Safety Concern

BAKER also alleged that approximately six years ago, he and one other individual did not get shift premium pay for filling in for the work control position, although those who filled in prior to and following BAKER received the premium pay. BAKER alleged that this discrepancy in pay was a result of raising a safety concern involving intoxicated control room operators reporting for duty. BAKER stated that he did not raise this concern at the time it occurred and was unable to provide payroll or other records to substantiate this allegation.

Agent's Analysis

BAKER has not established a prima facie case of retaliation in that: (1) he failed to report his concerns to the NRC in a timely manner (until approximately 6 years later); (2) he has not established the adverse action taken against him, i.e., BAKER cannot provide documentation supporting his contention that there was a discrepancy between him and others in receiving shift premium pay for filling in for the work control position; (3) nor did he provide any evidence that the licensee was aware of his protected activity and subsequently took adverse action against him in retaliation.

Conclusion

Based upon the lack of evidence available concerning the allegation, this allegation was not substantiated.

Allegation 5: Assist To Inspection: Chilling Effect

OI was asked to provide assistance to the staff in obtaining information regarding a chilling effect which may have resulted after BAKER alleged that he was labeled a "whistleblower."

Documentation provided by the licensee indicates that after July 28, 1999, BAKER wrote 37 PIFs/CRs through July 17, 2000 (Exhibit 11). The Operations Group, which included BAKER, wrote 2,313 PIFs/CRs between March and December 1999, out of a total of 5,193 at

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Byron for that period of time. The Operations Group has written 1,690 PIFs/CRs from January through October 2000, out of a total of 4,065 at Byron for that period of time. There is no indication from that information that BAKER or anyone else in the Operations Group suffered any chilling effect for reporting concerns at Byron. SNOW also provided testimony that BAKER has subsequently been promoted from Field Supervisor to Unit Supervisor.

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LIST OF EXHIBITS

<u>Exhibit No.</u>	<u>Description</u>
1	Investigation Status Record, OI Case No. 3-1999-049, dated November 24, 1999.
2	Transcript of Interview of BAKER, dated October 19, 1999.
3	E-mail from BAKER, dated September 26, 2000.
4	Letter from [REDACTED] dated June 18, 1999.
5	Memorandum from Penny E. REISTER, dated October 13, 2000.
6	PIF #B1999-02673, dated July 28, 1999.
7	Transcript of Interview of LOPRIORE, dated September 28, 2000.
8	Transcript of Interview of [REDACTED] dated October 12, 2000.
9	Transcript of Interview of SNOW, dated October 13, 2000.
10	BAKER's Individual Development Plan, dated June 6, 2000.
11	Listing of PIFs originated by BAKER, dated October 13, 2000.
12	Bar Chart and Table of CRs Generated at Byron from March through December 1999.
13	Bar Chart and Table of CRs Generated at Byron from January through October 2000.
14	ComEd Memorandum from SNOW, dated October 25, 2000; ComEd Memorandum from REISTER, dated October 26, 2000.
15	ComEd Memorandum from [REDACTED] dated June 9, 1999; Licensed Requalification Training Absence Notification Form, dated June 17, 1999.

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