



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

DOCKETED
USNRC

August 31, 1998

'98 SEP -1 P4:15

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

Mr. Michael D. Kohn
National Whistleblower
Legal Defense and Education Fund
3233 P Street, NW
Washington, DC 20007-2756

Dear Mr. Kohn,

I am responding to the Petition you submitted pursuant to Section 2.206 of Title 10 of the Code of Federal Regulations (10 C.F.R. § 2.206), dated March 25, 1998, on behalf of the National Whistleblower Legal Defense and Education Fund. Mr. Randy Robarge initially was also named as a Petitioner; but, by a written submittal dated June 26, 1998, the NRC was notified by you that Mr. Robarge was withdrawing his Petition. The Petition was referred to the Office of Nuclear Reactor Regulation for preparation of a response in accordance with 10 C.F.R. § 2.206.

The Petition requests that the NRC take immediate corrective action and impose civil penalties against Commonwealth Edison Company (ComEd). As grounds for the request, the Petition asserts that: (1) ComEd's assertion in a pleading in a case before the U.S. Department of Labor, 98-ERA-2, that the filing of a "Problem Identification Form" does not constitute protected activity fosters an atmosphere of intimidation and chills the reporting of safety concerns in violation of 10 C.F.R. § 50.7; and (2) ComEd intentionally imposed "restrictive confidentiality" aimed at prohibiting employees from providing information to the NRC in violation of 10 C.F.R. § 50.7.

By letter dated April 29, 1998, I acknowledged receiving your Petition and stated that pursuant to 10 C.F.R. § 2.206 of the Commission's regulations, your Petition was referred to me for action and that it would be acted upon within a reasonable time. You were also informed that the issues raised in the Petition do not constitute an immediate safety concern at ComEd's nuclear facilities and that the information provided did not warrant the immediate action that you requested.

For the reasons stated in the enclosed Director's Decision (DD-98-08), your request has been denied. A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of issuance of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

19481

M. Kohn

- 2 -

August 31, 1998

The enclosed Notice and Director's Decision are being forwarded to the Office of the Federal Register for publication.

Sincerely,

Frank J. Miraglia
for Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Docket Nos. STN 50-456, STN 50-457, STN 50-454,
STN 50-455, 50-237, 50-249, 50-373, 50-374,
50-254, 50-265, 50-295, 50-304

Enclosures: 1. Director's Decision
2. Notice

cc w/encls: See next page

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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION '98 SEP -1 P4:15

Samuel J. Collins, Director

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of)
)
COMMONWEALTH EDISON COMPANY)
)
(Braidwood Station, Units 1 and 2))
(Byron Station, Units 1 and 2))
(Dresden Nuclear Power Station,)
Units 2 and 3))
(LaSalle County Station, Units 1 and 2))
(Quad Cities Nuclear Power Station,)
Units 1 and 2))
(Zion Nuclear Power Station, Units 1 and 2))

Docket Nos. STN 50-456, STN 50-457,
STN 50-454, STN 50-455, 50-237, 50-249,
50-373, 50-374, 50-254, 50-265, 50-295,
50-304

DIRECTOR'S DECISION UNDER 10 C.F.R. §2.206

I. INTRODUCTION

On March 25, 1998, the National Whistleblower Legal Defense and Education Fund and Mr. Randy Robarge filed a Petition with the U.S. Nuclear Regulatory Commission (NRC) pursuant to Section 2.206 of Title 10 of the Code of Federal Regulations (10 C.F.R. § 2.206). (Although Mr. Randy Robarge was also initially named as a Petitioner, the NRC was notified by counsel for Mr. Robarge by written submittal dated June 26, 1998, that Mr. Robarge was withdrawing his Petition). The Petition requested that the NRC take certain immediate "corrective" action and impose civil penalties against Commonwealth Edison Company (ComEd) based upon ComEd's: (1) "interference" with the willingness of employees to file Problem Identification Forms (PIFs); and (2) "intentional prohibition" of employees from directly communicating information to the NRC. The Petitioner raised two issues. Specifically, the Petitioner asserted, first, that ComEd's assertion in a pleading in a case before the U.S.

Department of Labor (DOL),¹ 98-ERA-2, that the filing of a PIF does not constitute protected activity fosters an atmosphere of intimidation and chills the reporting of safety concerns in violation of 10 C.F.R. § 50.7. As a consequence, the Petitioner requested the NRC to:

(1) immediately issue a Show Cause Order requiring ComEd to explain why the filing of a PIF does not constitute protected activity under Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1988 and Supp. V 1993) (ERA); (2) issue a Severity Level I violation and appropriate civil penalty for taking action that ComEd knew or should have known would prevent employees from filing PIFs; and (3) require the licensee to post a public apology for claiming that the filing of a PIF does not constitute a protected activity.

In addition, the Petitioner asserted that ComEd intentionally imposed restrictive confidentiality provisions in a discovery agreement in a pending DOL proceeding aimed at prohibiting employees from providing information to the NRC in violation of 10 C.F.R. § 50.7. As a consequence, the Petitioner requested that the NRC: (1) issue a Show Cause Order to ComEd requiring it to explain under oath why the imposition of restrictive confidentiality clauses prohibiting employees from directly communicating information to the NRC should not be prohibited; (2) impose a Severity Level I violation and appropriate civil penalty against ComEd for the intentional violation of 10 C.F.R. § 50.7(f); (3) require ComEd to transmit to all individuals under similar restrictive confidentiality terms notice that they are now free to communicate information to the NRC; and (4) require the licensee to release to the NRC copies of all restrictive confidentiality agreements entered into by ComEd and any subcontractors employed by ComEd since March 21, 1990 (the date the Federal Register notice of 10 C.F.R. § 50.7(f) was published).

By letter dated April 29, 1998, I informed the Petitioner that the Petition had been referred to me pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. I further informed the

¹The case involved an assertion by Mr. Robarge that he had been discriminated against by ComEd for raising Nuclear Safety concerns in violation of Section 211 of the Energy Reorganization Act of 1974, as amended, 42USC § 5851 (1988 and Supp. V. 1993)

Petitioner that the issues raised in the Petition did not constitute an immediate safety concern at ComEd's nuclear facilities and that the information provided did not warrant the immediate action that was requested, but that action would be taken upon the Petition within a reasonable time.

On May 20, 1998, the NRC forwarded a copy of the Petition to the licensee with a request to respond to the issues raised in the Petition. The licensee responded to the NRC's request by letter dated June 19, 1998.

II. BACKGROUND

Mr. Randy Robarge, a former health physics supervisor at the Zion Nuclear Power Station, filed a complaint with the U. S. Department of Labor (DOL) under Section 211 of the ERA (98-ERA-2) claiming that he was discriminated against and subjected to a retaliatory discharge for filing PIFs. On November 26, 1997, during discovery in connection with the pending litigation before the DOL Administrative Law Judge, Mr. Robarge filed through his counsel a "Request for Production of Documents, Admissions, and Interrogatory Questions" (Complainant's Request). On February 5, 1998, ComEd filed through its counsel its "Respondent's Response and Objections" (Respondent's Response). In addition, during discovery, counsel for Mr. Robarge and ComEd entered into a joint agreement to provide for the confidentiality of certain documents. The agreement was embodied in an Order signed by counsel for both parties on March 23, 1998, entitled, "Stipulation and Order Governing Confidentiality of Document and Information" (Confidentiality Order).²

²On June 8, 1998, the parties submitted to the DOL Administrative Law Judge a joint motion seeking approval of a settlement agreement and to protect its confidentiality and to dismiss the claim. Attached to the motion was the settlement and release agreement signed by counsel for both parties, as well as Mr. Robarge. On June 10, 1998, the Administrative Law Judge issued a Recommended Decision and Order recommending that the joint motion to approve settlement agreement and for order of dismissal be granted, and noted that the Recommended Decision and Order would become the final order of the Secretary of Labor absent a petition for review being received by the Administrative Review Board within ten business days. We have been informed that the DOL has no record of an appeal being filed.

III. DISCUSSION

The Petitioner makes two assertions in support of the request that the NRC take the action requested. These assertions arise from statements made by ComEd in the discovery documents described above.

First, the Petitioner claims that ComEd's response in its Respondent's Response to a request made by Mr. Robarge in his Complainant's Request (Request Number 3) amounts to an assertion that the filing of PIFs is not a protected activity and, as such, will "chill" the reporting of safety concerns in violation of 10 C.F.R. § 50.7. Request Number 3 requested that ComEd admit or deny the following statement: "The complainant engaged in protected activity under Section 211 when he filed 'PIFs' with the Respondent." In its Respondent's Response, ComEd stated the following: "Respondent objects to the Request as being overly broad, vague and ambiguous in referring generally to 'PIFs' and for calling for a legal conclusion and, therefore, this Request is denied."

The Petitioner asserts that this "cavalier attitude and recalcitrance to admit that the filing of PIFs is protected activity" by the licensee will "chill" the willingness of employees to file PIFs and, as such, warrants that the NRC issue a Show Cause Order to the licensee, issue a Severity Level I violation and civil penalty, and require the licensee to post a public apology. In support of this assertion, the Petitioner submitted as an attachment to the Petition an affidavit by a ComEd employee that stated that ComEd's denial that the filing of a PIF constitutes protected activity "chills" the willingness of employees to file PIFs.

In construing ComEd's response to Request Number 3 in such a manner, the Petitioner appears to have misconstrued the statement by taking it out of context and misstating the licensee's position. In making this statement, the licensee does not appear to be taking the position that the filing of all PIFs was not a protected activity. Rather, the licensee was objecting

specifically to a request for admission as being an inappropriate discovery request as a litigative technique. Nothing in its response suggests that ComEd did not recognize that the actual filing of a PIF could constitute protected activity. In fact, in its response to the Petition, dated June 19, 1998, ComEd specifically stated that it recognizes that the preparation of internal nuclear safety-related documents, such as PIFs, could give rise to protected activity.³ Thus, there is no merit to this assertion, nor does it warrant the action requested by the Petitioner.

The Petitioner's second assertion is that ComEd intentionally imposed a restrictive provision upon Mr. Robarge aimed at prohibiting employees from providing information to the NRC in violation of 10 C.F.R. § 50.7. To "correct" this practice, the Petitioner requests that the NRC issue a Show Cause Order to ComEd, impose a Severity Level I violation and civil penalty against ComEd, require ComEd to transmit to all individuals under similar confidentiality terms notice that they are now free to communicate information to the NRC, and require ComEd to release to the NRC copies of all restrictive confidentiality agreements entered into by ComEd and its subcontractors since March 21, 1990.

The provision that the Petitioner asserts was intended to prohibit Mr. Robarge from providing information to the NRC in violation of NRC requirements is Section 3 (g) of the Confidentiality Order. Section 3 (g) of the Confidentiality Order states that confidential information may be disclosed to governmental law enforcement agencies and other governmental bodies pursuant to valid subpoena, provided that: (l) the subpoenaed party give counsel for the designating party written notice of the subpoena and, if so directed by the designating party, object to such subpoena on a timely basis so as to preserve the designating

³With regard to the attached affidavit (Exhibit 5 to the Petition), the affiant indicates that he viewed the licensee's response to request number 3 in its Respondent's Response to represent ComEd's "official legal position." It thus appears that the affiant misunderstood the purpose of the response and its limited significance as a litigation technique and the fact that this statement did not constitute an "official legal position" about whether the filing of PIFs could constitute protected activity.

party's rights; and (2) the subpoenaed party proceed in good faith to seek to obtain confidential treatment of the subpoenaed documents from the relevant governmental body. The Confidentiality Order also contains a provision (Provision 6) that would allow either party to challenge the applicability of this stipulation to any document designated as confidential.

The Petitioner alleges that Mr. Robarge objected through his counsel to the wording of Section 3 (g) and requested that the provision include an additional paragraph stating the following:

Nothing in this agreement shall constitute a prohibition on either party to communicate directly with the U.S. Nuclear Regulatory Commission any information or documentation that is designated as "confidential" by either party except that the party seeking to provide that material to the NRC shall clearly designate the documents as "confidential" and request that the documents be treated as confidential to the fullest extent reasonable under the circumstance.

The Petitioner asserts that ComEd's counsel responded in a letter dated March 19, 1998, that "the language in your addendum is not something that ComEd will stipulate to end a confidentiality order (or an addendum to such an order). On the merits, this section goes directly against the purpose for having a confidentiality order in the first place." The Petitioner also states that ComEd's counsel acknowledged to counsel for Mr. Robarge that "the restrictive confidentiality language is routinely incorporated in agreements entered into by ComEd." The Petitioner asserts that these statements demonstrate that the prohibition in communication with the NRC was intentional rather than inadvertent, and that identical restrictive language is routinely incorporated into ComEd agreements.

The language of which the Petitioner complains is reflected in the Confidentiality Order executed by counsel for both parties as well as the Administrative Law Judge (ALJ) presiding in the DOL proceeding regarding Mr. Robarge's Section 211 complaint. Indeed, it appears that the Confidentiality Order was executed by counsel for both parties on March 23, 1998, and entered by the DOL ALJ on March 24, 1998; both dates are after the exchange of correspondence

alluded to by counsel for Mr. Robarge with respect to his complaints about the possible restrictive nature of the provision. To the extent that Mr. Robarge had such concerns, they should have been raised in the first instance, before the DOL ALJ. That agency has, in the past, expressed no hesitation in assuring that agreements reached by parties to proceedings before it under Section 211 do not contain provisions which unlawfully interfere with an individual's right to engage in protected activity, *Polizzi V Gibbs & Hill, Inc., 87-ERA-38 (Secretary of Labor, July 18, 1989)*. There is no indication that Mr. Robarge requested that the ALJ consider this matter in the first instance, or sought reconsideration by DOL. In the absence of consideration of this matter by the ALJ, NRC does not intend to take action.

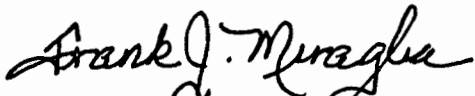
IV. CONCLUSION

For the reasons discussed in the preceding section, no basis exists for taking the actions requested by the Petitioner. Accordingly, the Petition is denied.

A copy of the Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission, 25 days after issuance unless the Commission, on its own motion, institutes review of the decision within that time.

Dated at Rockville, Maryland, this 31st day of August 1998.

FOR THE NUCLEAR REGULATORY COMMISSION


for Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

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DOCKETED
USNRC

UNITED STATES NUCLEAR REGULATORY COMMISSION
DOCKET NOS. STN 50-456, STN 50-457, STN 50-454, STN 50-455,

'98 SEP -1 P4:16

50-237, 50-249, 50-373, 50-374, 50-254, 50-265, 50-295, 50-304

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

COMMONWEALTH EDISON COMPANY

BRAIDWOOD STATION, UNITS 1 AND 2

BYRON STATION, UNITS 1 AND 2

DRESDEN NUCLEAR POWER STATION, UNITS 2 AND 3

LASALLE COUNTY STATION, UNITS 1 AND 2

QUAD CITIES NUCLEAR POWER STATION, UNITS 1 AND 2

ZION NUCLEAR POWER STATION, UNITS 1 AND 2

ISSUANCE OF DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

Notice is hereby given that the Director, Office of Nuclear Reactor Regulation, has taken action with regard to a Petition submitted by the National Whistleblower Legal Defense and Education Fund (Petitioner), dated March 25, 1998, regarding Commonwealth Edison Company (ComEd).

The Petitioner requested that the NRC take corrective action and impose civil penalties against ComEd. The Petitioner asserted that: (1) ComEd's assertion in a pleading in a case before the U.S. Department of Labor that the filing of a "Problem Identification Form" does not constitute a protected activity fosters an atmosphere of intimidation and chills the reporting of concerns in violation of 10 CFR §50.7; and (2) ComEd intentionally imposed "restrictive confidentiality" aimed at prohibiting employees from providing information to the NRC in violation of 10 C.F.R. § 50.7.

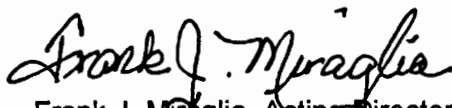
The Director of the Office of Nuclear Reactor Regulation has denied the Petition. The reasons for the denial are explained in the Director's Decision under 10 C.F.R. § 2.206 (DD-98-08), the complete text of which follows this notice and which is available for public

inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, N.W., Washington, D.C. 20555-0001; and at the local public document rooms; the Byron Public Library District, 109 N. Franklin, P.O. Box 434, Byron, Illinois 61010; the Wilmington Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481; Morris Area Public Library District, 604 Liberty Street, Morris, Illinois 60450; Jacobs Memorial Library, 815 North Orlando Smith Avenue, Illinois Valley Community College, Oglesby, Illinois 61348-9692; Dixon Public Library, 221 Hennepin Avenue, Dixon, Illinois 61021; and Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c) of the Commission's regulations. As provided by this regulation, this Decision will constitute the final action of the Commission 25 days after the date of issuance unless the Commission, on its own motion, institutes a review of the decision within that time.

Dated at Rockville, Maryland, this 31st day of August 1998.

FOR THE NUCLEAR REGULATORY COMMISSION


Frank J. Miraglia, Acting Director
Office of Nuclear Reactor Regulation

ACTION

EDO Principal Correspondence Control

FROM: DUE: 04/27/98 EDO CONTROL: G980185
DOC DT: 03/25/98
FINAL REPLY:

Michael D. Kohn
Stephen M. Kohn
National Whistleblower Legal
Defense and Education Fund

TO:

NRC

FOR SIGNATURE OF :

** GRN **

CRC NO:

Collins, NRR

DESC:

2.206 PETITION TO CORRECT ILLEGAL RESTRAINT ON
COMMUNICATION WITH NRC AND TO RECTIFY A CURRENT
CHILLING EFFECT ON THE REPORTING OF SAFETY
CONCERNS AT COMED PLANTS

ROUTING:

Callan
Thadani
Thompson
Norry
Blaha
Burns
Beach, RIII
Cyr, OGC
JGoldberg, OGC
BGleaves, NRR

DATE: 03/27/98

OPENED TO:

CONTACT:

NRR

Collins

SPECIAL INSTRUCTIONS OR REMARKS:

NRR ACTION: DRPW:Adensam
NRR RECEIVED: March 30, 1998

NRR ROUTING: Collins/Miraglia
Boger
Sheron
Travers
Roe
Zimmerman
NRR Mailroom

ACTION

DUE TO NRR DIRECTOR'S OFFICE
BY 4/23/98

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'98 SEP -1 P4:16

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of)

ComEd)
(Zion Plant, Units 1 and 2))

Docket Nos. 50-295
50-304

In the Matter of)

ComEd)
(Braidwood Plant, Units 1 and 2))

Docket Nos. 50-456
50-457

In the Matter of)

ComEd)
(Byron Plant, Unit 1 and Unit 2))

Docket Nos. 50-454
50-455

In the Matter of)

ComEd)
(Dresden Plant, Unit 2 and Unit 3))

Docket Nos. 50-237
50-249

In the Matter of)

ComEd)
(LaSalle County, Unit 1 and Unit 2))

Docket Nos. 50-373
50-374

In the Matter of)

ComEd)
(Quad Cities, Unit 1 and Unit 2))

Docket Nos. 50-254
50-265

**10 C.F.R. § 2.206 PETITION TO CORRECT ILLEGAL RESTRAINT ON
COMMUNICATION WITH NRC AND TO RECTIFY A CURRENT CHILLING
EFFECT ON THE REPORTING OF SAFETY CONCERNS**

Pursuant to 10 C.F.R. § 2.206, The National Whistleblower Center and Randy Robarge (hereinafter "Petitioners") file this petition to seek immediate corrective action and imposition of civil penalties for 1) ComEd's interference with the willingness of employees to file "Problem Identification Forms" or "PIFs" for fear that the employee could lawfully be retaliated against by ComEd for doing such; and 2) the intentional prohibition of an employee from being able to directly communicate information to the U.S. Nuclear Regulatory Commission ("NRC").

ALLEGATION I

Petitioners summarize the first allegation as follows:

ComEd's Assertion in a Pending Nuclear Whistleblower Case That the Filing of a "PIF" Does Not Equate to Engaging in "Protected Activity" Fosters an Atmosphere of Intimidation and Chills the Reporting of Safety Concerns in Violation of 10 C.F.R. §50.7 .

BASIS FOR THE ALLEGATION

On March 4, 1998, ComEd's President and Chief nuclear officer, Oliver D. Kingsley, Jr., issued a memorandum to nuclear employers and contractors claiming that "ComEd is committed to a safety-conscious work environment in which nuclear workers are encouraged to identify safety issues" and that "[s]everal avenues exist within ComEd to report safety issues" and that the "use of Problem Identification Forms (PIFs)" is "the most appropriate method of reporting a safety issue." Mr. Kingsley then states "Acts of discrimination by a licensee, contractor or subcontractor taken against a worker for bringing safety issues to the attention of licensee management or the NRC are against the law." We attach a copy of Mr. Kingsley's memorandum hereto as Exhibit "1" (ComEd Nuclear Division Integrated Reporting Program, NSWP-A-15, adopts the PIF reporting mechanism as the core method of reporting safety-related concerns for

the Braidwood, Byron, Dresden, LaSalle County, Quad Cities, and Zion plants). The memo appears to state that the filing of a PIF constitutes core protected activity for which discrimination against an employee for filing a PIF will not be tolerated.¹ ComEd does not practice that which it preaches.

Mr. Robarge, a former employee at one of ComEd's plants, filed a complaint under Section 211 claiming that he was discriminated against and subjected to a retaliatory discharge for filing PIFs. This matter is known as Robarge v. Commonwealth Edison Company, 98-ERA-2. Two attorneys for Commonwealth Edison Company's legal department, Glenn D. Newman, Esq., and Robert E. Helfrich, Esq., filed notices of appearance in this matter (see Exhibit 2) as did two outside attorneys, Richard F. O'Malley, Jr., and David A. Goldberg (see Exhibit 3). On November 26, 1997, pursuant to Department of Labor discovery rules, Mr. Robarge filed requests for admission, seeking to establish that the filing of a PIF constitutes "protected activity."

Specifically, Admission Request No. 3 states:

The Complainant engaged in protected activity under Section 211 when he filed "PIFs" with the Respondent.

ComEd responded as follows:

Respondent objects to this Request as being overly broad, vague and ambiguous in referring generally to "PIFs" and for calling for a legal conclusion and, therefore, this Request is denied.

A copy of Respondent's Response is attached hereto as Exhibit 4.

¹ The filing of internal safety reports constitutes core protected activity under Section 211 of the Energy Reorganizing Act 42 U.S.C. § 5851 (1993). The filing of a PIF therefore must constitute core protected activity.

This cavalier attitude and recalcitrance to admit that the filing of PIFs is protected activity will directly impact on the safe operation of all of ComEd's nuclear plants. Attached to this petition as Exhibit 5 is a redacted affidavit submitted by a current ComEd employee. This affidavit states that ComEd supervisors are angered by the filing of PIFs and that ComEd's denial that the filing of a PIF constitutes protected activity chills the willingness of employees to file PIFs.²

ARGUMENT

PIFs are absolutely essential to ComEd's safe operation of its nuclear plants. ComEd Nuclear Division Integrated Reporting Program, NSWP-A-15, Revision 1, p. 28, stresses the need for filing PIFs: "If question arises as to whether a PIF should be initiated, initiate the PIF. Data obtained from several seemingly unrelated and insignificant events may indicate areas needing improvement or adverse trends." Without the system of filing PIFs, safety concerns may go undocumented, unreported and, most importantly, unresolved. Such inaction places an undue risk on the health and safety of employees and the general public.

ComEd's public admission that the filing of a PIF is not absolutely and unquestionably core protected activity: 1) reinforces the current abhorrent behavior, as identified in paragraph 3 of the attached affidavit that supervisors currently vent anger towards employees for filing PIFs; and 2) demonstrates to the entire workforce that the memorandum sent out by Mr Kingsley and similar actions on the part of ComEd are meaningless and that the real sentiment of ComEd management is consistent with the anger shown by supervisors for the filing of PIFs. The

² The identity of the affiant can be released to NRC by entering into the execution confidentiality agreement with the employee. The basis for seeking confidentiality is set forth in paragraph 6 of the affidavit.

Commission's May 14, 1996 policy statement entitled: "Freedom for Employees in the Nuclear Industry to Raise Concerns Without Fear of Retaliation," provides that there is an "expectation that licensees and other employers subject to NRC authority will establish and maintain safety-conscious environments in which employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation." ComEd's public denial that the filing of a PIF is protected activity runs counter to the Commission's Policy Statement.

REQUESTED RELIEF

Given the extreme safety significance associated with the unhampered filing of PIFs, the Licensee knew or should have known that the assertion in the midst of a Section 211 proceeding that filing a PIF is not protected activity would further chill employees from the filing of PIFs. As such, ComEd's actions constitute a callous disregard towards the maintenance of a safety-conscious environment where employees are free to raise safety concerns without the fear of retaliation.

WHEREFORE, Petitioners respectfully requests that the Nuclear Regulatory Commission implement the following relief:

- 1) Immediate issuance of a show cause order requiring ComEd to explain why the filing of a PIF does not constitute core protected activity under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851 (1993);
- 2) The issuance of a Level I violation and appropriate civil penalty for taking action that ComEd knew or should have known would chill employees from filing PIFs (a Level I violation is appropriate given the recent imposition of a Level III violation for a violation 10 C.F.R. §50.7 issued on November 28, 1995, see EA 95-235);
- 3) Require licensee to post a public apology for claiming that the filing of a PIF does not constitute protected activity.

ALLEGATION II

The second allegation is summarized as follows:

ComEd Intentionally Imposed Restrictive Confidentiality Aimed at Prohibiting Employees from Providing Information to the NRC in Violation of 10 C.F.R. §50.7.

BASIS FOR THE ALLEGATION

During the course of discovery undertaken on behalf of Randy Robarge in the Section 211 proceeding known as Robarge v. Commonwealth Edison, Case No. 98-ERA-2, Mr. Robarge's counsel agreed to a blanket confidentiality provision to expedite discovery. Counsel to ComEd and Mr. Robarge were to reduce the confidentiality agreement to writing. Because Mr. Robarge had uncovered information he wished to provide to NRC, his counsel specifically sought to gain ComEd's consent that Mr. Robarge could directly communicate information to NRC.

On March 12, 1998, Mr. Robarge's counsel submitted a letter to ComEd's counsel noting that Mr. Robarge objected to the wording of Section 3 (g) "because it interfered with Mr.

Robarge's right to directly communicate with the Nuclear Regulatory Commission."³ See
March 12, 1998 Letter from Michael Kohn to David Goldberg (copy enclosed as Exhibit 6)

³ Section 3 reads as follows:

All information designated as confidential shall not be disclosed to any person other than:

- a. Counsel for the parties to this action including necessary secretarial, support and clerical personnel assisting such counsel;
- b. The individual parties and their employee or former employee witnesses or witnesses employed or formerly employed by Commonwealth Edison or any subsidiary thereof;
- c. Qualified persons transcribing or recording testimony involving such information or documents and necessary stenographic and clerical personnel thereof;
- d. Technical experts and their staff who are employed for the purpose of this litigation;
- e. The presiding Administrative Law Judge ("ALJ"), his assistants and such other personnel as may be authorized by him;
- f. Other persons by written consent of the person or party which furnished the confidential information;
- g. Governmental law enforcement agencies and other governmental bodies pursuant to valid subpoena, provided that:

(i) the subpoenaed party give counsel for the designating party written notice of such subpoena within five (5) days after service of the subpoena but not less than five (5) business days prior to the production of the documents in response thereto and shall, if so directed by the designating party, object to such subpoena on a timely basis so as to preserve the designating party's rights; and

(ii) at or before the time of production the subpoenaed party shall proceed in good faith to seek to obtain confidential treatment of such "Confidential" subpoenaed documents from the relevant governmental law enforcement agency or body to the fullest extent available under law.

To cure this problem Mr. Robarge's counsel requested the inclusion of an additional paragraph under subsection (g) that would read as follows:

Nothing in this agreement shall constitute a prohibition on either party to communicate directly with the U.S. Nuclear Regulatory Commission any information or documentation that is designated as "confidential" by either party except that the party seeking to provide that material to the NRC shall clearly designate the documents as 'confidential' and request that the documents be treated as confidential to the fullest extent reasonable under the circumstance.

Id., at p. 1.

On March 18, 1998, counsel to Mr. Robarge again wrote to ComEd's counsel noting that:

...the only outstanding dispute concerns complainant's insistence to the inclusion of subpart (iii) to Section 3(g). We are greatly disturbed by Respondent's refusal to incorporate this change into the agreement. In any event, I am herewith including a proposed addendum to the agreement that would incorporate the language Complainant wants included, i.e., Section 3(g)(iii). We have executed this proposed addendum in the hopes that you will agree to these terms.

Copies of the March 18, 1998 letter and addendum are attached hereto as Exhibit 7.⁴

Evidence of ComEd's specific intent to prohibit direct communication of information to the NRC is contained in the follow-up letter issued by ComEd's counsel on March 19, 1998.

Therein it states:

⁴ The addendum to 3(g) reads as follows:

(iii) nothing in this stipulation and order shall constitute a prohibition on either party to communicate directly or indirectly with the U.S. Nuclear Regulatory Commission ("NRC") any information or documentation that is designated "Confidential" by either party except that the party seeking to provide that material to the NRC shall clearly designate the document as "Confidential" and request that the document be treated as such by NRC to the fullest extent possible under the circumstances.

As I explicitly noted just three days ago in my letter to you, the language in your Addendum is not something ComEd will stipulate to in a confidentiality order (or an addendum to such order). On the merits, this section goes directly against the purpose for having the confidentiality order in the first place.

(Emphasis added)(copy attached as Exhibit 8)

It should be noted that Mr. David Goldberg, the author of the letters, confirmed to Michael Kohn that he discussed the prohibition of allowing Mr. Robarge to directly communicate with the NRC with the "client." Prior to that ComEd's counsel acknowledged to Stephen Kohn that the confidentiality terms represented the standard gag provisions ComEd requires in all such matters.

ARGUMENT

Interfering with an employee's right to directly communicate with NRC is repulsive to 10 C.F.R. §50.7(f).⁵ Most troubling is that the March 19, 1998 letter from ComEd's counsel demonstrates that the prohibition on communication with NRC was intentional rather than inadvertent. A pattern and practice of keeping information from the NRC is demonstrated by a statement made by ComEd's counsel to Stephen Kohn that identical the restrictive confidentiality language is routinely incorporated in agreements entered into by ComEd.

REQUESTED RELIEF

⁵ The term "employee" under Section 211 of the Energy Reorganization Act, 42 U.S.C. §5851, is specifically meant to including former employees. See, e.g., Hill, et. al v. TVA, Case No. 87-ERA-23/24, D&O f Remand by SOL, at p. 10 (May 24, 1989). As such, interfering with Mr. Robarge's right to communicate directly with NRC is no more permitted that prohibiting a current employee's right to communicate with NRC. Indeed, it is not uncommon for former employees to be more willing to provide information to NRC as they are no longer fearful of losing their job.

The wilful intent to interfere with an employee's right to directly communicate information to the NRC is a prohibited practice under 10 C.F.R. §50.7(f). To correct this prohibited practice, NRC should take the following action:

- 1) Issue a show cause order to ComEd requiring it to explain under oath why the imposition of restrictive confidentiality clauses prohibiting employees from directly communicating information to NRC should not be prohibited;
- 2) Imposition of a Level I violation and appropriate civil penalty against ComEd for the intentional violation of 10 C.F.R. §50.7(f);
- 3) Require ComEd to transmit to all individuals under similar restrictive confidentiality terms notice that they are now free to communicate information to NRC;
- 4) Require Licensee to release to the NRC copies of all restrictive confidentiality agreements entered into by ComEd and any subcontractors employed by ComEd since March 21, 1990 (the date of the Federal Register notice of 10 C.F.R. §50.7(f) was published).

Respectfully submitted:



Michael D. Kohn, Esq.
Stephen M. Kohn, Esq.
NATIONAL WHISTLEBLOWER
LEGAL DEFENSE AND EDUCATION FUND
P.O. Box 3768
Washington, D.C. 20007
www.whistleblowers.org
(202)342-2177 Fax (202)342-6984

On Brief: Melanie Olson

Dated: March 25, 1998

Memorandum

ComEd

Date: March 4, 1998
To: All NGG ComEd Employees and Contractors
From: Oliver D. Kingsley, Jr.
Subject: ComEd's Safety-Conscious Work Environment

ComEd is committed to a safety-conscious work environment in which nuclear workers are encouraged to identify safety issues. I expect and encourage a positive attitude toward safety. It is your obligation and duty as nuclear workers to identify any issue that may affect safe and reliable operations. This requires a safety ethic at all levels that reflects this attitude and personal responsibility for identifying safety issues. We must know the issues we face in order to resolve them.

The Nuclear Regulatory Commission (NRC) encourages nuclear workers to identify safety issues to their employer because licensees have primary responsibility for ensuring safe nuclear operations. The NRC believes that its licensees are in the best position to deal promptly and effectively with safety issues. Safety issues, when raised, will be promptly reviewed, given proper priority based upon safety significance, and resolved appropriately. We also will provide timely feedback to the originator of an issue and to other employees.

Several avenues exist within ComEd to report safety issues. The use of Problem Identification Forms (PIFs), generally the most appropriate method of reporting a safety issue, is strongly encouraged. Using the NGG Corrective Action Program in this way ensures appropriate assessment, documentation, and trending of issues. The NGG Employee Concerns Program provides an alternative avenue for reporting issues that cannot be resolved through line supervision or when confidentiality is desired. Nuclear workers may also raise issues directly with the NRC at any time, but the NRC expects that workers normally will have identified the issues to their employers either before or at the same time they contact the NRC.

We must all communicate openly and accurately up and down the management chain in order to maintain a safety-conscious work environment. I encourage employees and contractor personnel to address safety issues to line supervision, up to and including Vice Presidents, or above, as appropriate. Supervisors are responsible for listening carefully, evaluating objectively, and acting promptly to address safety issues brought to their attention.

Acts of discrimination by a licensee, contractor or subcontractor taken against a worker for bringing safety issues to the attention of licensee management or the NRC are against the law. ComEd will not tolerate intimidation, harassment, discrimination, or retaliation of any kind against a nuclear worker for reporting a safety issue. To successfully improve on our nuclear performance, we must continue to identify, evaluate, and correct all safety issues in a timely manner. Thank you for your cooperation in fulfilling this important requirement of your job.

A United Company

Exhibit 1

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of)

RANDY D. ROBARGE,)

Complainant)

v.)

COMMONWEALTH EDISON COMPANY,)

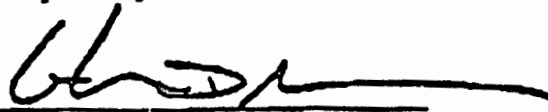
Respondent)

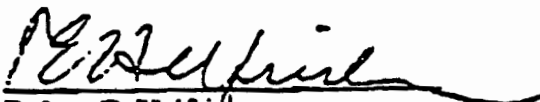
Case No. 98-ERA-2

NOTICE OF APPEARANCE

Pursuant to 29 C.F.R. § 18.34(b), Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, attorneys Glenn D. Newman and Robert E. Helfrich hereby notice their appearances in the above-captioned matter on behalf of Respondent, Commonwealth Edison Company.

Respectfully submitted,


Glenn D. Newman


Robert E. Helfrich

Commonwealth Edison Company
Legal Department
125 South Clark Street, Suite 1500
Chicago, Illinois 60690-0767

Exhibit 2

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a true and correct copy of the attached NOTICE OF APPEARANCE to be served on the following party by U.S. Mail, first class postage pre-paid, and by U.S. First Class Mail, on this 6th day of November, 1997:

Stephen M. Kohn
Kohn, Kohn & Colapinto, P.C.
3233 P Street, N.W.
Washington, D.C. 20007-2756


David A. Goldberg

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of)

RANDY D. ROBARGE,)

Complainant)

v.)

COMMONWEALTH EDISON COMPANY,)

Respondent)

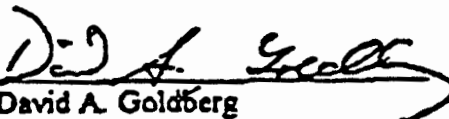
Case No. 98-ERA-2

NOTICE OF APPEARANCE

Pursuant to 29 C.F.R. § 18.34(b), Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, attorneys Richard F. O'Malley, Jr. and David A. Goldberg hereby notice their appearance in the above-captioned matter on behalf of Respondent, Commonwealth Edison Company.

Respectfully submitted,


Richard F. O'Malley, Jr.


David A. Goldberg

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000 (tel.)
(312) 853-7036 (fax)

Exhibit 3

BEFORE THE UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

RANDY D. ROBARGE,

Complainant,

V.

COMMONWEALTH EDISON,

Respondent.

Case No. 98-ERA-2

**RESPONDENT'S RESPONSE AND OBJECTIONS TO
COMPLAINANT'S REQUEST FOR PRODUCTION OF DOCUMENTS
AND REQUEST FOR ADMISSIONS**

Respondent, Commonwealth Edison Company, by and through counsel, hereby responds and objects to Complainant's Request for Production of Documents, Admissions and Interrogatory Questions to Respondent ("Complainant's Request").

GENERAL OBJECTIONS TO DOCUMENT REQUESTS

1. Some or all of the document requests are vague, ambiguous, ill-defined, and largely duplicative of the material requested in Complainant's prior requests.
2. The document requests are unduly burdensome for Respondent in light of the relevant facts and issues in this action, and they represent an improper attempt to harass and disrupt Respondent's business operations.
3. Some or all of the document requests seek production of materials which are not relevant to this case, and not likely to lead to relevant evidence. In particular, but without

Exhibit 4

3. The Complainant engaged in protected activity under Section 211 when he filed "PIFs" with the Respondent:

Response: Respondent objects to this Request as being overly broad, vague and ambiguous in referring generally to "PIFs" and for calling for a legal conclusion and, therefore, this Request is denied.

4. The Complainant engaged in protected activity when he raised issues concerning the conduct of Toni Myers:

Response: Respondent objects to this Request as being overly broad, vague and ambiguous in referring generally to "raised issues" and for calling for a legal conclusion and, therefore, this Request is denied

5. The official who made the decision to terminate Mr. Robarge knew of the protected activity engaged in by the Complainant:

Response: Respondent objects to this Request in that it is vague and ambiguous by suggesting that a single "official" was involved in the decision to terminate Mr. Robarge, and to the extent it calls for a legal conclusion. Therefore, this Request is denied.

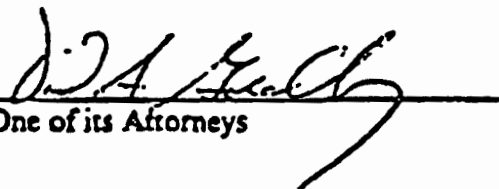
6. Other supervisors employed in the HP Department made remarks which were crude, rude, lured, vulgar and/or foul and did not obtain any discipline:

Response: Respondent objects to this Request on the basis that it is inherently vague and ambiguous and, therefore, this Request is denied.

Response: Respondent objects to this Request as being vague and ambiguous, in addition to being irrelevant to the extent it calls for information "prior to April 1996" given that Complainant was terminated on December 9, 1996. Therefore, this Request is denied.

Respectfully submitted,


COMMONWEALTH EDISON COMPANY

By: 
One of its Attorneys

Richard F. O'Malley, Jr.
David A. Goldberg
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603

0014 PCDCS CHICAGO 813978 2 February 5, 1998 (7:19am)

AFFIDAVIT

Under the pains and penalties of perjury, I,  hereby affirm that the following information is true and correct:

1. I am currently an employee of Commonwealth Edison at Plant Zion, and I have been employed by Commonwealth Edison for eight (8) years.
2. Filing a Problem Identification Form (PIF) is very important to public health and safety.
3. It is well known at Commonwealth Edison that other employees and supervisors may get angry at an employee for filing a PIF
4. I have seen the official legal position of Commonwealth Edison regarding whether filing PIFs constitutes protected activity, and I was very upset by what I have read
5. This type of statement by Commonwealth Edison confirms the chilling effect that it has on me and whether I will file PIFs in the future I believe that this statement would clearly have a chilling effect on other employees as they continue to learn of Commonwealth Edison's position.
6. I am very concerned that filing this affidavit may result in retaliatory actions taken against me, and thus I request complete confidentiality from the Nuclear Regulatory Commission.

THE AFFIANT SAYETH FURTHER NOT.



2/26/98
Date

Exhibit 5

KOHN, KOHN & COLAPINTO, P.C.

3233 P Street, N.W.
Washington, D.C. 20007-2756
Tel: (202) 342-6980
Fax: (202) 342-6984

March 12, 1998

Via Fax No. 312-853-7036

David Goldberg
Sidley & Austin
One First National Plaza
Chicago, Il. 60603

Re: *Robarge v. Commonwealth Edison, 98-ERA-2*

Dear David:

I can only hope that the proposal set out in this letter can constitute a final agreement on the wording of a stipulated confidentiality agreement. Earlier today we briefly spoke about complainant's objection to the inclusion of Section (g) in the stipulated protective order. During our discussions I advised you that we object to the inclusion of Section (g) because it interfered with complainant's ability to directly communicate with the Nuclear Regulatory Commission ("NRC"). Your response to this concern was that under the remainder of the agreement the complainant need only alert respondent as to which documents complainant would like to submit to NRC and that if we are unable to reach an agreement on this matter that we would then be required to obtain an order from the Department of Labor to secure the release of the documents. Since our last conversation I reviewed your original draft as well as the proposed draft Stephen forwarded to you on March 10, 1998. As it turns out, the mere deletion of section (g) did not cure the problem complainant sought to cure (i.e., an unhindered right to share documents directly with NRC without having to wait for a subpoena and exhaust the procedures stated in the agreement.). In fact, we can agree to the introduction of Section (g) simply by your agreeing to add a new subpart (iii) thereto, which would state as follows:

Nothing in this agreement shall constitute a prohibition on either party to communicate directly with the U.S. Nuclear Regulatory Commission any information or documentation that is designated as "confidential" by either party except that the party seeking to provide that material to the NRC shall clearly designate the document as "confidential" and request that the document be treated as confidential to the fullest extent reasonable under the circumstance.

Exhibit 6

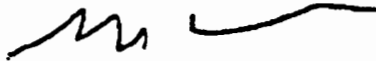
Complainant also now seeks to include a new paragraph 12 as follows:

Nothing in this agreement shall constitute a waiver by any party thereto to seek a modification of the terms of this stipulated protective order with the presiding administrative law judge.

Finally, we agree to sign the agreement as counsel for Mr. Robarge and to modify paragraphs 7 and 8 as you requested. I am enclosing herewith a copy of "Exhibit A" (which should have been include in our March 10th transmission but may have been inadvertently omitted).

Complainant would like to wrap this matter up today. I am prepared to fax a signed agreement incorporating the above-identified changes today.

Very truly yours,



Michael D. Kohn

KOHN, KOHN & COLAPINTO, P.C.

3233 P Street, N.W.
Washington, D.C. 20007-2756
Tel: (202) 342-6980
Fax: (202) 342-6984

March 18, 1998

Via Fax No. 312-853-7036

David Goldberg
Sidley & Austin
One First National Plaza
Chicago, Il. 60603

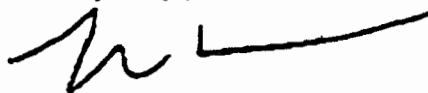
Re: *Robarge v. Commonwealth Edison* 98-ERA-2

Dear David:

Please find enclosed an executed Stipulation and Order Governing Confidentiality of Documents and Information that incorporates all of your demands. As you are aware, the only outstanding dispute concerns complainant's insistence to the inclusion of subpart (iii) to Section 3(g). We are greatly disturbed by Respondent's refusal to incorporate this change into the agreement. In any event, I am herewith including a proposed addendum to the agreement that would incorporate the language Complainant wants included, i.e., Section 3(g)(iii). We have executed this proposed addendum in the hopes that you will agree to these terms. You are directed to execute and fax to me a copy of the agreement after you execute it. I anticipate that you will file an executed agreement with the Court today (and serve a copy on me as well).

As we have executed an agreement deleting the terms to which respondent was unwilling to incorporate, you are directed to immediately transmit all documents responsive to complainant's outstanding discovery requests. I anticipate that these documents will be shipped today. I continue to be mystified by respondent's continued refusal to produce documents you claim to constitute confidential material when these documents were protected from disclosure under the agreement set forth in the November 25, 1997 on-the-record agreement entered into between Stephen Kohn and Richard O'Malley, Jr. (See Strodl deposition at pages 49-52). Your continued refusal to produce documents has hampered and continues to hamper complainant's trial preparations.

Very truly yours,



Michael D. Kohn

Exhibit 7

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

_____)
RANDY ROBARGE,)
)
Complainant,)
)
v.) 98-ERA-2
)
COMMONWEALTH EDISON,)
)
Respondent.)
_____)

ADDENDUM TO STIPULATION AND ORDER GOVERNING CONFIDENTIALITY OF
DOCUMENTS AND INFORMATION

On March __, 1998 the parties entered a Stipulation pertaining to the confidentiality of documents and information produced during discovery. The parties hereby agree to the inclusion of an additional subpart at the conclusion of section 3(g)(ii) which shall henceforth be designated as section 3(g)(iii), and which shall state as follows:

(iii) nothing in this stipulation and order shall constitute a prohibition on either party to communicate directly or indirectly with the U.S. Nuclear Regulatory Commission ("NRC") any information or documentation that is designated "Confidential" by either party except that the party seeking to provide that material to the NRC shall clearly designate the document as "Confidential" and request that the document be treated as such by NRC to the fullest extent possible under the circumstances.

[Signatures appear on following page]

By:



Attorney for Complainant:

Stephen M. Kohn
Michael D. Kohn
KOHN, KOHN & COLAPINTO, P.C.
3233 P Street, N.W.
Washington, D.C. 20007-2756
(202) 242-6980

Attorney for Respondent

Richard F. O'Malley, Jr.
David A. Goldberg
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7000

SO ORDERED:

Hon. Thomas F. Phalen, Jr.
Administrative Law Judge

Dated

518/po addendum

SIDLEY & AUSTIN

A PARTNERSHIP INCLUDING PRACTICES OF CORPORATION

60500
LOS ANGELES
NEW YORK

ONE FIRST NATIONAL PLAZA
CHICAGO, ILLINOIS 60603
TELEPHONE 312 853 7000
FACSIMILE 312 853 7036

FOUNDED 1866

WASHINGTON, D.C.
LONDON
HONGKONG
TOKYO

WORLDWIDE DIRECT NUMBER
(312) 853 2216

March 19, 1998

Via Facsimile

Michael D. Kohn
Kohn, Kohn & Colapinto
1233 P Street, N.W.
Washington, D.C. 20007-2756

Re. Robarge v. Commonwealth Edison Company (98 ERA 2)

Dear Michael:

The form of executed confidentiality order that you forwarded to me yesterday continues to have errors and other problems that I have conveyed to you since we began talking on the subject recently. I am assuming that, given your revised order, you have chosen not to take me up on my suggestion to go back to ComEd's original order from January (which is puzzling given that you have now basically incorporated all of the sections from the ComEd document that you once reported to be problematic). Nonetheless, I would recommend that until we either discuss these matters personally, or you circulate a draft for my review and comment, you refrain in the future from sending me an executed document that you prepared with a "direction" to sign and file it.

Here is a list of items that I have found for correction or modification:

- ¶ 3(e)(ii) reads "the subpoenaed party shall *produce* in good faith..." This should read "*proceed* in good faith..."
- § 7 improperly reads "the party *requesting* confidentiality shall have twenty days following termination of such negotiations in which to make a motion..." It should read the party *objecting* to the confidentiality has to make any motion.
- As I explicitly noted just three days ago in my letter to you, the language in your Addendum is not something ComEd will stipulate to in a confidentiality order (or an addendum to such order). On the merits, this

Exhibit 8

SIDLEY & AUSTIN

CHICAGO

Michael D. Kohn
March 19, 1998
Page 2

section goes directly against the purpose for having the confidentiality order in the first place. Further, there is already a provision in the order (once it is stated properly in § 7) that gives both parties the ability to avoid a confidentiality designation if they so desire.

As we have since the beginning of this year, we remain ready to submit a workable and suitable confidentiality order for Judge Phalen to enter. Nothing should be causing you to be, as your letter puts it, "mystified" by CornEd's commitment to ensuring that an appropriate stipulation is finalized before further document production takes place - indeed, the deposition transcript pages you cite at the close of your letter expressly provide that your brother and Richard O'Malley agreed at the Strodt deposition back in November to eventually replace Steve's oral representations with a formal court order. I trust you will make the necessary corrections to the document, and if you are unable to drop your proposed NRC language, please let me know as soon as possible.

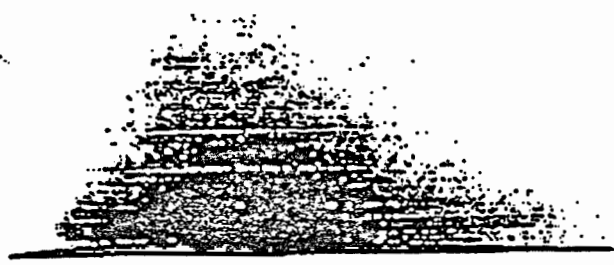
Finally, please find attached hereto a Notice of Continued Deposition for your client, Mr. Korbarg.

Very truly yours,

David A. Goldberg
David A. Goldberg

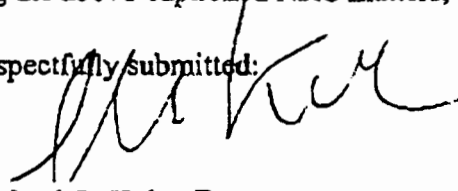
enclosure
cc: Richard T. O'Malley, Jr.

Last
PAGE



Pursuant to 10 C.F.R. § 2.206, Randy Robarge hereby withdraws, with prejudice, the 2.206 petition he filed concerning the above-captioned NRC matters, dated March 25, 1998.

Respectfully submitted:



Michael D. Kohn, Esq.
Stephen M. Kohn, Esq.
NATIONAL WHISTLEBLOWER
LEGAL DEFENSE AND EDUCATION FUND
P.O. Box 3768
Washington, D.C. 20007
www.whistleblowers.org
(202)342-2177 Fax (202)342-6984

Dated: June 26, 1998



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

April 29, 1998

Michael D. Kohn
National Whistleblower
Legal Defense and Education Fund
P.O. Box 3768
Washington, D.C. 20007

Dear Mr. Kohn:


I have received your Petition dated March 25, 1998, addressed to the U. S. Nuclear Regulatory Commission (NRC), which you filed on behalf of the National Whistleblower Legal Defense and Education Fund and Mr. Randy Robarge. The Petition requests that the NRC take immediate corrective action and impose civil penalties against Commonwealth Edison Company (ComEd). As grounds for the request, the Petition asserts that (1) ComEd's assertion in a pleading in a case before the U.S. Department of Labor, 98-ERA-2, that the filing of a "Problem Identification Form" (PIF) does not constitute protected activity fosters an atmosphere of intimidation and chills the reporting of safety concerns in violation of 10 CFR 50.7, and (2) ComEd intentionally imposed "restrictive confidentiality" aimed at prohibiting employees from providing information to the NRC in violation of 10 CFR 50.7.

Your Petition has been referred to me pursuant to 10 CFR 2.206 of the Commission's regulations. The NRC staff has determined that the issues raised in the Petition do not constitute an immediate safety concern at ComEd's nuclear facilities, based on the information you have provided, and, therefore, your request for immediate action is denied. The NRC routinely assesses licensee actions to identify problems at facilities, including the processes used by employees to identify problems (e.g., PIFs). Based on these periodic assessments and observations made during the conduct of normal inspection activities, as well as investigations of particular allegations, the NRC has not found that the licensee discourages employees at ComEd sites from utilizing the process of filing PIFs to identify safety concerns.

As provided by 10 CFR 2.206, the staff is reviewing your request and we will inform you, within a reasonable time, of the action we will take.

I have enclosed for your information a copy of the notice that is being filed with the Office of the Federal Register for publication. I have also enclosed for your information a pamphlet on the public Petition process.

Sincerely,


Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Enclosures: *Federal Register Notice*
Pamphlet re: Public Petition Process

cc w/o encl 2: See next page

UNITED STATES NUCLEAR REGULATORY COMMISSION

DOCKET NOS. STN 50-456, STN 50-457; STN 50-454, STN 50-455; 50-237, 50-249;

50-373, 50-374; 50-254, 50-265; AND 50-295, 50-304

LICENSE NOS. NPF-72, NPF-77; NPF-37, NPF-66; DPR-19, DPR-25;

NPF-11, NPF-18; DRP-29, DPR-30; AND DPR-39, DPR-48

COMMONWEALTH EDISON COMPANY

RECEIPT OF PETITION FOR DIRECTOR'S DECISION UNDER 10 CFR 2.206

Notice is hereby given that by Petition dated March 25, 1998, the National Whistleblower Legal Defense and Education Fund and Mr. Randy Robarge (the Petitioners) have requested that the U.S. Nuclear Regulatory Commission (NRC) take immediate corrective action and imposition of civil penalties against Commonwealth Edison Company (ComEd).

As grounds for their request, the Petitioners assert that (1) ComEd's assertion in a pleading in a case before the U.S. Department of Labor, 98-ERA-2, that the filing of a "Problem Identification Form" (PIF) does not constitute protected activity fosters an atmosphere of intimidation and chills the reporting of safety concerns in violation of 10 CFR 50.7, and (2) ComEd intentionally imposed "restrictive confidentiality" aimed at prohibiting employees from providing information to the NRC in violation of 10 CFR 50.7.

The request is being treated pursuant to 10 CFR 2.206 of the Commission's regulations. The Petition has been referred to the Director of the Office of Nuclear Reactor Regulation. The Petitioners' request for immediate action was denied by letter dated April 29, 1998.

A copy of the Petition is available for inspection at the Commission's Public Document Room at 2120 L Street, N.W., Washington, DC 20003-1527.

Dated at Rockville, Maryland, this 29th day of April 1998.

FOR THE NUCLEAR REGULATORY COMMISSION


Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Commonwealth Edison Company

cc: w/incoming Petition

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

May 20, 1998

Mr. Oliver D. Kingsley
President, Nuclear Generation Group
Commonwealth Edison Company
Executive Towers West III
1400 Opus Place, Suite 500
Downers Grove, IL 60515

SUBJECT: REQUEST FOR INFORMATION RELATED TO PETITION FILED PURSUANT TO 10 CFR 2.206 - BRAIDWOOD, UNITS 1 AND 2; BYRON, UNITS 1 AND 2; DRESDEN, UNITS 2 AND 3; LASALLE, UNITS 1 AND 2; QUAD CITIES, UNITS 1 AND 2; AND ZION, UNITS 1 AND 2 (TAC NOS. MA1383, MA1384, MA1385, MA1386, MA1387, MA1388, MA1389, MA1390, MA1391, MA1392, MA1393 AND MA1394)

Dear Mr. Kingsley:

On March 25, 1998, The National Whistleblower Center and Randy Robarge filed a Petition with the U. S. Nuclear Regulatory Commission pursuant to 10 CFR 2.206 regarding the above-named facilities. A copy of the Petition is enclosed. The Petitioners requested that the NRC take "corrective" action against Commonwealth Edison Company (ComEd) including immediate issuance of a show cause order and issuance of a Severity Level I violation and associated civil penalty. The Petitioners contend that these actions should be taken because of: "(1) ComEd's interference with the willingness of employees to file "Problem Identification Forms" or "PIFs" for fear that the employees could be retaliated against by ComEd for doing such; and (2) the intentional prohibition of an employee from being able to directly communicate information to the U.S. Nuclear Regulatory Commission."

By letter dated April 29, 1998, the Petitioners were informed that the NRC had determined that the issues raised did not warrant immediate action; however, the NRC would review the Petitioners' requests. As a part of our review, we are requesting ComEd's response to the issues raised in the Petition. Your response should include your position on the relationship between filing a PIF and protected activity, your explanation as to your refusal to include a provision, in the confidentiality agreement referenced in the Petition, that would allow disclosure of confidential information to the NRC, and your position on whether requiring a subpoena before bringing confidential information to the NRC regarding any matter within NRC jurisdiction is consistent with 10 CFR 50.7(f).

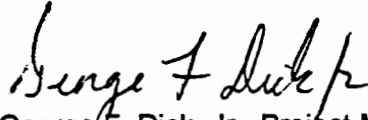
Also please provide a copy of the letter referenced in the March 19, 1998, letter from David Goldberg of Sidley and Austin to Michael Kohn (Exhibit 8 to the Petition). The letter is referenced on pages 8-9 of the Petition in the sentence, "As I explicitly noted just three days ago in my letter to you, the language in your Addendum is not something ComEd will stipulate to in a confidentiality order (or an addendum to such order)."

O. Kingsley

- 2 -

Please provide your response within 30 days of receipt of this letter. If there are any questions, I may be contacted at (301) 415-3019.

Sincerely,



George F. Dick, Jr., Project Manager
Project Directorate III-2
Division of Reactor Projects - III/IV
Office of Nuclear Reactor Regulation

Docket Nos. STN 50-456, STN 50-457, STN 50-454,
STN 50-455, 50-237, 50-249, 50-373, 50-374,
50-254, 50-265, 50-295, 50-304

Enclosure: Petition

cc w/encl: See next page




O. Kingsley

cc:

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O. Kingsley

- 2 -

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National Whistleblower
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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

In the Matter of)
)

ComEd)
(Zion Plant, Units 1 and 2))

Docket Nos. 50-295
50-304

In the Matter of)
)

ComEd)
(Braidwood Plant, Units 1 and 2))

Docket Nos. 50-456
50-457

In the Matter of)
)

ComEd)
(Byron Plant, Unit 1 and Unit 2))

Docket Nos. 50-454
50-455

In the Matter of)
)

ComEd)
(Dresden Plant, Unit 2 and Unit 3))

Docket Nos. 50-237
50-249

In the Matter of)
)

ComEd)
(LaSalle County, Unit 1 and Unit 2))

Docket Nos. 50-373
50-374

In the Matter of)
)

ComEd)
(Quad Cities, Unit 1 and Unit 2))

Docket Nos. 50-254
50-265

**10 C.F.R. § 2.206 PETITION TO CORRECT ILLEGAL RESTRAINT ON
COMMUNICATION WITH NRC AND TO RECTIFY A CURRENT CHILLING
EFFECT ON THE REPORTING OF SAFETY CONCERNS**

Pursuant to 10 C.F.R. § 2.206, The National Whistleblower Center and Randy Robarge (hereinafter "Petitioners") file this petition to seek immediate corrective action and imposition of civil penalties for 1) ComEd's interference with the willingness of employees to file "Problem Identification Forms" or "PIFs" for fear that the employee could lawfully be retaliated against by ComEd for doing such; and 2) the intentional prohibition of an employee from being able to directly communicate information to the U.S. Nuclear Regulatory Commission ("NRC").

ALLEGATION I

Petitioners summarize the first allegation as follows:

ComEd's Assertion in a Pending Nuclear Whistleblower Case That the Filing of a "PIF" Does Not Equate to Engaging in "Protected Activity" Fosters an Atmosphere of Intimidation and Chills the Reporting of Safety Concerns in Violation of 10 C.F.R. §50.7 .

BASIS FOR THE ALLEGATION

On March 4, 1998, ComEd's President and Chief nuclear officer, Oliver D. Kingsley, Jr., issued a memorandum to nuclear employees and contractors claiming that "ComEd is committed to a safety-conscious work environment in which nuclear workers are encouraged to identify safety issues" and that "[s]everal avenues exist within ComEd to report safety issues" and that the "use of Problem Identification Forms (PIFs)" is "the most appropriate method of reporting a safety issue." Mr. Kingsley then states "Acts of discrimination by a licensee, contractor or subcontractor taken against a worker for bringing safety issues to the attention of licensee management or the NRC are against the law." We attach a copy of Mr. Kingsley's memorandum hereto as Exhibit "1" (ComEd Nuclear Division Integrated Reporting Program, NSWP-A-15, adopts the PIF reporting mechanism as the core method of reporting safety-related concerns for

the Braidwood, Byron, Dresden, LaSalle County, Quad Cities, and Zion plants). The memo appears to state that the filing of a PIF constitutes core protected activity for which discrimination against an employee for filing a PIF will not be tolerated.¹ ComEd does not practice that which it preaches.

Mr. Robarge, a former employee at one of ComEd's plants, filed a complaint under Section 211 claiming that he was discriminated against and subjected to a retaliatory discharge for filing PIFs. This matter is known as Robarge v. Commonwealth Edison Company, 98-ERA-2. Two attorneys for Commonwealth Edison Company's legal department, Glenn D. Newman, Esq., and Robert E. Helfrich, Esq., filed notices of appearance in this matter (see Exhibit 2) as did two outside attorneys, Richard F. O'Malley, Jr., and David A. Goldberg (see Exhibit 3). On November 26, 1997, pursuant to Department of Labor discovery rules, Mr. Robarge filed requests for admission, seeking to establish that the filing of a PIF constitutes "protected activity."

Specifically, Admission Request No. 3 states:

The Complainant engaged in protected activity under Section 211 when he filed "PIFs" with the Respondent.

ComEd responded as follows:

Respondent objects to this Request as being overly broad, vague and ambiguous in referring generally to "PIFs" and for calling for a legal conclusion and, therefore, this Request is denied.

A copy of Respondent's Response is attached hereto as Exhibit 4.

¹ The filing of internal safety reports constitutes core protected activity under Section 211 of the Energy Reorganizing Act 42 U.S.C. § 5851 (1993). The filing of a PIF therefore must constitute core protected activity.

This cavalier attitude and recalcitrance to admit that the filing of PIFs is protected activity will directly impact on the safe operation of all of ComEd's nuclear plants. Attached to this petition as Exhibit 5 is a redacted affidavit submitted by a current ComEd employee. This affidavit states that ComEd supervisors are angered by the filing of PIFs and that ComEd's denial that the filing of a PIF constitutes protected activity chills the willingness of employees to file PIFs.²

ARGUMENT

PIFs are absolutely essential to ComEd's safe operation of its nuclear plants. ComEd Nuclear Division Integrated Reporting Program, NSWP-A-15, Revision 1, p. 28, stresses the need for filing PIFs: "If question arises as to whether a PIF should be initiated, initiate the PIF. Data obtained from several seemingly unrelated and insignificant events may indicate areas needing improvement or adverse trends." Without the system of filing PIFs, safety concerns may go undocumented, unreported and, most importantly, unresolved. Such inaction places an undue risk on the health and safety of employees and the general public.

ComEd's public admission that the filing of a PIF is not absolutely and unquestionably core protected activity: 1) reinforces the current abhorrent behavior, as identified in paragraph 3 of the attached affidavit that supervisors currently vent anger towards employees for filing PIFs; and 2) demonstrates to the entire workforce that the memorandum sent out by Mr Kingsley and similar actions on the part of ComEd are meaningless and that the real sentiment of ComEd management is consistent with the anger shown by supervisors for the filing of PIFs. The

² The identity of the affiant can be released to NRC by entering into the execution confidentiality agreement with the employee. The basis for seeking confidentiality is set forth in paragraph 6 of the affidavit.

Commission's May 14, 1996 policy statement entitled: "Freedom for Employees in the Nuclear Industry to Raise Concerns Without Fear of Retaliation," provides that there is an "expectation that licensees and other employers subject to NRC authority will establish and maintain safety-conscious environments in which employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation." ComEd's public denial that the filing of a PIF is protected activity runs counter to the Commission's Policy Statement.

REQUESTED RELIEF

Given the extreme safety significance associated with the unhampered filing of PIFs, the Licensee knew or should have known that the assertion in the midst of a Section 211 proceeding that filing a PIF is not protected activity would further chill employees from the filing of PIFs. As such, ComEd's actions constitute a callous disregard towards the maintenance of a safety-conscious environment where employees are free to raise safety concerns without the fear of retaliation.

WHEREFORE, Petitioners respectfully requests that the Nuclear Regulatory Commission implement the following relief:

- 1) Immediate issuance of a show cause order requiring ComEd to explain why the filing of a PIF does not constitute core protected activity under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851 (1993);
- 2) The issuance of a Level I violation and appropriate civil penalty for taking action that ComEd knew or should have known would chill employees from filing PIFs (a Level I violation is appropriate given the recent imposition of a Level III violation for a violation 10 C.F.R. §50.7 issued on November 28, 1995, see EA 95-235);
- 3) Require licensee to post a public apology for claiming that the filing of a PIF does not constitute protected activity.

ALLEGATION II

The second allegation is summarized as follows:

ComEd Intentionally Imposed Restrictive Confidentiality Aimed at Prohibiting Employees from Providing Information to the NRC in Violation of 10 C.F.R. §50.7.

BASIS FOR THE ALLEGATION

During the course of discovery undertaken on behalf of Randy Robarge in the Section 211 proceeding known as Robarge v. Commonwealth Edison, Case No. 98-ERA-2, Mr. Robarge's counsel agreed to a blanket confidentiality provision to expedite discovery. Counsel to ComEd and Mr. Robarge were to reduce the confidentiality agreement to writing. Because Mr. Robarge had uncovered information he wished to provide to NRC, his counsel specifically sought to gain ComEd's consent that Mr. Robarge could directly communicate information to NRC.

On March 12, 1998, Mr. Robarge's counsel submitted a letter to ComEd's counsel noting that Mr. Robarge objected to the wording of Section 3 (g) "because it interfered with Mr.

Robarge's right to directly communicate with the Nuclear Regulatory Commission."³ See

March 12, 1998 Letter from Michael Kohn to David Goldberg (copy enclosed as Exhibit 6)

³ Section 3 reads as follows:

All information designated as confidential shall not be disclosed to any person other than:

- a. Counsel for the parties to this action including necessary secretarial, support and clerical personnel assisting such counsel;
- b. The individual parties and their employee or former employee witnesses or witnesses employed or formerly employed by Commonwealth Edison or any subsidiary thereof;
- c. Qualified persons transcribing or recording testimony involving such information or documents and necessary stenographic and clerical personnel thereof;
- d. Technical experts and their staff who are employed for the purpose of this litigation;
- e. The presiding Administrative Law Judge ("ALJ"), his assistants and such other personnel as may be authorized by him;
- f. Other persons by written consent of the person or party which furnished the confidential information;
- g. Governmental law enforcement agencies and other governmental bodies pursuant to valid subpoena, provided that:

(i) the subpoenaed party give counsel for the designating party written notice of such subpoena within five (5) days after service of the subpoena but not less than five (5) business days prior to the production of the documents in response thereto and shall, if so directed by the designating party, object to such subpoena on a timely basis so as to preserve the designating party's rights; and

(ii) at or before the time of production the subpoenaed party shall proceed in good faith to seek to obtain confidential treatment of such "Confidential" subpoenaed documents from the relevant governmental law enforcement agency or body to the fullest extent available under law.

To cure this problem Mr. Robarge's counsel requested the inclusion of an additional paragraph under subsection (g) that would read as follows:

Nothing in this agreement shall constitute a prohibition on either party to communicate directly with the U.S. Nuclear Regulatory Commission any information or documentation that is designated as "confidential" by either party except that the party seeking to provide that material to the NRC shall clearly designate the documents as 'confidential' and request that the documents be treated as confidential to the fullest extent reasonable under the circumstance.

Id., at p. 1.

On March 18, 1998, counsel to Mr. Robarge again wrote to ComEd's counsel noting that:

...the only outstanding dispute concerns complainant's insistence to the inclusion of subpart (iii) to Section 3(g). We are greatly disturbed by Respondent's refusal to incorporate this change into the agreement. In any event, I am herewith including a proposed addendum to the agreement that would incorporate the language Complainant wants included, i.e., Section 3(g)(iii). We have executed this proposed addendum in the hopes that you will agree to these terms.

Copies of the March 18, 1998 letter and addendum are attached hereto as Exhibit 7.⁴

Evidence of ComEd's specific intent to prohibit direct communication of information to the NRC is contained in the follow-up letter issued by ComEd's counsel on March 19, 1998.

Therein it states:

⁴ The addendum to 3(g) reads as follows:

(iii) nothing in this stipulation and order shall constitute a prohibition on either party to communicate directly or indirectly with the U.S. Nuclear Regulatory Commission ("NRC") any information or documentation that is designated "Confidential" by either party except that the party seeking to provide that material to the NRC shall clearly designate the document as "Confidential" and request that the document be treated as such by NRC to the fullest extent possible under the circumstances.

As I explicitly noted just three days ago in my letter to you, the language in your Addendum is not something ComEd will stipulate to in a confidentiality order (or an addendum to such order). On the merits, this section goes directly against the purpose for having the confidentiality order in the first place.

(Emphasis added)(copy attached as Exhibit 8)

It should be noted that Mr. David Goldberg, the author of the letters, confirmed to Michael Kohn that he discussed the prohibition of allowing Mr. Robarge to directly communicate with the NRC with the "client." Prior to that ComEd's counsel acknowledged to Stephen Kohn that the confidentiality terms represented the standard gag provisions ComEd requires in all such matters.

ARGUMENT

Interfering with an employee's right to directly communicate with NRC is repulsive to 10 C.F.R. §50.7(f).⁵ Most troubling is that the March 19, 1998 letter from ComEd's counsel demonstrates that the prohibition on communication with NRC was intentional rather than inadvertent. A pattern and practice of keeping information from the NRC is demonstrated by a statement made by ComEd's counsel to Stephen Kohn that identical the restrictive confidentiality language is routinely incorporated in agreements entered into by ComEd.

REQUESTED RELIEF

⁵ The term "employee" under Section 211 of the Energy Reorganization Act, 42 U.S.C. §5851, is specifically meant to including former employees. See, e.g., Hill et al v TVA, Case No. 87-ERA-23/24, D&O f Remand by SOL, at p. 10 (May 24, 1989). As such, interfering with Mr. Robarge's right to communicate directly with NRC is no more permitted than prohibiting a current employee's right to communicate with NRC. Indeed, it is not uncommon for former employees to be more willing to provide information to NRC as they are no longer fearful of losing their job.

The wilful intent to interfere with an employee's right to directly communicate information to the NRC is a prohibited practice under 10 C.F.R. §50.7(f). To correct this prohibited practice, NRC should take the following action:

- 1) Issue a show cause order to ComEd requiring it to explain under oath why the imposition of restrictive confidentiality clauses prohibiting employees from directly communicating information to NRC should not be prohibited;
- 2) Imposition of a Level I violation and appropriate civil penalty against ComEd for the intentional violation of 10 C.F.R. §50.7(f);
- 3) Require ComEd to transmit to all individuals under similar restrictive confidentiality terms notice that they are now free to communicate information to NRC;
- 4) Require Licensee to release to the NRC copies of all restrictive confidentiality agreements entered into by ComEd and any subcontractors employed by ComEd since March 21, 1990 (the date of the Federal Register notice of 10 C.F.R. §50.7(f) was published).

Respectfully submitted:



Michael D. Kohn, Esq.
Stephen M. Kohn, Esq.
NATIONAL WHISTLEBLOWER
LEGAL DEFENSE AND EDUCATION FUND
P.O. Box 3768
Washington, D.C. 20007
www.whistleblowers.org
(202)342-2177 Fax (202)342-6984

On Brief: Melanie Olson

Dated: March 25, 1998



Date: March 4, 1998
To: All NGG ComEd Employees and Contractors
From: Oliver D. Kingsley, Jr.
Subject: ComEd's Safety-Conscious Work Environment

ComEd is committed to a safety-conscious work environment in which nuclear workers are encouraged to identify safety issues. I expect and encourage a positive attitude toward safety. It is your obligation and duty as nuclear workers to identify any issue that may affect safe and reliable operations. This requires a safety ethic at all levels that reflects this attitude and personal responsibility for identifying safety issues. We must know the issues we face in order to resolve them.

The Nuclear Regulatory Commission (NRC) encourages nuclear workers to identify safety issues to their employer because licensees have primary responsibility for ensuring safe nuclear operations. The NRC believes that its licensees are in the best position to deal promptly and effectively with safety issues. Safety issues, when raised, will be promptly reviewed, given proper priority based upon safety significance, and resolved appropriately. We also will provide timely feedback to the originator of an issue and to other employees.

Several avenues exist within ComEd to report safety issues. The use of Problem Identification Forms (PIFs), generally the most appropriate method of reporting a safety issue, is strongly encouraged. Using the NGG Corrective Action Program in this way ensures appropriate assessment, documentation, and trending of issues. The NGG Employee Concerns Program provides an alternative avenue for reporting issues that cannot be resolved through line supervision or when confidentiality is desired. Nuclear workers may also raise issues directly with the NRC at any time, but the NRC expects that workers normally will have identified the issues to their employers either before or at the same time they contact the NRC.

We must all communicate openly and accurately up and down the management chain in order to maintain a safety-conscious work environment. I encourage employees and contractor personnel to address safety issues to line supervision, up to and including Vice Presidents, or above, as appropriate. Supervisors are responsible for listening carefully, evaluating objectively, and acting promptly to address safety issues brought to their attention.

Acts of discrimination by a licensee, contractor or subcontractor taken against a worker for bringing safety issues to the attention of licensee management or the NRC are against the law. ComEd will not tolerate intimidation, harassment, discrimination, or retaliation of any kind against a nuclear worker for reporting a safety issue. To successfully improve our nuclear performance, we must continue to identify, evaluate, and correct all safety issues in a timely manner. Thank you for your cooperation in fulfilling this important requirement of your job.

A United Company

Exhibit 1

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a true and correct copy of the attached NOTICE OF APPEARANCE to be served on the following party by U.S. Mail, first class postage pre-paid, and by U.S. First Class Mail, on this 6th day of November, 1997:

Stephen M. Kohn
Kohn, Kohn & Colapinto, P.C.
3233 P Street, N.W.
Washington, D.C. 20007-2756


David A. Goldberg

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of)

RANDY D. ROBARGE,)

Complainant)

v.)

COMMONWEALTH EDISON COMPANY,)

Respondent)

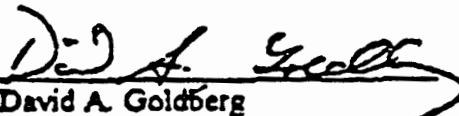
Case No. 98-ERA-2

NOTICE OF APPEARANCE

Pursuant to 29 C.F.R. § 18.34(b), Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, attorneys Richard F. O'Malley, Jr. and David A. Goldberg hereby notice their appearance in the above-captioned matter on behalf of Respondent, Commonwealth Edison Company.

Respectfully submitted,


Richard F. O'Malley, Jr.


David A. Goldberg

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000 (tel.)
(312) 853-7036 (fax)

Exhibit 3

BEFORE THE UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

RANDY D. ROBARGE,

Complainant,

V.

COMMONWEALTH EDISON,

Respondent.

Case No. 98-ERA-2

**RESPONDENT'S RESPONSE AND OBJECTIONS TO
COMPLAINANT'S REQUEST FOR PRODUCTION OF DOCUMENTS
AND REQUEST FOR ADMISSIONS**

Respondent, Commonwealth Edison Company, by and through counsel, hereby responds and objects to Complainant's Request for Production of Documents, Admissions and Interrogatory Questions to Respondent ("Complainant's Request")

GENERAL OBJECTIONS TO DOCUMENT REQUESTS

1. Some or all of the document requests are vague, ambiguous, ill-defined, and largely duplicative of the material requested in Complainant's prior requests.
2. The document requests are unduly burdensome for Respondent in light of the relevant facts and issues in this action, and they represent an improper attempt to harass and disrupt Respondent's business operations.
3. Some or all of the document requests seek production of materials which are not relevant to this case, and not likely to lead to relevant evidence. In particular, but without

Exhibit 4

3. The Complainant engaged in protected activity under Section 211 when he filed "PIFs" with the Respondent:

Response: Respondent objects to this Request as being overly broad, vague and ambiguous in referring generally to "PIFs" and for calling for a legal conclusion and, therefore, this Request is denied.

4. The Complainant engaged in protected activity when he raised issues concerning the conduct of Toni Myers:

Response: Respondent objects to this Request as being overly broad, vague and ambiguous in referring generally to "raised issues" and for calling for a legal conclusion and, therefore, this Request is denied

5. The official who made the decision to terminate Mr. Robarge knew of the protected activity engaged in by the Complainant:

Response: Respondent objects to this Request in that it is vague and ambiguous by suggesting that a single "official" was involved in the decision to terminate Mr. Robarge, and to the extent it calls for a legal conclusion. Therefore, this Request is denied.

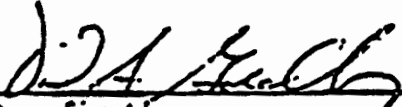
6. Other supervisors employed in the HP Department made remarks which were crude, rude, lured, vulgar and/or foul and did not obtain any discipline:

Response: Respondent objects to this Request on the basis that it is inherently vague and ambiguous and, therefore, this Request is denied.

Response: Respondent objects to this Request as being vague and ambiguous, in addition to being irrelevant to the extent it calls for information "prior to April 1996" given that Complainant was terminated on December 9, 1996. Therefore, this Request is denied.

Respectfully submitted,


COMMONWEALTH EDISON COMPANY

By: 
One of its Attorneys

Richard F. O'Malley, Jr.
David A. Goldberg
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603

COMMONWEALTH EDISON COMPANY 813978 2 February 3, 1998 (2/19/98)

AFFIDAVIT

Under the pains and penalties of perjury, I,  hereby affirm that the following information is true and correct:

1. I am currently an employee of Commonwealth Edison at Plant Zion, and I have been employed by Commonwealth Edison for eight (8) years.
2. Filing a Problem Identification Form (PIF) is very important to public health and safety.
3. It is well known at Commonwealth Edison that other employees and supervisors may get angry at an employee for filing a PIF
4. I have seen the official legal position of Commonwealth Edison regarding whether filing PIFs constitutes protected activity, and I was very upset by what I have read
5. This type of statement by Commonwealth Edison confirms the chilling effect that it has on me and whether I will file PIFs in the future I believe that this statement would clearly have a chilling effect on other employees as they continue to learn of Commonwealth Edison's position.
6. I am very concerned that filing this affidavit may result in retaliatory actions taken against me, and thus I request complete confidentiality from the Nuclear Regulatory Commission.

THE AFFIANT SAYETH FURTHER NOT.



2/26/98
Date

Exhibit 5

KOHN, KOHN & COLAPINTO, P.C.

3233 P Street, N.W.
Washington, D.C. 20007-2756
Tel: (202) 342-6980
Fax: (202) 342-6984

March 12, 1998

Via Fax No. 312-853-7036

David Goldberg
Sidley & Austin
One First National Plaza
Chicago, Il. 60603

Re: *Robarge v. Commonwealth Edison, 98-ERA-2*

Dear David:

I can only hope that the proposal set out in this letter can constitute a final agreement on the wording of a stipulated confidentiality agreement. Earlier today we briefly spoke about complainant's objection to the inclusion of Section (g) in the stipulated protective order. During our discussions I advised you that we object to the inclusion of Section (g) because it interfered with complainant's ability to directly communicate with the Nuclear Regulatory Commission ("NRC"). Your response to this concern was that under the remainder of the agreement the complainant need only alert respondent as to which documents complainant would like to submit to NRC and that if we are unable to reach an agreement on this matter that we would then be required to obtain an order from the Department of Labor to secure the release of the documents. Since our last conversation I reviewed your original draft as well as the proposed draft Stephen forwarded to you on March 10, 1998. As it turns out, the mere deletion of section (g) did not cure the problem complainant sought to cure (i.e., an unhindered right to share documents directly with NRC without having to wait for a subpoena and exhaust the procedures stated in the agreement.). In fact, we can agree to the introduction of Section (g) simply by your agreeing to add a new subpart (iii) thereto, which would state as follows:

Nothing in this agreement shall constitute a prohibition on either party to communicate directly with the U.S. Nuclear Regulatory Commission any information or documentation that is designated as "confidential" by either party except that the party seeking to provide that material to the NRC shall clearly designate the document as "confidential" and request that the document be treated as confidential to the fullest extent reasonable under the circumstance.

Exhibit 6

Complainant also now seeks to include a new paragraph 12 as follows:

Nothing in this agreement shall constitute a waiver by any party thereto to seek a modification of the terms of this stipulated protective order with the presiding administrative law judge.

Finally, we agree to sign the agreement as counsel for Mr. Robarge and to modify paragraphs 7 and 8 as you requested. I am enclosing herewith a copy of "Exhibit A" (which should have been include in our March 10th transmission but may have been inadvertently omitted).

Complainant would like to wrap this matter up today. I am prepared to fax a signed agreement incorporating the above-identified changes today.

Very truly yours,



Michael D. Kohn

KOHN, KOHN & COLAPINTO, P.C.

3233 P Street, N.W.
Washington, D.C. 20007-2756
Tel: (202) 342-6980
Fax: (202) 342-6984

March 18, 1998

Via Fax No. 312-853-7036

David Goldberg
Sidley & Austin
One First National Plaza
Chicago, Il. 60603

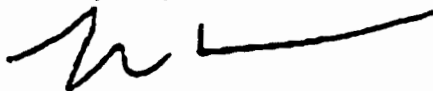
Re: *Robarge v. Commonwealth Edison. 98-ERA-2*

Dear David:

Please find enclosed an executed Stipulation and Order Governing Confidentiality of Documents and Information that incorporates all of your demands. As you are aware, the only outstanding dispute concerns complainant's insistence to the inclusion of subpart (iii) to Section 3(g). We are greatly disturbed by Respondent's refusal to incorporate this change into the agreement. In any event, I am herewith including a proposed addendum to the agreement that would incorporate the language Complainant wants included, i.e., Section 3(g)(iii). We have executed this proposed addendum in the hopes that you will agree to these terms. You are directed to execute and fax to me a copy of the agreement after you execute it. I anticipate that you will file an executed agreement with the Court today (and serve a copy on me as well).

As we have executed an agreement deleting the terms to which respondent was unwilling to incorporate, you are directed to immediately transmit all documents responsive to complainant's outstanding discovery requests. I anticipate that these documents will be shipped today. I continue to be mystified by respondent's continued refusal to produce documents you claim to constitute confidential material when these documents were protected from disclosure under the agreement set forth in the November 25, 1997 on-the-record agreement entered into between Stephen Kohn and Richard O'Malley, Jr. (See Strodl deposition at pages 49-52). Your continued refusal to produce documents has hampered and continues to hamper complainant's trial preparations


Very truly yours,



Michael D. Kohn

Exhibit 7

By:



Attorney for Complainant:

Stephen M. Kohn
Michael D. Kohn
KOHN, KOHN & COLAPINTO, P.C.
3233 P Street, N.W.
Washington, D.C. 20007-2756
(202) 242-6980

Attorney for Respondent

Richard F. O'Malley, Jr.
David A. Goldberg
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7000

SO ORDERED:



Hon. Thomas F. Phalen, Jr.
Administrative Law Judge

Dated

518/po addendum

SIDLEY & AUSTIN

A PARTNERSHIP INCLUDING FULLY OWNED CORPORATIONS

CHICAGO
LOS ANGELES
NEW YORK

ONE FIRST NATIONAL PLAZA
CHICAGO, ILLINOIS 60603
TELEPHONE 312 853 7000
FACSIMILE 312 853 7036

FOUNDED 1866

WASHINGTON, D.C.
LONDON
SINGAPORE
TOKYO

TELETYPE UNIT NUMBER
(312) 853 2214

March 19, 1998

Via Facsimile

Michael D Kohn
Kohn, Kohn & Colapinto
1233 P Street, N.W.
Washington, D.C. 20007-2756

Re. Robarge v. Commonwealth Edison Company (98 ERA 2)

Dear Michael

The form of executed confidentiality order that you forwarded to me yesterday continues to have errors and other problems that I have conveyed to you since we began talking on the subject recently. I am assuming that, given your revised order, you have chosen not to take me up on my suggestion to go back to ComEd's original order from January (which is puzzling given that you have now basically incorporated all of the sections from the ComEd document that you once reported to be problematic). Nonetheless, I would recommend that until we either discuss these matters personally, or you circulate a draft for my review and comment, you refrain in the future from sending me an executed document that you prepared with a "direction" to sign and file it

Here is a list of items that I have found for correction or modification:

- ¶ 3(g)(ii) reads "the subpoenaed party shall produce in good faith ..." This should read "produced in good faith..."
- ¶ 7 improperly reads "the party requesting confidentiality shall have twenty days following termination of such negotiations in which to make a motion ..." It should read the party objecting to the confidentiality has to make any motion
- As I explicitly noted just three days ago in my letter to you, the language in your Addendum is not something ComEd will stipulate to in a confidentiality order (or an addendum to such order). On the merits, this

Exhibit 8

Michael D. Kohn
March 19, 1998
Page 2

section goes directly against the purpose for having the confidentiality order in the first place. Further, there is already a provision in the order (once it is stated properly in ¶ 7) that gives both parties the ability to avoid a confidentiality designation if they so desire.

As we have since the beginning of this year, we remain ready to submit a workable and suitable confidentiality order for Judge Phalen to enter. Nothing should be causing you to be, as your letter puts it, "mystified" by CornEd's commitment to ensuring that an appropriate stipulation is finalized before further document production takes place — indeed, the deposition transcript pages you cite at the close of your letter expressly provide that your brother and Richard O'Malley agreed at the Strodt deposition back in November to eventually replace Stove's oral representations with a formal court order. I trust you will make the necessary corrections to the document, and if you are unable to drop your proposed NRC language, please let me know as soon as possible.

Finally, please find attached hereto a Notice of Continued Deposition for your client, Mr. Kobarge.

Very truly yours,


David A. Goldberg

enclosure

cc: Richard F. O'Malley, Jr.

— — —
Last
PAGE

ComEd

June 19, 1998

U.S. Nuclear Regulatory Commission
Attn: Document Control Desk
Washington, D.C. 20555-0001

Subject: Response to Request for Information Related to Petition
Filed Pursuant to 10CFR2.206

Braidwood Nuclear Power Station, Units 1 and 2
Facility Operating License Nos. NPF-72 and NPF-77
NRC Docket Nos. 50-456 and 50-457

Byron Nuclear Power Station, Units 1 and 2
Facility Operating License Nos. NPF-37 and NPF-66
NRC Docket Nos. 50-454 and 50-455

Dresden Nuclear Power Station, Units 2 and 3
Facility Operating License Nos. DPR-19 and DPR-25
NRC Docket Nos. 50-237 and 50-249

LaSalle County Nuclear Power Station, Units 1 and 2
Facility Operating License Nos. NPF-11 and NPF-18
NRC Docket Nos. 50-373 and 50-374

Quad Cities Nuclear Power Station, Units 1 and 2
Facility Operating License Nos. DPR-29 and DPR-30
NRC Docket Nos. 50-254 and 50-265

Zion Nuclear Power Station, Units 1 and 2
Facility Operating License Nos. DPR-39 and DPR-40
NRC Docket Nos. 50-295 and 50-304

References:

- (1) Mr. George F. Dick, Jr. (NRC) Letter to Mr. Oliver D. Kingsley, Jr. (ComEd), dated May 20, 1998
- (2) Mr. Samuel J. Collins (NRC) Letter to Mr. Michael D. Kohn (The National Whistleblower Legal Defense and Educational Fund), dated April 29, 1998

This letter provides the Commonwealth Edison (ComEd) Company response to the request for information related to a petition dated March 25, 1998, filed by Michael D. and Steven M. Kohn, attorneys for The National Whistleblower Legal Defense Fund and Mr. Randy Robarge, requesting NRC action pursuant to 10 CFR 2.206. ComEd's response to the Petition was requested by the NRC in Reference (1). We received a copy of the NRC letter on May 20, 1998, and as requested, we are providing our response within 30 days of receipt of the May 20, 1998 NRC letter.

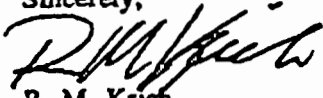
We consider that the Petition is wholly without merit and fails to meet the legal standard applicable to 10 CFR 2.206. Further, the Petition is a misrepresentation of facts pertaining to a proceeding pending before the U. S. Department of Labor, Case No. 98-ERA-2, concerning Section 211 of the Energy Reorganization Act. The Petition is based upon unfounded allegations that ComEd's actions pertaining to that proceeding constitute violations of 10 CFR 50.7(f). The facts do not support these allegations. No violations of NRC regulations occurred and, therefore, the relief requested by Petitioners should be denied entirely.

In Reference (2), the NRC informed Petitioners that the issues raised in the Petition did not warrant immediate action. The NRC determined that the issues raised in the Petition, based upon the information provided by the Petitioners, "...do not constitute an immediate safety concern..." at ComEd's nuclear facilities. The NRC further informed the Petitioners that it "...has not found that the licensee [ComEd] discourages employees at ComEd sites from utilizing the process of filing PIFs to identify safety concerns." ComEd concurs with the NRC's findings.

As requested in the second paragraph of Reference (1), the enclosed response includes a discussion of ComEd's position regarding the relationship between Problem Identification Forms (PIFs) and the concept of protected activity, ComEd's reasons for objecting to certain confidentiality agreement provisions suggested by the petitioning attorneys in the Section 211 proceeding mentioned in the Petition, and ComEd's position regarding the relationship between the confidentiality agreement and 10 CFR 50.7(f). In addition, as requested in the third paragraph of Reference (1), ComEd is enclosing a copy of the March 16, 1998 letter to Mr. Michael Kohn that is referenced at pp. 8-9 of the Petition

If you have any questions with respect to this submittal, please call me at 630-663-7330 or Mr. Robert E. Helfrich at 312-394-4970.

Sincerely,



R. M. Krich

Vice President-Regulatory Services

Enclosure: Response of Commonwealth Edison Company (ComEd)
to the 10 CFR 2.206 Petition Dated March 25, 1998

cc: Regional Administrator - RIII
Braidwood - Senior Resident Inspector
Byron - Senior Resident Inspector
Dresden - Senior Resident Inspector
LaSalle - Senior Resident Inspector
Quad Cities - Senior Resident Inspector
Zion - Senior Resident Inspector
Illinois Department of Nuclear Safety



Enclosure**RESPONSE TO NRC REQUEST FOR INFORMATION RELATED TO PETITION
FILED PURSUANT TO 10CFR 2.206 DATED MAY 20, 1998****RESPONSE TO COMMONWEALTH EDISON COMPANY (COMED) TO THE 10CFR
2.206 PETITION DATED MARCH 25, 1998**

On March 25, 1998, Michael D. and Steven M. Kohn, attorneys for The National Whistleblower Legal Defense Fund and Mr. Randy Robarge ("Petitioners"), filed a petition with the U. S. Nuclear Regulatory Commission (NRC) requesting enforcement and other actions pursuant to 10 CFR 2.206 ("Petition"). As grounds for the request, the Petitioners assert that NRC action should be taken because of: "(1) ComEd's interference with the willingness of employees to file "Problem Identification Forms" or "PIFs" for fear that the employees could be retaliated against by ComEd for doing such; and (2) the intentional prohibition of an employee from being able to directly communicate information to the U.S. Nuclear Regulatory Commission ("NRC")." The Petition also asserts that ComEd intentionally violated 10 CFR 50.7, "Employee protection".

By letter dated April 29, 1998, the NRC informed the Petitioners that the issues raised in the Petition did not warrant immediate action. The NRC determined that the issues raised in the Petition, based upon the information provided by the Petitioners, "...do not constitute an immediate safety concern..." at ComEd's nuclear facilities. The NRC further informed the Petitioners that it routinely assesses ComEd's actions to identify problems at its nuclear facilities, including the processes used by ComEd's employees to identify problems (e.g., the PIFs process). Based on these NRC assessments, as well as investigations of particular allegations, the NRC "has not found that the licensee [ComEd] discourages employees at ComEd sites from utilizing the process of filing PIFs to identify safety concerns." ComEd concurs with the NRC's findings.

Discussion

The Petition should be denied in its entirety because it fails to satisfy the legal standard for NRC action under 10 CFR 2.206. The institution of a proceeding or the initiation of an enforcement action in response to a request under 10 CFR 2.206 is appropriate only when substantial health and safety issues have been raised. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), DD-92-1, 35 NRC 133, 143-144 (1992); Consolidated Edison Co. of New York (Indian Point, Units 1, 2 and 3), CLI-75-8, 2 NRC 173, 176 (1975); Washington Public Power Supply System (WPPSS Nuclear Project No. 2), DD-84-7, 19 NRC 899, 923 (1984).

The Petition fails to articulate substantial health and safety issues related to nuclear power safety at ComEd's plants (see NRC's April 29, 1998 letter, noted above). The Petition is simply a misrepresentation of facts pertaining to a proceeding pending before the U. S. Department of Labor, Case No. 98-ERA-2, concerning Section 211 of the Energy Reorganization Act. "A mere dispute over factual issues does not suffice." Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), CLI-78-7, 7 NRC 429, 433 (1978).

The use of 10 CFR 2.206 to raise disputes pertaining to the give-and-take of discovery in such a proceeding, is wholly inappropriate. Petitioners' two allegations, as set forth in the Petition, demonstrate that counsel for Petitioners were merely dissatisfied with ComEd's legitimate response to an inappropriate discovery request (Allegation I) and with the negotiated terms of a confidentiality agreement governing discovery that was signed and agreed to by both parties and then jointly presented to the Administrative Law Judge, who approved the agreement (Allegation II).

Because of the significant factual misrepresentations contained therein, ComEd chooses not to restate the allegations on pp. 2 and 6 of the Petition.

Allegation I.

Allegation I in the Petition (p. 2), concerning whether the filing of PIFs amounts to protected activity, should be dismissed. The allegation mischaracterizes ComEd's answer to an inappropriate discovery request lodged by the complainant in the above noted Section 211 proceeding. ComEd denied the complainant's request for admission of fact in that instance, on the basis that it called for a legal conclusion and was overly broad, vague and ambiguous. ComEd categorically rejects the ploy by Petitioners of suggesting, on page 4 of the Petition, that ComEd has denied that the filing of a PIF constitutes protected activity. If complainant was concerned about ComEd's objections, he could have brought his concern properly before the Administrative Law Judge handling the matter.

In short, the Allegation is simply incorrect as a matter of fact, and totally disregards the narrow perspective of ComEd's response. ComEd's denial in that particular context was merely an objection to an improperly worded litigation discovery request to admit. Nothing in ComEd's response suggests ComEd does not recognize the broader legal question that was buried within that request. ComEd recognizes that the preparation of internal nuclear safety related documents, such as a PIF, could give rise to protected activity.

In this regard, the anonymous affiant in the redacted affidavit set forth as Exhibit 5 of the Petition appears to suffer from the same misunderstanding of fact as Petitioners do regarding ComEd's response to the discovery request at issue. Most telling, is the reference in paragraph 4 of the affidavit to the "official legal position" of ComEd. This choice of words appears to indicate some coaching on the part of someone, perhaps counsel for Petitioners or Mr. Robarge himself, to assist the **affiant** in achieving that

one who makes an affidavit

misunderstanding. This is all the more likely since Petitioners' counsel is the likely source of the disclosure to the affiant of the "official legal position." It is simply an error to stretch ComEd's discovery response into an official legal position about PIFs.

Allegation II.

Allegation II in the Petition (p. 6), concerning whether the court-approved confidentiality Order entered by the Administrative Law Judge in the above mentioned Section 211 proceeding violates 10 CFR 50.7(f), also should be dismissed. Section 50.7(f) applies to agreements "affecting the compensation, terms, conditions, or privileges of employment [including settlement agreements]. . . ." See 55 Fed. Reg. 10,387, 10,399 (March 21, 1990) (Final Rule) ("The Commission is, therefore, maintaining in the final rule the application of its prohibitions to all agreements affecting the compensation, terms, conditions, and privileges of employment").

ComEd recognizes that the NRC construes that provision broadly, for example, in situations involving management "instructions" that might be interpreted as a condition of employment that could discourage employees from engaging in protected activity. The agreement contained in the confidentiality Order referred to in Allegation II, however, is clearly outside the ambit of 10 CFR 50.7(f). It is not an agreement affecting the compensation, terms, conditions, or privileges of employment. It is not a settlement agreement with an employee. It is not "instructions" to an employee that could impede any protected activity. Rather, it is merely a tool implemented by an Administrative Law Judge of the U. S. Department of Labor (which agency has complementary responsibilities with the NRC in this area) to facilitate the exchange of potentially confidential litigation documents as part of an ongoing Section 211 proceeding. The Section 211 complainant's disagreement with provisions of the Order governing

designation and exchange of confidential information between the parties does not establish a violation of Section 50.7(f).

The confidentiality Order, Exhibit A, embodies an agreement that was signed by counsel for ComEd and counsel for the Section 211 complainant in the above-mentioned case, and then jointly presented to the Administrative Law Judge for entry. The Order is styled a "Stipulation and Order Governing Confidentiality of Documents and Information." The sole purpose of this Order was to allow either party to designate something as "confidential," such as an employee's personnel file containing sensitive information, for example, to protect against the unfettered publication of that information to third parties without notice to the designating party. The Order contains a mechanism (Paragraphs 6-8) for either party to that case to challenge the other's designation of any material as confidential.

ComEd has a legitimate interest in protecting against the disclosure of confidential information, especially sensitive personnel related information, which is the type of information that ComEd sought to protect. ComEd sought to protect as confidential only a limited number of the vast array of documents requested by the complainant in the above-mentioned Section 211 proceeding. If either side wished to provide to the NRC a "confidential" document that an opponent produced, whether or not a subpoena is involved, the matter could easily be pursued consistent with the express terms of the Order.

The confidentiality provisions of the Order are not designed to impede any protected activities by employees, as the Petitioners suggest. Those provisions pertain only to the complainant in the Section 211 proceeding and no other employee. The Order does ~~prevent~~ not any person from bringing a safety concern to the attention of the NRC or citing evidence in support of that concern and, accordingly, does not impinge impermissibly on NRC regulatory responsibilities. In this instance, Petitioners have not alleged

that the complainant in the Section 211 proceeding sought unsuccessfully to disclose to the NRC any information whether designated confidential or not that was obtained during discovery. Also, Petitioners have not alleged that the Order has resulted in any instance of discrimination against an employee for engaging in protected activity (10 CFR 50.7).

The Petition notes (pp. 8-9) that ComEd did not agree to certain suggested language contained in the addendum to Mr. Michael Kohn's March 18, 1998 letter to ComEd's counsel (Exhibit 7 of the Petition). As ComEd's counsel explained in its March 19, 1998 reply to Mr. Kohn (Exhibit 8 to the Petition), the suggested language was contrary to the purpose of the confidentiality provisions contained in the Order.¹ Specifically, the suggested language would have permitted the disclosure of any confidential document to the NRC, without any prior notice to the other party and without any consideration given to whether or not the information pertains to a matter within NRC jurisdiction (i.e., whether related to nuclear safety or not). By its literal operation, the suggested language would give to either party total discretion to waive the confidential status of the opposing party's documents, simply by disclosing that information to the NRC. ComEd concluded that the suggested language was overly broad (similar to the complainant's inappropriate discovery request noted in ComEd's response to Allegation I above). Thus, ComEd determined not to agree to present the suggested language as part of the stipulation by the parties to the Administrative Law Judge.

Matters Addressed in the NRC Letter of May 20, 1998

¹ As indicated on p. 2 of its March 16, 1998 letter to Mr. Kohn, included as Exhibit B to this response, ComEd's counsel was surprised by Mr. Kohn's suggestion to add such a provision at that juncture. In fact, the week before, complainant's counsel had faxed on March 10, 1998 to ComEd's counsel a "final" proposed confidentiality agreement that it urged ComEd to immediately execute. Notably, the suggested language in Mr. Kohn's March 18, 1998 letter to ComEd's counsel was not in that "final" proposal.

ComEd has addressed above the items mentioned in the second paragraph of the NRC letter dated May 20, 1998 (Mr. George F. Dick, Jr. to Mr. Oliver D. Kingsley, Jr.), i.e., ComEd's position regarding the relationship between Problem Identification Forms (PIFs) and the concept of protected activity, ComEd's reasons for objecting to certain confidentiality agreement provisions suggested by opposing counsel in the Section 211 proceeding mentioned in the Petition, and ComEd's position regarding the relationship between the confidentiality agreement and 10 CFR 50.7(f).

In addition, as requested in the third paragraph of that letter, ComEd is enclosing herewith as Exhibit B a copy of the March 16, 1998 letter to Mr. Michael Kohn referenced at pp. 8-9 of the Petition.

Conclusion

The Petition is based only upon unfounded allegations that ComEd's actions pertaining to an ongoing Section 211 proceeding before the Department of Labor constitute violations of 10 CFR 50.7(f). The facts do not support these allegations. No violations of NRC regulations occurred and, therefore, the Petition should be denied.

Exhibits A and B, as noted

UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

RANDY ROBARGE,

Complainant,

v.

98-ERA-2

COMMONWEALTH EDISON,

Respondent.

STIPULATION AND ORDER GOVERNING CONFIDENTIALITY OF
DOCUMENTS AND INFORMATION

It is hereby stipulated and agreed this 23rd day of March, 1998, by and between the complainant in this matter, Randy Robarge and respondent in this matter, Commonwealth Edison, through their undersigned counsel, as follows:

1. As used herein, the following words shall have the following meanings:
 - a. "Party or "parties" means one or more of the following: Randy Robarge and/or Commonwealth Edison;
 - b. "Court" or "this Court" means the U.S. Department of Labor and/or the Office of Administrative Law Judges;
 - c. "Disclosed," "furnished" or "submitted" means, without limitation, divulged, revealed, produced,

described, transmitted or otherwise communicated, in whole or in part; and

- d. "This action" and "this litigation" shall mean the above captioned action, *Robays v. Commonwealth Edison*, Case No. 98 SRA-2 pending before the Department of Labor.
2. Any party hereto may designate as confidential any information, including documents being produced, interrogatory answers, responses to requests for admissions and/or transcripts of testimony, disclosed, furnished or submitted, either voluntarily or pursuant to Court order, to any other party in this litigation. Such designation shall be made pursuant to the procedure set forth in paragraph 4 below after a good faith determination that the material contains a trade secret, proprietary information or other confidential research, development, technical, personnel, or commercial information.
3. All information designated as confidential shall not be disclosed to any person other than:
 - a. Counsel for the parties to this action including necessary secretarial, support and clerical personnel assisting such counsel;

- b. The individual parties and their employee or former employee witnesses or witnesses employee or formerly employed by Commonwealth Edison or any subsidiary thereof;
- c. Qualified persons transcribing or recording testimony involving such information or documents and necessary stenographic and clerical personnel thereof;
- d. Technical experts and their staff who are employed for the purpose of this litigation;
- e. The presiding Administrative Law Judge ("ALJ"), his assistants and such other personnel as may be authorized by him;
- f. Other persons by written consent of the person or party which furnished the confidential information;
- g. Governmental law enforcement agencies and other governmental bodies pursuant to valid subpoena, provided that:

(1) The subpoenaed party give counsel for the designating party written notice of such subpoena within five (5) days after service of the subpoena but not less than five (5) business days prior to the production of the documents in response thereto and shall, if so directed by the designating party,

subject to such subpoenas on a timely basis so as to preserve the designating party's rights; and

(ii) at or before the time of production the subpoenaed party shall proceed in good faith to seek to obtain confidential treatment of such "Confidential" subpoenaed documents from the relevant governmental law enforcement agency or body to the fullest extent available under law.

4. Any document (including transcripts of testimony) containing confidential information shall be stamped with the legend "Confidential," or otherwise identified by the party disclosing such information as confidential information, and the information contained therein shall not be disclosed except as provided in paragraph 3 above. The production by any of the undersigned parties of any "Confidential" documents during discovery in this Action without a "Confidential" designation shall not constitute a waiver of any rights. In the event that such production occurs, counsel for the producing party may designate as "confidential" and thereafter such documents shall be subject to terms of this Order. Confidential information not contained in a document shall be identified as such, orally or in writing, at the

- time it is furnished and such information shall not be disclosed except as provided above in paragraph 3.
5. Nothing in this Stipulation and Order Governing Confidentiality of Documents and Information ("Stipulation") shall preclude any party from asserting the attorney-client, or other privilege or the work product protection as to any information.
 6. If a party believes that any document designated as confidential does not contain confidential information as defined in paragraph 2, such party may contest the applicability of this stipulation to such document by stating in writing the basis for challenging the designation of each such document as confidential.
 7. Upon receipt of such written notification, the parties shall make a good faith attempt to resolve the challenge. In the event the parties cannot resolve the disagreement, the party objecting to confidentiality shall have twenty days following termination of such negotiations in which to make a motion for an adjudication with respect to any such document.
 8. When the parties are unable to resolve any such dispute and the party objecting to the confidentiality files a motion pursuant to paragraph 7 above, any document that

is made the subject of such a motion with respect to whether it in fact contains confidential information shall, until further order of the Court, be treated as confidential in accordance with the provisions of this Stipulation.

9. Notwithstanding the provisions hereof, each party is free to disclose information it has furnished, including confidential information to whomsoever it chooses, however such disclosure made to third parties outside the confines of this stipulation, shall be deemed a waiver of the protections provided for in this stipulation.
10. This stipulation shall be without prejudice to the right of any party to bring before the ALJ the question of (a) whether any particular material is or is not confidential provided the party has complied with the procedures set forth herein; or (b) whether any particular material is or is not relevant to any issue in this case. No party, by entering into this stipulation, concedes that any document, material or information classified by any other party as confidential or any document, transcripts or other material reflecting claimed confidential information does in fact contain or reflect confidential information. However, no information designated as

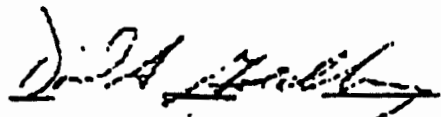
CONFIDENTIAL PURSUANT TO THIS STIPULATION SHALL BE DISCLOSED EXCEPT AS PROVIDED HEREIN UNLESS AND UNTIL THE ALJ ORDERS THE RELEASE OF SUCH INFORMATION FROM THE CONFIDENTIALITY PROVISIONS OF THIS STIPULATION.

11. THE PARTIES' AGREEMENT TO PROVIDE CONFIDENTIAL INFORMATION IS CONDITIONED UPON THE TREATMENT OF SUCH AS PROVIDED HEREIN. NOTHING HEREIN SHALL BE CONSTRUED TO CREATE RIGHTS IN ANY PERSON WHO IS NOT A PARTY.

By:

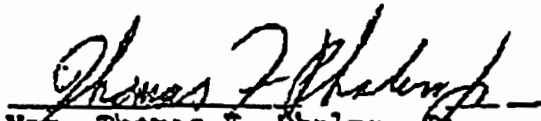

Attorney for Complainant.

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Attorney for Respondent

Richard F. O'Malley, Jr.
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One First National Plaza
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(312) 853-7000

SO ORDERED: Subject to the right of this Court and of each party to attach a copy of this signature page to a clean copy of the stipulation and order for the official record of these proceedings.


Hon. Thomas F. Phelan, Jr.
Administrative Law Judge

3/24/98
Dated

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WRITER'S DIRECT NUMBER
(312) 853-2216

March 16, 1998

Via FacsimileMichael D. Kohn
Kohn, Kohn & Colapinto
3233 P Street, N.W.
Washington, D.C. 20007-2756Re: Robarge v. Commonwealth Edison Company (98 ERA 2)

Dear Michael:

We are in receipt of your fax of March 12, which I must say at the outset appears to add new layers of confusion in what should be a straightforward process of getting a protective order on file. In any event, especially in light of my recent letter to your partner which relates the history behind this aspect of the case, I would request you to refamiliarize yourself with the original ComEd proposed order. I think you will find that that proposal remains the most workable, and perfectly suitable, for our case. Moreover, your letter suggests that your biggest concerns with that original proposal -- regarding Section 5(g) and the requirement for the "challenging" party, rather than the "designating" party, to go to court to object to a confidential designation -- are no longer problematic. For your consideration, I set forth below some clarifying observations about your recent correspondence.

First, your letter is correct in that we discussed Section 5(g) of the ComEd order in our discussion on March 12. You were attempting to object to that section as some type of hindrance to your side's ability to, as you put it, "bring documents to the attention of the NRC." My only point to you was that Section 5(g) has nothing to do with what you were suggesting -- plus it is a mutually beneficial provision. Indeed, you seem to agree with my point now as you report that after further review, "the mere deletion of section (g) did not cure the problem [Complainant was raising.]" I trust you have recognized that the section merely provides a mechanism for either party to deal with governmental subpoenas that may be issued and that call for turnover of documents that were produced with a confidential designation in our litigation (i.e., it gives us a procedure to avoid having one's hands tied if a subpoena were ever issued that technically conflicted with the protective order).

SIDLEY & AUSTIN

CHICAGO

Michael D. Kohn

March 16, 1998

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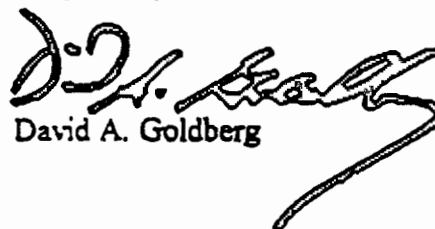
As for the next aspect of your letter, we frankly had never heard of your side's interest in potentially going to the NRC with any documents, and we will obviously have to address that, either amongst ourselves or with Judge Phalen, if that is a "right" you are now trying to preserve in this confidentiality order -- and it seems that you may be trying to do exactly that with your proposal for a new section that you include at the bottom of page one. Aside from the merits of that highly suspect provision, we see no basis for you to introduce it as a "bargain" for keeping Section 5(g) in the order. I state again, Section 5(g) has both parties' interests in mind. The same, obviously, cannot be said about your new paragraph which would not appear to be something ComEd could propose to Judge Phalen in an "agreed" stipulation.

Next, you indicate at the top of page two that you want a new paragraph that, in substance, preserves the ability for either party to go before the ALJ to obtain a "modification" of the protective order. This superfluous language does not strike us as something that Judge Phalen needs to affirmatively state in an order. I think we both agree that judges inherently have the authority to modify an order -- especially one of their own. Thus, I would ask you to rethink what this provision is intended to accomplish and let me know your thoughts.

Finally, the points you raise in your second-to-last paragraph are noted. I would only add that you did not need to send me another Exhibit A. The point I made in this regard in my last letter was that your latest version of the order did not cite to an Exhibit A, thus attaching an Exhibit A seemed confusing

I am sure we will be in touch on these topics shortly, but in the meantime I seriously urge you to reconsider your position on the stipulation we first proposed in January.

Very truly yours,



David A. Goldberg

cc: Richard F. O'Malley, Jr.