

July 11, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
COMMONWEALTH EDISON COMPANY)	Docket Nos. 50-454
(Byron Station, Units 1 and 2))	50-455

NRC STAFF APPLICATION FOR STAY OF THE
LICENSING BOARD'S JULY 1, 1983 MEMORANDUM AND ORDER

I. INTRODUCTION

On July 1, 1983, the Licensing Board ordered the NRC Staff to make a full evidentiary presentation on allegations made by confidential informants about a contractor at the Byron site and to produce in advance of the August 9 reopened hearing all documents relevant to the NRC investigation and inspection of the allegations. Memorandum and Order at 3-4. Because the NRC Region III Staff and the Office of Investigations (OI) have not completed their respective inspection and investigation of some of the allegations, the Staff objected to providing testimony and producing documents regarding such allegations until the inspection and investigation are completed. On July 8, 1983, the Staff filed with the Appeal Board a notice of appeal and a motion for directed certification regarding the Licensing Board's directives to the Staff.^{1/}

^{1/} In the event the Appeal Board finds that the Board's Order is not properly before it as an appeal of right under 10 CFR § 2.762, the Staff filed a motion for directed certification under 10 CFR § 2.718(i).

DESIGNATED ORIGINAL

Certified By DSO [Signature]

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Consequently, the Staff hereby requests the Licensing Board to stay the effectiveness of its July 1 Order with respect to allegations which are the subject of ongoing Staff inspection and investigation pending consideration of the appeal and the motion for directed certification by the Appeal Board. Unless a stay is granted by the Licensing Board, the Staff will be compelled to disclose detailed information about allegations which Region III has not resolved in inspection reports and OI has not resolved in an investigation report. Such disclosure could result in harm to the Commission's investigative ability because the disclosure of the detailed information regarding allegations before the NRC has completed its inspection and investigation could compromise the inspection and investigation of the allegations. For these reasons, as more fully set forth herein and as further explained in the Staff's motion for directed certification, the Staff urges that the Licensing Board grant the instant stay application.

II. BACKGROUND

The events leading up to the Licensing Board's July 1 Order are set forth in the background section of the Staff motion for directed certification to the Appeal Board and the Staff hereby incorporates that section by reference. In brief, the Board issued two companion orders ruling on the Joint Intervenors' motion to reopen the record to receive the testimony of a former worker at Byron. Memorandum and Order Reopening Evidentiary Record, dated June 21, 1983; Memorandum and Order

Ruling on Intervenors' Motion to Admit Testimony of John Hughes dated June 21, 1983. Upon the request of the Staff during telephone conference calls held June 29 and 30, the Board issued its July 1 Order to clarify the scope of the evidentiary presentation required for the reopened hearing on August 9, 1983. Specifically, the Board directed the Staff to present a full evidentiary presentation and explanation of pertinent investigations of allegations made by confidential informants regarding a Byron electrical contractor's quality assurance program and to provide in advance of the August 9 hearing, documents related to the Staff inspection and investigation of the allegations. Because all of the allegations have not been inspected and documented in investigation and inspection reports, the Staff objected to providing information, including documents, regarding allegations which are the subject of ongoing investigation by OI and inspection by Region III until such allegations are resolved in investigation and inspection reports. The Staff does not object to providing testimony and documents, to the extent not privileged, on those allegations for which inspections and investigations have been completed and intends to provide such testimony and documentation in accordance with the Licensing Board's directive.

III. DISCUSSION

Pursuant to 10 CFR § 2.788(e), any determination as to whether an application for a stay should be granted must be based upon a consideration of the following four factors:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.^{2/}

While no one of the four factors is necessarily dispositive, the weightiest consideration is "the need to preserve the status quo -- whether the party requesting a stay has shown that it will be irreparably injured unless a stay is granted." Westinghouse Electric Corp. (Exports to the Phillipines), CLI-80-14, 11 NRC 631, 662 (1980).

The purpose of a stay is to preserve the status quo pending resolution of the matter contested. In the present instance, the status quo is that the Region III Staff and OI have information regarding allegations about Hatfield Electric Company (HECo), an electrical contractor at Byron, which, pending the inspection by Region III and investigation by OI, has not been disclosed to individuals or entities which are the subjects of the allegations.^{3/} The following discussion

^{2/} The Appeal Board has recognized that stays may be granted pending consideration of a motion for directed certification by the Appeal Board. Kansas Gas & Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-307, 3 NRC 17 (1976).

^{3/} The Staff is prepared to present testimony as to the 29 HECo allegations that have been inspected and documented in Region III inspection reports. The Staff objects however, to providing testimony or to producing documents regarding the 35 allegations (9 of which have been referred to OI) for which the Staff inspection and OI investigation has not been completed.

addresses each of the four factors. For the reasons set forth herein, the Staff submits that each of these factors supports the granting of the Staff's application for a stay.

A. Likelihood of Prevailing on the Merits

The Licensing Board's Order requires the Staff to present testimony and produce documents regarding allegations made by confidential informants before the NRC has completed its inspection and investigation. Compliance with this directive, even in an in camera proceeding, could compromise the inspection and investigation. The subjects of the investigation and inspection may become aware of the allegations, either by inadvertence or otherwise, and frustrate NRC efforts to discover potentially serious problems affecting the public health and safety. This would cause considerable harm to the Commission's investigative ability because, once disclosed, the information could enable the subjects of the investigation to mask deficiencies. Even if detailed information regarding the NRC inquiry into the allegations were provided in camera and under protective order, the risk of premature disclosure, although somewhat reduced, would still exist.

Further, if allowed to stand, the longstanding practice of the Staff's providing testimony and producing documents, not otherwise privileged, regarding allegations after they have been addressed in inspection and investigation reports would be disrupted. This practice of providing testimony after the NRC investigation is completed is well-established in NRC adjudicatory proceedings, and its function in the fulfillment of the NRC's health and safety responsibilities is extremely important.

Post-investigation/inspection disclosure enables the NRC to effectively expend limited agency resources. Inspectors and investigators who are already under considerable work loads would be able to focus their efforts towards fulfilling their duties and address the allegations before coming before adjudicatory boards. Thus a balance must be struck between (1) the Staff's need to protect the public health and safety without premature disclosure which could jeopardize investigations and inspections and (2) the desire for the adjudicatory board to conclude the adjudicatory process in a timely fashion. Surely the balance must be struck in favor of the Commission's duty to protect the public health and safety by keeping information about allegations in confidence until the inspection and investigation have been completed.

In addition, the NRC has been criticized for disclosing information to licensees prematurely. The Committee on Interior and Insular Affairs Subcommittee on Oversight and Investigations recently conducted hearings to inquire into the investigative practices of the NRC, including the issuance of draft investigation reports to the companies under scrutiny and instances wherein the Department of Justice has alleged that the NRC's handling of an investigation hindered or compromised possible criminal prosecution.^{4/} In light of this congressional attention regarding premature disclosure of NRC information and the substantial potential for interference with ongoing investigations that could result from premature

^{4/} See Memorandum to Members, Subcommittee on Oversight and Investigations from Staff, Subcommittee on Oversight and Investigations Regarding Subcommittee Hearings on June 20, 1983: Nuclear Regulatory Commission Investigative Practices, dated June 17, 1983, at 1.

disclosure of the information sought by the Board, the Staff believes it will prevail on its position regarding nondisclosure because of the crucial role that NRC inspections and investigations of licensed facilities play in assuring safe construction and operation.

Accordingly, in the Staff's view, this factor weighs in favor of granting the Staff's motion for a stay.

B. Irreparable Injury

The Licensing Board's decision may result in irreparable injury to the Staff unless a stay is granted. As noted above, if the Staff divulges detailed information about the allegations against HECO, the inspection and investigation of the allegations could be substantially compromised. Once such disclosure is made, there exists the risk that, due to the premature release of information on the uninvestigated allegations, the investigation and inspection may be compromised to the extent that potentially significant public health and safety problems may remain undiscovered and uncorrected. That risk cannot be eliminated after the information is disclosed.

For this reason, the Staff submits that injury may result to the Staff if the instant application for a stay is not granted, that such injury cannot be repaired after disclosure of the information directed by the Board, and that the injury is, therefore, irreparable.

C. Harm to Other Parties

The Staff submits that the granting of a stay pending Appeal Board review of the matter will not result in harm to either Applicants or the Joint Intervenors. The timing of an initial decision will not be affected by the grant of the stay because of the delay which already will result from

the reopened hearing on QA/QC scheduled for August 9. In addition, the fuel load date for Byron, originally scheduled for August 1983, has been postponed to December 1983 such that some delay in final adjudicatory resolution of all QA/QC matters may be accommodated. Finally, this motion seeks a stay of the ruling directing the provision of testimony and documents on the uninvestigated allegations only for the period of time necessary to complete the investigations into those allegations. Upon completion, the Staff will provide the testimony and documentation directed by the Board. For these reasons, the Staff submits that no harm to any other party is likely to result from the granting of the instant application for stay.

D. The Public Interest

The Staff believes that the public interest clearly favors the granting of a stay. As set forth supra, at 6-7, the public health and safety could be significantly affected in the absence of a stay, and irreparable injury may be caused thereby to the Commission's ability to investigate the instant allegations of conduct potentially injurious to the health and safety of the public. Also, in view of the fact that the Commission is now engaged in a generic review of the issue of confidentiality,^{5/} it would be most appropriate for disclosure in this

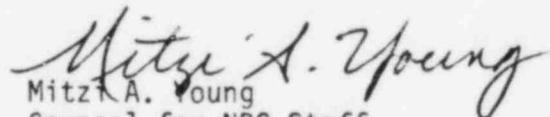
^{5/} The Commission is now engaged in a review, on a generic basis, of the issue of informant confidentiality. See Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-83-18, 17 NRC ____, slip op. at 2 (June 30, 1983). While the premature disclosure of detailed information regarding allegations which are the subject of ongoing NRC inspection and investigation is broader than the issue of informant confidentiality, the policy which favors keeping the identities of informants confidential is founded upon the same principle: the ability of the Staff to protect the public health and safety.

proceeding to be deferred until the issues raised herein can be reviewed by the Appeal Board. These factors demonstrate that the public interest favors the granting of the instant application.

IV. CONCLUSION

For all the above reasons, the Staff submits that its application for a stay of the Licensing Board's July 1 Order, pending a decision on the Staff's appeal and motion for directed certification, should be granted.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 11th day of July, 1983

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF APPLICATION FOR STAY OF THE LICENSING BOARD'S JULY 1, 1983 MEMORANDUM AND ORDER" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by double asterisks, by express mail, this 11th day of July, 1983:

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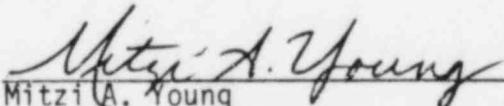
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