

August 5, 1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
COMMONWEALTH EDISON COMPANY
(Byron Station, Units 1 and 2)

)
)
)
)

Docket Nos. 50-454
50-455

NRC STAFF MOTION FOR RECONSIDERATION
AND REQUEST FOR
EXCLUSIVE IN CAMERA REVIEW BY THE BOARD

I. INTRODUCTION AND BACKGROUND

On July 27, 1983, the Appeal Board denied the Staff's July 8, 1983 directed certification motion in this proceeding (ALAB-735). The directed certification motion sought reversal of that portion of this Board's July 1, 1983 Memorandum and Order directing the Staff to present public testimony at the reopened August 9 hearing session and to produce relevant documents before then, concerning incomplete aspects of the Region III inspection into allegations regarding the Hatfield Electric Company quality assurance program. The Staff will provide testimony, and has produced documents, concerning completed aspects of its special inspection. The Staff objected to the provision of testimony and the production of documents concerning incomplete aspects of the inspection in the context of the August 9 hearing session on the grounds that it could unalterably compromise the remaining inspection but did not decline to provide such information at the completion of the inspection if the Licensing Board deemed it necessary to do so.

8308090089 830805
PDR ADOCK 05000454
G PDR

DESIGNATED ORIGINAL

ified By

D. J. O'Neil

11

The Licensing Board denied a July 11 Staff application to stay the operative portion of the Board's July 1 order by Memorandum and Order of July 26 1983. See also Licensing Board Memorandum and Order, dated July 13, 1983. The July 26 Order redirects the Staff to provide testimony (publicly or in camera) on the nature of the outstanding allegations under inspection and a description of the evidence assembled to date. Stay Order at 13. The Order does not require the Staff to produce documents pertinent to this phase of the inspection by any date certain. The Licensing Board's July 13 Order indicates that the Board had as yet set no date for the production of that category of documents and that the Staff is not in default of the July 1 Order relative thereto until and unless it is specifically directed to comply. July 13 Order at 2. Unless the Staff is mistaken, the Board's July 26 order contains no such direction and the Staff has proceeded on that basis.

In its ruling on the Staff directed certification motion, the Appeal Board alluded to the prospect that the testimony requested by the Licensing Board could be disclosed to the parties in camera and under an appropriate protective order provided a sufficient factual justification was shown. ALAB-735, Slip op. at 9-10. In its July 26 denial of the Staff stay application, the Licensing Board stated that the Staff may avail itself of the provisions of 10 CFR § 2.744(c)^{1/} by submitting

^{1/} Section 2.744(c) provides, in relevant part:

If the Executive Director for Operations objects to producing a record or document, the requesting party may apply to the presiding officer, The record or document covered by the application shall be produced for the "in camera" inspection of the presiding officer, exclusively, if requested by the presiding officer, and only to the extent necessary to determine (1) The relevancy of that record or (2) Whether the document is exempt from disclosure under § 2.790; (3) Whether the disclosure is necessary to a proper decision in the proceeding; (4) Whether the document or the information therein is reasonably obtainable from another source.

the information in camera exclusively to the Board to determine whether the information is relevant and necessary to the proceeding and whether the Staff claim that the requested information constitutes exempt "investigatory records" under 10 CFR § 2.790(a)(7) is valid. Stay Order at 9.

The Staff has elected to follow the course of action suggested by the Board here. Accordingly, on the strength of the attached affidavit of Region III Administrator, James P. Keppler, and applicable authority, the Staff hereby moves the Board to reconsider its initial order to provide the testimonial and documentary evidence on the public record and requests that such information be provided in camera to the Board exclusively for its determination whether the subject information is disclosable under the applicable terms of 10 CFR § 2.744(d).^{2/} This motion is in line with the procedure for handling such matters outlined in the a recent Commission policy statement regarding adjudicatory consideration of ongoing Staff inspections.^{3/} If the Board determines that disclosure to other parties is required, such disclosure can be under protective order. Pursuant to the

^{2/} Under Section 2.744(d), the Board is empowered to order Staff disclosure of material over which the Staff has asserted a privilege if the Board determines that the subject material is relevant and unprivileged or, if privileged, that its disclosure is necessary to a proper decision in the case. Disclosure may be restricted to parties in the proceeding under protective terms and conditions, including affidavits of non-disclosure. 10 CFR § 2.744(e).

^{3/} See Statement of Policy on Investigations and Adjudicatory Proceedings, dated August 4, 1983 (copy attached).

policy statement, if the Staff is concerned about any eventual disclosure arrangements directed by the Board following the exclusive in camera review, whether under protective order or otherwise, such disclosure is not to be ordered pending an opportunity to seek immediate review of the matter by the Commission.

II. DISCUSSION

The Staff has taken the position that the presentation of public testimony concerning the substance of ongoing Staff inspections could compromise the effectiveness of such inspections. In this regard, the Commission's regulations exempt from public disclosure investigatory records to the extent their production would interfere with enforcement proceedings and disclose confidential sources of information. See 10 CFR §§ 2.790(a)(7), 9.5(a)(7). The cited regulatory provisions are derived from the parallel exceptions in the Freedom of Information Act.

This law enforcement investigative privilege extends to federal agency investigations as well as civil or criminal investigations. See, e.g., Pope v. U.S., 499 F.2d 1383, 1386 (5th Cir. 1979); Irons v. Bell, 596 F.2d 468, 473 (1st Cir. 1973). This privilege has been extended to the provision of information which falls within this category in the form of testimonial as well as documentary evidence.^{4/} In a related sense,

^{4/} U.S. v. Winner, 641 F.2d 825, 832-33 (D.C. Cir. 1981) (in camera testimony and questioning in presence of defendant and counsel under non-disclosure order). Citing approvingly from the case of Black v. Sheraton Corporation (see n. 14 infra), the Court stated that the law enforcement investigative privilege is predicated on harm to law enforcement efforts which could accrue from public disclosure of investigatory files and related facts. Id. at 831.

the informer's privilege^{5/} has been extended to both forms of evidence in NRC adjudications.^{6/}

As the attached affidavit of Region III Administrator, James Keppler, attests,^{7/} public evidentiary disclosure of the nature of the as yet uninspected allegations received by the Region would compromise the conduct of the inspection(s) pertaining thereto. The same is true of unreleased documents and those portions of documents already produced for discovery^{8/} which have been excised on privilege grounds concerning these same matters.^{9/}

5/ See 10 CFR §§ 2.744(d), 2.790(a)(7)(iv) and 21.2.

6/ See Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC _____, motion for stay denied, ALAB-716 17 NRC _____, stay granted, CLI-83-6, 17 NRC _____, review accepted, CLI-83-18, 17 NRC _____ (1983). Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469 (1981).

7/ As the agency official most aware of the adverse impact disclosure of the privileged information would have on the Commission's inspection program, his position is entitled to "great weight" in a decision on this matter. See Northern States Power Co. (Monticello Nuclear Generating Plant), ALAB-10, 4 AEC 391, 399, aff'd, 4 AEC 409 (1970).

8/ See letter from Staff counsel to Applicant and Intervenor counsel, dated August 1, 1983.

9/ It is already a matter of record that some pertinent allegations received originally by Region III have been referred to the NRC Office of Investigations (OI) and are undergoing investigation by that office. Staff Counsel does not represent that office and it is not otherwise a party in this proceeding. Region III does have some knowledge of, and in one case a document, concerning those allegations under OI investigation. OI has requested Region III not to divulge this information in any form in this case. See Affidavit of James P. Keppler at 3. The Region has agreed to abide by that request unless specifically directed otherwise by the Board.

Region III Administrator Keppler indicates that the effectiveness of NRC inspection efforts largely depend on the ability of the Staff to investigate the merits of allegations without premature public dissemination of the details of the allegations and disclosure of what and the manner in which, the Staff intends to conduct its inspection. Keppler affidavit at 2. The effectiveness of Staff inspections could be compromised should the potential targets of its inquiries become aware of the Staff's particular interest thereby enabling individuals associated with the entity in question to prepare unresponsive or untruthful answers to anticipated questioning by Staff inspectors. This could further lead to documents being altered, removed, or destroyed, and hazardous defects corrected or disguised prior to the inspectors' examination. Id. Administrator Keppler has concluded this potential for compromise exists in the present instance. Id. at 2-3.

In a related vein, although the Board did not expressly direct the disclosure of the identities of confidential informants, and has shown an inclination to protect such information in this case, detailed discussions of some pending allegations and the disclosure of unexpurgated copies of documentary material pertinent to such allegations could lead to the unintended disclosure of the identities of confidential informants responsible for the subject allegations. Id. at 3-5. The informer's privilege, designed to protect the identities of confidential informants from public disclosure in order not to inhibit the receipt of future such information in that manner, is a well-established precept in NRC practice.^{10/}

^{10/} See n. 5, supra.

Under the circumstances, the Staff submits that public disclosure of the information in question should be prevented.^{11/} Accordingly, the Staff requests that this Board reconsider its July 1 Order directing the Staff to publicly present testimony and provide documents pertinent to uninspected allegations. Instead, the Staff hereby requests that, pursuant to the Commission's August 4, 1983 policy statement, and the terms of 10 CFR § 2.744(c) and (d), the pertinent information concerning uninvestigated allegations be presented in an in camera session to the Board exclusively, in the first instance, to determine whether the information in question is relevant, privileged and, if so, necessary for a proper decision in this proceeding so as to be disclosable.^{12/}

This in camera procedure has been employed in both NRC administrative adjudications^{13/} and the courts^{14/} to evaluate claims of governmental privilege and is mandated, in the present situation, by the Commission's

^{11/} In at least one recent instance, a licensing board has upheld the principle espoused by the Staff in the present case that documents and testimony pertaining to ongoing inspections should not be presented until the completion of the subject inspections. See hearing transcript in the matter of Consumers Power Co. (Midland Plant, Units 1 and 2), at pp. 14,285-14,294 (April 27, 1983).

^{12/} See n. 1 and n. 2, supra.

^{13/} See, e.g., Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-6, 7 AEC 313 (1974); Consumer Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701 (1971), aff'd, ALAB-123, 6 AEC 331 (1973); Three Mile Island, LBP-81-50, supra; See also Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-62, 14 NRC 1743 (1981) (non-NRC proprietary claim).

^{14/} See, e.g., Kerr v. U.S. District Court, 426 U.S. 394, 405-06 (1975); U.S. v. Winner, supra; Black v. Sheraton Corp., 564 F.2d 531, 544-45 (D.C. Cir. 1977); Porter County Chapter of the Izaak Walton League v. AEC, 380 F. Supp. 630 (N. D. Ind. 1974).

August 4, 1983 policy statement on the subject of Staff testimony concerning ongoing inspections. Under this policy statement if the Board decides that disclosure of the information presented to it by the Staff in camera to the other parties is required in this case, such disclosure can be under protective order.^{15/} Pursuant to this statement, if the Staff is concerned about any eventual disclosure arrangements directed by the Board, whether under protective order or otherwise, such disclosure cannot be ordered until the Staff has had an opportunity to seek immediate Commission review of any such decision. The proceeding would be effectively continued until a Commission determination of the matter. If the Board decides that the information in question is not disclosable, the record on this issue can be closed at that time.

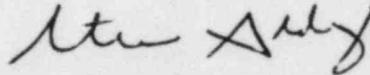
The Staff has canvassed the other parties to this proceeding as to their positions on the instant Staff motion for reconsideration. Intervenors have indicated their objection to this motion. The Applicant has authorized the Staff to state that it does not object to the Board's exclusive receipt of documents in camera but reserves a position with respect to the receipt of oral information.

^{15/} Restricted disclosure of privileged information to representatives of the parties exclusively under appropriate protective order has been sanctioned in the course of NRC practice. See 10 CFR § 2.744(e) (affidavits of non-disclosure); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775 (1980); Comanche Peak, supra; Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), LBP-81-50, 14 NRC 888, 893, vacated as moot, ALAB-658, 14 NRC 481 (1981).

III. CONCLUSION

In order not to compromise the conduct of the ongoing Region III inspection(s), with the concomitant risk that safety-related problems will go undetected, as attested to by the Region III Administrator, and in light of the cited regulatory and legal authority, the Staff moves the Board to reconsider its July 1 order to provide public testimony and documentary production concerning these matters and for a ruling whereby such information would be provided exclusively to the Board in camera, in the first instance, for determination of disclosability under the terms and conditions of the Commission's August 4 policy statement on the subject and 10 CFR § 2.744.

Respectfully submitted,



Steven C. Goldberg
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 5th day of August, 1983