

**ORIGINAL**

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

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In the matter of:

COMMONWEALTH EDISON COMPANY

(Byron Nuclear Power Station,  
Units 1 & 2)

Docket No. 50-454 OL  
50-455 OL

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Location: Rockford, Illinois

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD

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 In the matter of: :  
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 COMMONWEALTH EDISON COMPANY : Docket Nos. 50-454 OL  
 : 50-455 OL  
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 (Byron Nuclear Power Station, :  
 Units 1 and 2) :  
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Courtroom 270  
Federal Building  
211 South Court Street  
Rockford, Illinois

Tuesday, August 9, 1983

Hearing in the above-entitled matter convened  
at 2:00 p.m., in open session, pursuant to notice.

BEFORE:

JUDGE IVAN SMITH,  
Chairman, Atomic Safety & Licensing Board.

JUDGE A. DIXON CALLIHAN,  
Member, Atomic Safety & Licensing Board.

JUDGE RICHARD COLE,  
Member, Atomic Safety & Licensing Board.

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APPEARANCES:

On behalf of the Applicant:

MICHAEL MILLER, ESQ.  
BRUCE BECKER, ESQ.  
Isham, Lincoln & Beale  
Three First National Plaza  
Chicago, Illinois 60603

On behalf of the NRC Staff:

STEVEN GOLDBERG, ESQ.  
MITZI YOUNG, ESQ.  
U.S. Nuclear Regulatory Commission  
Office of the Executive Legal Director  
Washington, D.C. 20555

On behalf of Intervenors DAARE/SAFE and  
Rockford League of Women Voters:

JANE WHICHER, ESQ.  
Business And Professional People for  
the Public Interest  
109 N. Dearborn Street, Suite 1300  
Chicago, Illinois 60602

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C O N T E N T S

Witness:                    Direct    Cross    Redirect    Recross    Board

[None.]

E X H I B I T S

[None.]



P R O C E E D I N G S

1  
2 JUDGE SMITH: Before we begin, I'd like to  
3 introduce Mr. Steve Crocker, sitting in the witness stand,  
4 who has just recently joined the panel as a law clerk. And  
5 he will be working on this case until its conclusion.

6 And if you have occasion to inquire of the Board  
7 and we're not available, you can call Mr. Crocker, and he will  
8 try to get the information for you.

9 Can you hear me all right?

10 MS. WHICHER: I'm having a little trouble.

11 JUDGE SMITH: Usually my loudmouthedness will  
12 carry the day, but I don't seem to be doing it today.

13 (Discussion off the record.)

14 JUDGE SMITH: Before we begin the business  
15 schedule for today, is there any related preliminary  
16 business?

17 MR. BECKER: Yes, Your Honor. For the record, I'd  
18 like to make a comment on the date of filing of the findings.

19 Last week -- I believe it was Wednesday -- we  
20 learned that Mr. Miller would be out of town at the end of the  
21 week and would not be able to review the findings prepared on  
22 behalf of the Applicant.

23 Therefore, I contacted each of the parties,  
24 Intervenor, and NRC counsel and asked if they any objection  
25 to our bringing the findings with us to Rockford today and

1 giving them, in hand, to the other parties. The parties did  
2 not have objection.

3 I then learned that Judge Smith and Judge Cole  
4 were unavailable.

5 I spoke to Judge Calliahn, who informed me he had  
6 no objection to that procedure and suggested I contact  
7 Judge Lazo. I did so. He said he thought this procedure  
8 was fine and we could file it today and suggested I go on the  
9 record with this statement.

10 JUDGE SMITH: Thank you.

11 Have you done that?

12 MR. BECKER: They are out in another room, and they  
13 are about to brought in.

14 JUDGE SMITH: We also received findings from the  
15 Staff.

16 Is any member of the Applicant's counsel able  
17 to address the late-filed or the corrected proposed findings  
18 of the League of Women Voters on the steam generator tube  
19 integrity?

20 MR. MILLER: Judge Smith, I'm not completely  
21 familiar with it. I believe that our position is spelled out  
22 in the paper that we filed. I don't know whether it was  
23 denominated a motion or to strike. I'm not certain, unless  
24 the Board wishes it, that any additional argument is warranted.

25 If you do feel that some additional comments ought

1 to be made on the record, I would like leave to do it tomorrow  
2 morning.

3 JUDGE SMITH: Okay. I wonder if you could find out  
4 if the League's pleading of August the 2nd changes your  
5 position. It does seem to us to go far to answer to answer  
6 your complaints.

7 MR. MILLER: I will report back to you tomorrow  
8 morning if that's okay.

9 JUDGE SMITH: That would be fine.

10 Thank you.

11 Is there any other preliminary business?

12 (No response.)

13 Yesterday -- perhaps -- Mr. Miller, you were  
14 present yesterday. Perhaps you can give us a report, if you  
15 will, as to what happened at the position for -- the arguments  
16 for petition of the temporary restraining order?

17 MR. MILLER: Yes, sir. I was not present.  
18 Ms. Whicher, I believe, was. But she can certainly supplement,  
19 contradict, or whatever.

20 MS. WHICHER: I'll be glad to fill in.

21 MR. MILLER: The matter came on before  
22 Judge Nordberg of the United States District Court for the  
23 Northern District of Illinois, sitting as the emergency judge  
24 in the District in Chicago.

25 This was done because of the absence from Chicago

1 of the two judges to whom the two cases are assigned, one case  
2 having been filed on behalf of the Rockford newspapers, the  
3 other on behalf of the American Civil Liberties Union.

4 A temporary restraining order was sought restrain-  
5 ing the conduct of any in camera evidentiary hearings.

6 The basis for the motion for temporary restraining  
7 order was an asserted conflict between the conduct of  
8 in camera hearings by the Atomic Safety and Licensing Board  
9 and the requirements of the so-called government in the  
10 Sunshine Act.

11 There was extended argument; and there was, at the  
12 conclusion of it, no order entered by Judge Nordberg.

13 It was the understanding of all the parties --  
14 and, I believe, the Judge -- that there was no complaint about  
15 the Board considering ex parte material that the Staff might  
16 submit to it for consideration under 2.744, in accordance  
17 with the motion that's pending before the Board.

18 JUDGE SMITH: In private?

19 MR. MILLER: In private.

20 And it was only directed -- the arguments to the  
21 parties and the Court's interest was directed toward the  
22 conduct of an evidentiary hearing in camera.

23 I think that there are really four steps that  
24 Judge Nordberg considered.

25 The first was this ex parte receipt of documents.

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He, then --

MS. WHICHER: This is the part -- you weren't there. These are the four steps which your attorney put forward that you were going to do.

JUDGE SMITH: Which we gave him.

MR. MILLER: Right.

JUDGE SMITH: So, perhaps I can report on that.

(Laughter.)

MR. MILLER: That would be probably very appropriate.

In any event, Judge Nordberg did, as I understand it, request that no ex parte evidentiary hearing be held before he had an opportunity to rule on the pending motions. And he has set a hearing tomorrow at 2:30 p.m. -- in Chicago, if necessary -- to provide us all with a prompt ruling should the four steps that you are about to describe take place and an in camera evidentiary hearing is contemplated.

Is that a fair summary?

MS. WHICHER: I hate to admit it, but that's a fair summary.

JUDGE SMITH: I have a different understanding.

MS. WHICHER: Let me just add to what Mr. Miller said.

The Court indicated yesterday that although the matter is set for 2:00 or 2:30 tomorrow, it will be continued

1 until Thursday and Friday if necessary.

2 In case the Board decides to hold an in camera  
3 evidentiary session, the Judge will have it on his docket  
4 and hopefully be able to make a ruling on the temporary  
5 restraining order issue.

6 MR. HICKEY: I can also say that the Judge said  
7 this Court, as well as any other Judge of this Court, would  
8 take a dim view of the NRC going in camera in view of the  
9 pending petitions and cases that were pending without a hearing  
10 from the Judge.

11 JUDGE SMITH: All right.

12 None of the relaters of those arguments stated my  
13 understanding of what happened. Let me state what I under-  
14 stand.

15 MS. WHICHER: Excuse me, Judge Smith.

16 Is your microphone on?

17 MR. HICKEY: There's no way to hook it up. It used  
18 to be hooked up to a dictating machine, I guess.

19 JUDGE SMITH: The United States District Attorney  
20 was told by me that there were potentially four steps which  
21 would be of interest to the Court and to the parties seeking  
22 the TRO.

23 The first step would be the in camera presentation  
24 by the Staff with no other party present.  
25

end 1



1 I understand that noone disputed that before the  
2 court; however, you reserved your right to argue to us, Ms.  
3 Whicher, that that is not an appropriate proceeding.

4 MS. WHICHER: Yes.

5 JUDGE SMITH: So, as far as Judge Nordberg is con-  
6 cerned, all of the parties there agreed that that could go  
7 ahead.

8 MR. HICKEY: In camera? Not in camera? I didn't  
9 understand that. Go ahead, Judge.

10 JUDGE SMITH: In camera is private.

11 MR. HICKEY: What you say what the Staff has asked  
12 for, I think, is in Camera and exclusively so; in any event,  
13 we, of course, could not object to that as -- the Rockford  
14 newspapers could not object to the exclusive remedy which he  
15 asked for.

16 In other words, that you would go into session  
17 without the parties.

18 JUDGE SMITH: Right.

19 MR. HICKEY: But in camera affects the public, and  
20 I understood specifically that the judge said that this court  
21 as well as any other judge sitting in this U.S. district could  
22 take a dim view if the NRC went into camera.

23 JUDGE SMITH: Well, I think we'd better define what is  
24 meant by in camera. The Staff had petitioned this Board to  
25 be heard in camera, that is, without public attendance and

1 without the participation of any other party to address the  
2 disputed information, the information that they think should  
3 not be presented.

4 Our counsel, the United States district attorney,  
5 informs me that noone objected to that approach before Judge  
6 Nordberg.

7 MR. HICKEY: You were misinformed, Your Honor.

8 MR. MILLER: I disagree. I think everybody was  
9 absolutely crystal clear that this preliminary step of having  
10 what I would call an ex parte consideration of the evidence by  
11 the Board to determine whether it was relevant material to any  
12 issue in this proceeding and privileged was not claimed by  
13 anyone to be subject to the requirements of the Sunshine Act  
14 and was not the subject of any request for a temporary restrain-  
15 ing order before Judge Nordberg.

16 MR. HICKEY: You were there and this was, I think,  
17 made crystal clear, certainly while I was in the courtroom.

18 MS. WHICHER: Your Honor, I did not take a position  
19 before Judge Nordberg with respect to the proposed in camera  
20 ex parte consideration of evidence. However, I have not  
21 waived my right to make arguments as to the propriety of that  
22 procedure.

23 JUDGE SMITH: What is your understanding as to the  
24 agreement of the parties and the judge's ruling yesterday as  
25 to that first step?



1 MS. WHICHER: I don't think there was an agreement  
2 of parties, Your Honor.

3 JUDGE SMITH: Well, three of the lawyers present  
4 recall it, and it was a point according to our counsel which  
5 was very carefully explained.

6 MR. HICKEY: No, Your Honor, we have got to dis-  
7 tinguish, Steve, between exclusive ex parte, as you call it --

8 JUDGE SMITH: Right.

9 MR. HICKEY: -- and as they called it in their  
10 petition, I think, and we also have to distinguish that from  
11 in camera.

12 JUDGE SMITH: All right, that's the problem. We  
13 want to explain the terms.

14 MR. HICKEY: I understand the judge said there will  
15 be no further proceedings on the in camera hearing unless we  
16 go to hearing on Wednesday.

17 JUDGE SMITH: I'm only going to Step One now, and  
18 there are four steps and you will not know our view and our  
19 view of what was presented to the court until I complete my  
20 remarks.

21 MR. HICKEY: That's right.

22 JUDGE SMITH: But first I want to establish that  
23 the first step -- now, you can give it whatever label you  
24 wish -- but the first step will be that the NRC Staff and no  
25 other party in a room from which the public is barred will

1 present their explanation of the need for protection.

2 Did you agree to that? Give it whatever label you  
3 wish, but did you agree to that approach?

4 MR. HICKEY: I cannot object to the exclusive, as  
5 Steve put it in his petition, exclusive ex parte. I am object-  
6 ing to going in camera.

7 JUDGE SMITH: All right, you are objecting to the  
8 word in camera.

9 MR. HICKEY: Right.

10 JUDGE SMITH: Step Two, then, would be after the  
11 Staff exclusively and in private ex parte informs us of the  
12 reasons why they wish to protect information and when and if  
13 the Board determines that this information must be made available  
14 to the parties, we would then schedule this very week an in  
15 camera presentation by the Staff and its witnesses as to the  
16 nature of their protected information and their plans for pre-  
17 senting it.

18 It was that session that Phase Number Two, to which  
19 the court referred he would be unhappy if it was -- I don't  
20 know the judge -- he'd be unhappy if we proceeded without 24  
21 hours notice.

22 Are we in agreement at that point?

23 MR. HICKEY: I want to say this, that I cannot  
24 speak for the Commonwealth or the intervenors on the ex parte  
25 part, you know, that's their problem.

1 JUDGE SMITH: We're trying to establish what  
2 happened before Judge Nordberg yesterday.

3 MS. WHICHER: Your Honor, if I may, it is not my  
4 recollection of the proceedings before Judge Nordberg yesterday  
5 that the U.S. attorney said that Step Two would occur this  
6 week.

7 JUDGE SMITH: We don't know that it will.

8 MR. HICKEY: He said that he didn't think it  
9 would.

10 MR. MILLER: The second step is reported to me  
11 because this took place in the afternoon when I was unable to  
12 attend the session, was that there would be simply an in camera  
13 conference with the parties to decide on the procedure for  
14 handling any evidence the Board determined to be material and  
15 relevant.

16 JUDGE SMITH: Step Two is not an evidentiary pre-  
17 sentation. Step Two is assuming during Step One the Board  
18 decides that there must be further in camera proceedings with  
19 the parties participating, and there would be sort of a pre-  
20 hearing conference in camera with the public barred: that  
21 would be Step Two, and that we would hope to have this week.

22 MS. WHICHER: And that is -- my recollection was  
23 it was not indicated to Judge Nordberg that even that step  
24 would occur this week. The first step is probably today.

25 JUDGE SMITH: Then that was a -- not only a

1 failure of our communication, but I think an unlikely event,  
2 because otherwise assuming that the parties had all agreed to  
3 an exclusive, private presentation by the Staff, we have all  
4 understood from the very beginning that we would not reach any  
5 in Camera evidence this week. We have all understood that,  
6 that we would not have an evidentiary presentation this week.  
7 I am distinguishing now between an evidentiary presentation and  
8 a discussion of the forthcoming evidence among the parties.

9           It is my understanding that Judge Nordberg, before  
10 we have -- maybe it's not as restrictive as I thought, maybe  
11 he's just referring to evidence, but let me complete the four  
12 steps.

13           The third step would be a pre-hearing exchange of  
14 information in camera, or protected, and the fourth step would  
15 be the actual evidentiary presentation, which I told the United  
16 States district attorney could not happen before September.

End 2.

1           Because we have already discussed that there's no  
2 time during this month for that to happen, now, notwithstanding  
3 what the Court said, do any parties -- not all of the  
4 plaintiffs in that TRO are present, are they?

5           MR. HICKEY: No, they're not, Your Honor.

6           MS. WHICHER: No, Your Honor.

7           I have committed to notifying the attorney for  
8 the ACLU of what this Board indicates this afternoon.

9           JUDGE SMITH: Well, we're put in a difficult  
10 position.

11           The parties came away from that TRO with inconsistent  
12 memories of it, a poor appreciation of what was going to  
13 happen. And now, not all the plaintiffs are around to  
14 express their feelings on it.

15           Do the parties -- were you a plaintiff in that  
16 case?

17           MR. MILLER: No, sir, we're an intervening  
18 defendant.

19           JUDGE SMITH: I was talking to Ms. Whicher.

20           MS. WHICHER: I can't see your eyes because of the  
21 reflection.

22           JUDGE SMITH: You can't hear me, and you can't  
23 see me. I feel very inadequate.

24           (Laughter.)

25           MS. WHICHER: I can hear you now. I just couldn't

1 tell you were looking at me.

2 I have intervened in that case as an attorney for  
3 the League and DARRE/SAFE and Business and Professional People  
4 for the Public Interest.

5 JUDGE SMITH: So, we do have confusion.

6 However, I do think it is workable, because given  
7 the plaintiffs in the TRO case, the greatest benefit, if we  
8 should decide after the Staff's private presentation to us  
9 that there must be further in camera proceedings, we can  
10 comply with the Court's request and not have even an  
11 in camera attorneys' discussion without 24 hours' notice  
12 because we have other business.

13 Then, there's the other eventuality and that is,  
14 under the Commission's new policy statement which was issued  
15 last week, if we should decide after the Staff's private  
16 presentation that they must proceed with in camera evidence  
17 and a discussion, they may petition directly to the Commission.

18 In that event, we are estopped. And certainly we  
19 would accept the Staff's presentation here today that they --  
20 we would not require them to actually petition, but we would  
21 allow them to invoke that privilege. And that would moot the  
22 whole consideration.

23 MR. GOLDBERG: Judge, can I comment?

24 I was briefed by Assistant U.S. Attorney  
25 Keith Seiffert on what transpired at the judicial session, and



1 I don't really feel I have anything to add on that.

2 But I did want to clarify the motion, since it  
3 may bear on the disposition.

4 The presentation that the Staff has offered to  
5 make to the Board in what I'm going to call, for want of a  
6 better word, an "informational presentation," rather than an  
7 "evidentiary presentation," is one prompted by the Board's  
8 request for details about the pending inspection into a number  
9 of allegations.

10 We are prepared to provide the Board with whatever  
11 information it wants concerning those matters. This could  
12 include information in documentary form, as well as oral form.  
13 It is the information that we understood the Board to want.

14 Now, as we understand the provisions in 2.744 and  
15 the Commission policy statement, if, at the conclusion of that  
16 presentation, the Board decides that the information is  
17 relevant and unprivileged, it can order disclosure to the  
18 parties.

19 JUDGE SMITH: Necessary to the decision.

20 MR. GOLDBERG: If it is relevant and privileged,  
21 it must find that it's necessary to the decision in order to  
22 require disclosure.

23 JUDGE SMITH: Yes.

24 MR. GOLDBERG: And it was our understanding we  
25 would present whatever information would enable the Board to

1 make that determination, so that it can decide whether or not  
2 the matters warrant adjudicatory consideration.

3           And if, at the conclusion of that presentation,  
4 which would be not only to further expound on the privilege  
5 claim, for which we have provided the factual substantiation  
6 in the form of the affidavit from the original administrator,  
7 but that the information is also necessary to a decision so  
8 as to require some future evidentiary session, not only the  
9 former -- not only to review the validity of the privilege  
10 claim -- given that, as I say, I cannot shed any further light  
11 on what transpired at the hearing on the TRO complaint, other  
12 than to say it was my understanding from Assistant U.S.  
13 Attorney Seiffert that he committed -- he did not commit to  
14 refrain from holding an in camera session for the exclusive  
15 receipt of information by the Board on any time frame.

16           But I did understand him to say that they would  
17 -- that the NRC would voluntarily abstain from holding such  
18 a session for Wednesday to enable the litigants to reappear.

19           And, of course, I had told Mr. Seiffert, both  
20 before and at the conclusion of his hearing in Chicago, that  
21 we did have a public session calendar that we felt should go  
22 forward and that, if time permitted, the Board could receive  
23 the in camera information from the Staff at the conclusion of  
24 the week or whenever else it could be conveniently scheduled.

25           And on that score, since the submission of our



1 motion, I have conferred with the Office in Investigations,  
2 and they are prepared to proceed with the provision of  
3 information to the Board exclusively, on the same basis as  
4 the Staff is prepared to proceed and on the same conditions.

5 JUDGE SMITH: Are they present today?

6 MR. GOLDBERG: They are not present today. But  
7 they can be assembled on 24 hours' notice to make that  
8 presentation and provide whatever information the Board  
9 desires.

10 Now, I guess, to further comment on what I  
11 understood to be your first comment, and that is the  
12 availability under the Commission's policy statement to  
13 seek immediate Commission review, that will obviously depend  
14 on what information is elicited in the in camera session and  
15 what the Board's decision is; if it decides there should be  
16 some party dissemination, what restrictions are placed on it.

17 We'll just have to judge from the nature of the  
18 information elicited and the arrangements under which the  
19 Board feels that it should be supplied to other parties.

20 So, I don't think we can say right now, at the  
21 outset, they're we're necessarily going to follow papers.  
22 It's going to have to be evaluated at the time we see what  
23 information is actually imparted.

24 MS. WHICHER: Judge Smith, may I be heard?

25 JUDGE SMITH: Yes, I am aware that parties have not

1 had a chance to respond to the petition. I'm aware of that.

2 MS. WHICHER: Well, you're going to hear me out,  
3 so I can wait.

4 I assume that you will allow the parties to respond  
5 to this motion.

6 JUDGE SMITH: Yes, certainly.

7 And we'll take that up as the very next order of  
8 business. I just wanted to complete discussion of scheduling  
9 possibilities.

10 I had hoped, when we learned about the Commission's  
11 policy statement and Judge Nordberg's -- I don't know what  
12 you call what he said.

13 MR. MILLER: They are really comments and  
14 suggestions.

15 MR. HICKEY: Your Honor, unfortunately, as  
16 Mike Miller and Jane know, laymen, including Judge Nordberg,  
17 don't understand the Nuclear Regulatory Commission, the  
18 whole statute, the whole thing. So, we spent part of  
19 yesterday reaffirming to the Court what everybody knows from  
20 constant reading and what Your Honors know. And then he  
21 adjourned at noon.

22 And at that time, we were all in agreement. But  
23 Keith Seiffert, representing the District Attorney, said he'd  
24 have to check with his client.

25 We were all in agreement that we would wait -- in

1 other words, that we would not hurry or that Staff -- somebody  
2 would not hurry with the in camera proceedings.

3 We adjourned at noon -- 12:00 or 1:00 o'clock, I  
4 guess it was. We were back at 2:20. And Steve had talked  
5 to somebody -- I don't know who -- and said he could not  
6 agree. So that we did not have an agreement at that time,  
7 then, to defer any in camera proceedings.

8 JUDGE SMITH: Well, I'm going to put it in the  
9 proper context.

10 The United States District Attorney, Mr. Seiffert,  
11 representing us, as a Board, secondarily, and the United  
12 States Nuclear Regulatory Commission primarily, consulted  
13 with the General Counsel and myself yesterday.

14 We both advised him that, as his clients, neither  
15 of us was willing, voluntarily, to make any stipulation or  
16 agreement to defer our legitimate business here this week,  
17 that we will proceed.

18 We also informed him, however, that there is some  
19 flexibility. And we do have public testimony to receive.

20 My allusion to what Judge Nordberg did or said is  
21 because I am confused. I know it's not a threat; judges  
22 don't threaten people. But it seems to be some kind of a  
23 warning on behalf of him and all the judges of the District.  
24 However, it is mooted, because the plan that we have would be  
25 -- after we hear your response to the motion, would be, this

1 afternoon, would be to listen to the Staff's private presenta-  
2 tion and, if possible, determine, either this afternoon or  
3 first thing tomorrow, that we want, then, to have an  
4 in camera lawyers' conference that would be put off till the  
5 end of the week, because we do have the priority problem of  
6 getting the evidence which is ready to be presented going  
7 first. And that's the best time for the conference anyway.

8 MR. HICKEY: I think Judge Nordberg's problem  
9 was that I explained to him at 2:00 o'clock you may say -- or  
10 anybody might say -- "We'll go into in camera session." I  
11 cannot get to Chicago because we have no judge here. And  
12 this judge here, the U.S. District Court Judge from Rockford,  
13 is on vacation. So, we have to pursue our remedies, if there  
14 are any, with the emergency judge.

15 Judge Nordberg ceases to be an emergency judge, as  
16 I understand it, Friday. And there's a new judge coming on  
17 which will be the emergency judge for another two weeks. And  
18 it's too bad, because Judge Reskowski has one case,  
19 Judge Moran has the case, which is the ACLU case, and those  
20 have got to ultimately decided one way or the other. And  
21 then it's got to go to the Circuit Court of Appeals.

22 What we're faced with is the Hunt case, as  
23 your Honors know. And neither Judge Nordberg -- I think I  
24 can safely say -- nor are we, the Plaintiffs, particularly  
25 enamored of the Hunt case, because the Judge went on,

1 unfortunately, to ramble after he rendered his decision. And  
2 by rambling, of course, he got into difficulty.

3 JUDGE SMITH: Then, there's one other aspect of it,  
4 of course, and that is if, as a matter of accommodation to  
5 counsel, you ask us to arrange our schedule wo that you would  
6 have time to pursue your TRO, we would, as we judiciously are,  
7 extending that courtesy, but that's a different matter.

8 MR. HICKEY: I understand that. And I thank you  
9 for it.

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1 MR. GOLDBERG; May I clarify one thing for the record? I was  
2 not consulted by Mr. Seiffert during the pendency of the hearing,  
3 although, as you indicated, Judge Smith, he did indicate to  
4 me that both our Office of General Counsel and yourself were  
5 consulted with respect to the Agency position. I was not  
6 consulted and did not indicate to him a position on the timing  
7 of any session.

8 JUDGE SMITH: All right. Now, I think if you want  
9 to argue the motion, that would be the Staff's motion --

10 MS. WHICHER: Of August the 5th.

11 JUDGE SMITH: Yes. Proceed, argue it in your own way,  
12 any way you wish.

13 MS. WHICHER: Judge Smith, Intervenors League of  
14 Women Voters and their DAARE/SAFE suggest that the Staff's  
15 motion ought to be denied. The Staff has yet to make the  
16 showing which this Board ordered it to make and which the  
17 Appeal Board ordered it to make concerning the factual basis  
18 for its decision not to disclose the documents and particu-  
19 larly its concern regarding investigatory materials.

20 Our objection to the documents and to testimonial  
21 evidence stands on different footing, although the policy and  
22 the reason I have just stated to the Court apply to both. NRC  
23 regulation 2.744 goes only to documents. It does not deal  
24 at all in any respect with any information, any evidence, any  
25 potential evidence other than documents. To apply 2.744 to



1 testimonial situations precludes parties to the proceeding  
2 from any possibility of cross-examining, of making arguments  
3 based on the demeanor of witnesses, whereas the document will  
4 always exist in the same state.

5 In other words, if the Board takes live testimony  
6 from witnesses, the moment of cross-examination is gone  
7 forever.

8 JUDGE SMITH: Wait a minute. Clarify that. I  
9 cannot envision that situation arising.

10 MS. WHICHER: If the Board takes live testimony,  
11 ex parte in camera --

12 JUDGE SMITH: No, no, that is not a part of Staff's  
13 motion.

14 MS. WHICHER: Then I misread the --

15 MR. GOLDBERG: Judge, that's what I tried to clarify,  
16 because I think the Board envisions a two-pronged approach  
17 here, one further information on the privilege claim and one  
18 further information on the substance of the allegation.

19 Now, this Board has maintained an interest in  
20 knowing the substance of the allegations under inspection.  
21 Now the Staff has decided in light of the Commission policy  
22 statement, which clearly governs the procedure advanced by  
23 the Staff to provide that information -- now, as I say, that's  
24 what I said. This would be an informational session; this  
25 would provide the Board with enough information to decide the

1 validity of the privilege claim and also decide whether that  
2 information is necessary for a decision so as to require an  
3 evidentiary session at some point in the future in which  
4 that information could be developed.

5 As you know, our original concern was that we not  
6 provide any information until the conclusion of the inspection.  
7 However, in light of the policy statement and the invitation  
8 of the Board in its stay decision and the valid observations  
9 made by the Appeal Board, we filed a motion for reconsidera-  
10 tion before this Board for it to reconsider the matter in  
11 which it would receive the information which it indicated it  
12 desired.

13 Now, I think that that information would rise to  
14 the level of testimony only if the Board decided that there  
15 would be a future evidentiary session concerning those  
16 inspections.

17 JUDGE SMITH; And then I would expect that that testi-  
18 mony be ex parte in private, would be repeated then in a  
19 subsequent in camera evidentiary presentation.

20 MR. GOLDBERG: Well, let me say further, that we  
21 are prepared to have that session transcribed so that when  
22 the need for exclusivity is removed that so can the matters  
23 that have transpired be removed, so that there is a record  
24 that could follow the case through.

25 JUDGE SMITH: All right, Ms. Whicher?



1 MS. WHICHER: The Staff has cited absolutely no  
2 authority for the hearing in camera ex parte, witness testi-  
3 mony and indeed to my knowledge, there is none. All cited  
4 authority by the Staff deals with in camera but not ex parte  
5 testimony. I think this is an entirely inappropriate procedure  
6 with respect to both the documents and the live testimony in  
7 this case.

8 I have argued both here before this Board as well as  
9 before the Appeal Board that there are, or at least appear to  
10 be, no facts the disclosure of which would threaten the Staff's  
11 investigation because the target and the scope of this investi-  
12 gation have been publicly testified to at length, beginning  
13 with the general statement by the Staff in February and culmin-  
14 ating in Mr. Hughes' day-long testimony before this Board on  
15 May 26th.

16 I notice in their brief to this Court, the Staff  
17 has carefully stopped short of responding at all to that  
18 argument. They have not made the statement -- they have not  
19 dealt at all with the fact that there's been extensive public  
20 disclosure of these allegations.

21 Further, I wish to point out to the Board that both  
22 the Staff motion and the Kepler affidavit are just as con-  
23 clusory and just as nonspecific as the arguments made before  
24 the Board and before the Appeal Board.

25 On the basis of those nonspecific and conclusory

1 statements, the Appeal Board affirmed this Board's order and  
2 gave the Staff a second chance to come up with facts. We  
3 still have none. We still have predicated language, it  
4 could affect, it could impact, and never a clear statement.

5 I don't think the Staff has made a showing first.  
6 I don't think it can make a statement to hold testimonial  
7 evidence in camera, ex parte; and second, it has not made  
8 a showing sufficient under 2.744.

9 JUDGE SMITH: Have you addressed the Commission's  
10 policy statement, which, incidentally, is somewhat ambiguous  
11 in its language. It could be read as being a prospective  
12 policy statement, however the Chairman of our panel has con-  
13 sulted with the General Counsel, who was present when the  
14 Commission took this action, as was our Chairman, and the  
15 Commission's policy statement is intended to be interim  
16 directions to the Board and the Staff and the Office of  
17 Investigations, and we are bound by that statement.

18 Moreover, I have Secretary Child's memorandum to the  
19 Executive Director of Operations and the General Counsel of  
20 August 3rd, 1983, referring to the Commission's action as  
21 interim guidance, so that it's immediately effective and we  
22 are bound by it.

23 As I understand the Commission's policy, pending the  
24 adoption of a final policy, no distinction is being made  
25 between documents as compared to information in general.

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1 I did not read it with that distinction in mind or  
2 try to make that distinction, but as I look at it now, the  
3 Commission is directing Boards to receive first in camera,  
4 ex parte the Staff's discussion.

5 MS. WHICHER: May I respond to that?

6 JUDGE SMITH: Yes, please.

7 MS. WHICHER: Judge Smith, my reading on the main  
8 face of this statement of policy, the current practice is set  
9 forth and Boards are directed to follow that current practice.  
10 Receipt of in camera, ex parte testimonial evidence is not  
11 approved. The Staff has cited no authority, no case where  
12 this has been done. The policy statement speaks of informa-  
13 tion.

14 JUDGE SMITH: Yes.

15 MS. WHICHER: It does not talk in terms of testimony.  
16 The policy statement -- to give your reading to the policy  
17 statement would mean overruling or sidestepping or ignoring  
18 2.744 altogether, and I don't think that's what the Commission  
19 had in mind.

20 The Commission is directing people to continue into  
21 the present policies and testimonial evidence is not one of  
22 those policies.

23 JUDGE SMITH: Mr. Miller?

24 MR. MILLER: Judge Smith, by and large, I agree with  
25 Ms. Whicher. I believe that -- however, I believe that the

1 Staff has made the appropriate showing with respect to docu-  
2 ments relating to the investigations to invoke the provi-  
3 sions of Section 2.744 and have this Board consider in private  
4 without any other person being present the claim of privilege,  
5 the materiality of the documents, and once a tentative decision  
6 would be reached by the three judges as to disclosure,  
7 whether it would be necessary to the outcome of this pro-  
8 ceeding, 2.744 is a regulation. The Commission's statement of  
9 policy is a statement of policy and I am confident that had  
10 the Commission wised to create such a large change in the ex  
11 parte communications to a licensing board, that it would have  
12 promulgated a regulation even if it was an interim one.

13 It seems to me that this was fairly carefully crafted  
14 as a statement of policy, perhaps to obviate judicial review  
15 or for some other reason, but I do not -- you know, you have  
16 already stated that you regard yourself as bound by it. I  
17 really question, just as a matter of law, whether statements  
18 of policy which speak in words that are not -- the verb is  
19 a very interesting one. It says they should first be pre-  
20 sented to the Board. It does not say they shall first be  
21 presented to the Board.

22 I don't regard this as a mandatory -- that is the  
23 statement of policy -- as a mandatory procedure that all  
24 Boards must follow, and I'd like to review, just for the  
25 record, really, where we are.

End 4.

1           We are really considering the tip of the tail of  
2 what's been a very, very large dog in terms of an issue that  
3 has occupied the attention of the parties and the Board over  
4 a period of many weeks of testimony.

5           It seems to me that, given the incomplete nature  
6 of the Staff's investigation on matters that are probably  
7 very tangential to the contention as formed by the  
8 Intervenors, that the Board should consider the documents  
9 and the documents alone, without a characterization of those  
10 documents by any person.

11           It is clear that the investigations are incomplete.  
12 What the Board hears is necessarily going to be an incomplete  
13 assessment of the significance of the documents and of the  
14 status of the investigation.

15           I believe that that is unfair, not only to  
16 Intervenors, but to the Applicant as well.

17           Characterizations may be made of these documents  
18 to the Board which will affect the Board's perception of  
19 evidence that it will later hear from the Applicant on matters  
20 that are already scheduled. At least there is that possibility.

21           And I just think the basic notions of due process  
22 keep us from having this sort of ex parte communication by a  
23 witness.

24           To you gentlemen, who are the triers of fact, I  
25 think it would be -- another bit of information that we ought

1 to have from the Staff which may be of assistance to the  
2 Board is when are these investigations going to be concluded?  
3 When will all this information be available to the public?

4 There is some indication, at least some of the  
5 papers the Staff filed, that they will, in any event, present  
6 these investigations to the Licensing Board and there will be  
7 an adjudicatory hearing on them.

8 On behalf of Commonwealth Edison Company, I protest  
9 that procedure.

10 I think we are almost done with this quality  
11 assurance issue. These documents and the incomplete  
12 investigation should be recorded by the Board as in the nature  
13 of almost supplementing or reopening the record. And the  
14 Board ought to consider carefully whether, given the massive  
15 testimony which has already been adduced on this record and  
16 the evidentiary presentations which are going to be made this  
17 week, whether you ought to go the next step and consider  
18 what -- you know, an in camera session.

19 I truly believe that all 2,744 contemplated is a  
20 submission of documents. The Board should come to those  
21 documents without the characterization on them of any party  
22 and make a judgment as to whether or not further evidentiary  
23 proceedings are warranted based on what the documents show.

24 MR. GOLDBERG: Can I comment on some of the points  
25 made?



1 JUDGE SMITH: Yes.

2 MR. GOLDBERG: In the first instance, as I  
3 indicated, the Board has requested information concerning  
4 ongoing Staff inspections.

5 The Staff is prepared to provide that information  
6 in whatever form, to whatever degree the Board wants, to  
7 enable it to determine the necessity for an adjudicatory  
8 session concerning those inspections on their conclusion.

9 We have never taken the position that the pending  
10 inspections must be the subject of adjudication. That is a  
11 decision for the Board to make.

12 We have agreed to provide the Board with information  
13 concerning those inspections despite our maintaining the  
14 position that premature, unrestricted disclosure would  
15 compromise those inspections.

16 And I believe that the affidavit of Regional  
17 Director Kepler amply provides the factual substantiation for  
18 the representations that counsel has made in his pleading  
19 before this Board and the Appeal Board on the need for  
20 such restrictions.

21 And as indicated in our Motion for Reconsideration,  
22 it should be entitled to great weight as the agency official  
23 most knowledgeable about the impact, both in a general sense,  
24 on his inspections and inspection program, and in a specific  
25 sense, in the context of the pending inspection concerning the

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1 Byron contractor.

2 Now, contrary to the position that Ms. Whicher  
3 takes, the allegations under inspection are not known in any  
4 further detail than the disclosure statement contained in the  
5 Staff direct testimony last May, which provided part of the  
6 inspiration for the Board to inquire further -- that is, very  
7 broad subject areas.

8 These allegations were made by individuals other  
9 than witnesses who have appeared on behalf -- who have provided  
10 prepared testimony on behalf of the Intervenor, namely  
11 Mr. Hughes.

12 The details and nature of the these inspections  
13 have not been revealed on the public record. And the  
14 revelation on the public record would not only have the  
15 effect that Administrator Keppler indicates of potential  
16 compromise, but also have potential for revealing for  
17 identities of confidential informants through which means  
18 these allegations were received by the NRC.

19 So, we are talking about allegations exclusive of  
20 those of Mr. Hughes that have been the subject of litigation,  
21 and we are talking about allegations in the approximate number  
22 of 30, as yet unexpected, whose inspection who is to be  
23 divided between the Regional Office of Inspection and  
24 Enforcement and the Regional Office of Investigations.

25 Now, with regard to the policy statement, I think



1 the policy statement shows no differentiation between the  
2 form in which the information concerning ongoing staff or OI  
3 investigations would take -- does not draw a distinction  
4 between oral information or documentary information. The  
5 Commission could well have drawn that distinction had it  
6 wanted to.

7 And had it wanted to leave the provisions in its  
8 Code of Federal Regulations in place as sufficient, it could  
9 have done so.

10 It obviously saw an emergent need to take some  
11 policy action to accommodate the increasing conflict in which  
12 the public hearing sessions and the necessarily, for a time,  
13 nonpublic inspection processes have proceeded.

14 Now, with regard to another point, and that is that  
15 the Commission's Rules do not provide for the provision of  
16 oral evidence testimony or information -- and I would say it  
17 is not evidence unless the Board decides that it is going to  
18 be evidence or form a part of the evidentiary record of this  
19 proceeding.

20 This is a preliminary decision that the Board would  
21 reach upon being apprised of the information in question.

22 The Staff has cited both judicial and NRC  
23 precedent for the extension of the law enforcement  
24 investigative privilege to both oral testimony as well as  
25 documentary evidence.

1           And I would cite the Board to note 4 of page 4  
2 of the Wenner case and the Sheridan case, in which the Board  
3 indicated that the law enforcement investigator privilege  
4 is predicated on harm to law enforcement efforts which would  
5 accrue from public disclosure of investigatory files and  
6 related facts, regardless of what form those facts take.

7           And in the Wenner case, those facts extended to  
8 the provision of in camera testimonial information.

9           And I would cite the Comanche Peak and South Texas  
10 cases for the provision of both testimonial and documentary  
11 material in camera in the context of the interrelated enforce-  
12 ment privilege.

13           JUDGE SMITH: I think you're going to address the  
14 point that Ms. Whicher is certain to make, and that is that  
15 you're not addressing ex parte in camera.

16           MR. GOLDBERG: In Comanche Peak -- and I don't have  
17 the case before me -- the Board first decided to have an  
18 in camera session with the parties to provide information  
19 concerning the identity of informers.

20           On Staff appeal, the Appeal Board decided that  
21 notwithstanding the protective -- excuse me, the protective  
22 measures available in the form of nondisclosure affidavits,  
23 that any non-NRC dissemination of that information would have  
24 the real and chilling effect of depriving the NRC Inspection  
25 Offices of information in the form of confidential information

1 and that nondisclosure and protective orders were not  
2 sufficient to preserve the fairly important informer's  
3 privilege.

4 I'm not sure if that was South Texas or Comanche  
5 Peak, but it is one of those two cases that dealt with the  
6 informer's privilege.

7 The law enforcement privilege has not received a  
8 great deal of NRC adjudicatory attention, because it has  
9 become one of emerging importance as the NRC adjudications and  
10 NRC inspection programs find themselves in increasing  
11 collateral movement.

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1           So there is an example of an NRC adjudication in  
2       which the Appeal Board decided that exclusive Board consider-  
3       ation of that information but non-party consideration of that  
4       information was appropriate. And, I might add that we have  
5       to get back to the crucial matter which is not so much the  
6       precedent that has existed, but the policy which the Commission  
7       announced this past week, which is to be followed, which  
8       explicitly provides for in camera Board-exclusive receipt of  
9       information concerning ongoing inspections. In this, a  
10      policy statement, some parties may have disagreement and they  
11      may not like it, but the Staff is bound to follow it as it is  
12      in this Board and and other appellate boards junior to the  
13      Commission.

14           JUDGE SMITH: There is a point that was not addressed  
15      by Mr. Miller and I think that you have raised in your most  
16      recent remark and that is, a policy statement refers to the  
17      obligations of the Commission components, the Staff and the  
18      Office of Investigations as well as the adjudicatory boards.

19           Is there any question in your mind that the policy  
20      statement gives contrary to regulation, the Staff the right  
21      to go directly to the Commission in the event that we require  
22      full disclosure to other parties?

23           MR. MILLER: It's the same word, "should" that  
24      appears with respect to the direct review by the Commission,  
25      and I don't understand why that word was used. The word

1 "shall" fits just as nicely in this paragraph.

2 JUDGE SMITH: Yes.

3 MR. MILLER: And --

4 JUDGE SMITH: It does. And this has been a source  
5 of concern to the Board, too.

6 MR. MILLER: I really believe that if there had been  
7 an intention to make such a fundamental change in the way  
8 evidence is received by fact-finding boards or licensing  
9 boards, we would have more than a statement of policy, we  
10 would have immediately effective regulation that could be  
11 reviewed appropriately, and it would presumably be in language  
12 that gave the boards and the Staff a little more guidance than  
13 thjs one has.

14 MR. GOLDBERG: Well, I view that as in somewhat of  
15 the nature of a collateral attack on a Commission policy  
16 statement which I think we have to take as binding absent its  
17 replacement by further guidance.

18 JUDGE SMITH: We also have to give the author of  
19 this policy statement the benefit of knowing the difference  
20 between "should" and "shall."

21 MR. HICKEY: Your Honor, I know I'm not a party to  
22 this proceeding, but may I just say something, though, that  
23 might be helpful to you and the Staff and that is that the  
24 gentlemen and women who write policy in Washington don't have  
25 to move when the place blows.

1 JUDGE SMITH: Your remarks are irrelevant to our  
2 session this afternoon.

3 MR. HICKEY: I know, but this is true, Your Honor.  
4 I'm saying that the policy Commission, as has been pointed  
5 out by Mr. Miller and Ms. Whicher both, should take into  
6 consideration other factors than the fact that they sit and  
7 write policy.

8 JUDGE SMITH; Well, I would like Mr. Hickey, for you  
9 to maybe advise us as to what you think we should do when we  
10 have become aware that there are investigations going on which  
11 the investigators say are important to public health and  
12 safety to the citizens of Rockford, and you are trying to  
13 enjoin us from inquiring into them.

14 MR. HICKEY: Your Honor, may I --

15 JUDGE SMITH: What should we do? I want your advice.

16 MR. HICKEY: May I say this? While we are interested  
17 in what the public knows and does in the event something  
18 happens, it is the obligation of Staff, it is everyone's  
19 obligation to try to cooperate and find out what is the  
20 safest procedure. I will agree with Your Honors, that you  
21 are experts and you should sit and decide whether or not  
22 something should be admitted into evidence or not. I agree  
23 that Your Honors should make the decisions. I don't think  
24 that somebody writing policy who does not know the difference  
25 between the word "shall" and "should" should tell all of us



1 including the public and should tell you what to do.

2 JUDGE SMITH: I'm asking for your advice, Mr. Hickey,  
3 because I know that you are deeply concerned about this  
4 problem. You've gone to a lot of effort.

5 MR. HICKEY: That's right.

6 JUDGE SMITH: But we do have competing considerations.  
7 We have a believable representation a public disclosure of  
8 the bases for these investigations will frustrate the invest-  
9 igation.

10 On the other hand, we have an interest and a desire  
11 to inquire into these inquiries. Where does the public in-  
12 terest lie? What is your advice to us, sir? Shall we ignore  
13 them or shall we frustrate the investigations and reveal them?

14 MR. HICKEY: You Honors, you have asked for advice.  
15 I think, and I have always taken this position and I did in  
16 Chicago yesterday, that you should hear -- I may not agree --  
17 this may not be in agreement with all the parties -- but,  
18 anyway, that you should hear what the Staff has to say and  
19 then decide whether or not the public should know.

20 JUDGE SMITH: All right. Let me put the same form  
21 of the question to you, Ms. Whicher.

22 Let's take your position that we can examine only  
23 documents ex parte without explanation and nothing else,  
24 only documents. We are only pursuing this because it is your  
25 contention, not ours. If we find that the documents do not

1 in themselves support further evidentiary proceeding, is that  
2 the end of it? Should we not inquire if we have suspicions  
3 that a document may lead someplace else? Do you want us to  
4 stop there?

5 This is your contention. You give us advice. Shall  
6 we stop or not? Shall we proceed with your contention?

7 MS. WHICHER: Yes, I suggest you proceed with my  
8 contention. I indeed urge you to. Your Honors, that inquiry  
9 should not be done ex parte. That is the point. I hesitate  
10 to say these words: it should be done in camera.

11 As the Board knows, my position is, with respect to  
12 in camera proceedings, they must comply with the Sunshine Act.  
13 That is a legal issue for the United States District Court.  
14 What I object to is the ex parte nature.

15 JUDGE SMITH: All right. Let's assume -- do you have  
16 a fall-back position? Let's assume that we feel ourselves  
17 bound at least the guidance that the Commission has given us,  
18 that we should listen to the Staff before we require an  
19 evidentiary proceeding.

20 Then, say we have made up our mind to do that. Then,  
21 should we follow your advice all the way and not ask questions  
22 about the significance of documents?

23 MS. WHICHER: Your Honor, it's the ex parte nature  
24 again that I object to. I think if the Staff has information  
25 to present it is very possible and apparently something that

1 has not even been explored, to frame a protective order so as  
2 not to frustrate any legitimate purposes of the Staff.

3 JUDGE SMITH: You're evading my question.

4 MS. WHICHER: Then perhaps I don't understand it,  
5 I'm sorry.

6 JUDGE SMITH: Assume that you and Mr. Miller have  
7 lost in the argument that we can only inquire into documents  
8 and that we must give the Staff an opportunity to come to us  
9 and explain ex parte why their ongoing investigations should  
10 be not the subject of even an in camera protective order type  
11 of hearing. Assume that we comply with the Commissions's  
12 guidance and we decided that should be the case. Do you want  
13 us then to fail to ask questions?

14 MS. WHICHER: Oh, no, Your Honor, I'm not making a  
15 distinction between hearing live testimony, the Board hearing  
16 live testimony. I don't see that there is any difference  
17 between that and being able to question the witnesses. I am  
18 not concerned about that. I think once you make us your  
19 mind that you can hear live testimony, I think that not to  
20 allow you to question the witnesses would be inappropriate  
21 in that situation.

22 JUDGE SMITH: I mean in an ex parte presentation?

23 MS. WHICHER: Yes, that's what I'm talking about.  
24 I mean I can't imagine -- if it were otherwise, the Staff  
25 could submit an affidavit, correct?

1 JUDGE SMITH: Well, I guess I don't understand you.

2 MS. WHICHER: I'm saying if a Witness really had to  
3 make an ex parte in camera presentation to you, you were not  
4 allowed to ask questions, that the same thing could be accom-  
5 plished through an affidavit. Apparently there is some reason  
6 why that cannot be done.

7 MR. GOLDBERG: Well, I don't know if that's an  
8 invitation for a comment. We will provide the information in  
9 whatever form the Board wants. The Board had wanted present  
10 public testimony. We will provide present Board-exclusive  
11 information. We had indicated all along that at the conclu-  
12 sion of our inspection, we'll provide whatever testimony the  
13 Board deems necessary to conclude the case. This could advance  
14 that date if the Board were to decide that it doesn't warrant  
15 evidentiary consideration or it does warrant evidentiary con-  
16 sideration.

17 In that latter instance, it's going to necessarily  
18 have to await the outcome of the Staff inspection anyway,  
19 because all we can do right now is provide you details about  
20 the allegations and their status.

21 Obviously, any evidentiary session on the substantive  
22 merits of the allegations is going to have to necessarily  
23 await the outcome of the Staff inspection, and to answer Mr.  
24 Miller's point, I think we indicated in our prepared testi-  
25 mony for this week, that we expect to conclude that inspection

1 by December.

2 So, we're trying to accommodate competing considera-  
3 tions here and do it in a way we feel most consistent with  
4 precedent, policy and the needs of this particular case.

5 JUDGE SMITH: Mr. Goldberg, are you able, are you  
6 prepared to explain to the Board in public session why you  
7 don't believe a protective order and an affidavit of non-  
8 disclosure affords sufficient protection to the Staff, why  
9 it does not?

10 MR. GOLDBERG: Who would be the recipients of the  
11 information under that arrangement?

12 JUDGE SMITH: As always, that is always subject  
13 to argument, discussion and Board order.

14 MR. GOLDBERG: Well, who would be the recipients of  
15 the information on the protective order? Legal representa-  
16 tives? A legal representative of each party, a nonlegal  
17 representative of each party?

18 JUDGE SMITH: I don't know. We would hear your  
19 argument. Traditionally you have from the utility, for  
20 example, a lawyer and a person informed of the facts who  
21 could or could not be a lawyer, it doesn't matter.

22 MR. GOLDBERG: It's necessarily going to depend on  
23 how far-reaching the information is that the Board wants  
24 about these matters. We have taken the position that we  
25 do not favor premature disclosure beyond the investigative

1 of information because notwithstanding even the best of  
2 intentions -- and this Board has shown that with regard to  
3 its protection of information presented in a confidential  
4 form -- the information could leak out to persons who should  
5 not have that information, and if the very frustrating effect  
6 that the regional administrator has indicated it would have,  
7 if those parties were to become privy to that information.

8 JUDGE SMITH: In your original papers, you suggested  
9 it could happen inadvertently or otherwise. You are not  
10 making a representation to the Board today that you have a  
11 legitimate fear that the persons who might be privy tradi-  
12 tionally to protected information might deliberately reveal  
13 it?

14 MR. GOLDBERG: No, I am not making that representa-  
15 tion, nor am I making the representation that at the conclusion  
16 of the exclusive, in camera receipt of this information, that  
17 the Staff may not regard it as appropriate or necessary if  
18 the Board decides to impart that information to, let's say,  
19 a legal and a nonlegal representative of the parties, but I  
20 think the Staff investigative offices have a very real concern  
21 with restricting so far as possible the dissemination of in-  
22 formation containing ongoing inspections. And every additional  
23 part of it becomes privy to that information.

24 There are additional and quantifiable but necessarily  
25 incremental risks.

End 6.



1 Well, let me say, also, it would seem also to be  
2 premature to impart that information to non-NRC sources,  
3 namely non-NRC Staff, non-NRC Licensing Board sources  
4 unnecessarily.

5 If the Board can decide on receipt of that  
6 information, then it is not necessary to its decision and  
7 not necessary for an evidentiary hearing that we would have  
8 unnecessarily invited the risk of disclosure of information  
9 that did not have to be. But I'm not saying that we could not,  
10 at the conclusion of the procedure, authorize and, in fact, I  
11 would say, commend it, if not mandate it, by the Commission  
12 -- I think we ought to follow that in the first instance.

13 And then, in the second instance, I think we can  
14 face the question of how we need to have that information and  
15 under what provisions.

16 Let me say further, for example, the mere receipt  
17 of information details by a legal and nonlegal representative  
18 of the parties, without any ability to do anything about it,  
19 it seems to me doesn't really serve any valid adjudicatory  
20 purpose. Because if the Board decides to try these issues at  
21 the conclusion of the Staff inspection, we can have full  
22 disclosure and full discovery and full cross-examination.

23 And, in fact, it may even put representatives of  
24 the company in the position of being privy to information  
25 about potential safety problems, that they are barred, by

1 virtue of protective order, from doing anything to rectify.  
2 And it may also create ethical problems for counsel, being  
3 privy to that information and being able to do nothing to  
4 rectify it.

5 And we would certainly require that if there were  
6 a party-exclusive disclosure, that that party not contain a  
7 representative of the company under inspection, as a first  
8 point. I think we tried to --

9 JUDGE SMITH: "The company under inspection" --  
10 you mean the contractor?

11 MR. GOLDBERG: Yes.

12 JUDGE SMITH: They are not parties under the  
13 proceeding. They have no rights.

14 MR. GOLDBERG: I tried to give you some of the  
15 factors that would entail when and if we come to that point.

16 MR. MILLER: Judge Smith, could I just be heard  
17 briefly?

18 This, in part, picks up on what Mr. Goldberg said.  
19 It seems to me that we may all be proceeding as if this was  
20 the last opportunity for the Board and parties to consider  
21 these investigations and the documents and other circumstances  
22 surrounding them.

23 I don't think that's the case. I think that if  
24 the procedure I suggest is followed -- and that is the Board  
25 receives the documents only and considers them, you will have

1 an opportunity to make a determination, albeit preliminary,  
2 that the documents are material, relevant, and necessary to  
3 the decision in the case; that they are not or it's indeter-  
4 minant at this point in time.

5 If you can decide on the basis of the documents  
6 alone that further evidentiary proceedings are warranted now,  
7 so be it; we'll fight out the question of the in camera  
8 proceedings either in court or here -- or probably both  
9 places. And we'll proceed on some sort of basis.

10 If you decide that nothing looks very important,  
11 presumably that would be the end of it until the Staff's  
12 investigation was concluded. And the same thing for the  
13 documents that might fall in the indeterminant category.

14 As Mr. Goldberg points out, we won't be able to  
15 have an evidentiary session on this that's meaningful until  
16 the Staff has concluded its investigation, at which point in  
17 time promising documents may be shown to be immaterial; or  
18 conversely, previously immaterial documemnts may be shown to  
19 have some significance.

20 As much as I would like, on behalf of Commonwealth  
21 Edison Company, to say that we ought to shut shut off right  
22 now, I think that it would always be open to the parties or  
23 to the Board, on its own motion, if an investigation that was  
24 concluded in October of November or December showed a serious  
25 safety problem that was significant, that we be back in

1 hearings considering it on an open record, with all the  
2 documents available to all the parties, I think that, in part,  
3 we may be creating a situation that is not really necessary.

4 As I have thought this through, even should the  
5 Board decide to have an evidentiary session on this incomplete  
6 investigations, my guess is that what you would get from the  
7 Staff is a status report.

8 JUDGE SMITH: Yes, that's right. That's all we  
9 expected. We expected more than that, a status report, and  
10 possibly the nature of the allegation and determination of  
11 whether we believed there is further inquiry indicated on  
12 that.

13 Don't forget, one of the reasons for reopening this  
14 is we don't know anything about these investigations, and we  
15 want to know something about them.

16 And actually, what we wanted was a status report  
17 and the nature of the allegations.

18 MR. MILLER: No, sir. I was talking about any  
19 evidentiary hearing that might ultimately flow from your  
20 ex parte consideration of these documents or, if you so rule,  
21 an ex parte oral submission by the Staff.

22 Even should we get to a full-fledged evidentiary  
23 hearing, under whatever protection seems appropriate, the  
24 most you're going to be able to get on the public record at  
25 that point in time, I believe, is a status report.

1           We will not know. And from what the Staff has said,  
2 we will probably be barred from investigating ourselves by  
3 the quasi-judicial means, discovery depositions and so on,  
4 as to what is going on with these investigations until the  
5 Staff has concluded its work.

6           JUDGE SMITH: Now, the Board proposed this idea  
7 of the Staff coming to us in camera ex parte in an effort  
8 to accommodate the dispute between the Intervenors and the  
9 Applicant.

10           Neither the Intervenors nor the Applicant want us  
11 to do it.

12           I'm sure you've considered the consequences,  
13 Mr. Miller -- you have alluded to them -- that we wait, just  
14 put the whole thing aside and wait. According to the prefiled,  
15 public, written testimony of the Staff, it may be January of  
16 '84 -- or perhaps even later -- that they complete these  
17 investigations.

18           The last advice you have to us is that you would  
19 like to load fuel in December of '83, but you're aware of the  
20 consequences of that.

21           MR. MILLER: Judge Smith, that's why I want to get  
22 some resolution now. And I believe that consideration of the  
23 documents, which, as Ms. Whicher said, witnesses' testimony may  
24 be somewhat different, depending on the state of knowledge at  
25 a particular time and the previous examination that they've



1 undergone on an issue, that the documents are presumably  
2 preexisting and they say what they say.

3 I don't know -- and perhaps Mr. Goldberg could  
4 enlighten us -- as to whether or not, among the documents to  
5 be submitted to you, are written allegations by various  
6 individuals -- in which case, you would certainly have an  
7 idea of what the thrust of the NRC's investigation was and  
8 what documents they have in hand to further the investigation.

9 And you may be able to dismiss, out of hand, all  
10 29 of the remaining incomplete investigations.

11 That's why I'd like you to go forward now with at  
12 least the document examination, as I believe the proper show-  
13 ing has been made under 2.744.

14 There is nothing I could do -- you say I have to  
15 take the consequences, but this Board has stated -- and I  
16 know that it's absolutely correct -- that you have an  
17 obligation to inquire into these matters. And that has been  
18 confirmed by the Commission's policy statement.

19 And if the consequences fall on the Applicant,  
20 well, that's going to be too bad. But I cannot think of any  
21 way around it at this point in time.

22 JUDGE SMITH: Or the consequences could fall on  
23 the Intervenors, too.

24 It could very well be that a reading of the  
25 documents without the textural information or explanation



1 would indicate nothing to us to require further hearings.

2 MS. WHICHER: Judge Smith, it is the ex parte  
3 nature that I object to.

4 JUDGE SMITH: I understand that; right. It may  
5 very well be, since we know nothing about these investigations  
6 now -- and we may look at the documents which underlie these  
7 investigations -- we may decide to close up shop and go home  
8 and wait until the end of the investigations and the reports  
9 come in and then see what happens.

10 MS. WHICHER: Or you may decide that you need more  
11 information from the Staff and from OI, in which case, under  
12 certain circumstances -- and this may very well be one -- an  
13 in camera, but not ex parte, proceeding can be had.

14 (Board conferring.)

15 JUDGE SMITH: Any additional arguments to be made?  
16 I think we should take a 15-minute recess.

17 MS. WHICHER: I forgot to ask Mr. Goldberg a  
18 question.

19 What would be your position, Mr. Goldberg, if we  
20 had an ex parte in camera proceeding in which we did nothing  
21 except receive documents?

22 MR. GOLDBERG: Judge, that's at your discretion.  
23 We will give you whatever information about the matters in  
24 whatever form and to whatever extent you want. If it would  
25 extend to documents, fine.

1                   Now, let me say on documents, as I indicated in  
2 my August 1 letter to the other counsel -- and this, in part,  
3 goes to a comment Mr. Miller made -- beyond those documents  
4 identified in my letter as being withheld on privilege  
5 grounds, there are not other documents pertaining to the  
6 incomplete inspections. Material has been expurgated from  
7 documents we have provided.

8                   That material includes a description of  
9 uninvestigated allegations, without elaboration. It also  
10 contains the identify of confidential informants. So that  
11 beyond the documents that the parties presently have, either  
12 in whole or in expurgated form, and otherwise described in  
13 the August 1 letter, there is not remaining any documents  
14 pertaining to uninspected allegations.

15                   MR. MILLER: Does that include OI, the investiga-  
16 tions being conducted by OI as well?

17                   MR. GOLDBERG: The Staff has indicated it has  
18 in its possession one document pertaining to a matter  
19 referred to OI. And we can supply the Board with that  
20 document, which would describe more fully the allegation  
21 under investigation by OI, which investigation is referred  
22 to in general terms in our direct testimony as an allegation  
23 received on or about March 10th of 1983.

24                   So that is the only documentary material that the  
25 Staff has in its possession pertaining to an OI investigation.

1 Staff also knows something about those allegations,  
2 having referred most, if not all, of those allegations to OI.

3 And as I indicated, OI is quite prepared to provide  
4 the same degree of information about its investigations to  
5 the Board exclusively in camera, as the Staff is prepared to  
6 to do.

7 JUDGE COLE: Orally?

8 MR. GOLDBERG: Orally or documentary. Although I  
9 do not know now that they have any documentary material, I  
10 do know that their investigation is progress.

11 So, the Staff could provide oral information  
12 concerning the allegations as of their receipt by the  
13 region and referral by OI. OI would have to speak to the  
14 nature and progress and prospects of their investigation.

15 MS. WHICHER: You're not representing that OI has  
16 no documents which you do not have?

17 MR. GOLDBERG: I know of no other documents.

18 The letter from OI Director Hayes to this Board  
19 on July 21 or 22 identifies no further documents. And I  
20 don't know what, if any, documents have been assembled by  
21 that office in the interim.

22 MS. WHICHER: We don't know.

23 MR. GOLDBERG: We don't know. But we are not in  
24 possession of documents, other than the one I alluded to, that  
25 form a part of OI's investigation, nor would we have access to

1 them, because they closely guard their documentary material.

2 JUDGE SMITH: How about completed interview  
3 statements?

4 MR. GOLDBERG: Then, whatever they indicate is in  
5 their possession in that letter is in their possession, and  
6 perhaps they have assembled other material; but we do not have  
7 that material. I am certain that would be among the material  
8 they would produce for the Board's review.

9 JUDGE SMITH: This, incidentally, is different  
10 than the Staff's understanding expressed in the Motion for  
11 Reconsideration of August 5.

12 MR. GOLDBERG: In what way, Judge?

13 JUDGE SMITH: Where you stated that somewhere in  
14 there --

15 MR. GOLDBERG: In our note, we indicated we had  
16 been requested not to divulge information concerning their  
17 investigation unless the Board ordered us.

18 JUDGE SMITH: That's not what it said. It says:  
19 You have been requested not to reveal any information, and  
20 you will not reveal any information unless we order you.

21 MR. GOLDBERG: Yes, that's correct.

22 JUDGE SMITH: Not "them," "you."

23 MR. GOLDBERG: That's correct.

24 JUDGE SMITH: I'm telling you we have information.  
25 The information is that the allegations were first made to the

1 Region. So, there's information in the heads of the  
2 individual recipients and in one instance a document. We've  
3 been asked by that office not to divulge the information, but  
4 we will abide by a Board directive requiring that disclosure  
5 in camera if the Board wants.

6 But I have been further advised since the  
7 submission of this motion that OI representatives, themselves,  
8 will provide that information, which would alleviate the need  
9 to obtain it from the Staff.

10 But unless OI appears to seek the protection of that  
11 information from Staff disclosure to the Board exclusively  
12 in camera or the Board says, "All right, we're not interested,"  
13 we will give you that information.

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1 JUDGE SMITH: You won't be representing OI in this  
2 proceeding?

3 MR. GOLDBERG: No, and I don't know that they'll be  
4 represented by counsel. It was my impression that they would  
5 be represented by investigators and perhaps the regional  
6 investigator.

7 JUDGE SMITH: They were aware, of course, that this  
8 hearing was scheduled for today, for this afternoon?

9 MR. GOLDBERG: Yes, I conferred with him, and they  
10 did discuss the prospects of an appearance but after further  
11 conference and not knowing what would transpire today and  
12 not wanting to engage in the kind of elaborate debate that  
13 we have necessarily had on the motion, they just authorized  
14 me to represent that if the Board accepted the principal in  
15 our motion that they would appear on a scheduled date to give  
16 the information, but they did not want to engage in any other  
17 colloquy.

18 (Recess.)

19 JUDGE SMITH: The Board is ready to proceed. Our  
20 decision is that we will excuse all of the parties for the  
21 rest of the afternoon except the NRC Staff, who will present  
22 to us privately in camera, ex parte documents and oral  
23 presentations consistent with their motion. It will be on  
24 the record.

25 Among the considerations that led us to this result



1 are the following.

2 One is, we are mindful that the joint intervenors in  
3 this case did not in the first instance seek this information.  
4 They sought only to have certain allegations of John Hughes  
5 received into evidence. We do not believe that the intervenors  
6 will be prejudiced by this approach.

7 While we recognize that once the Board decided to  
8 make the inquiry, the intervenors ratified it. The intervenors  
9 will not be prejudiced in any way that we can see. A record  
10 will be kept of it. We will not go off the record in the  
11 in camera, ex parte session, and any prejudicial error that might  
12 arise, the intervenors will be able to demonstrate. During  
13 the in camera session, we will seek a greater justification,  
14 if any exists, for the need for proceeding without the par-  
15 ticipation of the parties. We will dwell on that. We will  
16 also consider as the regulation requires, whether there is  
17 privilege and we will also seek information as to the impact  
18 of the information on the hearing which is not necessarily  
19 relevant at this stage of the proceeding.

20 We are aware that the applicant approaches this  
21 approach and asserts it is willing to take all of the risks  
22 of any delay if we wait until the investigations are completed.  
23 It may very well be, and I think however there might be  
24 difficulty if the plant sits idle waiting for this investiga-  
25 tion to be completed and we decide it is then necessary to

1 reopen the record together with the prefiled testimony,  
2 discovery, perhaps proposed findings and everything else.

3 Notwithstanding that, even assuming that the Appli-  
4 cant is willing to take that risk, there is more involved and  
5 that is the resources of the Commission and resources of this  
6 Board and the public interest in proceeding with dispatch and  
7 having this case resolved.

8 We are very much aware of the Applicant's arguments  
9 that the policy statement is couched in very uncertain terms  
10 and it seems to be advisory and it is.

11 It says "should" where we're told of the actions that  
12 should be taken and it also introduces the two operative  
13 paragraphs with this phrase (quote), "Until the task force  
14 reports and the Commission acts on its recommendations, the  
15 Commission's policy in individual cases would be as follows"  
16 (end quote).

17 So, the policy guidance -- I believe we have to  
18 accept your arguments, Mr. Miller -- and are not binding on  
19 the Board. At this time, however, they serve another purpose,  
20 and that is they are permissive.

21 And there is a provision in the Commission's regula-  
22 tions with which we are all familiar, 2.758, which authorizes  
23 upon the certification of the presiding officer, the Commis-  
24 sion to waive regulations for a particular need.

25 In this instance, no certification was made by the

1       presiding officer, but certainly the Commission has a right  
2       on its own to perceive that there are circumstances extant  
3       which requires a waiver temporarily of the regulations, and  
4       that's what we see the Commission has done here.

5               The only basis that we can reconcile the Commission's  
6       action, and we think it's a rational basis, the Commission  
7       recited in the prologue to its policy statement that recent  
8       developments of several ongoing licensing proceedings re-  
9       quired the Commission to address how the Staff, Office of  
10      Investigation and these Boards treat information regarding  
11      pending inspections and investigation. So, we regard that  
12      as somewhat of a sua sponte Commission action under 2.758,  
13      waiving for this case the provision of 2.744, which do relate  
14      to documents and the ex parte consideration, that is, however  
15      valid it may be, is our legal justification.

16             Recently, as a result of this case, we received com-  
17      munications on the letterhead of Applicant's law firm for  
18      Mr. Gallo concerning the contract with Tayloe Associates,  
19      the reporting firm. We have inquired during the recess and  
20      we understand that Mr. Gallo represents the reporting firm;  
21      therefore, we are asking you, Mr. Miller, on behalf of your  
22      firm, to institute the necessary administrative controls to  
23      assure that the client-attorney relationship between the  
24      reporter here and your firm does not violate the in camera,  
25      ex parte nature of the proceeding we are about to have.

1 MR. MILLER: Yes, sir, I will undertake to do that.

2 JUDGE SMITH: Is that satisfactory with you, Mr.  
3 Goldberg, that representation and handling of that?

4 MR. GOLDBERG: Yes, Judge, I would just note, as I  
5 indicated earlier, that OI is similarly prepared to provide  
6 information to the Board.

7 I did not anticipate that that session would take  
8 place today, although they are available on 24-hour notice.  
9 We are prepared to proceed today. Would you --

10 JUDGE SMITH: Yes, we would plan to excuse all of  
11 the parties and just proceed immediately. Now this could  
12 mean that at the end of today or possibly tomorrow, we would  
13 make a determination, possibly that we would have an ex parte  
14 conference of the parties on a future -- I don't mean ex parte  
15 conference, I mean in camera conference of the parties on  
16 future evidentiary presentations in camera and protective  
17 order. And that is a possibility. And I would like to see  
18 if that happens, to have it happen this week.

19 Therefore, we would announce at the beginning of the  
20 session if there's going to be any type of in camera dis-  
21 cussion and try for the parties to renew their TRO efforts.

22 MR. GOLDBERG: In that eventuality, then, perhaps  
23 OI ought to be present to participate in this ex parte con-  
24 ference and I will confess taking some responsibility for  
25 not anticipating that that session would take place today

1 and so, advising them and advising them to be available on  
2 short notice.

3 JUDGE SMITH: The difficulty is, Mr. Goldberg, that  
4 there apparently will be two discrete aspects between what  
5 you have pending and what they have pending. Even if the  
6 Commission's policy statement directs OI to proceed in a  
7 certain manner, it does not give this Board any jurisdiction  
8 over OI. They may appear or not appear, I don't know, we  
9 cannot control them.

10 The most recent letter I have indicates that they  
11 will not cooperate and Mr. Kepler's affidavit says that they  
12 will not cooperate.

13 MR. GOLDBERG: Well, my telephone conversation with  
14 them indicates that they will cooperate to the extent that  
15 I indicated and that that cooperation will be coincident with  
16 the Staff's offer. The prior letter -- and I'm sure you can  
17 appreciate -- well, I'm asking you to appreciate the diffi-  
18 culty in speaking for that office but upon receipt of the  
19 Commission policy statement, they have modified their position  
20 and will join in the same type of disclosure that the Staff  
21 has volunteered.

22 JUDGE SMITH: Is there any particular reason why the  
23 two sessions should be combined? I would imagine that Region  
24 III Office of Inspection and Enforcement could do their thing  
25 and have a discussion of that at the end of this week.

1           OI could perhaps, back in Maryland, have an ex parte  
2 presentation but at least we want to get moving on it.

3           MR. GOLDBERG: I don't know whether to ask for an  
4 opportunity to confer or a brief recess, but I'd like to con-  
5 fer with OI on that.

6           JUDGE SMITH: If we do that necessarily it means that  
7 we will not begin the procedures necessary to receive evidence  
8 on uncompleted investigations this week. It will mean another  
9 trip, another delay.

10          MR. GOLDBERG: If what? I'm saying that OI is  
11 available to appear this week.

12          JUDGE SMITH: Yes, but we have Judge Nordberg sitting  
13 in Chicago telling us that if we try to proceed with any ex  
14 parte discussion that the judges of this district will look  
15 unkindly upon the Board, and I think we should be cognizant  
16 of that. And the only way we can have any parties discussion  
17 of it is to have your presentation this afternoon.

18          MR. GOLDBERG: We are prepared to make a presenta-  
19 tion this afternoon, but perhaps OI's presentation will also  
20 be a factor in --

21          JUDGE SMITH: In your presentation?

22          MR. GOLDBERG: I'd like to confer with that office  
23 because there are matters underinvestigation by that office,  
24 and make sure they understand we will be imparting informa-  
25 tion concerning that.



1           As I have indicated on the phone, and they have in-  
2           dicated their willingness to appear personally to impart that  
3           information this week, and we're prepared to go forward. I  
4           want to confer with that office and if it's going to be in-  
5           fluential in the decisional process, the Board is going to  
6           undergo about whether to make this the subject of investiga-  
7           tion, maybe you should hear the complete story.

8           JUDGE SMITH: Are we being perhaps unrealistic in  
9           hoping that we could have the beginning of any possible  
10          in camera, party participation discussion of future evidenti-  
11          ary presentations this week? Is that being unrealistic?

12          MR. GOLDBERG: I don't know. I don't think it's  
13          beyond the realm of possibility. It would obviously depend  
14          on the outcome of our exclusive session and what kind of  
15          information the Board proposes to impart and under what kind  
16          of restrictions and what the nature of that session is going  
17          to be, so we could formulate our position at that time.

18          JUDGE SMITH: Well, with your representation, I  
19          guess we'll have to do it that way. If it's not realistic,  
20          I thought we'd just begin with the testimony that's already  
21          prepared and put the matter off.

22          MR. GOLDBERG: I don't know if it's realistic or  
23          unrealistic.

24          JUDGE SMITH: All right. Why don't we take a break  
25          and you can communicate with them and see what they want to do.

End 9.

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MR. GOLDBERG: Okay.

(Recess.)

1 JUDGE SMITH: Mr. Goldberg.

2 MR. GOLDBERG: May I apologize, first, for the  
3 delay.

4 In conference with OI representatives, they have  
5 expressed the preference that they be present for the entirety  
6 of the exclusive Board review of information concerning  
7 uninspected allegations.

8 They can be present to commence such a session  
9 tomorrow afternoon.

10 However, the Staff can otherwise proceed with a  
11 discussion of allegations not under OI investigation and  
12 produce documents pertaining to the allegations in their  
13 entirety.

14 So, however you want to proceed. But OI said  
15 that they --

16 JUDGE SMITH: Yes, I have not appreciated that  
17 overlapping problem there. Yes, that's reasonable.

18 Well, then, let's proceed with the I&E pending  
19 investigations.

20 MR. GOLDBERG: And can we notify that office to  
21 be present tomorrow, then, for the balance of the submission?  
22 They'd like to --

23 JUDGE SMITH: All right. That would be tomorrow.

24 And then the earliest that we could have a  
25 discussion of possible evidentiary presentation, then, would

1 Friday morning.

2 That would be possible, wouldn't it?

3 MR. GOLDBERG: If we're able to conclude the  
4 public testimony, which I thought would be the order -- you  
5 know, that was my expectation when we first came, that we  
6 would take that up as a first order. So -- but we can --

7 JUDGE SMITH: Well, I think they should be called  
8 then.

9 MR. GOLDBERG: Okay.

10 JUDGE SMITH: Other than the opposition to the  
11 approach in its entirety, do you have any comments about the  
12 procedure?

13 MS. WHICHER: My only concern is a personal one,  
14 which would be to question the Board as to what the schedule  
15 will be tomorrow. I need to make sure that I have complete  
16 sets of exhibits for all the witnesses.

17 If I could just have some idea -- will it take all  
18 afternoon? Should I be prepared to come at 3:00 o'clock?

19 I don't know what to do.

20 JUDGE SMITH: I would expect we would have to allow  
21 two hours -- would you say?

22 MR. GOLDBERG: This evening?

23 JUDGE SMITH: No, tomorrow afternoon.

24 MR. GOLDBERG: I don't think that's unreasonable.  
25 Yes. And the morning would be taken up with the direct

1 Applicant testimony.

2 MR. MILLER: I'd like to just suggest that we would  
3 begin with our first witness, whose testimony is really pretty  
4 limited, that we continue tomorrow morning and break at 2:30  
5 or 3:00 for the in camera ex parte session. At that point --  
6 everybody except the Staff would be excused at that point in  
7 time.

8 JUDGE SMITH: About how long would your presentation  
9 be, the I&E presentation?

10 MR. GOLDBERG: I guess a couple of hours, but we  
11 expected something of a dialogue.

12 We can make some remarks and then respond to any  
13 questioning. But I would think --

14 JUDGE SMITH: Can you provide us documents today  
15 and go ahead with your witness? And then we'll be in a better  
16 position to ask questions tomorrow perhaps.

17 MR. GOLDBERG: Give the documents only today --  
18 documents only -- and put off the discussion, in its entirety,  
19 until tomorrow? Sure.

20 MS. WHICHER: Judge Smith, it is nearly 5:00 o'clock,  
21 And I know Mr. Kokus' direct testimony is quite short, but I  
22 but I do have quite a lot of cross-examination for him. I  
23 would prefer not breaking it up.

24 JUDGE SMITH: This is one of those days when  
25 absolutely nothing works -- nothing.

1 (Laughter.)

2 MS. WHICHER: Then, let's go home and come back  
3 tomorrow.

4 MR. GOLDBERG: We can do either. We can go as  
5 long and as far as you want today, either orally or in  
6 documents, or, you know, to resume tomorrow afternoon.

7 I think we are talking about a couple of hours.

8 JUDGE SMITH: Mr. Miller, in view of the extensive  
9 cross-examination, I think it would be helpful to the Board to  
10 get on with the -- we know what the completed investigations  
11 are. We won't know, really, what our problems are until  
12 we --

13 MR. MILLER: Okay.

14 Should we all excuse ourselves at this point in  
15 time expect for the Staff?

16 JUDGE SMITH: In view of the lengthy cross-  
17 examination, does that make sense to you?

18 MR. MILLER: Yse, sir, I think it does.

19 MR. BECKER: Mr. Kokas will be on at 9:00 tomorrow  
20 morning.

21 JUDGE SMITH: Let's make it 8:30. I think this  
22 week is already running short.

23 MR. MILLER: In about 3:00 o'clock tomorrow?

24 MR. GOLDBERG: Whatever time you want to set for  
25 a break, I'll tell them to be here.



1 JUDGE SMITH: Tell them to be here at 3:00. and  
2 then we might start with you earlier -- well, no, we're going  
3 to start with you now, right? Tell them to be here at 3:00.

4 MR. GOLDBERG: I'll even tell them to be here in  
5 advance of that.

6 JUDGE SMITH: Ms. Whicher, Mr. Goldberg, before you  
7 leave, we have provided copies of a Protective Order and  
8 Affidavit of Nondisclosure which was adopted from and modified  
9 -- adopted from the Diablo Canyon case and modified to meet  
10 the circumstances of this case.

11 You will note that, unlike the provision we made  
12 earlier on the Westinghouse Protective Order, it does require  
13 counsel to enter into the affidavit the agreement -- for which  
14 I apologize. That would not be my desire, but that was the  
15 standard approved by the Appeal Board and the Commission in  
16 Diablo Canyon. And I'm just giving it to you as a draft, in  
17 the event we do have in camera proceedings, that you will at  
18 least be familiar with what we were thinking would be the  
19 appropriate order.

20 MR. MILLER: Judge Smith, I take it from your  
21 ruling that the Staff's motion has, in effect, been granted.

22 JUDGE SMITH: Yes.

23 MR. MILLER: Okay.

24 (Whereupon, at 5:00 p.m., the open portion of the  
25 record was closed.)

CERTIFICATE OF PROCEEDINGS

This is to certify that the attached proceedings before the  
NRC COMMISSION

Commonwealth Edison Company  
In the matter of: (Byron Nuclear Power Station, Units 1  
and 2)

Date of Proceeding: Tuesday, August 9, 1983

Place of Proceeding: Rockford, Illinois

were held as herein appears, and that this is the original  
transcript for the file of the Commission.

Ann Riley

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Official Reporter - Typed

*Ann Riley*

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Official Reporter - Signature