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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
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In The Matter of)	
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)	
COMMONWEALTH EDISON COMPANY)	Docket Nos. 50-454 0L
)	50-455 0L
)	
(Byron Nuclear Power Station,)	
Units 1 & 2))	

COMMONWEALTH EDISON COMPANY'S OPPOSITION TO
DAARE/SAFE'S MOTION TO RECONSIDER
SUMMARY DISPOSITION OF CONTENTION 1
WITH RESPECT TO QUALITY ASSURANCE
AND QUALITY CONTROL

On September 23, 1982, DAARE/SAFE filed "DAARE/SAFE's Motion To Reconsider Summary Disposition of Contention 1 With Respect To Quality Assurance and Quality Control". As is explained in detail below, Commonwealth Edison Company ("Edison") submits that through its motion DAARE/SAFE is improperly attempting to circumvent the summary disposition process established by the Commission's Rules of Practice. Absent a showing of good cause for its untimely submittal, many of the matters presented in DAARE/SAFE's motion were required to be presented at an earlier stage in this proceeding to receive consideration by this Board. In addition, those presented in the motion which DAARE/SAFE can legitimately claim arose following the decision of this Board granting summary disposition with respect to Contention 1 are insufficient

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to grant the relief sought. For these reasons, Edison respectfully requests that DAARE/SAFE's motion be denied.

ARGUMENT

1. Background

On May 9, 1980, DAARE/SAFE filed its amended contentions in this proceeding. DAARE/SAFE contention 1 alleged that Edison's "record of noncompliance with Nuclear Regulatory Commission regulations ... demonstrates its inability, unwillingness, or lack of technical qualifications to operate the Byron Station ..." One of the bases for the contention was stated as follows:

The history at all of Applicant's plants (whether now operating) of its failure (and that of its architect-engineers and contractors) to observe on a continuing and adequate basis the applicable quality control and quality assurance criteria and plans adopted pursuant thereto.

On October 23, 1981 DAARE/SAFE initiated discovery by way of written interrogatories to Edison requesting certain information regarding quality assurance. DAARE/SAFE saw fit not to inquire into any of the factual matters which are presented in support of its present motion for reconsideration.

Edison initiated discovery requesting that DAARE/SAFE identify any factual support for its contention. The matters raised in DAARE/SAFE's present motion were not identified in its response to Edison's discovery request.

By Order dated September 9, 1981, this Board established a schedule for the conduct of prehearing matters. The schedule required, inter alia, that summary disposition motions be filed by June 7, 1982 with responses due June 28, 1982. Edison's Motion for Summary Disposition of Contention 1 was filed in accordance with the Board's schedule. To accommodate DAARE/SAFE, the Board extended the due date for its response to July 15, 1982.

Edison's Motion for Summary Disposition presented a detailed discussion of Edison's organizational structure as it relates to Edison's efforts to assure that its nuclear facilities are operated safely, and the specific measures which will be implemented at Byron to assure the safe operation of that facility. Included as part of this presentation was the affidavit of Walter Shewski, Edison's Corporate Manager of Quality Assurance. Mr. Shewski's affidavit described in detail the Company's Quality Assurance Program as it will apply to the operation of the Byron Station.^{1/} The affidavit also stated that Edison is responsible for all phases of plant operations, including safety related activities carried out by Edison contractors. (Shewski Affidavit, p. 4; Cf. DAARE/SAFE Motion, p. 8). Finally, Mr.

^{1/} It should not be surprising that many of Mr. Shewski's statements are in the future tense. (See DAARE/SAFE Motion, p. 8). Mr. Shewski's affidavit describes what will be the quality assurance department's role in assuring safe operation of Byron in response to DAARE/SAFE's contention that Edison does not have the requisite technical qualifications to operate Byron safely. Since Byron is not now operating, Mr. Shewski's statements could obviously not have been stated in the present tense.

Shewski stated his conclusion, and the basis therefore, that Edison's Quality Assurance Program will be satisfactorily implemented at the Byron Station during operations. (Shewski Affidavit at p. 7).

DAARE/SAFE responded to Edison's Motion. The response contained a discussion which purported to controvert certain material facts as to which Edison asserted there existed no genuine issues to be heard based upon the affidavits of "Gogol", which was not submitted by DAARE/SAFE, and Michael D. Molander which relied upon various "exhibits" which also were not provided by DAARE/SAFE.^{2/}

In its ruling on Edison's Motion, the Board quite appropriately determined that DAARE/SAFE's "unsubstantiated general allegation that at all of Applicant's plants Commonwealth Edison Company failed to observe on a continuing and satisfactory basis applicable quality control and quality assurance requirements" was entitled to no weight. (Order, at 6). It also found that in light of the presentations made by Edison and the Staff, which were not refuted by DAARE/SAFE, DAARE/SAFE's assertion that Edison was unable, unwilling and unqualified to operate the Byron Station in accordance with NRC regulations was not supportable. (Order, at 7). Consequently, the Board granted Edison's motion.

^{2/} We note that in its present motion, DAARE/SAFE has provided Mr. Gogol's affidavit, the substance of which will be discussed infra, but still has not provided the "exhibits" relied upon by Mr. Mollander.

Apparently dissatisfied with the Board's ruling, DAARE/SAFE now attempts to marshall a further factual presentation. This presentation consists of: (1) three affidavits in which the affiants rely on alleged facts, the existence of which significantly predates the date on which DAARE/SAFE's response to Edison's Motion for Summary Disposition was due; (2) a report on QA/QC at Byron prepared by the NRC Office of Inspection and Enforcement dated June 24, 1982; and (3) an affidavit submitted by Edward Gogol raising matters primarily concerning Edison's LaSalle Station. The I&E report was apparently not made available to DAARE/SAFE until August, 1982. While the recent date on which the report was received by DAARE/SAFE could possibly justify its tardiness in relying on that document in opposition to the motion for summary disposition, it is obvious from the face of the document that the information contained therein predates DAARE/SAFE's response to the summary disposition motion and is insufficient to warrant a reversal of the grant of the motion for summary disposition. In addition, the matters raised by Mr. Gogol are simply not probative of the question whether the Board's decision to summarily dispose of Contention 1 should stand.

2. Discussion

A. Alleged Facts Which Existed Prior to the Board's Summary Disposition Ruling.

The affidavits of Messrs. Gallagher, Stomfrey-Stitz and Smith each recites alleged deficiencies in certain

construction practices at Byron during the period 1977-1980. Irrespective of the merits of the claims presented in the affidavits, and the relationship, if any, which these claims might have with respect to the safe operation of Byron,^{3/} it is clear that the allegations contained therein relate to matters which predate the time by which DAARE/SAFE was required to present evidence which it believed gave rise to contested factual issues related to Contention 1. We do not know, nor is it apparent from DAARE/SAFE's motion, whether DAARE/SAFE was aware of these matters at the time it filed its response to Edison's motion. We do know, however, that as a party to this proceeding, DAARE/SAFE was responsible for gathering evidence it deemed relevant to the presentation of its case, and if it wanted such evidence considered, was responsible for presenting it to the Board in a timely manner. It is also clear that DAARE/SAFE failed to meet its responsibility, and seeks to avoid the consequences of this failure through its motion to reconsider.

It is axiomatic under our legal and administrative systems that a party cannot hoard evidence until such time as it most pleases the party to offer it, nor can a party

^{3/} Of course, the allegations will not be ignored. We note that the allegations reflect an incomplete understanding of Edison's quality assurance program. This is hardly surprising given the subordinate positions and correspondingly limited knowledge of the affiants concerning the overall quality assurance program. As we explain below, the claims presented will be investigated by both Edison and the NRC Staff.

reasonably expect a tribunal to consider untimely submitted evidence without justifying its tardiness. Requests for reconsideration are particularly inappropriate vehicles by which to attempt to accomplish such a result. As the Commission has recently reiterated, "motions to reconsider should be associated with requests for re-evaluation of an order in light of an elaboration upon, or refinement of, arguments previously advanced." Central Electric Power Corporation, Inc. (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787 at 790 (1982). Such a motion is "an appropriate means of alerting a tribunal to facts which that tribunal may have either overlooked or failed to appreciate fully." P.A.S.N.Y. and Niagra Mohawk Power Corporation (James A. Fitzpatrick Nuclear Power Plant, Unit 1), ALAB-169, 6 AEC 1157, 1158 (1973).

DAARE/SAFE's motion, insofar as it relies upon the Affidavits of Messrs. Gallagher, Smith and Stomfrey-Stitz, does not point to facts or factors that the Board purportedly overlooked in its initial summary disposition ruling. Nor is DAARE/SAFE presenting an argument that this board misunderstood the meaning or the impact of evidence previously submitted. Instead, DAARE/SAFE is using its motion as a vehicle for a second complete attempt at convincing this Board that material factual issues are raised by Contention 1. It is urging this Board to ignore its failure to submit evidence in a timely manner, with no justification there-

fore, in effect to allow it a second opportunity to accomplish what it could not the first time. Under these circumstances, DAARE/SAFE's attempt to use the reconsideration process is manifestly inappropriate. The affidavits in question should therefore be stricken.

Quite obviously, a denial by this Board of DAARE/SAFE's request in no way implies that the matters brought forward in the affidavits will be ignored. Both Edison and the NRC Staff are responsible for investigating allegations which might raise safety concerns, to assure that the public health and safety is protected. The Commission recently made this very point in the course of ruling against permitting eight late-filed contentions to be litigated in a licensing proceeding. Cincinnati Gas and Electric Company (William H. Zimmer Nuclear Power Station, Unit No. 1), CLI-82-20, 2 CCH Nucl. Reg. Rptr. ¶30,691 (July 30, 1982). The Commission emphasized that the matters raised by the eight contentions were being dealt with in the course of an ongoing investigation and in the NRC staff's monitoring of the applicant's Quality Confirmation Program. Clearly, the NRC staff is monitoring the Byron program with at least equal diligence, and any serious questions raised by the affidavits will be given thorough scrutiny.

2. Alleged Facts Which Arose Following The Board's
Summary Disposition Order

Certain information presented by DAARE/SAFE can, at least arguably, be deemed "new facts" which arose following the Board's ruling. This information consists of Mr. Gogol's affidavit pertaining to alleged deficiencies at Edison's LaSalle Station and the NRC Inspection Report which DAARE/SAFE asserts was not provided to it until August, 1982. Obviously, when information which is relevant to an earlier order was simply not available for presentation to a tribunal during its deliberations, despite a party's best efforts to marshal all available evidence in support of its case, different standards govern requests for reconsideration. However, because of the interest in achieving a final resolution of disputes, a party seeking to reopen decided issues must do more than simply present new information which may have been relevant. "After a decision has been rendered, a dissatisfied litigant who seeks to persuade us - or any tribunal for that matter - to reopen a record and reconsider 'because some new circumstance has arisen, some new trend has been observed or some new fact discovered,' has a difficult burden to bear." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-359, 4 NRC 619 at 620 (1976). In an earlier decision, the Appeal Board described that burden:

"... in administrative proceedings, as in court litigation, there is no occasion to remand a cause for further proceedings on the basis of newly discovered evidence' which does not show that a different result would have been reached initially had it been considered."

Northern Indiana Public Service Co. (Bailey Generating Station, Nuclear -1), ALAB-227, 8 AEC 416 (1974).

Neither Mr. Gogol's affidavit nor the I&E Report present new information sufficient to meet this heavy burden. Mr. Gogol's affidavit contains various broad allegations, which are unsupportable in light of the Commission's decision authorizing operation of the LaSalle Station. Moreover, these allegations relate to a different facility, with different vendors and personnel and, as such, are simply not probative to the issues raised in Contention 1.

The NRC I&E report, while dated in June, 1982, is based on events which took place over a period of many years prior to that time. For example, the turnover of Quality Assurance superintendents at the Byron site, set forth at page 16 of the I&E report, refers to a situation which began in January, 1976. Clearly, a properly framed interrogatory or request for documents from DAARE/SAFE to Edison would have elicited that information. DAARE/SAFE chose not to engage in discovery on that subject. Accordingly, DAARE/SAFE's assertion that it just became aware of the information contained in the I&E report is disingenuous.

Moreover, the report on its face demonstrates the relative insignificance of the information contained therein in terms of the safe operation of the Byron facility. The letter states that Edison's QA/QC program "appeared good", and while violations were identified, the letter also states

the NRC Staff's conclusion that Edison's QA/QC program is adequate. The NRC letter simply shows that the NRC is performing its regulatory function, and falls far short of demonstrating that the motion for summary disposition would have been denied had the information contained therein been considered by the Board.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Commonwealth Edison Company respectfully requests that DAARE/SAFE's Motion for Reconsideration be denied.

Respectfully submitted,

By Michael I. Miller
One of the Attorneys for
Commonwealth Edison Company

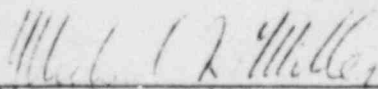
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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Commonwealth Edison Company, certifies that on this date he filed two copies (plus the original) of the attached pleading with the Secretary of the Nuclear Regulatory Commission and served a copy of the same on each of the persons at the addresses shown on the attached service list in the manner indicated.

October 10, 1982



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