UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Morton B. Margulies, Chairman
Dr. Richard F. Cole
Dr. Dixon Callihan

In the Matter of	Docket Nos. STN 50-454 OL STN 50-455 OL
COMMONWEALTH EDISON COMPANY	
(Byron Station, Units 1 and 2)	
	October 12, 1982

MEMORANDUM AND ORDER RULING ON
APPLICANT'S DISCLOSURE OBLIGATIONS

By motion of August 27, 1982, Applicant seeks a ruling on its disclosure obligations. NRC Staff responded to the motion on September 15, 1982 giving its views. No other party has filed a response to the motion.

The matter had its beginning in May 1982 when Applicant began the practice of submitting copies of all Byron-related correspondence between it and NRC Staff to the Licensing Board and the other parties. It was done for the expressed purpose to assure that the Licensing Board would receive information pertinent to matters pending before it.

Based on a transmittal of such correspondence to the Licensing Board on July 6, 1982, intervenor League, in a letter to the Licensing Board, of July 16, 1982, complained of the practice. It raised the possibility of the Licensing Board being influenced by unsworn representations by a party in a litigated

proceeding. It concluded that the procedure was bad and had a tendency to 'muck up' the licensing process and the ultimate findings of fact.

The League's complaint was commented on at page 10 of a Memorandum and Order of the Licensing Board, dated July 26, 1982, primarily treating with motions of the Intervenor for protective orders. It was stated in the memorandum, without elaboration, that the practice that Applicant engages in of providing the Licensing Board with copies of correspondence passing between it and Staff pertaining to Byron Station should be discontinued.

The matter then was raised during a prehearing conference at Rockford, Illinois on August 18, 1982. The parties were advised that should they desire any change in the expression of the Licensing Board that they propose it by written motion.

Applicant asserts that the letters that were submitted to the Licensing Board were arguably relevant to pending contentions or to scheduling matters related to this proceeding and therefore should be disclosed in accordance with the applicable NRC Appeal Board precedents.

Cited as precedent in the motion was the following language of the Appeal Board in Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC at 625.

> In all future proceedings, parties must inform the presiding board and other parties of new information which is relevant and material to the matters being adjudicated.

> To avoid any misunderstanding, we do not mean that necessary administrative actions by the regulatory staff should not go on while a proceeding is being adjudicated (See 10 CFR 2.717(b)). But this does not mean that the staff or applicant can be permitted to leave the presiding body and the other parties to the proceeding in the dark about any change which is relevant and material to the adjudication. 15/
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> [Text of Footnote 15] Any uncertainty regarding the relevancy and materiality of new information should be decided by the presiding board.

The second cited paragraph omitted the last sentence contained in the original, "Changes may take place but they must be disclosed".

Applicant states that given the broad scope encompassed by pending contentions in this proceeding and the Appeal Board's instructions that a party should err in favor of overdisclosure, it decided to submit copies of all correspondence between itself and the Staff and to the parties relating to the Byron proceeding. Commonwealth Edison Company recognizes that this disclosure practice may result in placing an undue burden on the Licensing Board due to the fact that some of the documents provided may not have been relevant and material to pending matters. Applicant proposes, in the future, to initially screen documents and other information to determine their relevancy and materiality. It requests that the Licensing Board withdraw that portion of its July 26, 1982 Memorandum and Order enjoining Commonwealth Edison Company from its practice of furnishing information to the Licensing Board and to instruct Applicant as to

the manner in which its disclosure obligations should be fulfilled.

NRC Staff is of the position that decisional precedent makes it clear that the Applicant, and the parties have an affirmative duty to keep the Licensing Board and the parties informed of relevant and material new information. Cited in support of its assertion are Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 406 n.26 (1976); Georgia Power Co. (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-191, 2 NRC 404, 408 (1978); and Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 491 n. 11 (1976).

The Staff believes the Licensing Board should not be encumbered with the furnishing of information such as routine review correspondence between Applicant and Staff which does not reasonably fall within the category of discloseable matter. It supports Applicant's motion to modify the Licensing Board's directive of July 26, 1982 to the extent it can be construed to preclude the submission of relevant and material new information to the Licensing Board.

No legal justification has been submitted to support Applicant's practice of submitting copies of all correspondence from it to NRC Staff on the Byron facility, which it was directed to stop doing in the Memorandum and Order of July 26, 1982. The cases cited as precedent by Applicant and Staff do not authorize the practice of indiscriminately forwarding correspondence to the

Licensing Board. To the contrary, the cases provide that the new information or changes that are to be made known to the Licensing Board are to be relevant and material to the adjudication. The information should be of a type that reasoned decision making would suffer, if it were not furnished. Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), supra. Materiality is to be on a level that the information is capable of influencing a decision maker. See Consumer Power Company (Midland Plant, Units 1 and 2), Docket Nos. 50-329 CP and 50-330 CP (Slip op. at 28) September 9, 1982. The purpose of furnishing the information is to keep Licensing Boards from acting on facts that are no longer current. New or changed circumstances are to be called to the attention of the Licensing Board so that it may act accordingly.

Submitting everything to the Licensing Board would tend to have the opposite result than only calling relevant and material new or changed situations to the decision maker's attention. Relevant and material information would not be highlighted to the presiding officer but concealed by routine and insignificant matter. Applicant's practice of submitting all correspondence would defeat the purpose of the disclosure requirement discussed in the cited cases.

Applicant in submitting all correspondence to the Licensing Board relieved itself of the responsibility for determining what is relevant and material to the adjudication in furnishing information. It is a duty that cannot be shirked. The Commission

has provided guidance as to how it should be performed advising, use common sense and consider the context and stage of the licensing process in which the materiality issue arises, and exercise simple good judgment when determining whether to disclose possible material information. Consumers Power Company (Midland Plant, Units 1 and 2), supra.

There is nothing to indicate that Applicant in following the procedure it had was attempting to make its case through the evasion of evidentiary requirements in a licensing proceeding or otherwise acting with impropriety. The responsibility of an Applicant and other parties to keep a Licensing Board informed of new or changed circumstances must be fulfilled as appropriate to an adjudicatory proceeding that involves public health and safety. Depending upon what is involved, disclosure could be accomplished satisfactorily through correspondence or the presentation of evidence at an oral hearing might be required.

Facts, circumstances and evidentiary requirements will dictate how to proceed. Without knowing the facts and circumstances in advance it is not possible to prescribe a proper method to follow on how disclosure should be made. Applicant is represented by counsel experienced in Commission practice and it is expected their future course will be governed by precedent. No instruction on how to proceed in the abstract would be appropriate.

ORDER

Upon consideration of all of the foregoing, it is hereby

ORDERED.

1. Tne requested modification of the Memorandum and Order of July 26, 1982 is denied. The practice that has been ordered terminated of Applicant submitting to the Licensing Board copies of all correspondence from itself to NRC Staff on the Byron facility, was improper. That order does nothing to relieve Applicant from its disclosure obligations under Commission precedents, which require the providing of new information or changes that are relevant and material to the adjudication to the Licensing Board. The disclosure obligations remain in effect.

2. The request to instruct Applicant as to the manner in which its disclosure obligations should be fulfilled is denied except to the extent the matter was discussed in the Memorandum.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Morton B. Margulies, Chairman
Administrative Judge

Dated at Bethesda, Maryland
this 12th day of October, 1982.