POLICY ISSUE

August 23, 1983 (NEGATIVE CONSENT) SECY-83-353

For: The Commissioners

From: Margin G. Malsch
Deputy General Counsel

Subject: IN THE MATTER OF COMMONWEALTH EDISON COMPANY

Facility: Byron Nuclear Power Station, Units 1 and 2

Purpose: To advise the Commission of an Appeal Board Decision [which, in our opinion, EX. 5

Petitions For Review: None[1]

Time Expires: September 6, 1983

Discussion: In ALAB-735, the Appeal Board denied the staff's motion for directed certification and dismissed its appeal without prejudice from an unpublished July 1, 1983 Licensing Board order directing the staff to present evidence in a public hearing concerning on-going

Contact:
C. Sebastian Aloot, OGC
x43224

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[1] Interlocutory appeals to the Commission are not authorized. 10 CFR 2.730(f).

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investigations into alleged deficiencies in the Hatfield Electric Company QA/QC program.[2] Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC ___ (July 27, 1983), slip opinion at 2.

The Appeal Board concluded that the staff had failed to offer any factual support establishing that directed certification was warranted under Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977).

> Whether a particular NRC investigation or inspection might be compromised by disclosures of the type ordered by the Licensing Board here is a question of fact, not of law. As such, it is not susceptible of resolution in the staff's favor on the basis of nothing more than the generalized representations of counsel who are unequipped to attest on the basis of their own personal knowledge to the accuracy of the representations.

Slip op. at 6-7. The Appeal Board further noted that even if it were to uncritically accept counsel's assertion of injury in the case of disclosure, the staff's motion for directed certification would fail since it did not establish that the protective measures

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[2] For a brief discussion of the Licensing Board's decision and the facts leading up to this controversy, see slip op. at 2-5.

of in camera submissions and protective orders were inadequate. Slip op. at 9-10. See, 10 CFR 2.744(c)-(e). The Appeal Board ended by suggesting that the staff return to the Licensing Board with sufficient factual support for its request for confidentiality regarding on-going investigations. Slip op. at 11. For similar reasons, the Appeal Board declined to address the question whether disclosure orders were appealable under the "collateral order doctrine" articulated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).[3]

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[3]Under the "collateral order doctrine", appeals are authorized from orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. at 546. As the Appeal Board notes, the federal courts are divided over whether disclosure orders such as that at issue here are within the doctrine. Slip op. at 11-12.

EX 5

Martin G. Malsch
Deputy General Counsel

Attachment: As stated

SECY NOTE: In the absence of instructions to the contrary, SECY will notify OGC on Tuesday, September 6, 1983 that the Commission, by negative consent, assents to the action proposed in this paper.

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Bd 8/17/83

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Ivan W. Smith, Chairman
Dr. Dixon Callihan
Dr. Richard F. Cole

In the Matter of	
	Docket Nos. STN 50-454 OL STN 50-455 OL
COMMONWEALTH EDISON COMPANY	
	(ASLB 79-411-04 PE)
(Byron Nuclear Power Station, Units 1 and 2)	
	August 17, 1983

MEMORANDUM AND ORDER

On August 5, 1983 the NRC Staff moved for reconsideration of the Board's July 1, 1983 order requiring the parties to present evidence on pending inspections and investigations into Hatfield Electric Company's quality assurance program at Byron. The Staff requested instead that the Board receive, in camera and exclusively to the Board, explanations of the allegations which gave rise to the pending inspections.

We found authority for the exclusive in camera presentation in 10 CFR 2.744(c) (pertaining to documents) and in the Commission's August 5, 1983 Statement of Policy - Investigations and Adjudicatory Proceedings

(pertaining to general information).[1] Accordingly, on August 9 we received exclusively and in camera, by means of an information deposition, information from Region III, Office of Inspection and Enforcement (IE). On August 10 we received exclusively and in camera more information from Region III and information from the Office of Investigations (OI).

As a result of these presentations, we have determined that some of the pending inspections by the Office of IE are of no interest to the Board. All other pending IE inspections and all pending investigations by OI are in early stages and respective evidentiary presentations now would not produce reliable results. Moreover, to receive an immediate evidentiary presentation on the pending inspections and investigations would disrupt the IE inspectors and OI investigators and would cause a delay in the ultimate resolution of the respective allegations.

Reports of completed inspections and investigations will be provided to the Board and parties as soon as they are available for disclosure and will be considered as new information on a case-by-case basis.

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1 The Applicant and Intervenors agreed that the Board may receive documents for its exclusive consideration but objected to an oral presentation. They argued that the only relevant regulation presently in force, Section 2.744(c), permits exclusive examination of documents only. We ruled, however, that the Commission authorized a broader inquiry by the August 5 policy statement and that the policy statement is, in effect, the Commission's generic sua sponte action under Section 2.758 expanding the regulations temporarily to meet recent developments in adjudications. The Commission noted the need for broader authority to review protected information pending the completion of investigations during adjudications.

The transcripts of the exclusive *in camera* presentations will be served on the public record when the respective inspections and investigations have been completed except where necessary to protect privileged information, *i.e.*, the identity of allegers. The NRC Staff and Office of Investigations are reviewing the *in camera* transcripts to determine which portions need not be confidential and these portions will be released as soon as possible.

Accordingly:

(1) The Board's order of July 1, 1983 directing the NRC Staff to present evidence on pending investigations in a reopened proceeding is vacated.

(2) The Board's request of June 21, 1983 to the Office of Investigations for cooperation in the reopened proceeding has been satisfied.

(3) The evidentiary record on the hearing reopened pursuant to the Board's order of June 21, 1983 was closed on August 12, 1983 (Tr. 8021) and will remain closed until further order. The Board does not foreclose all possibilities that it might inquire again into the status of pending inspections and investigations.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Ivan W. Smith, Chairman
ADMINISTRATIVE LAW JUDGE

Bethesda, Maryland

August 17, 1983

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Christine N. Kohl
Dr. Reginald L. Gotchy

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

Steven C. Goldberg and Mitzi A. Young for the Nuclear Regulatory Commission staff.

Jane M. Whicher, Chicago, Illinois, for the intervenors, the Rockford League of Women Voters and DAARE/SAFE.

Joseph Gallo, Robert G. Fitzgibbons, Jr., and Lisa C. Styles, Washington, D.C., for the applicant, Commonwealth Edison Company.

Thomas Devine, Billie Pirner Garde, and John Clewett, Washington, D.C., for the amicus curiae, Government Accountability Project, Institute for Policy Studies.

MEMORANDUM AND ORDER

July 27, 1983

(ALAB-735)

The NRC staff has appealed from, and in the alternative moved for directed certification of, an unpublished July 1, 1983 memorandum and order of the Licensing Board in this operating license proceeding ("July 1 order"). Responses to the motion for directed certification were filed by the

applicant, the joint intervenors,[1] and the Government Accountability Project of the Institute for Policy Studies as amicus curiae.[2] On full consideration of the papers before us, and for the reasons set forth below, we deny directed certification. In addition, the staff's appeal is dismissed.

1. It is not necessary to canvass in great detail here the background of the controversy. Suffice it to say that the July 1 order was preceded by a June 21, 1983 unpublished memorandum and order ("June 21 order") in which, on the motion of the joint intervenors, the Licensing Board reopened the record on quality assurance issues. That motion was founded upon the sworn statement of John Hughes, a quality assurance inspector formerly assigned to the Hatfield Electric Company (a construction subcontractor for the Byron facility). In that statement, Mr. Hughes asserted a number of specified irregularities in the execution of the quality assurance program pertaining to the work performed by Hatfield.[3]

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[1]The Rockford League of Women Voters and DAARE/SAFE.

[2]The Project's motion for leave to file an amicus curiae brief, which accompanied its response, is hereby granted.

[3]In a companion order issued on the same day, the Licensing Board granted the joint intervenors' further request to allow the testimony of Mr. Hughes.

For its part, the July 1 order served principally to memorialize the substance of conferences that the Licensing Board had held with the parties by telephone in the wake of the June 21 order. The Board first took note of the directive in the June 21 order that the parties be prepared "'to present a full evidentiary showing and explanation of the pertinent investigations of Hatfield Electric's quality assurance program and the subsequent reinspections.'" July 1 order at 1. In this connection, the Board alluded to the previously received direct testimony of NRC officials in Region III (which has territorial inspection jurisdiction over facilities located, as is Byron, in Illinois) that:

> "Three additional persons have provided allegations related to work performed or being performed by the Hatfield Electric Company and these allegations are now under NRC investigation. These allegations are in the areas of records, QC [quality control] inspector qualification and certification, hardware, design and drawing control, corrective action, housekeeping, and inspector independence. Approximately half of these allegations were previously identified by routine and nonroutine inspections, and will be resolved by routine inspector followup. The remaining allegations are being evaluated jointly and severally by the Office of Investigations and Region III. The results of the inspections or investigations will be documented at some future time."

Id. at 1-2. The Board went on to reiterate that, as it had explained in one of the telephone conferences, the ordered evidentiary presentation is to cover "all aspects of the Hatfield QA/QC program referred to in the Region III testimony." Id. at 2.

The Licensing Board then addressed the staff's insistence that it would not comply with the directive to present evidence elaborating on the Region III testimony because, "'as a matter of policy, [it] will not disclose detailed information about allegations which are the subject of ongoing inspections and investigations (including those by the Office of Investigations) because such disclosure has the potential to compromise the inspection and investigation of the matters.'" Ibid. On that score, the Board observed, inter alia, that the staff "has failed to explain or even discuss why traditional procedures such as in camera hearings and protective orders would not serve to protect the effectiveness of the investigations and inspections. Nor does the Staff provide an explanation why it believes, if it does, the Board can proceed to a decision on the factual issue without the evidence covered by the order." Id. at 3. Indeed, the staff had not provided "any advice to the Board whatever, other than to advise [it] to accept the premise that [it] cannot inquire into pending investigations." Ibid. Accordingly, as the Board saw it, it was "left with no choice but to direct the Staff to present evidence on the cited portion of the Region III testimony." Ibid.

Finally, the Licensing Board addressed the question whether the staff should be required "to provide in advance of the hearing relevant information on the confidential investigations." Id. at 3-4. Observing that the staff

opposed the imposition of such a requirement "on the basis of 10 CFR 2.790[(a)](7) which may exempt from disclosure investigatory records compiled for law enforcement purposes," the Board responded:

> Here again the staff would not consider the possibility of protective orders as anticipated by 10 CFR 2.744(e) and, of course, the Board has no way of knowing whether all of the information is covered by exemption (7) of Section 2.790 or whether an exception to exemption (7) is in order. Accordingly, the Staff is directed to produce relevant documents in advance of the reopened proceeding. This order does not prohibit the Staff from declining to produce documents exempt from production on other grounds, e.g., privilege, or from seeking a protective order against improper disclosure by other parties.

Id. at 4.[4]

2. The standards for the grant of directed certification are well established:

> Almost without exception in recent times, we have undertaken discretionary interlocutory review only where the ruling below either (1) threatened the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated by a later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner.

Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190,

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[4] At the conclusion of the order, the Board announced that the reopened hearing would commence on August 9, 1983. It now appears, however, that the required staff evidentiary presentation in controversy here will not, in any event, be received at that time. See Licensing Board Memorandum and Order Denying Stay Application (July 26, 1983) at 13 fn. 7.

1192 (1977). The staff does not maintain here that the second of these criteria is satisfied. Rather, its motion rests entirely upon the first criterion. We are told that "the disclosure of detailed information regarding allegations which the NRC has not yet inspected or investigated could seriously compromise the inspection and investigations of the pending allegations and the Commission's ability to pursue future investigations of safety-related matters, thereby injuring the Commission's ability to protect the public health and safety." Motion at 10-11. This same broad assertion is repeated throughout the motion, with respect to both the evidentiary presentation and the prehearing disclosure of documents that has been ordered by the Licensing Board. See, e.g., id. at 12, 15, 17.

The difficulty with this line of argument is that it is advanced by staff counsel, entirely unsupported by the affidavit of any NRC official actually responsible for the conduct of either inspections or investigations. Whether a particular NRC investigation or inspection might be compromised by disclosures of the type ordered by the Licensing Board here is a question of fact, not of law. As such, it is not susceptible of resolution in the staff's favor on the basis of nothing more than the generalized representations of counsel who are unequipped to attest on the basis of their own personal knowledge to the accuracy of

the representations. See, e.g., Charles River Park "A" Inc. v. Department of Housing and Urban Development, 519 F.2d 935, 939 (D.C. Cir. 1975). See also Cohen v. Massachusetts Bay Transp. Authority, 647 F.2d 209, 213-14 (1st Cir. 1981); Stokes v. United States, 652 F.2d 1 (7th Cir. 1981). Cf. Fed. R. Civ. P. 56(e); 10 CFR 2.749(b) (affidavits in support of a motion for summary judgment or disposition "shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein").

In its motion (at 2 fn. 2), the staff pointed out that the "inspection" and "investigation" functions that it lumps together in its argument are performed by two separate entities within the Commission: "inspections are done by NRC Regional personnel and investigations by the Office of Investigations (OI)." The footnote goes on to stress that OI is not represented by the Office of the Executive Legal Director (i.e., the office that authored the motion and the assertions therein).[5] Nonetheless, we are told, "reference

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[5]For organizational purposes, OI is regarded as a "Commission staff" office; i.e., it reports directly to the Commission rather than (as do the Region III personnel concerned with reactor inspections) to the Executive Director for Operations. The Office of the Executive Legal Director is not charged with the responsibility of representing Commission staff offices in adjudicatory matters or providing them with legal advice. Rather, as we

(Footnote Continued

to investigations is appropriate because the potential compromise of NRC activities is equally important with respect to both inspections conducted by the Staff and investigations undertaken by OI." Ibid. (emphasis supplied).

In these circumstances, crucial significance attaches to the failure of the staff to have buttressed its pivotal assertion with the affidavits of officials of both Region III and OI possessing firsthand knowledge of the possible impact of the Licensing Board's disclosure order on the carrying out of their respective responsibilities. Surely, if they in fact subscribed to staff counsel's sweeping claim, it is reasonable to suppose that those officials would have been prepared not merely to go on record to that effect but, as well, to provide under oath the requisite underlying detail. Be that as it may, absent any such undertaking, neither the Licensing Board nor we could justifiably accept the claim.[6]

(Footnote Continued)
understand it, such offices must look to the Office of the General Counsel for any desired representation and advice.

[6]On July 22, 1983 Ben B. Hayes, the OI Director, responded to a letter sent over a month earlier (on June 21) by Judge Ivan W. Smith, the Licensing Board Chairman, to Eugene T. Pawlik, the Director of the OI field office located in Region III. (OI is headquartered in Bethesda, Maryland, but has field personnel stationed in each of the five NRC regions.) In his letter, Judge Smith requested the
(Footnote Continued)

Even were we to overlook these considerations and to adopt uncritically counsel's premise that public disclosure of the sought information might compromise inspections and investigations, the staff's request for our intercession at this juncture would still be lacking a sufficient foundation. We do not understand the Licensing Board to be insistent that the information supplied by the staff be made publicly available. See p. 4, supra. The staff appears to recognize as much but argues that, even if the information were disclosed to the parties in camera and under an appropriate protective order, there would remain the risk that, inadvertently or otherwise, the protective order would be violated and the information communicated to individuals who are the target of the investigation or inspection. Motion at 12.

But the same could be said of the disclosure of any information to the parties to an adjudicatory proceeding under the aegis of a protective order. Up to this point at

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(Footnote Continued)
voluntary cooperation of OI in certain particular respects with regard to the further evidentiary hearing on the reopened quality assurance issues. (OI is not a party to this proceeding.) Although stating his belief that compliance with some of Judge Smith's specific requests of OI might compromise the ongoing investigation, Mr. Hayes did not address explicitly or implicitly the Licensing Board's July 1 order. Moreover, Mr. Hayes' letter neither was before the Licensing Board nor properly can be treated as part of the record before us.

least, licensing and appeal boards have acted on the assumption that protective orders will be obeyed. Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 400 (1979). On that assumption, boards have permitted the disclosure to parties of a wide variety of sensitive information -- including the details of plant security plans. See, e.g., Pacific Gas a Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 a 2), ALAB-592, 11 NRC 744, 746, and ALAB-600, 12 NRC 3 (1980); Consolidated Edison Co. (Indian Point Station, Uni No. 2), ALAB-177, 7 AEC 153 (1974). But see Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469, 477 (majority), 484-85 (dissent) (1981). To our knowledge, there has never been a breach o an NRC protective order that seriously threatened the confidentiality of the information revealed under that order. If, nevertheless, the staff has some basis for believing that there is an actual, as opposed to purely theoretical, risk of such a breach here, it had the obligation to document that basis.

In sum, the staff has failed to buttress adequately the record its claim that the ongoing inspections and investigations into the pertinent allegations might be seriously compromised. Thus, it has failed to satisfy th first of the two Marble Hill criteria (see p. 5, supra), there is simply no cause for our stepping into the

controversy. We therefore deny the staff's motion without prejudice to its seeking Licensing Board reconsideration of the July 1 order.[7] Any motion for such relief, however, must be grounded upon a concrete showing, through appropriate affidavits rather than counsel's rhetoric, of potential harm to the inspection and investigation functions relevant to this case.

3. In light of the foregoing, there is also no justification for keeping the staff's appeal from the July 1 order on our docket. That appeal is founded on the "collateral order doctrine" set out in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).[8] As the staff acknowledges (Motion at 3 fn. 4), we have previously observed that "[w]hether a disclosure order of the kind in question" comes within that doctrine "is an issue about which the federal courts are themselves divided." South

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[7]For a like reason, we reject the applicant's suggestion that the Licensing Board's order warrants ultimate referral to the Commission to "reconcile conflicting policy considerations." Response at 29.

[8]As described in Cohen, the doctrine permits the immediate appeal of orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

Texas, supra, 13 NRC at 472.[9] We see no need here to endeavor to reconcile the conflicting judicial views respecting the reach of the doctrine. For, even were we to conclude that it lies, the appeal would be unsuccessful for essentially the same reason as the motion for directed certification has been denied, i.e., the failure of the staff to establish that it has a substantial claim of Licensing Board error. This being so, the appeal is dismissed.

The staff's motion for directed certification and appeal are, respectively, denied and dismissed without prejudice to the filing of a motion with the Licensing Board for reconsideration of that Board's July 1, 1983 order.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[9] In this regard, see In re United States, 565 F.2d 19, 21 (2d Cir. 1977), certiorari denied sub nom. Bell v. Socialist Workers Party, 436 U.S. 962 (1978), and Southern Methodist Univ. Ass'n. v. Wynne & Jaffe, 599 F.2d 707, 711-12 (5th Cir. 1979), cited in fn. 8 of the South Texas opinion.