UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket No. 50-454
	)	50-455
(Byron Station, Units 1 and 2)	)	

RESPONSE OF INTERVENORS THE ROCKFORD LEAGUE OF WOMEN VOTERS AND DAARE/SAFE TO NRC STAFF'S MOTION FOR DIRECTED CERTIFICATION

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July 18, 1983

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Pursuant to the Appeal Board's July 11, 1983 Order. Intervenors and the Rockford League of Women Voters (the League) and DeKalb Area Alliance for Responsible Energy, and the Sinnissippi Alliance for the Environment (DAARE/SAFE), by their undersigned attorney*/, submits the following response to the Staff's motion for directed certification. As that Order requested, Intervenors limit their response to the merits of the staff's challenge to the Licensing Board's July 1, 1983 Order.

I. INTRODUCTION

In the second section of this brief, Intervenors discuss the background of the instant issue in the context of the litigation of the QA/QC contention. In Section III, the rulings below of the Licensing Board on June 21 and July 1 are discussed. Specifically, the bases for these rulings are set forth, including a

*/ The undersigned represented Intervenors the League and DAARE/SAFE on QA/QC matters only. Other contentions were litigated by other counsel, and, in some instances, pro se.

description both of what the Licensing Board had before it, and what it did not have before it despite requests to the Staff.

In Section IV, Intervenors demonstrate the absence of any policy consideration which precludes the Staff from providing the requested testimony and documents, and further shows that the Staff has not made the showing required for withholding the information. Intervenors conclude, in Section V, that the Staff's Motion should be denied.

II. BACKGROUND

Intervenors the League and DAARE/SAFE submitted a joint contention before the Licensing Board in this operating license proceeding pertaining to quality assurance/quality control (QA/QC). That contention, as reformulated by the Licensing Board, states:

> "Intervenors contend that Edison does not have the ability or the willingness to comply with 10 CFR Part 50, Appendix B, to maintain a quality assurance and quality control program, and to observe on a continuing and adequate basis the applicable quality control and quality assurance criteria and plans adopted pursuant thereto, as is evidenced by Edison's and its architect-engineers' and its contractors' past history of noncompliance at all Edison plants (whether or not now operating). In addition, Applicant's quality assurance program does not require sufficient independence of the quality assurance functions from other functions within the Company."

QA/QC was one of several contentions in issue. Witnesses were scheduled so that the Board could hear all witnesses on one contention before proceeding to another contention. From March 28 through April 11, 1983, Intervenors, Edison and the Staff

presented witnesses*/ before the Board in the portion of the evidentiary hearing concerning the QA/QC contention.

On April 24, 1983, before the remaining contentions had been fully litigated, the undersigned was contacted by John H. Hughes, a former QA/QC Level II inspector employed by Pittsburg Testing Laboratories at the Byron Plant to inspect work done by Hatfield Electric Company. Having ascertained Mr. Hughes' willingness to make his knowledge public in the hearing context, Intervenors through the undersigned appeared before the Board the following day, moving the Board to allow Mr. Hughes to testify. The Board declined to hear Mr. Hughes' oral testimony on that day, but instead suggested that Mr. Hughes submit a written statement indicating the possible areas of his testimony. That statement was submitted several hours later. After written submissions by the parties, including affidavits of Mr. Teutken for Commonwealth Edison and Mr. Hayes and Mr. Connaughton of Region III for the Staff, the Board ruled that it would apply "relaxed" standards applicable to opening a closed evidentiary record to determine whether Mr. Hughes should be allowed to testify. Commonwealth Edison and the Staff deposed Mr. Hughes on May 19; on May 26 the Board supervised a deposition of Mr. Hughes, in an open public session in Rockford, Illinois. The parties again submitted written argument to the Board concerning whether the Board-imposed standard of "significant safety issue" had been met.

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*/ Intervenors are essentially limited, on issues pertaining to QA/QC, to presenting direct evidence in the form of workers willing to make public statements about their knowledge of construction practices at the plant, and by cross-examination of Staff and applicant witnesses.

Among the matters testified to by Mr. Hughes were: the date he was told he was certified and other circumstances surrounding his certification, the training he received, and being tested over Hatfield procedures before and after certification. Specifically, Mr. Hughes testified that after taking a test and failing it, he was given his old test, with the corrected answers, to study, and then immediately given a new -- and identical -- test, with the first test before him. Mr. Hughes had contacted the NRC Region III inspectors with this information in November, 1982, and again in January, 1983. He also testified that he was certified within two weeks of reporting to work at Byron; documents produced by Edison showed that it would have been impossible for him to complete the prescribed training program within two weeks.

Of the facts testified to by Mr. Hughes, the Board considered that sufficient safety implications were raised relative to "the Hatfield Company training and certification procedures for QA inspectors and the possible use of supplied answers in inspector testing." (Memorandum and Order Ruling on Intervenors' Motion to Admit Testimony of John Hughes, June 21, 1983 at p.18). Following a series of conference calls with counsel for the staff, Intervenors and Commonwealth Edison, the Board issued its July 1, 1983 Order, clarifying portions of the June 21 Orders, which the Staff now brings to the Appeal Board's attention.

III. THE RULING BELOW

When the Board made its June 21 and July 1 rulings, it had before it, in addition to written argument, the May 26 transcript, the sworn affidavits by Mr. Teutken for Commonwealth Edison and Mr. Hayes and Mr. Connaughton for Region III, as well as the transcripts of over two weeks of testimony from the March and April segment of the QA/QC litigation.

In determining whether to admit testimony of Mr. Hughes, the Board focused on specific matters in the record, the combined significance of which it had not previously recognized.

As the June 21 Memorandum and Order Reopening Evidentiary Record makes clear, the Board's attention was drawn to:

(1) A March 1983 reinspection program of Hatfield and others initiated because of "questionable practices", concerning inadequate inspector qualifications and inadequate inspections (Region III affidavit at 5 and 6).

(2) Mr. Hughes' testimony concerning Hatfield practices of certifying inspectors without providing the designated training (Memorandum at p.2).

(3) Mr. Hughes' testimony regarding the provision of answers to tests (Memorandum at p.2).

(4) The results of a program of reinspection of Hatfield's work which might require a larger reinspection program (Teutken affidavit at pp.2-3).

(5) That the Office of Investigations is looking into the potential criminal implications of Mr. Hughes' allegations, and the fact that that office has documents concerning Mr. Hughes

which it refused to release to his counsel. (Memorandum at pp.2-3).

(6) Region III direct prefiled testimony that allegations have been made against Hatfield:

> "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 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."
>
> NRC Region III Testimony, ff. Tr. 3586, at 6 (Memorandum at p.3).

The Board concluded, on the basis of its careful review of all of the foregoing, that:

> "Collectively, the reports establish that it would be an improper delegation of the Board's adjudicating responsibilities to leave the resolution of the problems raised in the reports to the Staff's enforcement program."

The Board below realized that there were gaps in the record concerning the practices of Hatfield Electric Company, and raised the question as to whether a license could in fact issue on the record as it now exists. (See Memorandum and Order, July 1, 1983, at p.3).

The Staff motion illustrates its agreement that the license cannot issue without further evidence from the Staff:

> "The Staff is not asserting that the results of its inspec-efforts are not fit subjects for litigation..."
> (Staff Motion at p.8).

"...[U]ltimately all proper and relevant issues must be fully litigated in the public hearing process,...."
(Staff Motion at p.9).

"...[W]ere the Licensing Board's Order...to be reversed, the impact would be...a delay in the adjudicatory resolution of QA issues."
(Staff Motion at p.16).

"Region III believes that many, if not all, of the allegations would require resolution before [the fuel load] date."
(Staff Motion at p.15 n.21).

Contrary to the Staff's assertion that "the Board also 'reopened' the record on several other issues" (Staff Motion at p.6)(emphasis supplied), the entire scope of the reopening order is based on Mr. Hughes' testimony and the testimony already in the record. The Board retains the authority to order evidence to supplement the record either by ordering additional evidence during the hearing (10 CFR App. A §V(d)(13)), or by reopening the record (10 CFR App. A §V(g)(1)). In essence, the Board has given the applicant and Staff a second chance to convince it that the operating license can issue in the face of Intervenors' evidence.*/

In addition to understanding what the Board considered in issuing its June 21 and July 1 rulings, it must also be noted what it did not have before it.

The Staff took the position that:

"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

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*/ Of course, the Board retains the option of denying the license because Intervenors have prevailed on their contention, inasmuch as the applicant (with staff support) has failed to meet its burden of proof. 10 CFR §2.732.

has the potential to compromise the inspection and investigation of the matters."
(July 1, 1983 Order at p.2)

Despite the repeated invitation of the Board, the Staff refused to discuss how it arrived, if it did, at the conclusion that in this case, with respect to these issues, this testimony, and these documents, the "potential" exists here.

> "...the Staff would not provide sufficient information to determine whether the Staff is correct in its refusal in the first instance. ... We assume that the Staff does not intend to make arguments to the Appeal Board based upon grounds it would not present to us.
>
> In particular, 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.[2]
>
> Finally, the Staff would not provide any advice to the Board whatever, other than to advise us to accept the premise that we cannot inquire into pending investigations.

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[2] The Staff states, however, that the Board cannot determine from the cited testimony that all items referred to must be considered. This is correct, but the Board, with the advice of the parties, must determine for itself whether apparently relevant and material information is necessary to a proper decision.

(July 1 Order at p.3)(footnote in original)

As the above-quoted portion of the July 1st Order makes clear, the Staff would provide absolutely no information to the Board regarding why it would not disclose evidence in this proceeding. Rather, the staff steadfastly relied on its asserted general policy.

The Staff now claims before this Appeal Board, however, that it has in fact made the determination which it would not make before the Licensing Board:

> "In the instant proceeding, the Staff has determined that the disclosure of detailed information regarding allegations which the NRC has not yet inspected or investigated could seriously compromise the inspection and investigations...and the Commission's ability to pursue further investigations of safety-related matters..." (emphasis supplied) (Staff Motion at pp. 10-11).

In other words, the Staff would not make known to the Licensing Board any facts, but now submits to the Appeal Board, again without supporting facts, that it has indeed determined the potential to compromise the inspection in this case.*/

The Staff's position has changed in another aspect in its appeal to this Board. That is, instead of absolute refusal to produce documents and testify, it will do so at some future date, after it (1) inspects and investigates, and (2) takes administrative and enforcement action. (See Staff Motion at p.8 note 11.) However, it cannot predict when that will be.**/

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*/ One appropriate solution for this Board is to remand the issue to the Licensing Board with directions that the Staff make that determination, and its basis, explicit and allow for responses by the other parties, so that the Licensing Board can make a determination as to the propriety of that determination. See discussion, infra.

**/ Mr. Hughes and coworkers spoke with NRC inspectors in November, 1982 and in January, 1983. Apparently some allegations identical to those given by Mr. Hughes were given to Region III as early as August, 1982. Furthermore, half had been identified in routine Region III inspections. (NRC testimony, quoted in June 21 Memorandum and Order Reopening Evidentiary Record at p.3). Thus the Staff has had substantial knowledge for at least eleven months.

IV. DISCUSSION

This is not a case where the Board is attempting to direct the Staff's inspections or investigations. See New England Power Co. (N.E.P., Units 1 and 2), LBP-78-9, 7 NRC 271 (1978). Rather, it seeks to know what the Staff knows and admits is crucial to whether the license should issue. The Staff realizes that the Board may appropriately order its inspection and investigating activities to be testified to at hearing (Staff Motion at p.15 n.20). What it objects to, however, is the timing of the disclosure.*/

Essentially, then, the Staff puts itself in a position of determining when, if at all, it will present any evidence, in spite of the admission that the operating license cannot issue in the absence of that evidence. The Licensing Board correctly realized that this is an improper delegation of adjudicatory responsibility to the Staff. Indeed, delegating the authority to the Staff in this instance allows the Staff to investigate the allegations, to determine their significance to the issues in this operating licensing proceeding outside the

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*/ By applying standards related to reopening a closed record, the Board essentially penalized Intervenors because of the fortuitous timing of Mr. Hughes' decision to come forward, by placing a burden on them to show "safety significance" to his testimony before deciding whether to consider it. The Staff supported this theory. The Staff should not now be heard to complain about a parallel development: the need to produce information at a time other than in the orderly progress of its inspections.

purview of the Licensing Board and the public,*/ and to decide whether a license shall issue. Such a position cannot be reconciled with the statutory duty of the Commission to issue operating licenses (§101 of the Atomic Energy Act, 42 USC §2131, which authority it has delegated to Licensing Boards (10 CFR §1.11), and the right of Intervenors to a hearing under §189 of the Act, 42 USC §2239. The Staff must not be allowed to determine, de facto, whether a license is to issue.

The staff has raised separate arguments with respect to providing testimonial evidence and providing documentary evidence. Intervenors now respond to these arguments, to the extent not responded to above.

A. Testimonial evidence.

There is simply no authority for withholding the testimonial evidence which the Board has ordered. The only basis given by the Staff is its rigid policy that ongoing inspections and investigations will not be disclosed.

As discussed above, the Staff has failed to engage in any balancing of the competing policies of protecting its investigations and inspections; the Board's need for information; and the integrity of an open, public hearing guaranteed by §189 of the Atomic Energy Act, 42 USC §2239. This fact alone should mandate denial of the Staff's motion. A careful look at those

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*/ See Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4), CLI-80-42, 11 NRC 514 (1980), regarding a Licensing Board's authority to institute hearing proceedings after issuance of its construction permit decision.

policies as they apply to this proceeding, however, makes clear that there is simply no reason not to disclose the evidence.

The policy behind the Staff's position is to safeguard its inspections and investigations.

> "If potential targets of NRC inspections are apprised of the areas of concern before the inspections and investigations can be performed, the inspection of the matters could be fruitless. Records could be put in order or documents destroyed.
> (Staff Motion at p.12)(footnote omitted).

An examination of that concern, however, shows the fallacy of the Staff position. The Staff introduced the target and the scope of its investigations in its pre-filed testimony. Because of Mr. Hughes' extensive public disclosure, beginning in April and culminating in May, testimony before the Board in public session, Hatfield Electric Company most certainly has had sufficient knowledge of the allegations raised against it to take any action it wishes, for with Mr. Hughes' disclosure, the target and parameters of the investigation are fairly predictable, if not obvious. If any action was going to be taken by it, surely it has already done so. Thus, the Staff can point to no potential in this instance to compromise its investigations and inspections.

The Staff citation to Texas Utilities Generating Co. (Commanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC ___, (February 24, 1983) and Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469 (1981) is unhelpful here, for it does not raise the issue of

informant confidentiality with respect to testimony.* Rather, the issue is whether the staff, in the face of voluntary public disclosure through its own testimony as well as by the voluntary public testimony an informant, can continue to keep secret related and crucial information and documents.

The Staff cannot control whether a person making allegations wants to keep those allegations confidential, or wishes to disclose them publicly. Once those allegations are publicly disclosed by any method, the potential to compromise the Staff's investigation becomes moot.

Therefore, no reason remains why the Staff should be allowed to refuse to provide the testimony ordered below.

B. Documentary Evidence.

The Staff's basis for withholding documentary evidence rests in the NRC's codification of the Freedom of Information Act, 5 USC §552 et. seq. In 10 CFR §2.790(b)(7) and 10 CFR §9.5(a)(7), records compiled for law enforcement purposes are exempt to the extent that they interfere with enforcement proceedings or would disclose the identity of a confidential source.**/ At least some of the documents at issue are described as "informant statements,

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*/ Although allegations against Hatfield have been made by persons in addition to Mr. Hughes, neither the parties nor the Board have requested the identity of other informants, and the staff has not raised any problem that cannot be solved by, e.g., deletion of names or substitution of identifying pseudonyms, as was done by Mr. Hughes during his testimony.

**/ These cited sections contain additional bases for nondisclosure which the Staff does not allege are applicable here.

interview summaries and inspector notes." (Staff Motion at pp.16-17). The staff asserts a policy justification identical to that which it asserts for testimentary evidence, i.e. to compromise the investigation. As shown above, that policy does not operate here to justify nondisclosure, since the target and scope of the investigation have long ago been made public.

The additional ground of informant confidentiality is also relied on. Intervenors assume that Staff witnesses are able to, for example, refer to informants other than Mr. Hughes by pseudonym,*/ and no reason is apparent why the same could not be accomplished with the documents, for example by obliterating names of informants and other specifically identifying information.

It is curious that the Staff's emphasis with respect to documents, as it was with respect to testimony, goes to the timing of production. (See Staff Motion at p.18). Apparently it is willing to waive the §2.790(b)(7) exemption even as to the confidentiality of informants at some future date. At the same time, it gives absolutely no justification for treating confidentiality differently depending on the status of Staff inspections and investigations.

The law enforcement exemption, if applicable here, cannot shield all the documents in the possession of the Staff. The Staff has admitted that some of the issues raised by informants

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*/ This procedure was suggested by the Board and used by Mr. Hughes in testifying about, and reading from, a document concerning the termination of employment of the witness and another inspector, to protect that inspector's privacy. The same system could, of course, be used to protect the identity of an informant whose name appears in a document.

were the result of routine inspections. As to those matters, the law enforcement exemption is inapplicable, because that exemption does not cover the results of routine monitoring or surveillance. Center for Nat'l Policy Review v. Weinberger, 502 F.2d 370, 373-74 (DC Cir. 1974); Rural Housing Alliance v. U.S. Dept. of Agriculture, 498 F.2d 73, 81 (D.C. Cir. 1974).

Even if this were a case where the "law enforcement" exemption applies,*/ the Staff has not made the showing necessary to avail itself of the exemption. Case law under FOIA is clear that this provision is not a blanket exemption, but only be applied on a case-by-case basis, and only on showing of harm. Title Guarantee Co. v. NLRB, 407 F.Supp. 498, 504 (S.D.N.Y. 1975), rev'd on other grounds, 534 F.2d 484 (1976), cert. denied, 429 US 834. That showing must be detailed and specific as to each document, and is not satisfied by "sweeping and conclusory citation of an exemption." Mead Data Central, Inc. v. U.S.A.F., 566 F.2d 242, 251 (D.C. Cir. 1977); Thorstad v. CIA, 494 F.Supp. 500, 501-02 (S.D.N.Y. 1979).

The showing requires setting forth facts by affidavit, and itemizing and indexing the documents with a sufficient description to show that the information falls within the exemption. Nonexempt portions of requested documents must be disclosed even

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*/ Further, it is not clear that these documents would fall within the law enforcement exception in the first instance. See, e.g., Pratt v. Webster, 673 F.2d 408 (D.C. Cir. 1982); Bristol-Myers v. FTC, 424 F.2d 935 (D.C. Cir. 1970), cert. denied, 400 US 824; Furr's Cafeterias, Inc. v. NLRB, 416 F.Supp. 629 (N.D. Tex. 1976).

if other portions are in fact exempt. Mead Data Central, Inc. v. U.S.A.F., 566 F.2d at 251 and 260; Vaughn v. Rosen, 484 F.2d 820, 826-27 (D.C. Cir. 1973), cert. denied, 415 US 977 (1974); Thorstad v. CIA, 494 F.Supp. at 501-02.

The inquiry does not end once the Staff specifies some harm that could occur if the documents were released. The adjudicating body must then determine whether in fact such harm would result. Title Guarantee Co. v. NLRB, 407 F.Supp. at 504. Because of the Staff's failure to make its initial showing, the Licensing Board was precluded from making this determination, since it had no facts before it other than the Staff's admission of the relevancy and crucial character of the documents.

The Staff has failed to specify potential harm, or disclose whether it weighed that harm against the need for the documents. The Staff requested the Licensing Board, and is requesting the Appeal Board, to give its imprimateur to the Staff decision without so much as an assertion of fact about the documents. Such a position should not be countenanced by this Board, for it places the Staff in the position of final adjudicator.

V. CONCLUSION

The Staff has failed to identify any valid reason why it should be allowed to refuse to provide the testimony and documents requested by the Licensing Board. Intervenors have shown that there is no policy at work which would justify non-disclosure and, in fact, substantial reasons for disclosure exist.

Irrespective of whether this Board reverses the Licensing Board's Order, admittedly no license can issue unless and until the evidence is produced. The Staff Motion should be denied.

Dated: July 18, 1983

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify this 18th day of July, 1983, that copies of "RESPONSE OF INTERVENORS THE ROCKFORD LEAGUE OF WOMEN VOTERS AND DAARE/SAFE TO NRC STAFF'S MOTION FOR DIRECTED CERTIFICATION" in the above captioned proceeding were served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by Federal Express, or by double asterisks, hand delivered.

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