2/13/84

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

APPLICANT'S MOTION IN THE
ALTERNATIVE TO REOPEN THE RECORD

In its brief filed today, Commonwealth Edison Company ("Applicant" or "Ceco") urges the Appeal Board to reverse the Licensing Board's January 13, 1984 Initial Decision ("ID") and authorize the issuance of operating licenses for Byron Station. In the alternative, if the Appeal Board finds that the record is insufficient to compel that result, Applicant respectfully requests the Appeal Board to vacate the Licensing Board's denial of Ceco's application and to reopen the record to receive further evidence.

The further evidence Applicant proposes to submit is described in the attached affidavit of Louis Del George, Ceco's Assistant Vice President. Ceco's evidentiary presentation focuses on the validity of the quality control inspector reinspection program, and what its results indicate about the qualifications of the contractors' QC inspectors and the quality of the contractors' work. The Licensing Board itself recognized that those results, which were not available at the time the

evidentiary record closed, could answer its doubts about Ceco's contractors' quality assurance performance. (ID, pp. 5, 6, ¶D-435 to D-438, D-444).[1] Applicant's proposed evidentiary presentation would also, if appropriate, address the general subject of Ceco's quality assurance oversight of the contractors at Byron (see, e.g. ID, pp. 4-7, ¶D-433, D-448, D-449). These two areas seem to be the essential deficiencies in the record which caused the Licensing Board to deny Ceco's application for operating licenses. However, if the Appeal Board concludes that the record is insufficient in other respects to support issuance of operating licenses, Applicant respectfully requests the opportunity to supplement this proposed evidentiary presentation.[2]

In its brief filed today, Applicant has argued that, under 10 CFR Part 2, Appendix A and applicable case law, the Licensing Board erred in denying Ceco's application for operating licenses rather than informing the parties of its concerns and receiving further evidence on those concerns. The Licensing Board's duty to ensure the sufficiency of the record to support its decision was not conditional upon the receipt of any motion

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[1] As stated by Mr. Del George in his affidavit, the Byron reinspection program was completed on February 4, 1984. Ceco's final report evaluating the results of that program will be available shortly and will be transmitted promptly to the Appeal Board in further support of this Motion. The Appeal Board has already received other documents related to the reinspection program by Board Notifications from Applicant's counsel dated January 27, 1984 and February 10, 1984.

[2] Notwithstanding the scope of Mr. Del George's affidavit, Applicant of course does not wish to reopen the record as to issues on which the Appeal Board finds Applicant prevailed.

to reopen the record from any parties. (Prior to January 13, 1984, of course, the parties did not know the Board's conclusions concerning the adequacy of the record.) However, Applicant now requests the Appeal Board to reopen the record to receive the information the Licensing Board should have called for.

As summarized by the Appeal Board in Diablo Canyon, the standards for reopening the record are that (1) the motion be timely, (2) significant new evidence on a safety question exist, and (3) the new evidence might materially affect the outcome.[3] In this case the significance of the information described in Mr. Del George's affidavit and its potential to affect the result reached below are obvious, based on a comparison of the affidavit with the Licensing Board's Initial Decision, particularly the Licensing Board's comments on the possibility that an effective reinspection program could resolve its concerns (ID, p. 5, 6, ¶D-435 to D-448). As for timeliness, as stated in the brief, Applicant was not given fair notice of the concerns expressed by the Licensing Board until January 13, 1984. Thirty days is not an excessive length of time to analyze that decision and the record, to gather further evidence, and to brief this appeal and draft this motion. Moreover, the reinspection program, which appears to be the most important part of any supplementary evidentiary presentation, was not completed until after the Initial Decision

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[3] Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) ALAB-598, 11 NRC 876, 879 (1980).

was rendered. There is no question in this case of a party failing to produce available evidence at the original hearings.

Moreover, the public interest requires that, if the Appeal Board finds the record to be insufficient to justify issuance of operating licenses, Applicant be given an opportunity to supplement the record. In the first place, a final denial of the application would deprive the public of Byron's benefits, including significant savings in system production costs and improved reliability in electric supply.[4] Second, such a result would sharply increase the perceived risk to applicants in NRC operating license proceedings. This would tend to discourage continued construction of other nuclear power plants[5] and to make nuclear projects more expensive as investors demand a greater return to compensate them for the increased risk. This would frustrate national policy which favors development

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[4] See the Byron Final Environmental Statement, Staff Ex. 2, Sections 2, 3 and 6. The Staff estimates the system production cost savings will amount to more than $200 million per year. NUREG-0848, § 6.4.2. (April 1982). See also Affidavit of Ralph L. Heumann dated January 24, 1984, attached to Commonwealth Edison Company's January 24, 1984 Motion for Expedited Consideration. Mr. Heumann estimates the additional costs of fuel and purchase power associated with delay of Byron Unit 1 to be $16 million per month.

[5] There are a number of plants under construction across the country which are reported to be facing serious financial and regulatory difficulties. Affirming the Licensing Board's decision in this case, where neither the Licensing Board nor the Staff found widespread hardware or construction problems (ID, p. 7), would be tantamount to telling the owners of these troubled facilities, "Give up".

of nuclear energy.[6] Finally, application of a "sudden death" principle whenever an NRC licensing board finds the record to be insufficient to support issuance of operating licenses would profoundly distort parties' litigation strategy in other pending operating license cases. Intervenors would be encouraged to increase the number of issues they raise. Applicants and the Staff could not afford to exercise restraint in the scope or depth of their evidentiary presentations on each issue.[7] The evidentiary records being compiled in NRC proceedings, especially quality assurance cases, are already enormous. Encouraging "saturation bombing" by the parties will not add to the quality or timeliness of the NRC's decisions.

Affirming the Licensing Board's decision and refusing to allow further supplementation of the record would not only be contrary to the public interest, it would also be unfair to Applicant. Denying the application would result in an enormous

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[6] See, e.g. Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U.S.C. §§ 2011-2281, esp. § 2013(b) (1976); Pacific Gas & Electric Company v. State Energy Resources Conservation and Development Commission, 461 U.S. ___, 103 S.Ct. 1713, 1730-1732 (1983). Of course national policy does not compel licensing any nuclear power plant without a showing that there is reasonable assurance that the public health and safety will be protected. National policy does require giving applicants every opportunity to make such a showing.

[7] Among other things, the Licensing Board found in favor of Intervenors as to certain allegations where Applicant did not provide any direct testimony, even though it found Intervenors' witnesses to be unreliable. See e.g. Findings D-278 to D-280 (whether Blount's production department controlled QA wages). Applicants in other pending proceedings will apparently have to rebut with testimony every assertion by Intervenors' witnesses, no matter how seemingly trivial the point and no matter how unreliable the alleger, to avoid the result reached by the Licensing Board in this case.

loss which would have to be borne by Ceco, its shareholders and ratepayers. Such a forefeiture is inappropriate where neither the Licensing Board nor the Staff has found widespread hardware or construction problems at Byron (ID, p. 7), and where further evidence has now been compiled which the Licensing Board itself recognized might resolve the concerns upon which its decision is based.[8] Moreover, such a penalty should not be imposed without warning.

The advanced stage of construction at Byron creates the possibility that, even if Applicant is successful in any reopened hearings, start-up of Byron may be delayed by the licensing process.[9] For this reason, and because the Licensing Board has apparently been improperly influenced by the receipt of ex parte information, Applicant requests the Appeal Board to conduct any reopened hearings itself. See, e.g. Pacific Gas & Electric Company (Diablo Canyon Nuclear Plant, Units 1 and 2)

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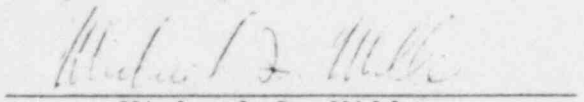
[8] The Appeal Board can not weigh Applicant's investment in Byron in deciding safety issues. See, e.g. Power Reactor Development Corporation v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396, 415 (1961). However, Applicant's investment is an equitable consideration which can be taken into account in the context of determining whether reopening the record is appropriate, as it can be in making a decision whether to stay construction pending further NEPA review. See Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 170-172 (1978).

[9] See Applicant's Motion for Expedited Consideration dated January 24, 1984.

ALAB-598, 11 NRC 876, 883 (1980). In the alternative, Applicant requests that the matter be remanded to a new licensing board.

Respectfully submitted,



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