



UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

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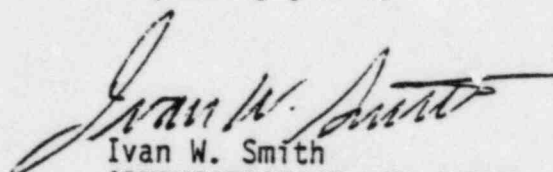
In re: Commonwealth Edison Company
(Byron Station, Units 1 and 2)
Docket Nos. 50-454 and 50-455 OL

Dear Ms. Whicher:

On May 31, 1984 at the prehearing conference in Rockford, Illinois, in a statement heard at your request, Ms. Diane Chavez, on behalf of your client, Sinnissippi Alliance For the Environment (SAFE), charged that I had engaged in unprofessional and objectionable personal conduct toward you in my remarks of May 30. My remarks appear at pages 8173-80 of the May 30 transcript. Ms. Chavez' statement appears at pages 8185-94 of the May 31 transcript.

As I promised at Ms. Chavez' request, I am providing you with a copy of the relevant transcript pages so that SAFE may seek relief.

Very truly yours,


Ivan W. Smith
ADMINISTRATIVE LAW JUDGE

cc: Docketing & Service ✓
(For Service on the Parties)

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[TRANSCRIPT OF MAY 30, 1984]

1 3 through 10 all relate to developments since the initial
2 decision.

3 JUDGE SMITH: No. 6, for example, is that what
4 you are after, the overtensioning?

5 MS. WHICHER: No. 6 is a good example.

6 JUDGE SMITH: I don't know, I just have to wait
7 until you try to do it in context.

8 MS. WHICHER: So I must prepare my cross
9 examination on every document and then wait for an objection?

10 JUDGE SMITH: Ms. Whicher, I can't help you
11 other than to repeat the advice I gave you in chambers,
12 and that is select your issues carefully. Do not dump on
13 the Board every conceivable issue you can think of and
14 expect us to untangle it. We can't do it. And that is
15 the tendency of your litigation. Throw it in, see what
16 happens, see if the Board will pick it up and run with it.
17 It is not going to work. You be your own litigator.

18 I restate that advice. I think the best you can
19 do for your clients, the best you can do to assure that
20 the reinspection program is reliable, and the best you can
21 do to assure, if you wish, that the Byron Plant is safe
22 within the scope of the issues we can consider, is to select
23 carefully your issues. Just don't dump them on us. We are
24 telling you that we are not capable of what you are asking
25 us to do.

1 Not only that, but we are not authorized to do
2 what you are asking us to do.

3 MS. WHICHER: My position is the footnote in
4 the Appeal Board authorizes the Board to go well beyond
5 the reinspection program, and I am asking this Board to
6 consider all the evidence on inspections at Byron that
7 have occurred since the close of the record.

8 I think that the Board certainly has jurisdiction
9 to do that under the footnote in ALAB. I am asking the
10 Board to do that.

11 JUDGE SMITH: I agree. We will look at them and
12 we will decide if they move us to take them up.

13 MS. WHICHER: I would like an opportunity to brief
14 that issue in writing, if I might, so that I can point to
15 the Board what I feel are the significant safety issues that
16 have come out in inspection reports since the close of the
17 record.

18 JUDGE SMITH: When do you want to do that?

19 MS. WHICHER: I will do it next week.

20 JUDGE SMITH: The difficulty is, Ms. Whicher,
21 in this reopened hearing, the Board is going to concentrate
22 on issues that we believe are important. We are not going
23 to concentrate on any more things, I'll tell you that. **In**
24 the series of allegations that you carried to the last
25 minute, you have never dropped one of them. We are going

1 to decide what is important. We will listen to your advice,
2 but we are not going to get bogged down with a lot of
3 paper.

4 You told the Appeal Board and you told us, and
5 I believe you, that you are not interposing this intervention
6 for delay and you have not acted in a delaying way.

7 MS. WHICHER: And I don't intend to.

8 JUDGE SMITH: But you know we are three people
9 here. We cannot take every issue you decide to dump on us
10 and analyze it. We are not inspectors, we are not Region III
11 engineers, we are adjudicators, and that is exactly what we
12 are going to be. And this time you are on warning that you
13 will have to act as a litigator.

14 MS. WHICHER: That is why I am offering to brief
15 this issue for the Board.

16 JUDGE SMITH: As a practical matter --

17 MS. WHICHER: I don't know what more I can do.

18 JUDGE SMITH: Yes, what more you can do is to make
19 your arguments today or tomorrow. But we are going to look,
20 whether you will allow us or not, but on behalf of your
21 clients, we are going to look at the safety issues that are
22 within our jurisdiction, and we are not going to look at a
23 lot of junk ^{such as} ~~that~~ you dumped on us the last time.

24 MS. WHICHER: Your Honor, let me state for the
25 record --

1 JUDGE SMITH: And this is our responsibility.
2 This is our responsibility and this should be your
3 responsibility. And I want to ask you this:

4 I want you to consult with your clients and
5 discuss with your clients the Board's admonition to you
6 and discussion with you, and you come back here tomorrow or
7 whenever you have had that opportunity, and tell me what
8 your position is.

9 MS. WHICHER: Your Honor, let me state for the
10 record what my position is. My position is I have never
11 dumped on the Board a lot of junk. I have taken the
12 witnesses that have come to me and presented them to the
13 Board as they have asked me to. I cannot --

14 JUDGE SMITH: You are not going to do it any more.

15 MS. WHICHER: I cannot control the evidence of
16 workers at the plant. I cannot control what they say. I
17 do not necessarily vouch for the truth of everything they
18 say. I can only facilitate their bringing their concerns
19 to the Board.

20 JUDGE SMITH: Then, Ms. Whicher, I agree that
21 that is the correct rule, that you do not have to vouch for
22 their credibility when you bring them here. But if you are
23 not prepared to filter your allegations and filter your
24 issues, then the Board must do it for you, and by golly we
25 will.

1 MS. WHICHER: Your Honor, I am offering to do
2 that filtering process in writing with this list. I am sorry
3 I do not have these inspection reports with me. I cannot
4 do it this evening. I will do it --

5 JUDGE SMITH: The difficulty is you brief this,
6 they will respond, then the Board is looking at paper again.
7 We are looking at papers and pleadings and that is not what
8 we want to look at. We want to look at safety issues
9 and the inspection report. We want to look at the hardware
10 problems, not your papers.

11 We will give you full opportunity, but this is
12 what a prehearing conference is for. This is what it was
13 noticed for today, to discuss the issues and the subissues.

14 You have had the remand now for what, three or
15 four weeks. I think this is your opportunity. I thought
16 there was a good chance of winding up tonight, but we will
17 continue to tomorrow and let you make your arguments as to
18 why the Board should exercise its discretion.

19 Other than that, you are going to be back to the
20 standards for reopening the record.

21 MS. WHICHER: Just so I am clear what your Honor
22 desires of me tomorrow, do you desire a presentation on each
23 one of these tomorrow?

24 JUDGE SMITH: No, it's not that I desire anything
25 from you. It's just that we will give you that opportunity

1 tomorrow. I do not wish a brief.

2 MS. WHICHER: Your Honor, let me reiterate. I
3 do not have these inspection reports with me. I did not
4 bring them from Chicago with me. You're asking me really
5 to do the impossible.

6 MR. MILLER: I'll facilitate it. We have them with
7 us. We will turn them over to you overnight.

8 MS. WHICHER: Fine. Fine.

9 MR. MILLER: I might add, Judge Smith, I had
10 understood this was something that was going to be done
11 between last Thursday and today so we wouldn't be faced with
12 this kind of vague --

13 MS. WHICHER: Well, I'm sorry, you were mistaken.

14 JUDGE SMITH: Ms. Whicher, then we are asking
15 that you give serious consideration as to what your position
16 in this case is, what your clients want, and how we should
17 proceed. And if this is really what you want, if your
18 clients really want every issue that you are alleging to be
19 litigated in full, and if they are satisfied, having read
20 that initial decision, if they are satisfied, if the
21 League of Women Voters is satisfied with having presented
22 Mr. ^{STOWMFW4-SF1F2}~~Stites~~ in this proceeding to this Board, and if that
23 is the kind of litigation you want in a reopened hearing --
24 I just want that to be a considered position.

25 MS. WHICHER: Your Honor, as I understand it,

1 tomorrow I will present you with a full explanation of what
2 we intend by our listing of actions that have been taken
3 since the close of the record August 10th that we consider
4 to be valid prospects for litigation in this remanded
5 proceeding.

6 Is there anything further that the Board would
7 like me to present it with tomorrow morning during that
8 presentation? I will be glad to, whether it is the views
9 of my clients as to the adequacy of my legal representation,
10 I'll be glad to provide that also; or if you would like to
11 talk with my clients personally about that --

12 JUDGE SMITH: No, no, absolutely not. I would
13 not suggest that you are not capable of representing your
14 clients. You are very capable. But having seen our initial
15 decision, knowing what our reaction is to the long list of
16 issues you have now, knowing what the admonition of the
17 Board is to you, or the advice, I should say, as to how you
18 can be most effective in this hearing, in gaining greater
19 assurance that the plant is built safely, I ask you to
20 consider it carefully, discuss it with your clients, and
21 determine whether or not you should not be focusing on
22 the issues that can make a difference.

23 You recognize that we cannot hear all those
24 issues, that we cannot do it.

25 MS. WHICHER: Might I ask why not?

1 JUDGE SMITH: Because if you follow your previous
2 track record, you will not see them through. We are not a
3 grand jury, we are not investigators. We are adjudicators,
4 and that is exactly what we are going to be in this reopened
5 proceeding, and I am going by your track record, your
6 proposed findings and your briefs.

7 MS. WHICHER: You are not referring it, I take it,
8 to the time constraint?

9 JUDGE SMITH: I am referring to -- never mind.
10 Our initial decision stands for itself. I am not going to
11 defend it and I am not going to quarrel with you any more.
12 I think we have given you fair admonition and good advice.
13 You can accept it or not. If you don't accept it, we will
14 exercise our own discretion and control.

15 MS. WHICHER: I will make my presentation to the
16 Board first thing in the morning.

17 JUDGE SMITH: Anything further this evening, or we
18 will adjourn.

19 MR. MILLER: Judge Smith, I just have one
20 suggestion:

21 My letter of May 25th regarding Systems Control
22 tries to deal in two pages with a complex subject matter,
23 and I would just like to urge the Board and the other parties
24 to look at my letter so that perhaps tomorrow we can
25 discuss what the views are on the scope of the Systems

1 Using the limited resources available to the
2 Intervenors, Jane Whicher was able to substantiate and
3 bring to the attention of the Atomic Safety and Licensing
4 Board serious quality assurance deficiencies that would not
5 have been litigated otherwise. The Rockford League thinks
6 that the January 13, 1984 decision denying the operating
7 license for the Byron Nuclear Power Station on the basis of
8 these quality assurance deficiencies is proof of the
9 excellence of the work that Jane Whicher did for us.

10 At all times, the Rockford League's attorney,
11 Jane Whicher, has worked closely with the Rockford League
12 and other intervenors to attain the goal of all parties to
13 these licensing proceedings, that there be "reasonable
14 assurance that the Byron facility has been properly
15 constructed" before an operating license is granted.

16 Neither the Rockford League or our attorney
17 wish to burden the Court with prolonged and/or unnecessary
18 proceedings. The Rockford League has confidence that
19 Jane Whicher is representing and will continue to represent
20 us in a responsible manner in any future proceedings
21 related to the granting of an operating license for the
22 Byron facility.

23 JUDGE SMITH: You may proceed, Ms. Whicher.

24 MS. CHAVEZ: Your Honor, I wish also to address
25 the Board. I don't think my comments, on behalf of Citizens

1 Alliance for the Safe Environment are going to be quite
2 as polished as the comments that Betty Johnson has just
3 addressed on behalf of the League of Women Voters. The
4 reason for that, I think, is that I have a very gut feeling
5 about what went on yesterday in the courtroom here, with
6 respect to Your Honor's comments directed towards Ms. Whicher,
7 our attorney.

8 Basically, I think the comments made by Your Honor
9 last evening far exceeded admonishment to an attorney. It
10 was unprofessional and uncalled for, in relation to the
11 concerns Ms. Whicher was addressing. Ms. Whicher was in
12 obvious dispute with the Board, concerning the Board's
13 rulings during the day, but I think that the Board went
14 far beyond disagreement with Ms. Whicher, in characterizing
15 the qualifications and equality of Ms. Whicher's participation
16 in these proceedings, I think that in terms of sensationalism
17 it was uncalled for --

18 JUDGE SMITH: In terms of what?

19 MS. CHAVEZ: Sensationalism -- it was uncalled
20 for and puts to the pale any sensationalism which the
21 Intervenor has thus far brought to the proceeding, in terms
22 of participation. In fact, from someone who has expressed
23 concerns concerning the public spectacle and bringing in the
24 media, I find your behavior last night to be totally
25 incomprehensible.

1 And basically, I'm wondering -- at this point in
2 time -- whether or not the Board has any intention -- whether
3 or not you have any intention right now of apologizing to
4 Ms. Whicher, because I feel that an apology is not only
5 required, but also a striking of the record of those comments
6 made last night.

7 The Citizens Alliance for the Environment, has
8 participated in these proceedings upon the assumption that its
9 participation, in playing along and being reasonable and not
10 delaying the power plant and so forth -- that there is a point
11 to all this. Your comments last night make us wonder whether
12 or not the process here, and your openness towards this
13 evidence and towards getting to the bottom of whether or not
14 the plant is safe, or not, are actual or merely for the
15 record's sake.

16 JUDGE SMITH: I can assure you, Ms. Chavez, if
17 I may interrupt at this point -- I'm somewhat confused about
18 your remarks, but you've used the word sensationalism, some
19 reference to the press attendance, and the sincerity of my
20 remarks. I can assure you that my remarks were made in my
21 perception of what my responsibilities are in this case and
22 for no other purpose. And I don't have any other motivation.

23 But let me cut it short. What you're talking about
24 is an accusation of prejudice, and there are provisions for
25 you to deal with that. I will help you with it. You

1 can move that I disqualify myself from the proceeding, and
2 I will consider it. I will review the remarks. And if I
3 believe that -- I will also search my own feelings, and if I
4 feel that I have prejudged the presentation of the
5 intervenors in this case, or if I have given the appearance
6 of it to such an extent that there can no longer be public
7 confidence, or your confidence, I will consider a refusal.

8 MS. CHAVEZ: I want to set the record straight --

9 JUDGE SMITH: Is that what you're seeking?

10 MS. CHAVEZ: No, actually it's not. I'm confident
11 that you will go over, in your mind, and reflect upon your
12 behavior.

13 JUDGE SMITH: No, I will not do it unless you make
14 the motion. I think you need to consult with counsel on this.
15 If you simply wish to criticize the Board, then we don't have
16 time for that. If you wish to have a remedial effect, and that
17 is bring the Board's attention to a problem that you perceive,
18 that's another thing. If you wish to make the allegation of
19 prejudice and seek remedy there, that would be that I, at
20 least, remove myself from the proceeding, there is a procedure
21 for that which I will explain to you and help you in, or
22 advise your counsel in, but I don't know what you want right
23 now. I think you just wish to criticize.

24 MS. CHAVEZ: No, I don't just wish to criticize,
25 or present the appearance of doing that. If I want to make a

1 motion today, it would be a motion to strike the portions
2 of the record that were this -- this conversation that
3 transpired last night. I am not concerned with the prejudice
4 of the Board, with respect to deciding the issues and the
5 evidence that's going to be presented today. I think that
6 what my concern is is the personal nature of the Board's
7 comments to Ms. Whicher.

8 And I think that those are uncalled for and I
9 think that --

10 JUDGE SMITH: I'm going to ask you to be more
11 specific on that, and I'll give you a copy of the transcript.
12 If I made personal remarks to Ms. Whicher, that certainly
13 was not intended. I don't feel any personal animosity toward
14 Ms. Whicher, nor to anyone in this proceeding. I don't recall
15 any.

16 I made strong remarks about her tactics and her
17 strategy and her responsibilities as counsel in this case.
18 No question. But Ms. Whicher, I'll say now, if anything
19 I said was inferred by you to be a personal disparagement,
20 I do regret it and did not intend it.

21 MS. WHICHER: Judge Smith, each of my clients
22 approached me last night about that very issue --

23 JUDGE SMITH: But you're going to have to be
24 more specific.

25 MS. WHICHER: I'm sorry. I don't have a copy of

1 the transcript, but they each expressed a desire to press the
2 Board on the issue this morning. And I assured them the
3 Board would allow them to do that, and then we can proceed
4 with my presentation.

5 JUDGE SMITH: We're just not going to have Ms.
6 Chavez stand -- rise and make suggestions, as she has, and
7 then say that's fine and then just leave it, as you seem to
8 be suggesting.

9 Just proceed, and tell me what you want.

10 MS. CHAVEZ: Well, I would like to review the
11 transcript, as you suggested, if that is appropriate and make
12 a motion to strike those portions of the transcript that we
13 find objectionable, based upon personal characterizations
14 that Your Honor made with respect to Ms. Whicher and the
15 quality of her participation in these proceedings.

16 Secondly, I want to go on record as saying that
17 on behalf of Citizens Alliance for a Safe Environment, we
18 are totally pleased with the representation of Ms. Whicher
19 of us in these proceedings.

20 I want to correct one part of the record in that,
21 I think, up to this point in time at least, I think Your
22 Honor mentioned that -- alluded to the League of Women Voters
23 as Ms. Whicher's client and implied that the League might
24 question or regret Ms. Whicher's representation of them.

25 JUDGE SMITH: No, I did not. I simply did not.

1 You're mischaracterizing my remarks. I wish to have a studied
2 consideration -- a careful consideration as to the direction
3 of your intervention. I asked you to stop, consider, regroup,
4 consult, and come back and tell us how you want to proceed.
5 This is our responsibility and it will happen again. This is
6 one of the methods by which we control the case.

7 Now we have come to the point where Ms. Whicher
8 has made it clear that she feels free to put witnesses on the
9 stand, as to whom she will not vouch, and she considers herself
10 free to propose findings to this Board that we find -- based
11 upon the testimony -- as to which she will not vouch --
12 findings.

13 And under the Federal Rules of Evidence, she is
14 not required to vouch for the voracity of a witness. But there
15 comes a point where, as a party to the proceeding, if you were
16 putting on evidence and making proposals to the Board based
17 upon evidence which you did not believe in, then I think we
18 have passed the point that we will accept in a proceeding.

19 This is what I've asked you to do; consider whether
20 you believe that all of the issues that you're putting forth --
21 whether you really believe that you wish to litigate them, and
22 what your course of action is going to be. And I made that
23 admonition and it still carries today. But if you are
24 unwilling to screen your issues and if you are unwilling to
25 present evidence as to which you vouch and if you are unwilling

1 to screen from your proposed findings and your briefs,
2 arguments which you do not have a moral conviction, and your
3 clients do not have a moral conviction -- if you're unwilling
4 to do that, or if I misunderstood, then that puts a different
5 light on the Board's control.

6 MS. CHAVEZ: Your Honor, CASE from the beginning
7 of this process carefully considered its options, as to
8 raising issues on the quality assurance/ quality control
9 contentions. To this point in time, largely, these issues
10 that we wish to raise have been raised and all the issues
11 that we wish to raise, we have not been able to do so, either
12 through lack of time, lack of expertise, or lack of ability --
13 financial ability -- to go out and actually present this
14 evidence to Your Honor.

1 So, we feel that Ms. Whicher is giving adequate
2 representation for our case. We carefully sat down last night
3 and looked at the issues and the laundry list that
4 Ms. Whicher brought to the Board.

5 Personally, I sat down and went through I don't
6 know how many I&E reports, looking to see whether or not, in
7 the words of Your Honor, there were issues there with no
8 basis.

9 And personally, I have to say that every single
10 allegation that I looked at contained some merit. In fact,
11 I only found two which were very general, on the order of
12 this Byron plant as another Zimmer that I could find the
13 Board to object to.

14 And when I looked through the rest, the SALP
15 reports and the other items on our list, those are all
16 pertaining to the quality assurance, quality control
17 attention. They all go to the root of the matter the
18 Appeal Board expressed in its concern, that it expressed
19 during oral argument in Washington. And that was when it
20 sat down to look at the Callaway. Unlike previous decisions,
21 it looked at all the paperwork that has been submitted up
22 to this point, and it was unable to come up with anything of
23 substantial analysis or substantial study submitted by
24 Applicant which would go to allow it to prove whether or not
25 the plant had been built safely or whether there were any

1 indications of problems.

2 And I think the Board is being unreasonable in the
3 process it has indicated it's taking right now, because I
4 don't think any profit will result in any such demonstration
5 being made to this point. I felt that Ms. Whicher should be
6 allowed, in her own way, to present this evidence.

7 JUDGE SMITH: Ms. Whicher, I don't really understand
8 Ms. Chavez recommendations for the procedural approach. I
9 think you're going to have to help. I don't think Ms. Chavez
10 understands very well our conversation yesterday either.

11 MS. WHICHER: She expressed to me a desire to
12 address the Board this morning. I offered to facilitate that
13 to the greatest extent that I could. All I can do is request
14 that Your Honor hear her out. She and I consulted about these
15 issues, as I have with Ms. Johnson, as I have with
16 Dr. Von Zellen. And Dr. Von Zellen has also expressed a
17 desire to address this Board.

18 I think each of these people were quite upset about
19 the remarks made about me last night. And my understanding
20 was that -- they asked me if they could address the Board.
21 My understanding was that their remarks were to be made to
22 that issue.

23 As to the legal portion of our presentation this
24 morning, Ms. Chavez and I have consulted. And I can assure
25 you I will carry the ball on that.