

RELATED CORRESPONDENCE

DOCKETED

MEMORANDUM

'84 JUL 16 A11:21

To: Ivan W. Smith
A. Dixon Callihan
Richard F. Cole

From: Isham, Lincoln & Beale

Date: July 10, 1984

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

Subject: Summary of July 3, 1984, conference call

On Tuesday, July 3, 1984, a conference call was held between the Licensing Board, and the parties. Judge Smith was the only judge participating in the conference. This memorandum constitutes a synopsis of the statements made by the parties and by Judge Smith during that call.

Intervenors counsel Douglass Cassel commenced the conference call by stating that two issues required discussion-- scheduling of the hearings and disclosure of one of Intervenors' witnesses. Discussing the issue of scheduling, Mr. Cassel informed the Board and parties that Jane Whicher has been ordered by her doctor to remain at home and to rest for at least two weeks. Therefore, Ms. Whicher will not be available to work on the proceedings in that time, and perhaps for some weeks after that as well. BPI consequently has been attempting to retain additional counsel to handle the Byron proceedings, but has not yet received a definite affirmative commitment. Mr. Cassel said that he hoped to receive on

Thursday, July 5, a definite commitment from an attorney with whom BPI had been having discussions. Because of BPI's difficulty in finding counsel to substitute for Ms. Whicher, and because any attorney that is ultimately retained will require time to learn the case, Mr. Cassel requested the Board to postpone the commencement of the hearings for two weeks from the presently-scheduled date of July 16.

In response to Mr. Cassel's request Michael Miller, counsel for Commonwealth Edison Company, stated that he could not, on behalf of the Applicant, agree to the delay requested by Mr. Cassel. Mr. Miller recognized the unfortunate burden placed on BPI by the illness of Ms. Whicher, and set forth several proposals designed to enable Intervenors to proceed to hearing as scheduled. First, Mr. Miller stated that Applicant would raise no objection to Intervenors' utilizing Josh Levin, a law student who has been working on the proceedings for BPI, as hearing counsel, with full cross examination privileges. Second, Mr. Miller noted that the technical advisers retained by Intervenors could be used to cross examine Edison's witnesses. Third, Mr. Miller said that Edison would agree to a continuance for the filing of Intervenors' direct testimony. Fourth, Mr. Miller offered Intervenors the opportunity to have their new counsel interview Edison's witnesses and counsel, to enable Intervenors' counsel to develop his or her knowledge concerning the substantive issues which will be presented at the hearings.

Fifth, Mr. Miller offered to postpone the depositions of Intervenor's witnesses until after the hearings have begun, the depositions to be held on weekends or during the evenings while the hearings are in progress.

Stephen Lewis, counsel for the NRC Staff, stated that the Staff concurs in Commonwealth Edison's opposition to the Intervenor's request for a delay in the hearings.

After additional discussion between the parties, Mr. Miller offered Intervenor the opportunity to have their technical advisers meet with Edison's experts prior to July 16 to discuss the concerns held by Intervenor's experts. Such discussions could resolve some of those concerns, and thus narrow the issues remaining for hearing. Mr. Miller suggested that such informal discussions could be followed by a prehearing conference before the Board held on the first day of the hearings, the purpose of the conference being to discuss with the Board the results of the experts' meetings. Mr. Miller informed the Board and parties that Commonwealth Edison would bear the cost of transportation to Chicago for Intervenor's experts for the proposed meetings.

Mr. Cassel responded to Mr. Miller's suggestion by noting that any counsel retained by BPI for the Byron proceedings would need preparation time for informal meetings between the parties' experts, just as such counsel would require time to prepare for other facets of the proceedings. Therefore Mr. Cassel could not at that time agree to the discussions proposed by Mr. Miller.

Mr. Miller noted that Intervenors never took advantage of the offers he made to them earlier, in May, to discuss the issues of the proceedings informally. In addition, the records at Sargent & Lundy which Mr. Stokes, one of the technical experts who will testify for Intervenors, recently reviewed, had been available to Intervenors for several weeks before they actually began their review.

Mr. Cassel stated that Mr. Stokes was the "last in a long line" of prospective expert witnesses contacted by Intervenors, and therefore he could not have reviewed the Sargent & Lundy records earlier than he did. In further discussing Intervenors' request for a postponement of the hearing date, Mr. Cassel asserted that Intervenors were entitled to representation by competent counsel as a matter of constitutional due process and the Administrative Procedures Act. Mr. Cassel was unable to identify specific support for this statement.

After the parties had made their statements, Judge Smith expressed his impressions concerning Intervenors' request. He noted that lawyers for the parties act as facilitators of the evidence which is presented to the Board, and consequently the needs of the lawyers involved in the proceedings should not assume paramount importance in matters such as scheduling. The focus of the presentation of testimony should be on the role of the technical advisers, rather than on the role of the lawyers. Judge Smith also

noted that the majority of the issues which are to be the subjects of the hearings were identified by the Board itself, rather than by Intervenors. Consequently, Judge Smith approved of the suggestions and offers made by Mr. Miller. Judge Smith also noted that Intervenors have institutional knowledge of the facts of the proceedings, through the relatively constant attendance of their representatives other than counsel, and that Intervenors' experts have had the time necessary to allow them to determine their positions between issuance of the Appeal Board's decision and the present.

Judge Smith also stated that the need for extensive depositions by Intervenors had been significantly reduced by the filing of Applicant's direct testimony. Judge Smith noted that he had repeatedly requested Intervenors' counsel to narrow the issues which Intervenors brought before the Board, but that Intervenors' counsel had continually refused to narrow the scope of issues placed before the Board. Consequently, counsel's "overextending" itself was not cause for delay in the hearings.

Judge Smith concluded that he could give no encouragement to Intervenors on their request for a delay in commencement of the hearings. Judge Smith said that he could see no basis for recommending to the other Board members that the request be granted.

Judge Smith scheduled a subsequent conference call

for 2:00 p.m. EDT on Thursday, July 5, to determine the position of the Intervenors at that time.

On the issue of Intervenors' disclosure of one of their witnesses, Mr. Cassel stated that Intervenors' concern was that public disclosure of the identity of the witness might compromise the ongoing investigation being conducted by the Staff into allegations made by the witness.

Mr. Lewis informed the Board and parties that the subject of the investigation had been disclosed in an earlier Board notification which had been served on those representatives of the parties who were subject to protective order. Mr. Lewis also noted that the Staff was not convinced that the subject matter of the allegations made by the witness was within the scope of the scheduled hearings. Mr. Lewis stated that Intervenors had been informed by the Staff that they had the choice of proceeding in any manner they desired with regard to disclosing the identity of their witness. The Staff could not and therefore would not make promises to Intervenors concerning the impact on the investigation of disclosure of the witness' identity, and Mr. Lewis noted that in conversations with Intervenors' counsel the Staff did not seek to dissuade Intervenors from disclosing the identity of the witness.

Mr. Miller suggested that Intervenors make an appropriate in camera motion to the Board regarding the issue of disclosure. Such a motion could also lead to

framing of the issues before the Board, which could prove beneficial to Intervenor's new counsel.

Judge Smith concluded that the issue was not properly before the Board, and thus no ruling was required.

Mr. Cassel then said that the name of the witness would be disclosed to the parties and Board in camera.

During the conference call Mr. Miller asked Mr. Cassel if the reports in the Chicago papers on the morning of July 3 concerning Ms. Whicher's departure from BPI to the Chicago ACLU were accurate. Mr. Cassel replied that they were, and that Ms. Whicher had informed him of her move the previous Friday. Mr. Cassel noted, however, that Ms. Whicher intended to remain at BPI until September, so that she could participate in the Byron hearings.

Mr. Miller asked Mr. Lewis about publication of the report from the Office of Investigations concerning the John Hughes allegations. Mr. Lewis said that he had expected the report on Tuesday, but had not yet received it.