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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of)
COMMONWEALTH EDISON COMPANY)
(Braidwood Station, Units 1 and 2))

Docket Nos. 50-456 OL
50-457 OL

NRC STAFF RESPONSE TO INTERVENOR'S
MOTION FOR CONFIDENTIAL TREATMENT OF
PROSPECTIVE QUALITY ASSURANCE WITNESSES

I. INTRODUCTION

On September 4, 1985, Intervenor Bridget Little Rorem filed a "Motion for Confidential Treatment of Prospective Quality Assurance Witnesses" ("Intervenor Motion"). In its Motion, Intervenor requests the Board to issue an order "which provides for the confidential treatment of identifying information regarding prospective witnesses on Intervenor's Quality Assurance contention," Motion at 1, and limits the disclosure of such information "strictly on a 'need-to-know' basis." Id. at 7. According to Intervenor, the relief requested is necessary to encourage eleven former and present quality control inspectors to come forward with information relating to the alleged harassment and intimidation of quality control inspectors by certain of L. K. Comstock Company's supervisory personnel. Id. at 1. As explained below, the Staff is of the

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view that Intervenor has not made a sufficient showing that the requested relief is warranted. Accordingly, the Board should deny the motion. ^{1/}

II. DISCUSSION

The Intervenor's Motion is to be considered in accordance with the standards set forth in Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), ALAB-327, 3 NRC 408 (1976). In that case, the Appeal Board held that before a request for confidential treatment could be honored, the requester must demonstrate that: (i) the information in question is of a type customarily held in confidence by its originator; (ii) the information in fact has been kept confidential by its originator; (iii) the information is not available from public sources; and (iv) there is a "rational basis" for treating the information confidentially. 3 NRC at 416-417. ^{2/} In respect to the latter requirement, it should be noted that because of "the strong public interest in conducting

^{1/} On September 16, 1985, Applicant filed a "Response In Opposition to Intervenor's Motion for Confidential Treatment of Prospective Quality Assurance Witnesses" ("Applicants Response"). In its Response, Applicant also urges the Board to deny Intervenor's motion because "Intervenors have plainly failed to allege a sufficient basis on which to sustain their motion." Id. at 1.

^{2/} To be sure, the decision in Wolf Creek concerned documentary materials. However, the principle of the case, that it is required "of one seeking to place restrictions upon the disclosure of information relevant to an issue in adjudication" to show that there is a "rational basis" to warrant protective treatment, 3 NRC at 417, should apply with equal force in situations such as the one at bar. See NAACP v. Alabama, 357 U.S. 449 (1958); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-525, 9 NRC 377, 399 (1979); Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-88-11, 11 NRC 477, 480 (1980).

a . . . proceeding which is open as possible to full public scrutiny," a request for confidential treatment will not be granted "in the absence of a concrete indication that it [is] necessary to do so to avoid significant harm[.]" Id. at 417. "[B]road, vague, and essentially unsupported allegations" will not suffice. Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-525, 9 NRC 377, 399 (1979). The factual showing made by Intervenor is woefully insufficient to enable the Board to conclude that there is a "concrete indication" that "significant harm" will ensue if the request for confidential treatment is not granted.

As an initial matter, it should be noted that at the July 23, 1985 Prehearing Conference, the Board denied Intervenor's request for confidential treatment of its prospective quality assurance witnesses. See Tr. at 256 (July 23, 1985). According to the Board, confidential treatment did not appear necessary in light of the extensive publicity surrounding this proceeding. Tr. at 241. The Board reasoned that in such circumstances it would be extremely unlikely that Applicant would take retaliatory action against any of the affected quality control inspectors. Tr. at 261. Nevertheless, the Board stated that it would consider future requests for confidential treatment for individual inspectors. Tr. at 256. The Board cautioned, however, that before it would do so, Intervenor would be required to convey to those individuals the reasons why the Board considered confidential treatment unnecessary and to explain to them that even if confidential treatment were to be granted, disclosure of their identities to many of the persons from whom reprisal was feared would be legally required. Id. If, after being so

advised, any of the inspectors continued to desire confidentiality, Intervenor could file a new request setting forth with particularity the reasons why the request should be granted. Id. As explained below, Intervenor has not shouldered this burden.

Intervenor claims that in the absence of confidential treatment, eleven of its potential witnesses, all of whom were or are employed by L. K. Comstock Company as quality control inspectors at the Braidwood facility, would be reluctant to participate in this proceeding out of fear of possible harassment or retaliation. See Intervenor Motion at 3. However, as Applicant has pointed out, Intervenor has not offered a single affidavit attesting to a fear of reprisal or retaliation on the part of any of these individuals. See Applicant's Response at 4. Intervenor would have this Board, as well as Applicant and the Staff, accede to the request solely on the basis of its counsel's representation that the affected individuals would be victimized if their identities are not withheld. This approach must be rejected, however, because it would deny the Board and the other parties their right "to determine for themselves, by independent inquiry if thought warranted," whether an adequate basis exists for granting the request for confidential treat. See Allens Creek, supra, ALAB-535, 9 NRC at 393 (emphasis added). ^{3/}

^{3/} Moreover, there is nothing in Intervenor's Motion to suggest that its counsel has personal knowledge of the facts represented. This is a significant deficiency in view of the Appeal Board's observation that questions of fact are "not susceptible of resolution . . . on the basis of nothing more than the generalized representations of counsel who are unequipped to attest on the basis of their

Intervenor suggests that the Board should overlook its failure to produce a supporting affidavit from a single inspector because it has good reason for not doing so. In this regard, Intervenor states that one of those persons, John D. Seeders, refused to execute an affidavit out of fear that retaliatory action will ensue. Intervenor Motion at 3-4. According to Intervenor, Mr. Seeders agreed initially to execute an affidavit but subsequently declined out of fear "that his cooperation will be met with reprisal." Id. at 4. Intervenor, however, does not describe the intervening events that caused Mr. Seeders to change his mind. Without such information, it is not possible for either the Board or the parties to determine for themselves whether Mr. Seeder's claimed fear of reprisal is genuinely held, and if so, whether it is reasonable in the circumstances.

The same deficiency applies in equal measure to the remaining individuals. Confidential treatment for these individuals is based on nothing more than Intervenor counsel's representation that all of them "expressed fear of reprisal or discrimination" if their identities were not withheld. Id. at 6. Such vague, conclusory, and unsupported allegations hardly satisfy the "concrete" showing necessary to honor a request for confidential treatment. See Allens Creek, supra, 9 NRC at 399.

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

own personal knowledge to the accuracy of the representations." Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 23-24 (1983).

The Appeal Board has stated the public interest "would be disserved were a licensing board . . . to place a veil of secrecy over some aspect of a licensing proceeding in the absence of a concrete indication that it was necessary to do so to avoid significant harm to a competing, equally cognizable interest." Kansas Gas and Electric Co. (Wolf Creek Nuclear Generating Station, Unit 1), supra, ALAB-327, 3 NRC 408, 417. The Intervenor simply has not carried its burden of demonstrating that significant harm will result if the request for confidential treatment is denied. In this connection, the Staff notes additionally that Intervenor has not proffered any description of the nature of the evidence that any of the affected individuals would provide were they to participate in the proceeding. Consequently, neither the Board, the Applicant nor Staff is in a position to determine whether the probative value of the information those individuals possess is such that the need for it, even if received in secrecy, outweighs the public interest in having that information examined in public. This is an additional reason why the Board should not grant Intervenor's request.

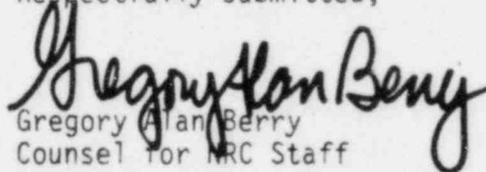
As a final matter, the Staff finds merit in Applicant's argument that considerations of fairness militate against granting the requested relief. As Applicant notes, to respond effectively to Intervenor's harassment and intimidation allegations, it is necessary to discuss those allegations "with the very officials who stand accused." Applicant's Motion at 8. It is not unlikely that in many instances these officials may be the same persons from whom retaliation is feared. Since Intervenor does not object to disclosure of its witnesses' identities to those persons with a "need-to-know," Intervenor Motion at 7,

it is only the public that would be affected were the Board to grant the motion. Nothing in Intervenor's motion, however, suggests that Intervenor fears reprisal or retaliation from the public. Therefore, no legitimate interest is served by excluding the public from this proceeding. Since there is no need to withhold the information from the public and fundamental fairness requires that the information be disclosed to Applicants, there does not appear to be any persuasive reason why the requested protective order should be granted. ^{4/}

III. CONCLUSION

For the reasons stated herein, Intervenor's Request for Confidential Treatment of Prospective Quality Assurance Witnesses should be denied.

Respectfully submitted,


Gregory Alan Berry
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 23rd day of September, 1985

^{4/} The Staff agrees with Applicant that the decision in Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-80-24, 11 NRC 775 (1980), which approved the disclosure of Applicant's security plan pursuant to a protective order does compel the issue of a protective order in this case. See Applicant's Response at 7-8. As the Appeal Board had earlier explained: "the security plan is very sensitive. Severe consequences may result from its compromise." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 746 (1980). The potential harm to the public flowing from the unrestricted dissemination of the identity of one or more quality control inspectors hardly can be equated to that resulting from the publication of the security plan for a nuclear power reactor. In any event, Intervenor has not made a persuasive showing that "severe consequences may result" if the request for protective treatment is not granted.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENOR'S MOTION FOR CONFIDENTIAL TREATMENT OF PROSPECTIVE QUALITY ASSURANCE WITNESSES" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 23rd day of September, 1985:

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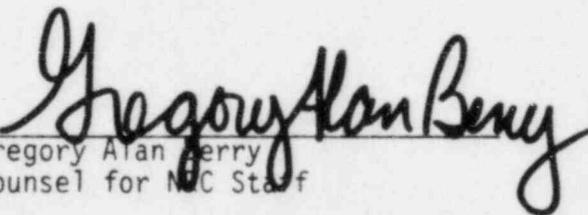
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