

August 31, 1998

Mr. Michael D. Kohn
National Whistle Blower Legal Defense and Education Fund
3233 P Street, NW
Washington, DC 20007-2756

Dear Mr. Kohn,

I am responding to the Petition you submitted pursuant to Section 2.206 of Title 10 of the **Code of Federal Regulations** (10 C.F.R. § 2.206), dated March 25, 1998, on behalf of the National Whistle blower Legal Defense and Education Fund. Mr. Randy Robarge initially was also named as a Petitioner; but, by a written submittal dated June 26, 1998, the NRC was notified by you that Mr. Robarge was withdrawing his Petition. The Petition was referred to the Office of Nuclear Reactor Regulation for preparation of a response in accordance with 10 C.F.R. § 2.206.

The Petition requests that the NRC take immediate corrective action and impose civil penalties against Commonwealth Edison Company (ComEd). As grounds for the request, the Petition asserts that: (1) ComEd's assertion in a pleading in a case before the U.S. Department of Labor, 98-ERA-2, that the filing of a "Problem Identification Form" does not constitute protected activity fosters an atmosphere of intimidation and chills the reporting of safety concerns in violation of 10 C.F.R. § 50.7; and (2) ComEd intentionally imposed "restrictive confidentiality" aimed at prohibiting employees from providing information to the NRC in violation of 10 C.F.R. § 50.7.

By letter dated April 29, 1998, I acknowledged receiving your Petition and stated that pursuant to 10 C.F.R. § 2.206 of the Commission's regulations, your Petition was referred to me for action and that it would be acted upon within a reasonable time. You were also informed that the issues raised in the Petition do not constitute an immediate safety concern at ComEd's nuclear facilities and that the information provided did not warrant the immediate action that you requested.

For the reasons stated in the enclosed Director's Decision (DD-98-08), your request has been denied. A copy of this Decision will be filed with the Secretary of the Commission for the Commission to review in accordance with 10 C.F.R. § 2.206(c). As provided by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of issuance of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

The enclosed Notice and Director's Decision are being forwarded to the Office of the Federal Register for publication.

Sincerely,

/s/ Frank J. Miraglia for
Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Docket Nos. STN 50-456, STN 50-457, STN 50-454,
STN 50-455, 50-237, 50-249, 50-373, 50-374,
50-254, 50-265, 50-295, 50-304

Enclosures: 1. Director's Decision
2. Notice
cc w/encls: See next page

DD-98-08

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION
Samuel J. Collins, Director

In the Matter of)	
)	
COMMONWEALTH EDISON COMPANY)	
)	
(Braidwood Station, Units 1 and 2))	Docket Nos. STN 50-456, STN 50-457,
(Byron Station, Units 1 and 2))	STN 50-454, STN 50-455, 50-237, 50-249
(Dresden Nuclear Power Station,)	50-373, 50-374, 50-254, 50-265, 50-295,
Units 2 and 3))	50-304
(LaSalle County Station, Units 1 and 2))	
(Quad Cities Nuclear Power Station,)	
Units 1 and 2))	
(Zion Nuclear Power Station, Units 1 and 2))	

DIRECTOR'S DECISION UNDER 10 C.F.R. §2.206

I. INTRODUCTION

On March 25, 1998, the National Whistle blower Legal Defense and Education Fund and Mr. Randy Robarge filed a Petition with the U.S. Nuclear Regulatory Commission (NRC) pursuant to Section 2.206 of Title 10 of the **Code of Federal Regulations** (10 C.F.R. § 2.206). (Although Mr. Randy Robarge was also initially named as a Petitioner, the NRC was notified by counsel for Mr. Robarge by written submittal dated June 26, 1998, that Mr. Robarge was withdrawing his Petition). The Petition requested that the NRC take certain immediate "corrective" action and impose civil penalties against Commonwealth Edison Company (ComEd) based upon ComEd's: (1) "interference" with the willingness of employees to file Problem Identification Forms (PIFs); and (2) "intentional prohibition" of employees from directly communicating information to the NRC. The Petitioner raised two issues. Specifically, the Petitioner asserted, first, that ComEd's assertion in a pleading in a case before the U.S.

Department of Labor (DOL), [\(1\)](#) 98-ERA-2, that the filing of a PIF does not constitute protected activity fosters an atmosphere of intimidation and chills the reporting of safety concerns in violation of 10 C.F.R. § 50.7. As a consequence, the Petitioner requested the NRC to:

- (1) immediately issue a Show Cause Order requiring ComEd to explain why the filing of a PIF does not constitute protected activity under Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5845 (1988 and Supp. V 1993) (ERA);
- (2) issue a Severity Level I violation and appropriate civil penalty for taking action that ComEd knew or should have known would prevent employees from filing PIFs; and
- (3) require the licensee to post a public apology for claiming that the filing of a PIF does not constitute a protected activity.

In addition, the Petitioner asserted that ComEd intentionally imposed restrictive confidentiality provisions in a discovery agreement in a pending DOL proceeding aimed at prohibiting employees from providing information to the NRC in violation of 10 C.F.R. § 50.7. As a consequence, the Petitioner requested that the NRC:

- (1) issue a Show Cause Order to ComEd requiring it to explain under oath why the imposition of restrictive confidentiality clauses prohibiting employees from directly communicating information to the NRC should be prohibited;
- (2) impose a Severity Level I violation and appropriate civil penalty against ComEd for the intentional violation of 10 C.F.R. § 50.7(f);
- (3) require ComEd to transmit to all individuals under similar restrictive confidentiality terms notice that they are now free to communicate information to the NRC; and (4) require the licensee to release to the NRC copies of all restrictive confidentiality agreements entered into by ComEd and any subcontractors employed by ComEd since March 21, 1990 (the date the Federal Register notice of 10 C.F.R. § 50.7(f) was published).

By letter dated April 29, 1998, I informed the Petitioner that the Petition had been referred to me pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. I further informed the Petitioner that the issues raised in the Petition did not constitute an immediate safety concern at ComEd's nuclear facilities and that the information provided did not warrant the immediate action that was requested, but that action would be taken upon the Petition within a reasonable time.

On May 20, 1998, the NRC forwarded a copy of the Petition to the licensee with a request to respond to the issues raised in the Petition. The licensee responded to the NRC's request by letter dated June 19, 1998.

II. BACKGROUND

Mr. Randy Robarge, a former health physics supervisor at the Zion Nuclear Power Station, filed a complaint with the U. S. Department of Labor (DOL) under Section 211 of the ERA (98-ERA-2) claiming that he was discriminated against and subjected to a retaliatory discharge for filing PIFs. On November 26, 1997, during discovery in connection with the pending litigation before the DOL Administrative Law Judge, Mr. Robarge filed through his counsel a "Request for Production of Documents, Admissions, and Interrogatory Questions" (Complainant's Request). On February 5, 1998, ComEd filed through its counsel its "Respondent's Response and Objections" (Respondent's Response). In addition, during discovery, counsel for Mr. Robarge and ComEd entered into a joint agreement to provide for the confidentiality of certain documents. The agreement was embodied in an Order signed by counsel for both parties on March 23, 1998, entitled, "Stipulation and Order Governing Confidentiality of Document and Information" (Confidentiality Order).⁽²⁾

III. DISCUSSION

The Petitioner makes two assertions in support of the request that the NRC take the action requested. These assertions arise from statements made by ComEd in the discovery documents described above.

First, the Petitioner claims that ComEd's response in its Respondent's Response to a request made by Mr. Robarge in his Complainant's Request (Request Number 3) amounts to an assertion that the filing of PIFs is not a protected activity and, as such, will "chill" the reporting of safety concerns in violation of 10 C.F.R. § 50.7. Request Number 3 requested that ComEd admit or deny the following statement: "The complainant engaged in protected activity under Section 211 when he filed 'PIFs' with the Respondent." In its Respondent's Response, ComEd stated the following: "Respondent objects to the Request as being overly broad, vague and ambiguous in referring generally to 'PIFs' and for calling for a legal conclusion and, therefore, this Request is denied."

The Petitioner asserts that this "cavalier attitude and recalcitrance to admit that the filing of PIFs is protected activity" by the licensee will "chill" the willingness of employees to file PIFs and, as such, warrants that the NRC issue a Show Cause Order to the licensee, issue a Severity Level I violation and civil penalty, and require the licensee to post a public apology. In support of this assertion, the Petitioner submitted as an attachment to the Petition an affidavit by a ComEd employee that stated that ComEd's denial that the filing of a PIF constitutes protected activity "chills" the willingness of employees to file PIFs.

In construing ComEd's response to Request Number 3 in such a manner, the Petitioner appears to have misconstrued the statement by taking it out of context and misstating the licensee's position. In making this statement, the licensee does not appear to be taking the position that the filing of all PIFs was not a protected activity. Rather, the licensee was objecting specifically to a request for admission as being an inappropriate discovery request as a litigative technique. Nothing in its response suggests that ComEd did not recognize that the actual filing of a PIF could constitute protected activity. In fact, in its response to the Petition, dated June 19, 1998, ComEd specifically stated that it recognizes that the preparation of internal nuclear safety-related documents, such as PIFs, could give rise to protected activity.⁽³⁾ Thus, there is no merit to this assertion, nor does it warrant the action requested by the Petitioner.

The Petitioner's second assertion is that ComEd intentionally imposed a restrictive provision upon Mr. Robarge aimed at prohibiting employees from providing information to the NRC in violation of 10 C.F.R. § 50.7. To "correct" this practice, the Petitioner requests that the NRC issue a Show Cause Order to ComEd, impose a Severity Level I violation and civil penalty against ComEd, require ComEd to transmit to all individuals under similar confidentiality terms notice that they are now free to communicate information to the NRC, and require ComEd to release to the NRC copies of all restrictive confidentiality agreements entered into by ComEd and its subcontractors since March 21, 1990.

The provision that the Petitioner asserts was intended to prohibit Mr. Robarge from providing information to the NRC in violation of NRC requirements is Section 3 (g) of the Confidentiality Order. Section 3 (g) of the Confidentiality Order states that confidential information may be disclosed to governmental law enforcement agencies and other governmental bodies pursuant to valid subpoena, provided that: (1) the subpoenaed party give counsel for the designating party written notice of the subpoena and, if so directed by the designating party, object to such subpoena on a timely basis so as to preserve the designating party's rights; and (2) the subpoenaed party proceed in good faith to seek to obtain confidential treatment of the subpoenaed documents from the relevant governmental body. The Confidentiality Order also contains a provision (Provision 6) that would allow either party to challenge the applicability of this stipulation to any document designated as confidential.

The Petitioner alleges that Mr. Robarge objected through his counsel to the wording of Section 3 (g) and requested that the provision include an additional paragraph stating the following:

Nothing in this agreement shall constitute a prohibition on either party to communicate directly with the U.S. Nuclear Regulatory Commission any information or documentation that is designated as "confidential" by either party except that the party seeking to provide that material to the NRC shall clearly designate the documents as "confidential" and request that the documents be treated as confidential to the fullest extent reasonable under the circumstance.

The Petitioner asserts that ComEd's counsel responded in a letter dated March 19, 1998, that "the language in your addendum is not something that ComEd will stipulate to end a confidentiality order (or an addendum to such an order). On the merits, this section goes directly against the purpose for having a confidentiality order in the first place." The Petitioner also states that ComEd's counsel acknowledged to counsel for Mr. Robarge that "the restrictive confidentiality language is routinely incorporated in agreements entered into by ComEd." The Petitioner asserts that these statements demonstrate that the prohibition in communication with the NRC was intentional rather than inadvertent, and that identical restrictive language is routinely incorporated into ComEd agreements.

The language of which the Petitioner complains is reflected in the Confidentiality Order executed by counsel for both parties as well as the Administrative Law Judge (ALJ) presiding in the DOL proceeding regarding Mr. Robarge's Section 211 complaint. Indeed, it appears that the Confidentiality Order was executed by counsel for both parties on March 23, 1998, and entered by the DOL ALJ on March 24, 1998; both dates are after the exchange of correspondence alluded to by counsel for Mr. Robarge with respect to his complaints about the possible restrictive nature of the provision. To the extent that Mr. Robarge had such concerns, they should have been raised in the first instance, before the DOL ALJ. That agency has, in the past, expressed no hesitation in assuring that agreements reached by parties to proceedings before it under Section 211 do not contain provisions which unlawfully interfere with an individual's right to engage in protected activity, *Polizzi V Gibbs & Hill, Inc.*, 87-ERA-38 (Secretary of Labor, July 18, 1989). There is no indication that Mr. Robarge requested that the ALJ consider this matter in the first instance, or sought reconsideration by DOL. In the absence of consideration of this matter by the ALJ, NRC does not intend to take action.

IV. CONCLUSION

For the reasons discussed in the preceding section, no basis exists for taking the actions requested by the Petitioner. Accordingly, the Petition is denied.

A copy of the Decision will be filed with the Secretary of the Commission for the Commission's review. The Decision will become the final action of the Commission, 25 days after issuance unless the Commission, on its own motion, institutes review of the decision within that time.

Dated at Rockville, Maryland, this **31st** day of **August 1998**.

FOR THE NUCLEAR REGULATORY COMMISSION

/s/ Frank J. Miraglia for
Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

7590-01

UNITED STATES NUCLEAR REGULATORY COMMISSION
DOCKET NOS. STN 50-456, STN 50-457, STN 50-454, STN 50-455,
50-237, 50-249, 50-373, 50-374, 50-254, 50-265, 50-295, 50-304
COMMONWEALTH EDISON COMPANY
BRAIDWOOD STATION, UNITS 1 AND 2
BYRON STATION, UNITS 1 AND 2
DRESDEN NUCLEAR POWER STATION, UNITS 2 AND 3

LASALLE COUNTY STATION, UNITS 1 AND 2
QUAD CITIES NUCLEAR POWER STATION, UNITS 1 AND 2
ZION NUCLEAR POWER STATION, UNITS 1 AND 2
ISSUANCE OF DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

Notice is hereby given that the Director, Office of Nuclear Reactor Regulation, has taken action with regard to a Petition submitted by the National Whistle blower Legal Defense and Education Fund (Petitioner), dated March 25, 1998, regarding Commonwealth Edison Company (ComEd).

The Petitioner requested that the NRC take corrective action and impose civil penalties against ComEd. The Petitioner asserted that: (1) ComEd's assertion in a pleading in a case before the U.S. Department of Labor that the filing of a "Problem Identification Form" does not constitute a protected activity fosters an atmosphere of intimidation and chills the reporting of concerns in violation of 10 CFR §50.7; and (2) ComEd intentionally imposed "restrictive confidentiality" aimed at prohibiting employees from providing information to the NRC in violation of 10 C.F.R. § 50.7.

The Director of the Office of Nuclear Reactor Regulation has denied the Petition. The reasons for the denial are explained in the Director's Decision under 10 C.F.R. § 2.206 (DD-98-08), the complete text of which follows this notice and which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, N.W., Washington, D.C. 20555-0001; and at the local public document rooms; the Byron Public Library District, 109 N. Franklin, P.O. Box 434, Byron, Illinois 61010; the Wilmington Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481; Morris Area Public Library District, 604 Liberty Street, Morris, Illinois 60450; Jacobs Memorial Library, 815 North Orlando Smith Avenue, Illinois Valley Community College, Oglesby, Illinois 61348-9692; Dixon Public Library, 221 Hennepin Avenue, Dixon, Illinois 61021; and Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c) of the Commission's regulations. As provided by this regulation, this Decision will constitute the final action of the Commission 25 days after the date of issuance unless the Commission, on its own motion, institutes a review of the decision within that time.

Dated at Rockville, Maryland, this **31st** day of **August 1998**.

FOR THE NUCLEAR REGULATORY COMMISSION
original signed by:

Frank J. Miraglia, Acting Director
Office of Nuclear Reactor Regulation

1. The case involved an assertion by Mr. Robarge that he had been discriminated against by ComEd for raising Nuclear Safety concerns in violation of Section 211 of the Energy Reorganization Act of 1974, as amended, 42USC § 5851 (1988 and Supp. V. 1993)
2. On June 8, 1998, the parties submitted to the DOL Administrative Law Judge a joint motion seeking approval of a settlement agreement and to protect its confidentiality and to dismiss the claim. Attached to the motion was the settlement and release agreement signed by counsel for both parties, as well as Mr. Robarge. On June 10, 1998, the Administrative Law Judge issued a Recommended Decision and Order recommending that the joint motion to approve settlement agreement and for order of dismissal be granted, and noted that the Recommended Decision and Order would become the final order of the Secretary of Labor absent a petition for review being received by the Administrative Review Board within ten business days. We have been informed that the DOL

has no record of an appeal being filed.

3. With regard to the attached affidavit (Exhibit 5 to the Petition), the affiant indicates that he viewed the licensee's response to request number 3 in its Respondent's Response to represent ComEd's "official legal position." It thus appears that the affiant misunderstood the purpose of the response and its limited significance as a litigation technique and the fact that this statement did not constitute an "official legal position" about whether the filing of PIFs could constitute protected activity.