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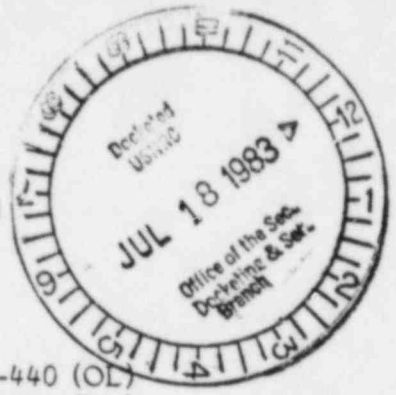

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

In the Matter of	)	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, et. al.	)	Docket Nos. 50-440 (OL) 50-441 (OL)
(Perry Nuclear Power Plant, Units 1 and 2)	)	
	)	

SUNFLOWER ALLIANCE'S PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

Now comes Sunflower Alliance, Intervenor herein, by and through counsel, and submits its proposed findings of fact and conclusions of law in the form of a proposed partial decision, all pursuant to 10 CFR 2.754(a)(2) and the directions of the Licensing Board in this matter.

Terry Jonathan Lodge
Counsel for Sunflower Alliance
824 National Bank Building
Toledo, Ohio 43604
(419) 243-6251

I. Summary of Findings

This cause, being Issue #3 in the operating license stage of these proceedings, came on for adjudication in Painesville, Ohio, from May 24-27, 1983.

As admitted by our Special Prehearing Conference "Memorandum and Order" (LBP-81-24, 14 NRC 175), Issue #3 comprised a contention directed at the efforts of Cleveland Electric Illuminating Company, et. al. (hereinafter "Applicant") in the area of quality assurance in construction:

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> Applicant has an inadequate quality assurance program that has caused or is continuing to cause unsafe construction.

The contention was further clarified and narrowed by this Board's determinations on summary disposition as follows:

> The existence, cause, severity, duration and extent of an alleged instance in which applicant's quality assurance program failed by not properly controlling its electrical contractors.
>
> Whether the alleged deficiencies in properly controlling electrical contractors extend to the proper control of other contractors.
>
> Whether deficiencies in the control of contractor activities have resulted in unsafe conditions at Perry.
>
> Whether applicant has an adequate system for periodically reviewing its program for assuring the quality of contractor performance and ascertaining and correcting deficiencies that have arisen, particularly in systems essential to safe plant operation.

Our determinations at that point were grounded upon the belief that Applicant and the Nuclear Regulatory Commission staff (hereinafter "Staff") failed to demonstrate the absence of genuine issues of material fact since the Staff's issuance of a letter and lengthy supporting documentation of September 27, 1982 (hereinafter "Report 81-19", an admitted Board exhibit). Report 81-19 documented numerous examples of the Applicant's failures to require even adequate performance in assuring quality electrical construction methodology at Perry from the contractor retained for that purpose, L. K. Comstock Company (hereinafter "Comstock"). Our prima facie presumption at that point was that if deficient oversight by Applicant of Comstock were allowing considerable nonconforming electrical construction, then project-wide quality assurance (QA) deficiencies might be imputable to other contract work.

Our hearing and subsequent consideration of documentary and oral testimony at adjudication has caused us to conclude that Applicant has failed in its proofs to establish, by a preponderance of the evidence, that quality construction methods pertain at Perry at the present time. Report 81-19's deficiencies were of such a severe nature in most instances, and so little rehabilitation time has passed since their revelation, from a construction timetable standpoint, that the Board hereby directs a reopening of this contention for the taking of testimony. Further, the Board will defer a final ruling upon the adequacy of Applicant's construction quality assurance practices until Perry is at or near the completion of the construction phase, presently targeted as early to mid-1985.

Procedurally speaking, the Board adopted what was in effect a comparatively activistic posture in the elicitation of testimony from Applicant's and Staff's expert witnesses. This approach was principally designed to assist intervenors Ohio Citizens for Responsible Energy (hereinafter "OCRE") and Sunflower Alliance (hereinafter "Sunflower"), the latter of which participated despite the unexpected loss of its main counsel, in their technical framing of questions and pursuit of lines of cross-examination. The Board had hoped to ensure as smoothly flowing a trial as possible. In practical terms, the Board finds that again and again, far from assisting the adversarial approach to fact-finding, that Board questions gave opportunities to Applicant and Staff witnesses to render conclusions upon the ultimate issues. Further, the Board occasionally changed the course of the intervenors' examination away from areas of possible relevance by raising its own lines of questioning. It would be the Board's intention in future litigation on this and other issues to focus on the development of as complete a record as possible by relying more fundamentally upon the parties so to do.

Finally, the Board is troubled by the possibility that it may have appeared to serve as a foil for the Staff in several material ways surrounding the discovery just prior to hearing that there was a considerable difference of opinion and of substantive viewpoint between one or more anonymous NRC-Region III inspectors and those experts from the same office. The Board erroneously allowed the NRC witnesses at hearing to ascribe many conclusions, statements and perspectives to the unknown person or persons, which effectively allowed the Staff to project the impression of internal dissent, but with a seeming ability to glossily resolve professional disputes in such a way as to produce unusually competent quality assurance oversight. This approach, we have determined, leaves too much room for doubt about this quite critical licensing issue, and the Board will direct this contention be set for additional hearing of evidence of a more reliable, probative and substantive nature.

II. Underlying the Issue

A. Summary Disposition

As previously stated, Issue #3 was modified to four rather specific fact questions by the Board's December 22, 1982 "Memorandum and Order (Concerning Summary Disposition: Quality Assurance, Corbicula, and Scram Discharge Volume Contentions)".

Report 81-19, relied upon by Sunflower in opposing summary disposition of this issue, is replete with glaring instances of management deficiencies which suggest pervasive difficulties by Applicant in guaranteeing reliable quality assurance practices.

Following our denial of summary disposition on Issue #3, we were called upon to reconsider. We did, with the same outcome. "Memorandum and Order (Reconsideration: Quality Assurance)", January 28, 1983. Fuller analysis of Report 81-19 leads us to believe that a causality of omission existed between a 1978 order

to stop work on certain aspects of Perry, and the Comstock problems identified in Report 81-19. Applicant omitted to deduce from facts it knew or should have known that there were extensive problems with L. K. Comstock's activities at Perry, and that, if anything, circumstances deteriorated badly through 1982.

B. Applicable Law

Appendix B of 10 CFR Part 50 governs this adjudication. Applicant "shall be responsible for the establishment and execution of the quality assurance program". Id., Criterion I. Applicant further has fixed responsibility for constant review and assessment of its QA program's sufficiency. Id., Criterion II.

More specifically, Applicant has clear duties to respond to deficiencies in its QA programming and corrective steps taken during construction:

> Measures shall be established to assure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, defective material and equipment, and nonconformances are promptly identified and corrected. In the case of significant conditions adverse to quality, the measures shall assure that the cause of the condition is determined and corrective action taken to preclude repetition. The identification of the significant condition adverse to quality, the cause of the condition, and the corrective action taken shall be documented and reported to appropriate levels of management.

Id., Criterion XVI

(emphasis supplied)

As this Board has been unable to find much delineation in NRC reported cases as to the meaning of "promptly identified and corrected", the Board has decided to rely upon the commonality of experience that "promptly" means "as quickly as humanly possible". This is the only interpretation that reasonably attaches to the phrase, in light of the focus of this regulation upon all-important safety-related equipment. It is also the only sensible reading from a dollars-and-cents perspective.

Costs can best be minimized by early and quick response to problems identified by quality assurance programs. Long-term plant outages, or expensive accidents can optimally be reduced by fast, early action. Promptness is central to staying within one's means, especially in the cumbersome complexity of plant construction.

The Applicant is allocated the burden of proof by the federal Administrative Procedure Act. 5 U.S.C.A. §556(d). Further, this Board must ground its findings upon "reliable, probative and substantial evidence". Id. As we discuss further herein, Applicant has not established as of yet a proven track record of "prompt" identification and correction of quality assurance problems, at least in light of the evidence adduced at hearing.

III. L. K. Comstock/Applicant Relationship

The Board requested Applicant to conduct a "play-by-play" description of Applicant's supervision of L. K. Comstock. Tr. 1006. That narrative appears as direct examination in the record. Tr. 1483-1543.

The blow-by-blow linear history raised as many questions as it answered. In April, 1979, Applicant noted "Comstock had improved, substantially, the materials in the plant". Tr. 1502. In August, 1979, Comstock was giving much attention to safety-related duct bank installation. Tr. 1503. In January, 1980, Applicant believed Comstock was "making progress in the audit area". Tr. 1506. An improvement in Comstock's QA/QC manning was seen by Applicant in March, 1980. Tr. 1507. "Significant improvement" was noted in June, 1980, with in-process inspections. Tr. 1509-10. In October, 1980, in-process inspections by Comstock were improving. Tr. 1512. In November of 1980, Comstock was "upgrading" training of craft personnel, and nonconformance report writing was up. Tr. 1514. Applicant noted "good staffing improvements" in September, 1981. Tr. 1527.

February, 1982, saw issuance of a stop-work order by Applicant against Comstock concerning welding and inspection techniques. Tr. 1532. In March, the NRC conducted a major onsite meeting. Tr. 1534. Comstock's craft manpower was greatly increased, and other changes made. Tr. 1533-4. Additional NRC-Applicant meetings took place, with additional changes made. Tr. 1537.

Then what Applicant established was a pernicious pattern of cause and effect. When NRC pressure was exerted, changes -- in both Applicant and Comstock QA performance -- came rapidly. As the Board reviews Report 81-19, it is clear that Applicant's corrective actions were perpetually effected only after NRC investigative activity had taken place. This does not set up the requisite halimark of confidence and assurance which the Board sees as needed in this case. The fact that no Comstock witnesses were produced by Applicant at trial further underscores Applicant's aversion to subjecting the documented history of QA problems to closer scrutiny.

Applicant always has the ultimate burden of proof. 10 CFR §2.732. The burden of persuasion should depend upon the gravity of the matters in controversy. Virginia Electric & Power Co. (North Anna Power Station, Units 1,2,3,4) 1 NRC 10, 17 at n.18 (1975). Applicant has not had the opportunity to demonstrate for any length of time, a period of QA supervision which has not been provoked by NRC regulatory activity. As the safety-related systems, and their quality construction are not as yet assured, the Board will not order otherwise.

IV. Corrective Action Responsiveness of Applicant

The Board hereby incorporates and adopts by reference here the section IV entitled "Timeliness of Corrective Action" as set forth by intervenor OCRE in its proposed findings of fact and conclusions of law dated July 11, 1983.

V. Seriousness of Report 81-19

A. Its Implications

Report 81-19 is the product of a six-month investigation by Staff which was initiated when present and past workers at the plant complained to Region III. The subsequent probe by Staff failed to substantiate the initial allegations in any material way, but Staff identified theretofore unknown quality assurance difficulties.

The significance of Report 81-19 is evident on the face of its intricate details. The document is an extremely severe critique of Comstock, and by implication if not explication, of Applicant. It is therefore disturbing to the Board that the Staff chose not to update its 1982 SALP report by way of rating the Perry site in the electrical area because it "felt that they were still in a recovery stage from the previous problems identified by Report 81-19". Tr. 1588-9. By transmittal letter dated February 10, 1983, Staff sent Applicant its most recent SALP, for the period 10/1/81 through 9/30/82. That SALP is the report acknowledging that generally Applicant took "appropriate corrective action on NRC identified items". SALP at 10.

Taken together, these two facts underscore our conclusion that insufficient Applicant oversight has passed over the Perry quality assurance dam for this Board to conclude that the QA program is free of defects sufficient to warrant a decision favorable to Applicant. Further, it emphasizes that Applicant responds correctly when Staff has identified problems, but it does not completely reassure the Board that Applicant appears to take enough initiative in the QA oversight area. See Report 81-19 at 95, that "CEI had failed to identify the findings of this investigation independent of the NRC". See also Tr. 1623.

Quite disconcerting to the Board were the Staff's glittering generalities in prefiled testimony as to Applicant's post 81-19 improvements. For instance, the Staff presented a statistically insignificant and substantively void table (pp. 7-8 of

prefiled Staff testimony) to demonstrate decreasing numbers of compliances per NRC inspector-hour. The Staff ultimately admitted that the table probably could not validly depict a trend of any sort. Tr. 1825. In fact Staff conceded that this type of computation was simply assembled for use in the prefiled testimony, and is not even regularly used as a measurement of NRC results in regulating other plants. Tr. 1828. And, of course, Staff had not even bothered to update this all-important yardstick with available 1983 data. Tr. 1830. But Staff had no reason to believe that the noncompliance rate had decreased in 1983. Tr. 1831.

A central Staff conclusion in prefiled testimony was that the Applicant had failed historically to act promptly, but that when Applicant did respond promptly it was effective. Id. at 20. If the Board views the Staff's insignificant tabular data alongside this conclusion, the Board is ill persuaded that quality contractor performance pertains at Perry. If the Staff means that Applicant lacks consistent initiative in overseeing QA performance, then how can the Staff conclude that electrical area NRC noncompliances are declining?

The Staff's testimony is not completely credible. Its analysis is superficial and at times, pointless. The Board speculates that, should an initial decision on quality assurance issue at this premature point, that the hollow threat of intervenors filing a late-filed QA contention will not necessarily deter the degradation of QA oversight which has been spotty and lacking in initiative for more than five (5) years.

B. The Phantom Inspector(s).

A critical issue to us in our deliberations over the May trial has been the Staff's reference to an anonymous inspector or inspectors with the Region III NRC offices who expressed very contrary views to those contained in the Staff's prefiled testimony. By May 18, 1983, transmittal, Region III's James Keppler notified the

Staff's Executive Legal Director, Guy H. Cunningham, that a "principal electrical inspector" and "investigator" behind Report 81-19 were "concerned that the [Staff's prefiled] testimony may not adequately convey the Region III efforts that were required to secure effective corrective action by the applicant".

Sunflower and OCRE objected strenuously to the use of the method, by this Board and the parties, of attempting to elicit these phantom Staff's viewpoints, responses and criticisms from the NRC witnesses who appeared at hearing. Tr. 1013, 1023, 1014, 1022, 1808, 1809, 1813, 1852-3, 1855. At the time, it was the Board's position that the dissenting Staff opinions embodied in the May 18, 1983, transmittal were distinctions of tone, rather than of substance. Tr. 1799, 1807, 1811. Presently, however, we are of the opinion that the Board improperly characterized the supposed dissenters' claims as being in tone as opposed to content -- that is, to say, if the dissenter's conclusions were mere opinion, then so were those of the Staff witnesses who did testify. Further, we now are prepared to acknowledge that the use of attribution of statements to anonymous persons who might add substantively to the record of this contention did, indeed, comprise inadmissible "hearsay within hearsay".

As previously noted, we are required by the Administrative Procedure Act to base any finding we make upon "the reliable, probative and substantial evidence". 5 U.S.C.A. §556(d). Hearsay of certain types has historically been admissible in administrative proceedings. Carter-Wallace v. Finch, 398 U.S. 938 (1970). This rule has been extended to NRC licensing proceedings. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), 4 NRC 397, 412 (1976) (testimony by utility officer on purchased power alternative held not to be hearsay); Illinois Power Co. (Clinton Power Station, Units 1 and 2) 4 NRC 27, 31 (1976) (successful NRC staff objection to testimony by witness based upon references to periodical articles as hearsay reversed).

The Board was able to locate one precedent which would seem to control here. In Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), ALAB-367, 5 NRC 92 (1977), the appeal board concluded that a statement by an unknown expert witness to a non-expert witness which the latter proffers as substantive evidence is unreliable and, therefore, inadmissible. In that case, the lay witness offered the expert's statement in a self-serving way. In the instant matter, Staff witnesses, with some cognizable expertise, characterized the hearsay of phantom witnesses who may be presumed from the circumstances to have differed from the Staff's apparent interest in a material way. In this adjudication, Staff witnesses were questioned at length about unknown persons whom they supervised, and who may have had closer "hands-on" awareness of the basis and implications of Report 81-19 than the witnesses testifying on behalf of Staff. Thus Staff witnesses had the luxury, or license, of being able to characterize their inferiors' statements, in content as well as intensity or implication, without fearing any lacking corroboration, because the identities of the witnesses could not be disclosed by ruling of this Board. The Board is mindful of how the strident warnings of an inspector named James Creswell, from the same office at Region III, were ignored, and how the accident at Three Mile Island resulted.

The great weight of federal court caselaw lends weight to our conclusion here. We found that Mr. Chief Justice Hughes maintained quite a while ago that "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence". Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229-30 (1938). The Chief Justice also held that reliance upon uncorroborated hearsay or rumor runs counter to evidence having "rational probative force". Id. at 230.

The "corroboration" requirement, that hearsay may become admissible in administrative proceedings when buttressed circumstantially, is, of course, applicable to the matters at hand. Nonetheless, our findings, to be valid, cannot rest upon hearsay

alone, nor upon hearsay corroborated merely by scintilla. Willapoint Oysters v. Ewing, 174 F. 2d 676, 690 (9th Cir. 1948), cert. den., 338 U.S. 860 (1949). In view of the guaranteed anonymity of the phantom inspectors, we find it hard to believe that the nature and intensity of their concerns was reflected by reliability beyond the scintilla level.

Hearsay becomes admissible as evidence at the point at which the corroborating evidence makes it reliable and substantial, with probative value. Jacobowitz v. U.S., 424 F. 2d 555 (1970); Glaros v. Immigration and Naturalization Service, 416 F. 2d 441 (C.A. Ga. 1969); Martin-Mendoza v. Immigration and Naturalization Service, 499 F. 2d 918, cert. den. 419 U.S. 1113 (1974). Moreover, it is not the nature of hearsay as hearsay which is significant in determining admissibility, but rather its probative value, reliability and the fairness of its use. Calhoun v. Bailar, 626 F. 2d 145 (C.A. Cal. 1980), cert. den. 101 S. Ct. 3033 (1980). The allowance of hearsay of the sort at issue was not fundamentally fair. History, it has been said, is the art of making the dead dance for us. We cannot allow the Staff to do the same with its phantom inspectors.

It is all too easy, in proceedings of this type, to ignore the fact that dry, highly technical documentary evidence fails to foreshadow the all-too-human colorations which go into so-called "objective" data compilation. The Staff waited until May 24, the first day of the adversarial trial on this issue, to adduce the May 18, 1983, memorandum describing this dissension for the first time. Tr. 1011. That lassitude, and the rule of this Board protecting the anonymity of the phantoms have had the effect of denying intervenors to subpoena them and to prove or disprove the credibility of the Staff's testimony through cross-examination. Goldberg v. Kelly, 397 U.S. 254, 270 (1970). It is axiomatic that written reports properly may be received as substantial evidence in administrative hearings only where the adverse party has had the opportunity,

albeit waived, to call the witnesses to which the reports are attributed for probative cross-examination. Richardson v. Perales, 402 U.S. 389, 402 (1971). However, even documents underlying a written report must be available for use in cross-examination. Carter-Wallace, Inc. v. Gardner, 417 F. 2d 1086, (4th Cir. 1969), cert. den. sub. nom. Carter-Wallace v. Finch, 398 U.S. 938 (1970). In the present matter, intervenors were cut off from ascertaining, via extended discovery, the facts, basis or foundations of the Staff's in-house dissensions. As the Supreme Court noted in Goldberg v. Kelly:

> [W]here governmental action seriously injures an individual, the reasonableness of the action depends on fact findings, the evidence used to prove the Government's [sic] case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.

397 U.S. 254, 270 (1970)

(emphasis supplied)

To the emphasized list of factors, the Board might add an excessive belief in infallibility and an unwillingness to believe vocal and militant subordinates. The Board is quite concerned that the Staff acknowledged that Cordell Williams' appeasement conferences with one phantom inspector numbered "ten", occupying "the better part of . . . [a] . . . week and a half", (Tr. 1855) yet at hearing the Staff remained firm in the position that no substantive evidence, but only opinion, could come from the sworn, personal appearance of the phantom(s). Mr. Williams' self-serving assertion that he encourages his underlings to express opinions (Tr. 1802) does nothing to dispel this Board's skepticism about the reliability of the Staff's testimony concerning the Applicant's behavior modifications since Report 81-19. In any event, the Board retracts its anomalous requirement of the intervenors that they prove the phantoms to have

relevant substantive facts to add to the record before they can be compelled to appear and add that substance. It may be true that the intervenors have the burden of going forward, either by direct evidence or by cross-examination, as to issues raised by their contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), 8 AEC 381, 388-89 (1974). However, the federal courts have questioned whether that requirement holds where the information is in the hands of the Staff or an applicant. See, e.g., York Committee for a Safe Environment v. NRC, 547 F. 2d 622, 628 (D.C. Cir. 1976).

One footnote of this controversy is in order. The Board has become aware, through official notice, of a memorandum from Region III Reactor Inspector K. R. Naidu dated June 29, 1983 and directed to the Board. Naidu assures the Board that his views were "adequately expressed" in the May 18, 1983, Keppler memorandum concerning the phantom inspectors. Even if the Board presumes Naidu to be one of the phantoms, we will nevertheless ignore this correspondence in making our ruling. In light of the strenuous Staff objections and movements for protective rulings by this Board, a one-page letter ill satisfies the search for truth here.

For all of these reasons, we reverse ourselves and direct the reopening of the QA contention for consideration of the testimony of the phantom witnesses.

VI. Impact of Counsel's Resignation from Sunflower

Doubtless Daniel Wilt's resignation as lead counsel for Sunflower Alliance was devastating to that intervenor's case. Upon reconsideration of that series of events, the Board is prepared to reopen this portion of the operating license proceeding for the conduct of additional cross-examination.

Indisputably, a party is entitled to appear by or with counsel in this agency proceeding. 5 U.S.C.A. §555(b); 10 CFR §2.713. In view of the sudden and utterly unexpected departure of Mr. Wilt, as well as the unavailability of

Sunflower's co-counsel until the last day of trial, the Board should have sua sponte continued the adjudication. This should have been done for several reasons. First, as previously discussed herein, supra, the Board believes that it should hold open its determination on this contention because of the nonimminence of the decision, and because the record is incomplete. As a practical matter, there is simply no hurry.

Second, in view of the disparity between Staff and Applicant on the one hand, and Sunflower and OCRE on the other with regard to the time available for review and case preparation, it is a policy of this Commission to be solicitous of intervenors' foreseeable needs for additional time for case preparation. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), 7 AEC 986, 992-3 (1974). While it is true that this Board demonstrated a solicitous demeanor to Sunflower as a result of Mr. Wilt's resignation, it nevertheless committed to going ahead without continuance of the original adjudication dates.

The Board has imputed no fraudulent, frivolous, or suspect motivation to Mr. Wilt, but instead accepted his departure as an unfortunate, but bona fide, step. Tr. 1001. In retrospect, however, it should have continued this matter. In any event. the Board intends to render its error harmless by reopening the record of this contention. Where a licensing board holds to its hearing schedule despite a claim by an intervenor that he is unable to prepare for the cross-examination of witnesses because of scheduling problems, the proceeding will be reopened to allow the intervenor to cross-examine witnesses. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), 8 AEC 980 (1974). Here, the Board placed Sunflower in the position of having to implore us, when its co-counsel did appear, for the privilege of further cross-examination through counsel. Tr. 1710-15; 1718. This was our error, and may be rectified only by reopening the record.

VII. Miscellaneous Issues

A. The Board's Activism

Upon due reconsideration, the Board is also reopening the quality assurance adjudication in light of the strong possibility that by taking steps to guide the smooth flow of the taking of testimony, the Board may have inadvertently caused the record to reflect an imbalance in favor of the positions taken by Staff and Applicant.

There are numerous examples in the record where the Board interfered with the direction of cross-examination, or elicited a conclusion from the experts who testified, or simply protected Staff or Applicant from relevant disclosures. See Tr. 1066, where a Board member leads Applicant's witness Edelman to a summary conclusion about Applicant's quality assurance manual. See Tr. 1069, 1074, where OCRE attempted to link the persons behind the 1978 stop-work order to Applicant's overview system and was blocked by the Board. See Tr. 1112-1117, where the Board refused to allow OCRE to adduce a quality engineer audit from the Perry Public Documents Room into the record for purposes of cross-examination because it was not identified in prefiling as a proposed exhibit (compare with the Board's receipt into the record of the May 18, 1983, Keppler memorandum concerning the phantom witnesses). See Tr. 1130-1, where a Board member leads Applicant's witness to a conclusion. See Tr. 1145-52, 1156, where the Board seized upon a technical proceduralism with the directive to OCRE to ask questions on documents not included on its prefiled list without putting the documents into evidence, an anomaly of no small moment. See Tr. 1160, 1161 where the Board leads Applicant's witness to self-serving conclusions (see also Tr. 1161, the Board's acknowledgement that it led the witness). See Tr. 1164-5, the Board's decision to short-circuit cross-examination concerning Pullman Power where the Board concludes in the midst of hearing, prior to completion of the record, that it need not follow the sequence of issues set forth in its summary

disposition motion (see also Tr. 1466, where the Board admits it has set up a "harsh criterion" by wanting to know that "there's a reason to go into further hearing on Comstock" before allowing it).[1/] See Tr. 1477, where the Board leads Applicant's expert to a self-serving conclusion. See Tr. 1483, where the Board leads Applicant's expert to a self-serving conclusion. See Tr. 1505, where the Board leads Applicant's expert to a self-serving conclusion. See Tr. 1512, where the Board leads Applicant's expert to a self-serving conclusion. See Tr. 1530, where the Board inconsistently rules on the time needed for preparation of cross-examination by the parties.

The foregoing was a by no means comprehensive resume of Board errors causing changes of a substantive nature to the record in this case. A licensing board has the responsibility of conducting an impartial hearing. While the Board also has broad discretion in implementing that responsibility, use of that discretion must be supported by a record showing a consideration of discretionary factors. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, 2B), 7 NRC 341, 356 (1978). This the Board did not adequately do.

ORDER

Based upon the foregoing, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Board as follows:

[1/] This determination is unusually unfair in an ongoing adjudication, when the standard for reopening a closed record is minimal: the new evidence to be presented need not be so significant that it would alter the Board's findings or conclusions; to exclude otherwise competent evidence because the Board's conclusions may be unchanged would not always satisfy the requirement that a record suitable for review be preserved. Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Units 1-4) 7 NRC 83, 85 (1978).

1. That the record of Issue #3 be and it hereby is reopened for the taking of evidence concerning Applicant oversight of all safety related contractors at Perry Nuclear Power Plant;

2. That discovery on this issue be extended liberally;

3. That this adjudication shall be set down for further trial at a date to be established by the Board.

Terry Jonathan Lodge
Counsel for Sunflower Alliance

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Sunflower Alliance's Proposed Findings of Fact and Conclusions of Law" was sent by me via regular U.S. Mail, postage prepaid, this 15th day of July, 1983, to the parties on the accompanying Service List.

Terry Jonathan Lodge

SERVICE LIST

Peter B. Bloch, Chairman
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry R. Kline
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mr. Glenn O. Bright
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James M. Cutchin, IV, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jay Silberg, Esq.
1800 M Street, N.W.
Washington, D.C. 20036

Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Susan L. Hiatt
8275 Munson Road
Mentor, Ohio 44060