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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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DOCKETING & SERVICE  
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ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket Nos. 50-454
	)	50-455
(Byron Nuclear Power Station,	)	
Units 1 and 2)	)	

INTERVENORS' RESPONSE TO EDISON'S  
ALTERNATIVE MOTION TO REOPEN THE RECORD

Edison's Motion in the Alternative To Reopen The Record asks the Board to "vacate" the Licensing Board's denial of Edison's application (p. 1) and to reopen the record to receive further evidence on three issues: Edison's reinspection program (id.); its quality assurance oversight of contractors at Byron, "if appropriate" (id. at 2); and contractor practices for qualification and certification of QA/QC personnel at Byron (Del George affidavit, ¶¶4, 8). Edison's motion also asks this Board either to conduct any reopened hearings itself or alternatively to remand to a new Licensing Board (id. at 6-7).

For the reasons set forth below, Intervenor's oppose Edison's motion in its entirety, except that we would not necessarily oppose, under one interpretation of the law, reopening the record on the single issue of Edison's reinspection program.

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1. Vacation

To reopen the record, the decision below need not be vacated. Nor should it be unless the reviewing Board were to repudiate the Initial Decision. This is true regardless of whether any reopened proceedings are before the Licensing Board on remand, see Vermont Yankee Nuclear Power Corporation (Vermont Yankee Station), ALAB-124, 6 AEC 358, 359 (1973), or before the Appeal Board itself, see Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 883, 887 (1980).

Edison's motion is inconsistent: it suggests reopening only if this Board chooses not to reverse (Motion at 1.), but nonetheless proposes vacation of the Initial Decision. Moreover, Edison's proposal is, at best, premature. Whether to vacate the Initial Decision because of new evidence is a determination to be made at the conclusion, not the beginning, of any reopened proceeding. Edison's motion to vacate should be denied.

2. Reopening the record

NRC law on reopening the record is not entirely clear. There is a three-part test, only two parts of which are clear: the motion must be timely and must address significant safety or environmental issues. <sup>\*/</sup> Diablo Canyon, id., 879.

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<sup>\*/</sup> Edison (Motion at p. 3) has characterized this second factor as whether "significant new evidence on a safety question exist[s]?" The focus, however, is on significance of the safety issue, not of the evidence. (Diablo Canyon, id. at 879.)

The third part of the test -- "potential to affect the result reached below" in Edison's words (Motion at 3) -- has been expressed in two different ways. One formulation is that "it must be established that 'a different result would have been reached initially had [the material submitted in support of the motion] been considered.'" \*/ The other formulation is, "Might a different result have been reached had the newly proffered material been considered initially?" \*\*/

As explained below, this difference -- whether the new evidence would have produced a different result, or only might have -- may make the difference here.

In either event, Edison bears a "heavy burden" to justify reopening the record. (Diablo Canyon), ALAB-756, supra, (slip op. at p. 5 ) quoting Kansas Gas and Electric Co., supra, 7 NRC at 338. Yet Edison's only discussion of the three-part test is to assert that the safety significance of the reinspection program and its potential to affect the result below are "obvious" (Motion at 3), and that Edison's motion is timely because it

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\*/ Pacific Gas and Electric Company (Diablo Canyon), ALAB-756 NRC, (Dec. 19, 1983), (slip. op. at p. 5), quoting Kansas Gas and Electric Co., (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978), quoting Northern Indiana Public Service Co., (Bailly Generating Station, Nuclear-1), ALAB-227, 8 AEC 416, 418 (1974) (emphasis added).

\*\*/ Pacific Gas and Electric Co. (Diablo Canyon), ALAB-598, 11 NRC 876, 879 (1980) (emphasis added).

supposedly had no "fair notice" until the Initial Decision (id.). \*/

A. The reinspection program

In Intervenor's view, the questions addressed by the reinspection program are of obvious safety significance. \*\*/ Likewise, since the program has only recently been "completed", Edison's motion (insofar as it relates to that program) is timely. Of course, in some respects the program remains incomplete. (Report at e.g., Appendix C, p. C-5; Exhibit C-2

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\*/ Edison argues that the public interest (Motion at 4-5) and fairness to Edison (id. at 5-6) require reopening. Edison's arguments are overstated. Application to this case of the three-part test could not have the results postulated by Edison. It would not realistically discourage continued construction of plants which utilities for financial reasons are reluctant to abandon. The more realistic effect will be to encourage their completion with greater attention to quality assurance. Edison's fear of "saturation bombing" is hyperbolic. An applicant's burden is to demonstrate "reasonable assurance", nothing more, nothing less. Moreover, there does not appear to be a different standard where an applicant, as opposed to an intervenor, requests reopening.

\*\*/ We therefore suggest that this part of the test is satisfied as to the reinspection program; we do not agree with Edison, however, (Motion, p. 3) that the significance of the new evidence is obvious.

at 10, 13; Exhibit D-1 at 9, 10.) \*/ In addition, the Staff evaluation is not yet complete, nor is its determination of additional inspections and evaluations.

The critical question is thus the effect of the reinspection program on the results below. If the test is whether the material submitted by Edison in support of its motion would have changed the result below, then Edison's motion plainly does not pass the test. The affidavit of Mr. Del George, Edison's only submission in support of its motion, tells little that the Licensing Board did not already know, and does not even purport to answer the serious methodological concerns about the program expressed by the Board below (I.D. ¶D-435-438) nor does or could the report itself answer those concerns.

On the other hand, if Edison need show only that the program might have altered the result below, the answer is still doubtful in light of the Board's strong statement of "no confidence" in the program. (I.D. at 5.) The question is not, as Edison suggests, whether the program "could answer [the Board's] doubts about CECO's quality assurance oversight of its contractors at Byron," (Motion at 2), but whether it might change the ultimate findings of "no reasonable assurance."

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\*/ The report was submitted to the Appeal Board and the parties pursuant to Duke Power Co. (Wm. B. McGuire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625-26 (1973) on February 27, 1984. See letter from Alan P. Bielawski to the Board. See also Memorandum of this Board, February 2, 1984.

Nonetheless, if in this Board's judgment the program's completion might have produced a different result below, and the Board believes that is all that Commission law requires, Intervenor's would not oppose reopening the record to hear evidence on the methodological validity and results of the program, and whether the program can in fact provide reasonable assurance. In the event of reopening, Intervenor's intend to show that the program raises as many questions as it answers and is wholly inadequate to afford "reasonable assurance" that Byron can be operated safely. (In addition to the questions raised by the Board below, compare, for example, this Edison-run reinspection program with the independent assessment criteria set forth in Texas Utilities Generating Co., (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81 (Dec. 28, 1983), slip. op. at 73-74.)

Of course, Intervenor's would be entitled in a reopened proceeding to a fair opportunity for discovery, cross-examination, and presentation of direct and rebuttal evidence. \*/

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\*/ These are basic rights under the Constitution, federal law, and NRC regulations. E.g., Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292, 300, 304-05 (1937) (constitutional due process); 5 U.S.C. §556(d) (Administrative Procedure Act rights to present evidence to cross-examine and to rebut); 10 C.F.R. §§2.740 and 2.743 (NRC regulations establishing rights to discovery, to present evidence and rebuttal evidence, and to cross-examine).



B. Edison's quality assurance oversight of its contractors.

Edison's motion offers, "if appropriate" (Motion at 2), to address the subject of its quality assurance oversight of its contractors at Byron. Reopening for that purpose, however, is not appropriate, because Edison's motion fails to present any new evidence on this issue, let alone significant new evidence which could not have been presented to the Board below.

C. Contractor practices for qualification and certification.

Similarly, in its offer of an expert's testimony on contractor practices for qualification and certification of QA/QC personnel (Del George affidavit, ¶8) Edison does not even purport to discuss the three-part test for reopening. Contractor practices have already been extensively litigated. Since the report of Edison's expert has not been made available, this Board cannot determine whether, or in what respects, it may differ from the evidence heard below. Most importantly, there is no showing why such evidence could not have been timely prepared and presented below. Edison's motion to reopen on this issue should be denied.

3. The Forum

Edison requests that this Board, or alternatively, a new Board, hear any reopened proceeding. Edison argues first that the Appeal Board should hear any reopened proceeding, citing Pacific Gas and Electric (Diablo Canyon Nuclear Station), ALAB-598, 11 NRC 876, 883 (1980). But there the Appeal Board heard

evidence based on an earthquake that occurred three weeks after the Licensing Board's decision (Id. at 878.) The Appeal Board's determination to hear the evidence was based on two circumstances not present here - that it was more familiar with the new evidence and that a hearing before it would involve less delay.

In contrast, the Licensing Board here devoted considerable time and attention to the reinspection program, which was extensively litigated below. It presided over weeks of hearings on the broader issue of quality assurance, and is better situated to evaluate the relative significance of any new evidence in the context of a large body of existing evidence, including - on an issue where credibility and personnel capabilities count more than on most - the demeanor and credibility of witnesses on the stand. Precisely because of the Licensing Board's greater familiarity with the totality of the evidence, a remand here would likely be the most expeditious resolution. \*/ This Board could, of course, retain jurisdiction during the pendency of any further proceedings below. Vermont Yankee, supra.

In fact, expedition does not seem to be Edison's paramount concern, for it alternatively seeks a new Licensing Board (motion, p. 7) which would have no familiarity with the issues

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\*/ In addition, the Licensing Board below retains jurisdiction over emergency planning aspects of Edison's license application. I.D. at p. 411.



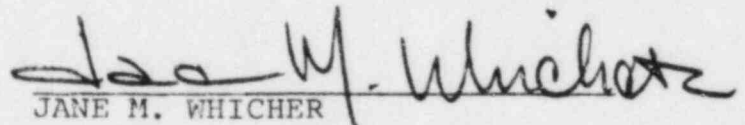
at all. Edison's purported basis for this request is its transparent accusation that the Board below engaged in injudicious conduct in relying on ex parte evidence in the face of an express statement by the Board that it did not do so. (See Brief of Intervenor at \$V.B.) It is difficult to avoid the inference that Edison raised this issue primarily to justify its effort to find a forum - any forum - more to its liking than the Board below. Edison's attempt at forum-shopping should be rejected.

Conclusion

Edison has offered no grounds to support its requests that the Initial Decision be vacated, or to reopen the record for two of the three issues raised. As to the third -- the reinspection program -- Edison's case depends in part on this Board's interpretation of unclear Commission law.

DATED: March 12, 1984

Respectfully submitted,

  
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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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CERTIFICATE OF SERVICE

I hereby certify this 12th day of March, 1984, that copies of "BRIEF OF INTERVENORS" and "INTERVENORS'S RESPONSE TO EDISON'S ALTERNATIVE MOTION TO REOPEN THE RECORD" in the above captioned proceeding were served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by Federal Express, or, by double asterisks, hand delivered.

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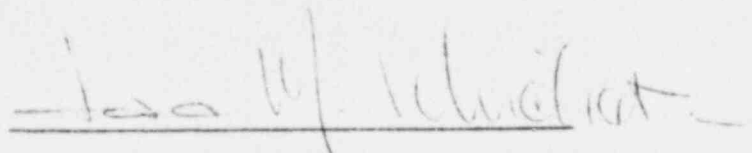
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DATED: March 12, 1984

  
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