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In the Matter of	)	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, et. al.	)	Docket Nos. 50-440 (OL) 40-441 (OL)
(Perry Nuclear Power Plant, Units 1 and 2)	)	March 20, 1984
	)	
	)	

SUNFLOWER ALLIANCE'S BRIEF IN SUPPORT
OF EXCEPTIONS TO 'PARTIAL INITIAL DECISION'

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I. Background

This cause, Issue No. 3 in the operating license stage of these proceedings, came on for adjudication from May 24-27, 1983.

The Special Prehearing Conference "Memorandum and Order" (LBP-81-24, 14 NRC 175), had set out the quality assurance issue as:

> 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 the Licensing 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.

The Licensing Board believed at that point in the proceeding that the 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", a 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"). The Licensing Board's 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.

Following hearing and subsequent consideration of documentary and oral testimony at adjudication, the Licensing Board concluded that Applicant established that quality construction methods pertain at Perry at the present time, and that there was no subsequent need to re-examine the QA/QC issue, even in light of hitherto-undiscovered data. "Memorandum and Order (Motion to Reopen)," August 18, 1983; "Memorandum and Order (Procedural Objections and Staff Witness Question,)" August 30, 1983; "Memorandum and Order (Dismissing Additional Quality Assurance issues and Closing the Quality Assurance Record)," November 10, 1984; "Partial Initial Decision (Quality Assurance Contention)," December 2, 1983, LBP-83-77.

II. Argument

Exception No. 1: The Licensing Board overrealously and and prejudicially conducted and intervened in the adjudication of the contention.

In its August 30, 1983 "Memorandum," the Licensing Board, by a 2-1 split decision, found that it "did not cause any substantial prejudice to Sunflower's case by the way in which [it] conducted the proceeding." Id. at 14. Dr. Jerry Kline of the panel filed a "Separate View," holding that the QA/QC record should not be reopened, but that

the Licensing Board did, indeed, exercise excessive activism at the hearings. See generally "Memorandum," August 30, 1983, "Separate Views of Dr. Kline" at 1-7. Sunflower Alliance believes that in light of the extent and nature of the Licensing Board intrusions, the record should, indeed be reopened.

There are numerous examples in the record where the Licensing 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 Licensing Board member leads Applicant's witness Edelman to a summary conclusion about Applicant's quality assurance manual. See Tr. 1069, 1074, where intervenor Ohio Citizens for Responsible Energy ("OCRE") attempted to link the persons behind a 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

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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

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 Licensing 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.

Exception No. 2: The hearing panel erred in its determination that Sunflower Alliance was not deprived of a fair hearing by the withdrawal of its lead counsel on the eve of the hearing.

Doubtless Daniel Wilt's resignation as lead counsel for Sunflower Alliance the night before the QA/QC adjudication was devastating to Sunflower's case.

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 Sunflower's lead attorney, 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 for several reasons. First, as a practical matter, there is simply no hurry because of the length of time before Perry becomes openable.

Second, in view of the disparity of resources 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

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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. (Sheron Harris Nuclear Power Plant, Units 1-4) 7 NRC 83, 85 (1978).

Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), 7 AEC 986, 992-3 (1974). While the Licensing Board may have occasionally demonstrated a solicitous demeanor to Sunflower as a result of its attorney's resignation, it nevertheless committed to going ahead without continuance of the original adjudication dates.

The Licensing Board imputed no fraudulent, frivolous, or suspect motivation to the attorney's withdrawal, but instead accepted his departure as an unfortunate, but bona fide, step. Tr. 1001. Based upon that withdrawal, it should have continued this matter. 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 it, when its co-counsel did appear on May 27, for the privilege of further cross-examination through counsel. Tr. 1710-15; 1718. This error may be rectified only by reopening the record.

Exception No. 3: Sunflower was prejudicially and improperly deprived of the opportunity to cross-examine a Staff "phantom inspector" whose identity was concealed and who had known, strongly dissenting views as to QA/QC practices at Perry.

There are various and numerous references in the record to a phantom inspector or inspectors in the NRC Region III office who had frequently expressed strong dissent to the conclusions of the Region III hierarchy that Perry QA/QC deficiencies were cleaned up. These views also contradicted the Region III staff conclusions in prefiled testimony for the QA/QC hearing. By a 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 strenously 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 Licensing 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. Sunflower urges 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 conclusory opinion, then so were those of the Staff witnesses who did testify. Moreover, 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".

The Administrative Procedure Act to require any finding made by the Licensing Board to be based upon "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, 396 U.S. 938 (1970). This rule has specifically 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).

It is also axiomatic that a genuine scientific disagreement on a central decisional issue is the type of matter that should ordinarily be raised for adversarial exploration and eventual resolution in the adjudicatory context. Metropolitan Edison Company (Three Mile Island Nuclear Power Station, Unit No. 1), 17 NRC 102 (1983). See also Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 491 (1976), aff'd sub nom. Virginia Electric and Power Company v. NRC, 571 F. 2d 1289 (4th Cir. 1978; Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 912-13 (1982), review declined, CLI-83-2, 17 NRC 69 (1983).

There is one NRC licensing precedent which seems 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 anonymous expert witness to a non-expert witness which the latter proffered as substantive evidence was 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 from the circumstances differed from the Staff's 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 NRC should remain 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 this conclusion, Mr. Chief Justice Hughes stated 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 clearly applicable to the issue at hand. Moreover, the Licensing Board could not allow its findings with respect to the "phantom inspectors" to 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 strangely guaranteed anonymity of the phantom inspectors, it is 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 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. That is exactly what the Staff did with its phantom inspectors. Only a compelling public policy could militate against disclosure of the identities of the phantoms -- which was not present here.

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 the internal dissensions for the first time. Tr. 1011. That lassitude, and the rule of the Licensing Board protecting the anonymity of the phantoms, had the effect of denying intervenors the opportunity 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). Written reports properly may be received as substantial evidence in administrative hearings only where the adverse party has had the opportunity to call the witnesses to which the reports are attributed for probative cross-examination. Richardson v. Perales, 402 U.S. 389, 402 (1971), approved and followed in Duke Power Co., supra, at 412 fn. 47. 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), approved and followed in Duke Power Co., supra. 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 the 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 above, Sunflower would add the licensing panel's excessive belief in Staff infallibility and its unwillingness to believe vocal and militant staff subordinates. It is disconcerting that the Staff acknowledged that Region III's Cordell Williams' appeasement conferences with one phantom inspector numbered "ten", occupying "the better part . . .[al . . .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 the suspect reliability of the Staff's testimony concerning the Applicant's QA/QC program modifications since Report 81-19. It was anomalous for the hearing panel to require the intervenors to prove the phantoms to have relevant substantive facts to add to the record before they could be compelled to appear and add that substance. It may be true that the intervenor had 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 strictly holds when 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 to this controversy is in order. The Licensing Board has made 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 assured the Board below that his views were "adequately expressed" in the May 18, 1983, Keppler memorandum concerning the phantom inspectors. Even if the Board presumed Naidu to be one of the phantoms, and would take as unsolicited Naidu's assurances, a one-page

letter ill satisfies the search for truth here.

For all of these reasons, the Appeal Board should reverse the Licensing Board and direct the reopening of the AQ/QC contention for consideration of the testimony of the phantom witnesses.

Exception No. 4: The Licensing Board incorrectly refused to reopen the QA/QC record for adjudication in its November 10 and December 2, 1983 decisions.

In support of this exception, Sunflower urges the Appeal Board to weigh the evidence upon which the licensing panel's November 10 and December 2, 1983 determinations were based, to reverse them as being based upon an insufficient evidence, and to reopen the QA/QC record.

Exception No. 5: The Licensing Board incorrectly interpreted the standards of CFR Part 50, Appendix B, Criterion XVI.

In its "Partial Initial Decision," the inferior panel took it upon itself to define the Criterion XVI requirement that adverse conditions and nonconformances be "promptly identified and corrected." The Licensing Board adopted a "reasonableness test" — that serious problems in QA/QC may require immediate resolution, and less-serious matters commensurately may take more time.

Criterion XVI states:

> 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.

(emphasis supplied)

The Appeal Board should 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 the adjudication record reveals, Applicant has not established a proven track record of "prompt" identification and correction of quality assurance problems.

Exception No. 6: The Licensing Board erred in finding that the Applicant and/or L. K. Comstock timely took corrective actions concerning ARs and CARs.

The Licensing Board requested Applicant to conduct a "play-by-play" description of Applicant's supervision of L. K. Comstock, Tr. 1006, which 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.

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 one reviews Report 81-19, it is clear that Applicant's corrective actions were perpetually effected

only after NRC investigative activity had taken place. This did not set up the requisite hallmark of confidence and assurance which was 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.

Exception No. 7: The Licensing Board erred in holding that Applicant evidenced satisfactory oversight of L. K. Comstock.

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 contractor 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 point to the conclusion that insufficient Applicant oversight had passed over Perry's QA/QC dam to show that the Applicant takes 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.

The Staff's prefiled testimony provided many unhelpful 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. Viewing the Staff's insignificant tabular data alongside this conclusion, the Appeal Board should be ill persuaded that quality contractor performance pertains at Perry. If the Staff meant that Applicant lacks consistent initiative in overseeing QA performance, then how could 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 hollow threat of intervenors filing a more late-filed QA contentions will certainly not deter the degradation of QA oversight which has been spotty and lacking in initiative for more than five (5) years.

Exception No. 8: The Licensing Board wrongfully restricted adjudicatory testimony to deficiencies in the electrical area only.

The QA/QC issue in this licensing case was compressed by the Licensing Board into four terse fact questions by its December 22, 1982 "Memorandum and Order (Concerning Summary Disposition: Quality Assurance, Corbicula, and Scram Discharge Volume Contentions)". See "Background" section herein.

At hearing, however, the licensing panel on its own initiative continuously instructed the intervenors that a new standard was being applied, namely, that significant deficiencies in QA/QC practices of L. K. Comstock, the electrical contractor, had to be conclusively proven before other contract work areas could be scrutinized. Tr. 1041, 1711, 1713, 1719, 1735, 1741. Certainly this changeup at trial flew in the face of at least two of the Licensing Board's specified fact issues:

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 essestial to safe plant operation.

Sunflower Alliance hopes that it goes without saying that a licensing panel must accept and admit evidence proffered against the parameters which the panel has itself set. The intervenors were irreparably damaged by the panel's denial so to do here, and the "Partial Initial Decision" must therefore be reversed on this basis.

Exception No. 9: The Licensing Board erred in its finding that Applicant timely identified and corrected nonconforming conditions in the electrical area.

In support of this exception, Sunflower invites the Appeal Board to weigh the evidence in the record, and as a result to require the QA/QC record be reopened.

Exception No. 10: The Licensing Board erred in holding that the deficiencies noted in Report 81-19 were not serious.

In support of this exception, Sunflower urges the Appeal Board to review Report 81-19 in its entirety, and to find that the "Partial Initial Decision" must be reversed.

Exception No. 11: "Partial Initial Decision" is against the manifest weight of the evidence, arbitrary and contrary to law.

In support of this exception, Sunflower hereby incorporates by reference the entirety of its foregoing argument in this brief, and urges the Appeal Board to reverse the "Decision."

Exception No. 12: The Licensing Board erred in failing to adopt the proposed "Partial Initial Decision" of Sunflower.

In support of this exception, Sunflower urges the Appeal Board to review its proposed findings, to weigh them against the QA/QC record, and to reverse the Licensing Board in all respects to which exception herein has been taken.

WHEREFORE, Sunflower Alliance respectfully requests the Appeal Board take the following actions upon this issue:

1. To reopen the record of Issue No. 3 for the taking of evidence concerning Applicant oversight of all safety related contractors at Perry Nuclear Power Plant;

2. To extend discovery on this issue be extended liberally;

3. To set down this adjudication 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 "Brief in Support of Exceptions to 'Partial Initial Decision'" was sent by me via regular U.S. Mail, postage prepaid, this 20th day of March, 1984, to the parties on the accompanying Service List.

Terry Jonathan Lodge

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