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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Christine N. Kohl
Dr. Reginald L. Gotchy

February 8, 1984

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In the Matter of)
COMMONWEALTH EDISON COMPANY)
(Byron Nuclear Power Station,)
Units 1 and 2)
_____)

Docket Nos. STN 50-454 OL
STN 50-455 OL

Philip P. Steptoe, Chicago, Illinois, for the
applicant, Commonwealth Edison Company.

MEMORANDUM AND ORDER

This proceeding is before us on the appeal of Commonwealth Edison Company (Edison) from the Licensing Board's January 13, 1984 initial decision denying the operating license application for the Byron facility.¹ In connection with its brief in support of that appeal, Edison has moved for enlargement to 120 pages of the 70-page limitation specified in 10 CFR 2.762(e). As the Secretary to this Board orally advised counsel for all parties yesterday, we grant the motion in part and enlarge the page limitation to 80 pages.

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¹ LBP-84-2, 19 NRC ____.

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1. By way of justification for the sought enlargement, Edison tells us that it currently expects its brief to include the following:

- (1) A statement of the case, with relevant procedural history. See Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-388, 5 NRC 640 (1977).
- (2) An argument that the Licensing Board ignored the weight of the evidence in finding that Intervenors had prevailed on League Contention 1A and that Appellant's quality assurance oversight of various contractors was inadequate. See Initial Decision ("ID"), ¶s D-429 to D-449 and pp. 4-7, 409.
- (3) An argument that the Licensing Board erred in concluding that completion of Appellant's reinspection program was a matter which could not be left to the Staff for post-hearing verification. See ID, ¶s D-418 to D-428.
- (4) An argument that the Licensing Board violated Appellant's rights, including its right to due process, in holding an ex parte, in camera hearing, with representatives of the Office of Inspection and Enforcement, Region III and the Office of Investigations to learn the status of pending inspections and investigations. See ID, ¶D-440, and footnote 75. Notwithstanding the Licensing Board's statement that it did not use this secret information in its decision, Appellant will argue that the Board was improperly influenced by it.
- (5) An argument that even if the Licensing Board was correct in concluding that the record was insufficient to support issuance of operating licenses, it erred in denying Appellant's application rather than reopening the record for further evidence. See ID, p. 410.
- (6) A motion to reopen the record to permit Appellant to provide further evidence on its reinspection program and any other matter as to which the Appeal Board should find the record is inadequate.

As is immediately apparent, however, the last item need not be included in Edison's brief. To the contrary, even if conditional, any motion to reopen the record may be presented in a separate document. Thus, the question is whether adequate briefing on the other five items might require as much as 120 pages.

We think not. To begin with, the statement of the case (Item 1) need include an exposition of just "that portion of the procedural history of the case related to the issue or issues presented by the appeal."² In this instance, there would appear to be no reason why that obligation could not be satisfied in 10 or fewer pages. Items 3, 4, and 5 involve essentially legal arguments and should be readily susceptible of full (albeit concise) development in a total of no more than 20 pages.

What remains is Item 2. In its opening brief in support of the appeal, Edison both can and should restrict itself to the findings of the Licensing Board adverse to it (and the evidence pertaining to those findings). Given their limited number (in large measure the issues covered in

² Black Fox, ALAB-388, supra, 5 NRC at 641. We also point out that the Federal Rules of Appellate Procedure, on which our own rules are based, require a similar statement of the case and that it is included within the page limitation set by those rules. See Fed. R. App. P. 28(a)(3), (g).

the initial decision were resolved in Edison's favor), 40 pages should be sufficient for this purpose.

In short, we are unconvinced that cause has been established for any enlargement of the 70-page limitation prescribed in the Rules of Practice. Nonetheless, recognizing that briefing in this case has been expedited thereby leaving less time for editing, we allow Edison an additional 10 pages.

2. Beyond seeking an enlargement of the page limitation, Edison advises us that, in connection with Item 4, it will object in its brief to our reviewing the unexpurgated transcript of the Licensing Board's in camera, ex parte session on August 9 and 10, 1983. For this reason, Edison requests that, until such time as we have had the opportunity to consider that objection, we refrain from looking at the transcript.

We summarily reject that request. It overlooks the fact that the members of this Board serve in the capacity of administrative judges and not jurors. This being so, Edison can rest assured that, even should we choose to examine the transcript in question, we will give its content no greater weight in the consideration of Edison's appeal than we ultimately determine is appropriate.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
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Secretary to the
Appeal Board