UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

* * *

BRIEF OF APPLICANT

COMMONWEALTH EDISON COMPANY

* * *

ISHAM, LINCOLN & BEALE
Three First National Plaza
Suite 5200
Chicago, Illinois 60602
(312) 558-7500

Attorneys for Applicant
Commonwealth Edison Company

February 13, 1984

TABLE OF CONTENTS

Table of Contents (continued) Page

Table of Contents (continued) Page

TABLE OF AUTHORITIES

INTRODUCTION

This case comes before the Atomic Safety and Licensing Appeal Board on Commonwealth Edison Company's ("Ceco's", or "Applicant's") appeal from the January 13, 1984 Initial Decision of the Atomic Safety and Licensing Board ("the Board") denying authority for issuance of operating licenses for the Byron Station ("Byron") on grounds arising out of Applicant's oversight of the quality assurance programs of certain Byron contractors.

In its Initial Decision, the Board itself made favorable findings regarding the structure and independence of Applicant's quality assurance organization, and recognized that the limited information it considered, concerning specific instances of quality assurance noncompliance, did not reflect the existence of substantial hardware problems at Byron. Moreover, in its testimony before the Board, the NRC Staff -- the sole participant with independent, in-depth, and first-hand knowledge of the full spectrum of quality assurance activities at the Byron site -- endorsed the adequacy of Applicant's quality assurance program, and recommended that operating licenses be issued. The record as a whole clearly shows that Applicant met its burden of proof on all issues, and that operating licenses should be issued as recommended by the Staff.

The Board's decision to withhold authorization of operating licenses for Byron is erroneous in at least four fundamental respects: (1) it ignored the legal standards

governing litigation of quality assurance issues set forth in the Appeal Board's recent Callaway decision; (2) it ignored the Staff's acceptance of Ceco's comprehensive reinspection program, mistaking the Staff's understandable caution in reserving final judgment about the success of the reinspection program for a negative Staff assessment of the entire program; (3) it apparently relied upon ex parte information concerning ongoing NRC Staff investigations into worker allegations, without Ceco even knowing about, let alone responding to, that information; and (4) it denied the application for operating licenses on the basis of previously unexpressed concerns about quality assurance implementation at Byron rather than calling for additional evidence, even though it knew that the reinspection program would address those concerns and that results of that program were imminent.

When the entire evidentiary record is considered, it is apparent that Byron has been constructed in accordance with all regulatory requirements, including a functioning quality assurance program. When the Board's decision is viewed in the context of the factual record and the controlling legal precedent, its reversal is compelled.

STATEMENT OF THE CASE

On November 30, 1978, Ceco filed an application with the Commission for facility operating licenses authorizing it to operate Byron. On December 15, 1978, the Commission published a Notice in the Federal Register stating that there would be an opportunity for a hearing on the issuance of the licenses. 43 Fed. Reg. 58659-60 (December 15, 1978). Timely petitions to intervene were filed by the League of Women Voters of Rockford, Illinois and (jointly) by the DeKalb Area Alliance for Responsible Energy and the Sinnissippi Alliance for the Environment (the "League" and "DAARE/ SAFE", respectively; collectively, "Intervenors").

Although the League and DAARE/SAFE at one time had separate quality assurance contentions,[1] the quality assurance issue litigated in this proceeding dates from a stipulation approved by the Licensing Board on December 16, 1982. As approved, reworded League Contention 1A states:

> Intervenor contends that Edison does not have the ability or the willingness to comply with 10 C.F.R. Part 50, Appendix B, to maintain a quality assurance and quality

---

[1] DAARE/SAFE's contention 1 was admitted by the Licensing Board on December 19, 1980 and dismissed by summary disposition on September 10, 1982. The League was dismissed as a party to this proceeding on October 27, 1981 for "the League's total failure to provide responsive answers to Interrogatories." LBP-81-52, 14 NRC 901, 906 (1981). The Appeal Board reinstated the League, but directed the Licensing Board to limit the number of contentions that the League would be allowed to litigate "to that number the Licensing Board concludes it can comfortably decide on the merits without unjustifiably delaying operation of the Byron facility." ALAB-678, 15 NRC 1400, 1420 (1982). On remand, the League's quality assurance contention (contention 1A) survived the cut. Memorandum and Order (August 30, 1982).

> control program, and to observe on a continuing and adequate basis the applicable quality control and quality assurance criteria and plans adopted pursuant thereto, as is evidenced by Edison's and its architect-engineers' and its contractors' past history of noncompliance at all Edison plants (whether or not now operating). In addition, Applicant's quality assurance program does not require sufficient independence of the quality assurance functions from other functions within the Company.

The language of this contention is quite broad. Both Applicant and the NRC Staff attempted by means of written interrogatories to the Intervenors to narrow the contention. Intervenors' responses referenced numerous NRC inspection reports. One of the many inspection reports indirectly referenced by Intervenors was the NRC Staff's Construction Assessment Team's joint inspection report 50-454/82-05 (DETP) and 50-455/82-04 (DETP) dated June 16, 1982.[2] One item of noncompliance in this report (Item 19) stated that there was not an effective program at Byron for certification, qualification and training of contractors QA/QC personnel, and that certain contractor QA/QC supervisors were inadequately qualified and/or trained to perform safety-related inspection functions.

Hearings on quality assurance were held between March 28 and April 11, 1983, and both Applicant and the Staff presented extensive testimony on all areas of Applicant's

---

[2] Hereinafter, this report is referred to as "82-05" or the "CAT inspection report." It was introduced into evidence as Applicant's Exhibit 8. 82-05 was attached as Exhibit D to DAARE/SAFE's Motion to Reconsider Summary Disposition with respect to Quality Assurance and Quality Control, dated September 23, 1982, which was incorporated by reference in League Answers to NRC Staff Second Set of Interrogatories Re Contention 1A, dated December 22, 1982.

quality assurance program. As part of its direct case, Applicant presented five witnesses. (Reed, Applicant's Prepared Testimony, ff. Tr. 2594; Querio, Applicant's Prepared Testimony, ff. Tr. 2714; Del George, Applicant's Prepared Testimony, ff. Tr. 2344; Shewski, Applicant's Prepared Testimony, ff. Tr. 2364; Stanish, Applicant's Prepared Testimony, ff. Tr. 2619.) Mr. Shewski, Mr. Del George and Mr. Stanish carried the burden of responding to the specific items listed by Intervenors in their responses to interrogatories.

The NRC Staff presented a five member panel from the Region III Office of Inspection and Enforcement to address the adequacy of Applicant's construction quality assurance program at Byron. (Region III, NRC Staff Prepared Testimony, ff. Tr. 3586.) The Staff described its extensive construction-related effort at Byron. The Staff further testified that, although a number of noncompliances with Commission requirements have been identified by Staff inspectors during the eight years of construction activity at the Byron site, Applicant's quality assurance program has made certain that effective action was taken to correct all identified deficiencies before any could develop into major problem areas. The NRC Staff concluded that there is reasonable assurance that Byron has been constructed in accordance with Commission requirements and Applicant's commitments, and can be operated safely. (Hayes, NRC Staff Prepared Testimony at 10 ff. Tr. 3586.)[3]

---

[3] The NRC Staff also presented the testimony of John Spraul, a quality assurance engineer in the Office of Inspection and Enforcement, who testified regarding the independence of Applicant's quality assurance organization from cost and schedule considerations. (Spraul, NRC Staff Prepared Testimony, ff. Tr. 3562.)

Intervenors presented three witnesses who challenged the effectiveness and integrity of the quality assurance programs of two Byron site contractors: Hunter Corporation ("Hunter") and Blount Brothers Corporation ("Blount"). These witnesses were Michael Smith, a former auditor for Hunter, and Peter Stomfay-Stitz and Daniel Gallagher, former Blount employees. (Smith, Intervenors' Prepared Testimony, ff. Tr. 3243; Stomfay-Stitz, Intervenors' Prepared Testimony, ff. Tr. 2939; Gallagher, Intervenors' Prepared Testimony, ff. Tr. 3459.)

Both Applicant and the Staff presented a number of witnesses with both general and specific knowledge as to the assertions of Intervenors' witnesses. (Somsag, Applicant's Prepared Testimony, ff. Tr. 2883; Pope, Applicant's Prepared Testimony, ff. Tr. 2833; Tallent and Johnson, Tr. 3960-3988; Mihovilovich, Applicant's Prepared Testimony, ff. Tr. 2750.) In addition, an affidavit from another Hunter ex-employee, Michael Zeise, was received into evidence by stipulation. (Bd Ex. 4.)

The NRC Staff conducted special inspections to determine the validity of the allegations made by Messrs. Smith, Stomfay-Stitz and Gallagher in their testimony. Most allegations were determined to be without substance, and those which were substantiated, in whole or in part, lacked safety significance. (Region III, NRC Staff Prepared Testimony at 16-28, 34, ff. Tr. 3586.)

The quality assurance record was closed on April 11, 1983. (Tr. 4099.) However, on April 25, 1983, counsel for

Intervenors attempted to present an additional q[illegible]surance witness, John Hughes, a former Pittsburgh Testi[illegible]ry employee who had been assigned to Hatfield Elect[illegible]ny ("Hatfield") as a quality control inspector. (Tr. [illegible]813.) In accordance with a recommendation by the Board, Mr. Hughes prepared a written statement to accompany a motion by Intervenors to reopen the quality assurance record to admit additional testimony concerning Hatfield's quality assurance program. (Motion to Allow Testimony of John Hughes and to Shorten Time for Responses, Attachment A, April 27, 1983.)

On May 26, 1983, John Hughes was deposed before the Licensing Board. On the basis of this deposition and the stipulated testimony of two other witnesses, the Board determined that further inquiry into certain of the issues raised by Mr. Hughes was warranted. In an Order dated June 21, 1983, the Board admitted portions of the deposition testimony of Mr. Hughes as Intervenors' direct evidence on the following issues: whether Mr. Hughes was properly certified by Hatfield and whether Hatfield inspectors were generally provided with test answers before being retested on examinations that they had failed. (Memorandum and Order Ruling on Intervenors' Motion to Admit Testimony of John Hughes, at 7-11, June 21, 1983.)

In a separate order, also dated June 21, 1983, the Board reopened the record with respect to quality assurance and directed the parties to present evidence in two areas: a) ongoing investigations of allegations related to Hatfield's quality assurance program, including but not limited to Mr.

Hughes' allegations; and b) the findings in 82-05 concerning the qualification and training of QA/QC supervisors and inspectors, and the reinspection program which Applicant had undertaken in response to this item of noncompliance.

On July 7, 1983, the Licensing Board clarified and limited its June 21 Memorandum and Order. This July 7, 1982 Memorandum and Order is the critical document in defining the scope of the reopened hearings. Among other things, it states:

> Evidence may be limited to Hatfield Electric Company. This would include Pittsburgh Testing Laboratory employees and similar personnel, if any, assigned to Hatfield.
>
> . . . .
>
> The Board is particularly interested in any fraudulent training, qualification, or certification practices.
>
> . . . .
>
> The Board does not require the parties to perform new investigations, inspections, evaluations, or research to comply with this directive.

(Memorandum and Order, July 7, 1983, at 2-3.)

The NRC Staff objected to the Licensing Board's June 21, 1983 Memorandum and Order on the ground that as a matter of policy the Staff and the Office of Investigations ("OI") will not disclose detailed information concerning ongoing inspections and investigations, because such disclosure might prejudice the inspections and investigations. After the Licensing Board on July 1, 1983 denied its motion of reconsideration, the Staff sought directed certification from this Appeal Board. In its Memorandum and Order dated July 27, 1983, ALAB-735, the Appeal Board denied the Staff's motion, finding that the

Staff had failed to buttress adequately by affidavits its claim that the ongoing inspections and investigations might be seriously compromised by any disclosure in this case, even if such disclosure took place in camera and pursuant to an appropriate protective order. On August 5, 1983 the Commission adopted a policy statement entitled, "Investigations and Adjudicatory Proceedings; Statement of Policy", 48 Fed. Reg. 36358 (August 10, 1983).

Under the purported authority of this Policy Statement, on August 9 and 10, 1983, the Licensing Board conducted in camera and ex parte hearings at which only the Board and members of the NRC Office of Inspection and Enforcement, Region III, and the Office of Investigations were present. The ex parte hearings, which were held over the objections of Applicant and Intervenors, (Tr. 7256-7264, 7280-7285) were for the purpose of informing the Board concerning pending investigations by the NRC Staff of workers' allegations involving Hatfield. Subsequently, after the close of the record in this case, the Board released a "sanitized" version of the transcript of the ex parte hearings to the parties, which deleted significant portions of testimony and all of the documentary evidence which had been presented.

During the public evidentiary hearings that began on the issues defined in the Licensing Board's July 7 Memorandum and Order Applicant presented three witnesses. (Koca, Applicant's Prepared Testimony ff. Tr. 7418; Stanish, Applicant's Prepared Testimony ff. Tr. 7549; Tuetken, Applicant's Prepared Testimony, ff. Tr. 7760.)

The NRC Staff presented a three member panel from Region III to address the issues delineated in the Board's

orders of June 21 and July 1. (Region III, NRC Staff Prepared Testimony, ff. Tr. 7801.) As part of its testimony the Staff discussed a special inspection which had been conducted by Region III between April 27 and May 10, 1983, to determine whether Mr. Hughes' allegations could be substantiated. Based on the results of the special inspection and information obtained from earlier interviews with Mr. Hughes and others concerning these matters, the Staff testified that there was no safety significance to any of the allegations in Mr. Hughes' statement. (Region III, NRC Staff Prepared Testimony at 12, ff. Tr. 7801.)

Both Ceco and the Staff presented detailed testimony regarding the reinspection program which was then underway. Applicant's prepared testimony in response to the Board's expression of interest in its July 7, 1983 Memorandum and Order regarding any fraudulent Hatfield training, qualification or certification practices addressed the only known allegations of fraud: those made by Mr. Hughes in his testimony. In response to a Board question, Mr. Stanish testified that in all his experience with Hatfield he has found no indication of any fraudulent practices. (Stanish, Tr. 7739.) There was no Staff testimony of which Applicant is aware substantiating any fraudulent training, qualification or certification practices.

The Licensing Board issued its Initial Decision on January 13, 1984, concluding that Intervenors had prevailed on the substance of the quality assurance contention and denying Ceco's application for operating licenses for Byron. Ceco filed a timely notice of appeal.

ARGUMENT

I. THE FLAWED LEGAL AND FACTUAL ANALYSIS WHICH LED TO DENIAL OF THE APPLICATION FOR OPERATING LICENSE IS APPARENT ON THE FACE OF THE INITIAL DECISION

The Licensing Board's unprecedented decision denying Commonwealth Edison Company's application for operating licenses for Byron rests on a conclusion that Ceco's quality assurance program was inadequate, particularly so in its quality oversight of the Byron contractors. The Appeal Board's recent decision in Union Electric Company (Callaway Plant, Unit 1), ALAB-740, __ NRC ___, (Sept. 14, 1983) established the legal criteria for the litigation of quality assurance issues in NRC licensing proceedings. "In any project even remotely approaching in magnitude and complexity of the erection of a nuclear power plant there inevitably will be some construction defects tied to quality assurance lapses. It would therefore be totally unreasonable to hinge the grant of an NRC operating license upon a demonstration of error-free construction." Callaway, (slip op. at pp. 1-2). Likewise, it is unreasonable to expect a QA program to uncover all errors. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-756, __ NRC ___ (Dec. 19, 1983) (slip op. at 7)

In the context of an operating license proceeding, the critical inquiry is whether any errors disclosed have serious implications for safe plant operation. Callaway, (slip op. at 2); Diablo Canyon, (slip op. at 7). In making that inquiry, a licensing board must first determine whether all

ascertained construction deficiencies have been cured. Callaway, (slip op. at 2-3). Second, even if it established that the deficiencies have been cured, there may remain a question as to whether there has been a breakdown in quality assurance procedures of sufficient dimensions to raise legitimate doubt as to the overall integrity of the facility and its safety-related structures and components.[4] Callaway, (slip op. at 2-3).

The reasonableness of this approach to quality assurance issues is manifest from the nature of the issues themselves. As the Licensing Board observed, most of the reliable adverse evidence to Ceco came from inspection reports prepared by the Office of Inspection and Enforcement. But it is clear that such inspection reports focus, as they should, on items of noncompliance. Commendation of a licensee in an inspection report is very rare. Consequently, when inspection reports are introduced in licensing hearings, an Applicant can only respond by demonstrating that the specific items of noncompliance do not represent an overall failure of the quality assurance program and that each has been satisfactorily resolved.[5] The

---

[4] The use of the word "breakdown" in the Callaway decision in a quality assurance context can be related to the NRC's enforcement policy. "Breakdown" is also used in 10 CFR Part 2, App. C to describe a Severity Level II non-compliance and as an indication of the circumstances under which escalated enforcement action will be taken. 10 CFR, Part 2, App. C Supplement II B.1, Supplement IV B.

[5] See, Long Island Lighting Co. (Shoreham Nuclear Power Station Unit 1), LBP 83-57, ___ NRC ___ (September 21, 1983) (slip op. at 268). "What we are concerned with here is whether the LILCO and Staff programs, as applied to Shoreham, have resulted in a plant design and projected operation that will provide reasonable assurance of no undue risk to the health and safety of the public, regardless of the obvious history at Shoreham of numerous instances of apparent failures to adhere to the QA/QC program in its detailed implementation."

Board did not find, nor does the record show, widespread hardware or construction problems, or any specific ascertained but uncured hardware problems. Indeed, the Board's findings were to the contrary. (Initial Decision ("ID"), p. 2, ¶D-370.) There is simply no basis to find that there are uncured, ascertained construction deficiencies at the Byron Station. Thus, the first criterion of the Callaway decision for determining that quality assurance implementation at Byron met regulatory requirements was satisfied.

The question that remains and which controls the resolution of the quality assurance issue here is whether the record demonstrates a "breakdown" in quality assurance procedures and a "pervasive failure" to carry out the quality assurance program such that the requisite safety finding cannot be made. Callaway, (slip op. at 2-3). The Board's findings of fact on quality assurance can be characterized as a pyramid. That is, there are detailed findings of fact on each item of noncompliance with quality assurance requirements. Next, ultimate findings (i.e. conclusions) appear, apparently based on the detailed findings of fact. These lead to the Licensing Board's result: denying Ceco's application for operating licenses. When the Board's findings are measured against the criteria of the Callaway case the detailed findings of fact do not support the ultimate findings and, in turn, the ultimate findings do not support the denial of the operating licenses.

The Licensing Board correctly found that Ceco's quality assurance program was adequately designed, and had

sufficient independence to satisfy the applicable Commission regulation, 10 C.F.R. Part 50, Appendix B. (ID, ¶D-450, D-3 to D-71.) Similarly, the Board properly found that Applicant was not institutionally incapable of maintaining or unwilling to maintain an adequate QA program. (ID, ¶D-449.) The Board also noted the NRC Staff's belief that Ceco's quality assurance program "assured timely effective corrective action." (ID, ¶D-42.) The incongruity between these findings and the Board's ultimate decision to deny a license on the basis of QA considerations should compel the Appeal Board to undertake a close, skeptical examination of the reasoning process which led to this result.

The Board's perception of the scope of the evidence before it was skewed in such a way as to lead it into a faulty analysis. The Board recognized the non-representative nature of the evidence before it, but characterized that evidence as sufficient to enable it to make conclusions about the overall adequacy of Ceco's quality assurance program. (ID, ¶D-431 to D-433; but see, ID, ¶D-91.) Thus, in its summary, the Licensing Board concluded that there were "widespread failures" in contractor quality assurance programs. (ID, p. 7 and ¶D-448.) The quality assurance history of Hatfield Electric Company is characterized as "long and bad" (ID, ¶D-434) and there are references to isolated quality assurance implementation deficiencies by other contractors. (See, e.g., ID, ¶D-240 (Blount Brothers); ID, ¶D-111 (Reliable); ID, ¶D-137 (Hunter).)

Of course, the quality assurance issues which were litigated before the Board were most assuredly not a random sample of Ceco's quality assurance implementation in the sense of a statistically selected sample. They represented Intervenors' choice of the most negative aspects of the quality assurance program at Byron, a potpourri of allegations from ex-contractor employees and specific items of noncompliance identified by the NRC Staff over a five year period. The Licensing Board lost its perspective on quality assurance matters when confronted with evidence which was inevitably negative and failed to consider the safety significance of the items of noncompliance; the corrective actions taken; and whether the quality assurance failures were sufficiently widespread to constitute a "breakdown" of the quality assurance program, all as mandated by the Callaway decision. Any leap of judgment from specific instances of noncompliance to the general conclusion that the quality assurance program is inadequate must recognize that deficiencies in discrete segments of a multi-element, multi-layered quality assurance program should not be imputed to the overall program, absent some substantial basis for that judgment. Callaway, supra, at 38-41; Diablo Canyon, ALAB 756 at 9.

The flaws in the Board's reasoning process do not end with its reliance upon a biased and unrepresentative sample. The Board also improperly extrapolated that invalid sample to a judgment of overall program inadequacy in the following respects:

1. The primary basis for the Board's negative decision was the evidence concerning Hatfield. The identified deficiencies in the record primarily concerned documentation of Hatfield QA inspector training and qualifications. The Board extrapolated the Hatfield enforcement history relating to documentation deficiencies first to a finding of no confidence in the quality of Hatfield's work, then to a finding that Hatfield is "perpetually incapable" of maintaining adequate records, and finally to a finding that the Applicant had not maintained an adequate QA program. In extrapolating to this result the Board failed to consider the corrective actions taken, the acknowledged absence of any evidence in the record to show that the work itself was inadequate, and Applicant's implementation of an "extensive and comprehensive, and apparently unusual reinspection program." (ID, ¶D-416.)

2. The record as to other contractors formed some, but not a clearly discernable, basis for the Board's judgment concerning overall QA program adequacy. In all instances, however, the Board failed to consider and credit the corrective actions taken, the fact that identification of contractor deficiencies often was the result of Applicant's own audits, and the absence of any evidence indicating significant implications for safe operation of Byron.

In addition, the Board's decision indicates that two facts of the record colored the Board's deliberations as it

reviewed the record as a whole, contributing to the Board's erroneous disposition of Ceco's application:

1. The Board held ex parte hearings in which it heard from the NRC Staff concerning the status of pending investigations and inspections. To this day, Ceco does not know what information was presented in the ex-parte hearings. While the Board advised the parties that evidentiary hearings concerning these matters would not yield reliable evidence, and its decision indicated that it did not "use that information," (ID, ¶D-440, n. 75) the Board nevertheless concluded that this was a matter of "added concern." (ID, ¶D-440.) By its own terms, the decision based its judgment of program adequacy on evidence which Applicant cannot know and cannot meet, thereby irreparably violating Applicant's hearing rights.

2. While the Board criticized Applicant's evidentiary presentation on fraud in relation to Hatfield training, qualification or certification practices, the Board also explicitly found no evidence of fraud. In response to a Board question, Applicant's witness stated that he knew of no indications of fraudulent practices at Hatfield. (Stanish, Tr. 7739.) In castigating Applicant for not undertaking additional investigations as to fraud, the Board's decision contradicted the provisions of its own July 7, 1983 order which delineated the scope of the hearings and provided that "the Board does not require the parties to perform new investigations ... to comply with this directive." (Memorandum and Order, July 7, 1983, at 3.)

In addition to the Board's errors in evaluating the evidence before it, its outright denial of Ceco's application for operating licenses was inappropriate. For example, a key finding of the Licensing Board supporting its conclusion denying the application is its asserted "lack of confidence" in a reinspection program then underway at Byron. (ID, p. 5, ¶D-435 to D-438.) The Board attributed its lack of confidence to the Staff's reluctance to provide an unequivocal endorsement of the program until the results are available, to certain unexplained aspects of the program, and to certain documentation problems uncovered in Applicant's audit of the reinspection program. (ID, ¶D-435 to D-438) As we discuss below, the Board misconstrued the evidence regarding these issues, and misapplied the law concerning the responsibility of the Staff in reviewing the results of the reinspection program. Moreover, the Licensing Board knew, when it closed the evidentiary record in August, 1983, that the reinspection program and the final Staff evaluation of the program would be concluded in the foreseeable future and thus, additional pertinent facts regarding the reinspection program would be available to it. It was kept apprised of the progress of the reinspection program by means of Board notifications from the NRC Staff and Ceco. The approach the Licensing Board should have followed in these circumstances is not a matter for interpretation; both Appendix A to 10 CFR Part 2 and applicable case law make clear that the Board should have articulated its concerns regarding the evidence before it in advance of its decision and required the parties to adduce

additional evidence on those concerns. Unfortunately, the Board, although recognizing that such an approach was open to it, decided instead to deny the application. (ID, p. 410.)

II. THE PREPONDERANCE OF THE EVIDENCE BEFORE THE LICENSING BOARD DEMONSTRATES THAT CECO MET ITS QUALITY ASSURANCE OBLIGATIONS.

NRC licensing boards are obligated by the Administrative Procedure Act and by the Commission's rules of practice to base their decisions on the whole record and the preponderance of the evidence. 5 U.S.C. § 556(d); 10 CFR § 2.760(c); Commonwealth Edison Company (Zion Station, Units 1 and 2) ALAB-616, 12 NRC 419, 421 (1980). When the whole record is examined, however, it quickly becomes apparent that the Board did not base its decision on the whole record, nor did it properly weigh the evidence it considered in reaching a conclusion regarding the adequacy of Ceco's quality assurance program. In the detailed discussion of the record evidence which follows, it is equally apparent that Ceco bore its burden of proof with respect to each of the quality assurance issues which were litigated.

The Board's ultimate conclusion was: "...despite the random nature of the litigation, enough information was considered for the Board to conclude that the insufficiencies in the quality assurance programs of the Byron contractors demonstrate an inadequate quality assurance program in Applicant's organization and that the resultant problems cannot be delegated for resolution." (ID, ¶D-433.) The Board evidently based this broad conclusion, which extended to all Byron con-

tractors, primarily on the record concerning Hatfield, (ID, ¶D-434 to D-438, D-441) and, at least to some significant extent, upon the ex parte evidence concerning pending inspections and investigations of worker allegations. (ID, ¶D-439-440.)[6] The Board's concern did not stop with Hatfield, however; in addition the Board found that several "other contractors had inadequate or questionable quality assurance programs." (ID, ¶D-441.) This brief first addresses the Licensing Board's findings with respect to these other contractors, and then focuses in detail on Hatfield.

A. The Licensing Board's Findings Concerning Contractors Other Than Hatfield Contain Factual Errors and Unreasonable Conclusions.

The Initial Decision does not make clear what weight the Board gave to its findings regarding other contractors. These findings are simply characterized as "additional support" for the Board's conclusions or "another reason why...the reinspection program is a matter too uncertain to delegate to post-hearing Staff verification." (ID, ¶D-442 to D-444.) The Board did not find that the evidence as to these other contractors, in itself, constituted a "pervasive failure" or "breakdown" of Applicant's quality assurance program within the meaning of Callaway. Indeed, the Board's own findings show that the quality assurance deficiencies identified for other contractors are not significant to safe operation, have been addressed by timely and effective corrective actions, and are not indicative

---

[6] See, Section V, infra.

of a "pervasive failure" in Applicant's overall quality assurance program sufficient to warrant withholding of the requisite safety finding. In short, the Board's nebulous reliance upon the "other contractor" evidence emerges as a patent attempt to bootstrap its Hatfield findings into an invalid conclusion of "widespread failures" (ID, p. 7) in all contractor quality assurance programs.

Aside from Hatfield, the quality assurance litigation involved four contractors: (1) Blount; (2) Reliable Sheet Metal ("Reliable"); (3) Systems Control Corporation ("SCC"); and (4) Hunter.

BLOUNT BROTHERS

The Board properly concluded that Applicant prevailed with respect to Blount's quality assurance program. (ID, ¶D-445, D-448.)[7]

---

[7] The Board, however, made two mistakes with respect to Blount which led it to make subsidiary findings adverse to Applicant. First, the Board built a house of cards to reach the conclusion that tendon storage conditions were inadequate, based on an equivocal answer by one of Applicant's witnesses to the question of whether tendon storage buildings had fans. Yet the Board overlooked the admission of Intervenors' witness, Mr. Stomfay-Stitz, on cross-examination that the tendon storage buildings were in fact ventilated with fans. (ID, ¶D-240 to D-248, D-300; Stomfay-Stitz, Tr. 3028.) Moreover, in other respects as well the record establishes the adequacy of storage conditions. (See, Mihovilovich, Applicant's Prepared Testimony at 7-10 and Exhibit 5, ff. Tr. 2750, Tr. 2779-2782, 2786-2788, 2791-2792; Hayes, NRC Staff Prepared Testimony at 20 and Attachment E at 11-12, ff. Tr. 3586; Hayes and Konklin, Tr. 3731-3736.) See also, Stomfay-Stitz, Tr. 3027-3034. Exhibit 5 to Mr. Mihovilovich's prepared testimony includes a series of I&E reports, covering a time period from before Mr. Stomfay-Stitz's employment to after it. In each of these reports one of the items inspected was the tendon storage areas, and no items of noncompliance as to tendon storage conditions were found.

(Footnote continued on following page)

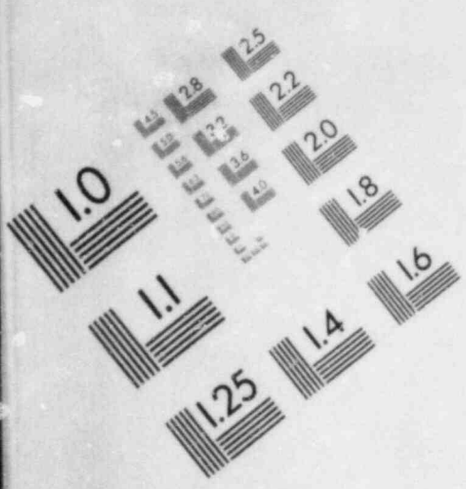
RELIABLE SHEET METAL

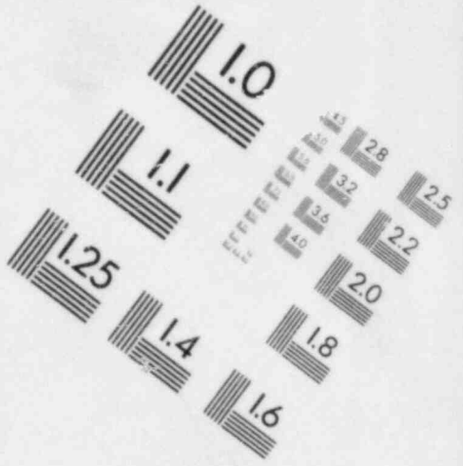
For Reliable, the evidence showed that significant QA deficiencies had been discovered and that Applicant had issued a stop-work order to Reliable pending corrective action to bring Reliable's QA activities into compliance. (ID ¶D-110 to D-115.) The Board found that the "evidentiary record with respect to the Reliable stop-work order is insufficent to support any major conclusion with respect to Commonweatlh Edison's quality assurance program." (ID, ¶D-115.) However, the Board found that Applicant has implemented an accelerated audit schedule for Reliable after the stop-work order is lifted, and Reliable's work is being 100% reinspected. (ID, ¶D-113.) On a separate quality assurance issue, the Board also found that Reliable's inspector certification deficiencies did not represent a continuous failure to meet the appropriate standards. (ID, ¶D-119.) Given these specific findings, the Board's contradictory conclusion that Reliable's quality assurance program was "inadequate" was clear error. (ID, ¶D-443.)

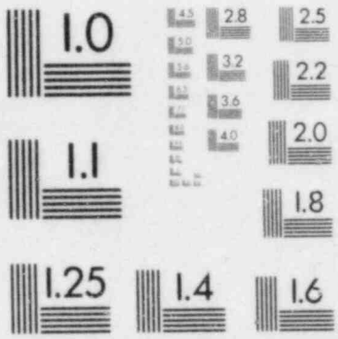
(Footnote 7 continued from previous page)

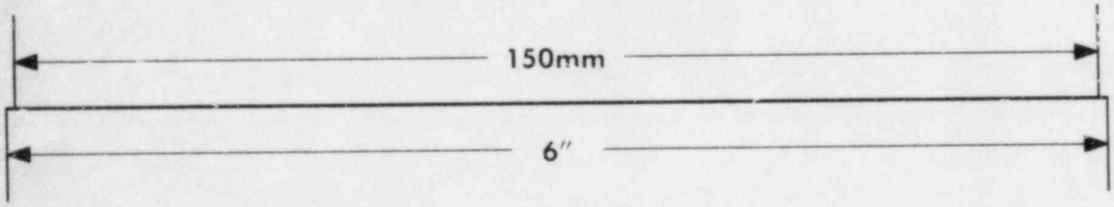
The Licensing Board's second mistake was to admit and rely on Mr. Stomfay-Stitz's hearsay (actually, double hearsay) evidence concerning production's control over his requests for pay increases and overtime. (ID, ¶D-278 to D-281; Stomfay-Stitz, Intervenors' Prepared Testimony at 9-10, ff Tr. 2939; Tr. 2932-2939, 2980-2982.) In particular, the Board's rationale that there were "equivalent circumstantial guarantees of trustworthiness" under the Federal Rules of Evidence, Rule 803(24), including the witness' demeanor, justifying admission of this evidence is impossible to square with the Board's other statements about Mr. Stomfay-Stitz' demeanor as a witness. (ID, ¶D-221 to D-224, D-280, D-298; Stomfay-Stitz, Tr 3123.) See also, Stomfay-Stitz, Tr. 3222; Hayes, Tr. 3744; Hayes and Forney, Tr. 3756-3760.

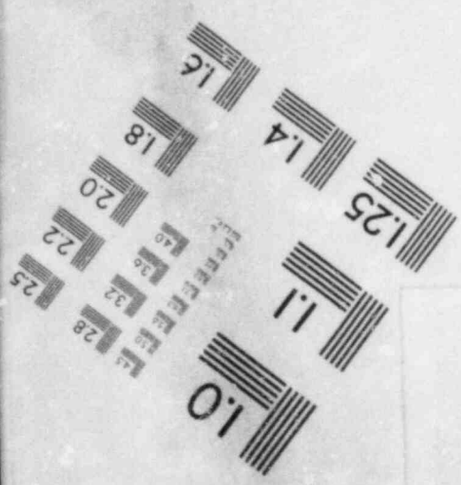
IMAGE EVALUATION
TEST TARGET (MT-3)

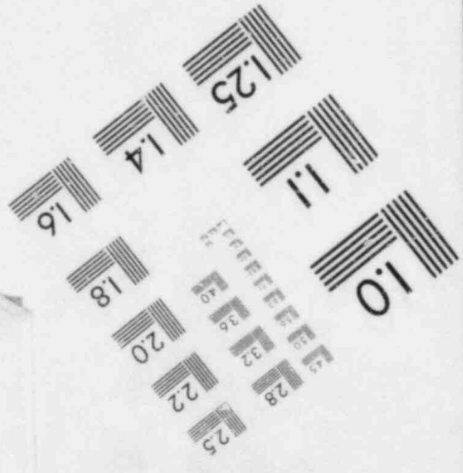












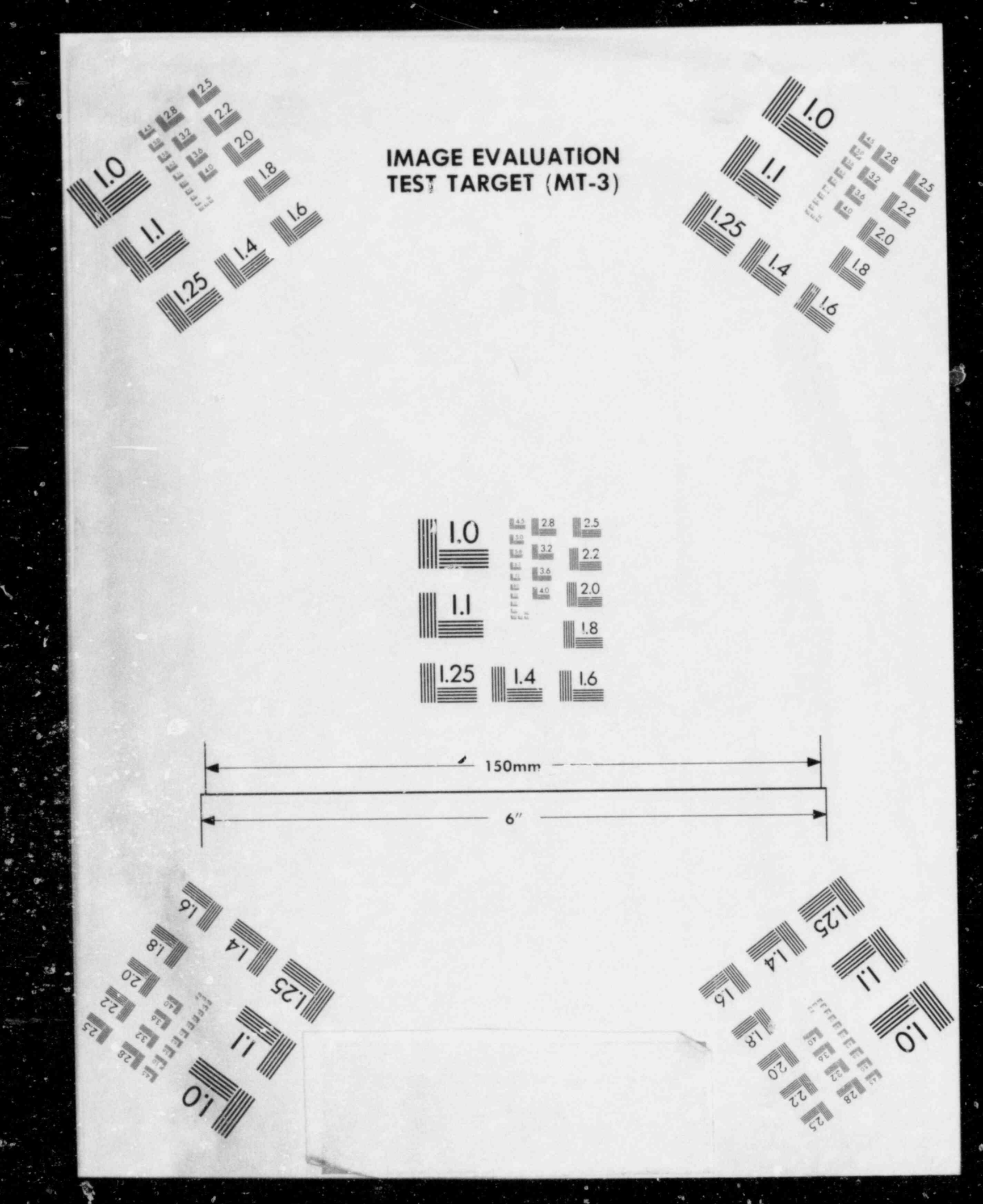


IMAGE EVALUATION
TEST TARGET (MT-3)
1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
4.5
5.0
5.6
150mm
6"

SCC

SCC was an off-site supplier of electrical and control equipment at Byron, including cable trays and supports, instrument racks, and main and local control boards. The Licensing Board found that "the Systems Control Corporation quality assurance program broke down, was unreliable and fraudulent and that Applicant defaulted in its respective oversight responsibility." (ID, ¶D-442.) There is no dispute on this record that deficient equipment was supplied to Ceco and that there were false quality assurance documents generated by SCC. (See Int. Ex. 8 for a complete description of this issue.)

The Board noted that the corrective action taken - a 100% reinspection of SCC work - "may remove the matter from a direct safety concern." (ID, ¶D-104, D-442.) In fact, all of the nonconforming conditions identified with equipment supplied by SCC have been remedied.[8] Nevertheless, the Board felt compelled to "allude to the Systems Control experience ... because it adds additional support to our conclusion that

---

[8] (Williams, NRC Staff Prepared Testimony at 30, ff. Tr. 3586; Williams, Tr. 3843; Hayes, Tr. 3898; Shewski, Tr. 2579.) Citing the testimony of Region III's Mr. Hayes, the Board asserted that at the time of the hearing the quality problems with SCC equipment remained an open item, in that as many as 40 to 60 percent of the welds on the local instrument panels were unacceptable. (ID, ¶D-103.) The implication that the weld defects remain uncorrected is erroneous, however; in the testimony cited by the Board Mr. Hayes did not testify to the present existence of defective welds. Mr. Hayes' testimony was that the open item remaining to be resolved is the reevaluation by Westinghouse of the seismic analysis on the control board welds, reevaluation required due to "complete revision" of the boards after their fabrication occasioned by Human Factors Engineering Review. (Williams, NRC Staff Prepared Testimony at p. 30, ff. Tr. 3586; Hayes, Tr. 3845-3847.)

Applicant's quality assurance oversight of its contractors, without more, is not sufficient protection of the public safety." (ID, ¶D-442.)

It is not necessary to rehearse at length the facts surrounding Applicant's conduct with respect to SCC, because the Staff presented two witnesses from Region III, Messrs. Williams and Hayes, who provided an overview of Applicant's performance. In evaluating the testimony of these individuals the Licensing Board established a unique evidentiary standard for Applicant to meet; the Board stated "It is true that Messrs. Hayes and Williams believe that Applicant acted responsibly, but their testimony falls short of unrestrained acclaim." (ID, ¶D-106.) Although the testimony of these inspectors may not have amounted to "unrestrained acclaim," or even unabashed ecstasy, nonetheless both men approved of Applicant's quality assurance performance concerning SCC. As the Board noted, (ID, ¶D-106; the Board's transcript reference is incorrect) Mr. Hayes testified with regard to Applicant's conduct:

> I thought they were very responsible. You might fault them for not immediately taking corrective action, but I think we both knew that the problem was not going to go away. The equipment is quite large, and it is hard to hide, so they knew and we knew that the problems were there, and they knew that we were going to insist that it be corrected before the plant operates.

(Hayes, Tr. 3850.)

Mr. Williams was one of the signatories to I&E Report 80-04 on behalf of Region III. (Joint Intervenors' Ex. 8 at 4.) He added his own impression of Applicant's actions to that of Mr. Hayes:

> I would like to add to Mr. Hayes' earlier comments that spoke to our awareness of these circumstances. Even in consideration of Paragraph 5 in our summary, certainly we were aware, and we believed that although the problems have persisted -- and I think it can be demonstrated for the record that Commonwealth Edison has conducted, in most of the areas -- in fact, nearly all of them, with one or two exceptions -- has conducted its business completely responsibly and in response to their commitments for monitoring and identifying quality. Corrective actions were taken and initiated by the licensee.
>
> The licensee informed us properly of their difficulties through the 50.55E report in the development of the problem.
>
> While we had some concern that in spite of their efforts and our own, after we were involved, that these issues were recurring -- that issues of deficient welds and deficiencies in other areas were recurring -- in no instances, do I believe, have they missed those things that needed to be repaired. That is the purpose of their quality assurance program and our functions as well.

(Williams, Tr. 3851-3852.) The exceptions noted by Mr. Williams were Applicant's waiver of final inspection points on the local instrument panels and a series of discussions between Applicant and the Staff concerning the extent of site receipt inspection of Systems Control equipment. Referring to these exceptions, Mr. Williams concluded:

> Those circumstances, in the context of the whole operation over four years, would best be characterized as perturbations and not necessarily unexpected from consideration of all organizations.

(Williams, Tr. 3853.)

The Licensing Board's evaluation of Ceco's oversight of SCC discounted the Staff testimony that Ceco acted responsibly

and to the uncontroverted record evidence that effective corrective action was taken. Unless the Licensing Board has some secret reason, not based on the public record, to believe that other suppliers or contractors at Byron are engaged in undetected fraudulent practices, (see, pp. 71-75, infra) it is erroneous for the Board to draw sweeping conclusions about the adequacy of Ceco's quality assurance oversight of its contractors based on the evidence regarding SCC which was before it. (ID, ¶D-442, D-443.) See, Callaway, supra (slip op. at 27-28).

HUNTER CORPORATION

Hunter Corporation is the Byron contractor responsible for the installation of piping and piping supports. The Board found that Applicant's quality assurance performance with regard to Hunter Corporation "has been inadequate." (ID, ¶D-448) The record before the Board fails to support such a conclusion.

Intervenors' witness on Hunter was Michael Smith, a former Hunter auditor. The Licensing Board found most of Mr. Smith's allegations to be unsubstantiated. For those few that were substantiated, the Board found these allegations "individually of no great significance to the Hunter quality assurance program." (ID, ¶D-169.)[9] The Board found only one of Mr. Smith's allegations to constitute a significant problem:

---

[9] The Board did note that these substantiated allegations collectively suggested "sloppiness" in Hunter's quality assurance program. (ID, ¶D-169.) In contrast, the Board also found that there was no evidence that Hunter's production workers were doing shoddy work. (ID, ¶D-126.)

> The allegation concerning the 'tabling' practice (not reporting nonconformances pending final 'walk-down'), we regard as a serious matter which could have important consequences. We were particularly concerned that Hunter continues to fail to take appropriate steps to issue documentation on nonconforming conditions.

(ID, ¶D-169.) But as the following discussion shows, the Board erroneously connected the "tabling" issue - a fuzzy allegation from a witness it was clearly reluctant to believe (ID, ¶D-142) - to a finding by an NRC inspector on a different matter, (ID, ¶D-141) and to a finding in Ceco's 1983 audit of Hunter's reinspection program. (ID, ¶D-145, D-170.) The three items are unrelated. There is no ongoing documentation problem at Hunter, and the Board's concern is therefore misplaced.

Mr. Smith was a surveillance inspector and then an auditor at Hunter from November, 1978, to January, 1980.[10] In evaluating Mr. Smith's testimony the Board noted that it was "troubled by the large number of inaccuracies in Mr. Smith's original allegations compared with his testimony at the hearing." (ID, ¶D-123.) Such inaccuracies characterized Smith's testimony concerning "tabling." (ID, ¶D-142.)

In his prepared testimony Smith testified that he and another auditor frequently found instances where documentation for piping supports existed, but the actual supports could not be located. Mr. Smith asserted that in these situations he was instructed by Mr. Somsag not to document that the problems existed. According to Mr. Smith, Somsag would tell him that

---

[10] He was fired as a result of a 20% absenteeism rate. (Smith, Tr. 3244; ID, ¶D-122.)

the hanger foreman and QA staff were cognizant of the situation. Mr. Somsag told Smith that such problems would be caught at "walk down." This practice was referred to as "tabling." Smith testified in his prepared testimony that instances of tabling occurred "at least once or twice a week," and he said that he never tabled items on his own, only when instructed to do so by Somsag. Although there was a system for reporting problems with supports called a "hanger field problem" system, Mr. Smith claimed that he never found that hanger field problem reports had been initiated. Finally, Mr. Smith testified that sometimes instances of abling would be mentioned in his rough drafts of audits, but not in the final version. (Smith, Intervenors' Prepared Testimony at 22-24, ff. Tr. 3243.)

On cross examination, however, Mr. Smith admitted that his earlier testimony that he never tabled an item on his own initiative was "at the very least, incomplete;" to the contrary, Mr. Smith and his co-auditor at times did table items on their own initiative, in situations where he was satisfied that the quality assurance staff was aware of the problem. (Smith, Tr. 3383-85.) Later in his oral testimony, Smith added that the tabling of items was done on his initiative when "a document such as the hanger field problem had been initiated." (Smith, Tr. 3448.) Thus, Mr. Smith testified variously that he never initiated tabling of items, but he sometimes did, and that hanger field problem forms were never utilized to document discrepancies in hanger location, but sometimes they were.

Moreover, in his affidavit of September 21, 1982, which was the initial statement of his allegations concerning Hunter, Smith did not even mention the issue of tabling. (Smith, Intervenor's Prepared Testimony at Ex. A, ff. Tr. 3243.) Because "tabling" was not an issue raised in the affidavit, Region III had no opportunity to investigate the allegation.

Mr. Smith claimed that instances of tabling would be included in his rough drafts of audits, but would be deleted from the final audit reports. Region III's Mr. Yin investigated the general subject of deletions from rough drafts of audit reports. Based on a comparison of Smith's rough drafts with final audit reports, Mr. Yin catalogued all deletions from rough drafts of audits. There were no instances of deletion of references to tabling. (Yin, NRC Staff Prepared Testimony at 26-27 and Attachment G at 7-9, ff. Tr. 3586; see also, ID, ¶D-162.) Furthermore, the rough drafts of audits attached to Mr. Smith's prepared testimony as exhibits contain no reference to tabling. (Smith, Intervenors' Prepared Testimony at Ex. E and F, ff. Tr. 3243.) In sum, Mr. Smith's charge of frequent "tabling" does not emerge from the record as an allegation characterized by consistency, specificity, or credibility.

The Licensing Board apparently found support for its conclusions regarding "tabling" in the prepared direct testimony of the NRC Staff:

> Mr. Yin of Region III inspected for an allegation by Mr. Smith that one support was found without any documentation. Mr. Yin did not substantiate the allegation. However, Mr. Yin expressed the view that the allegation by Mr. Smith (exaggerated as we later learned) that there was 100 percent

> noncompliance with proper design locations of supports checked by Mr. Yin could be factual because the QC inspection program had not then been formally established. Region III Testimony, ff. Tr. 3586, at 25-26 (Yin).

(ID, ¶D-141.) Mr. Yin's reference to 100% noncompliance with proper design locations did not relate to Smith's testimony regarding "tabling." On the contrary, Mr. Yin was referring to the fact that the Hunter quality control inspection program at the time of Mr. Smith's employment did not encompass documentation of utilization of design tolerances in installation of the supports, or documentation of as-built data. (Yin, NRC Staff Prepared Testimony at 25-26, ff. Tr. 3586.) This QC inspection program deficiency was addressed in another section of the Initial Decision, and, in regard to that issue, the Licensing Board found in Applicant's favor, based on Hunter's prompt and positive corrective action. (ID, ¶D-127 to D-132.)[11]

---

[11] See also, Yin, NRC Staff Prepared Testimony at 25-26 and Attachment G, ff Tr. 2586; Yin, Tr. 3664-3677. The distinction between "tabling" and the QC program deficiency discussed in the text above is that "tabling", as defined by Mr. Smith, was an ad-hoc practice in which quality assurance auditors allegedly did not document problems they identified. The QC program deficiency described by Mr. Yin was a programmatic decision not to do quality control inspections against certain criteria until a later stage in the construction process. What makes things confusing is that the one specific example of tabling offered by Mr. Smith - and he offered it for the first time on cross-examination - was this: he allegedly was instructed not to include certain information (concerning a maximum of 4 documents without supports or supports without documents) in Audit Report 059-3. Audit Report 059-3 was the report by which Hunter discovered and began to correct the QC inspection program deficiency described in the text above. (Smith, Tr. 3382-3386, 3447-3448; ID, ¶D-131.) In short, Mr. Yin's testimony indicates that there was incomplete QC documentation for supports. It does not suggest that Mr. Smith was told to "table" such nonconforming conditions when he discovered them in his QA audit.

Confusing still another issue with "tabling", the Board referred to the finding of a 1983 audit performed by Applicant of contractor implementation of the reinspection program developed in response to the CAT inspection. (ID, ¶D-145.) Applicant's quality assurance staff determined that Hunter and certain other contractors were improperly using "field problem sheets" rather than discrepancy reports to document nonconforming conditions identified through the reinspection program. (Int. Ex. 29 at A-1.) From the finding of Applicant's audit the Board reached its conclusion that "Hunter continues to fail to take appropriate steps to issue documentation on nonconforming conditions." (ID, ¶D-169.) This conclusion is unsupported in the record. The tabling issue related to the alleged failure to document nonconformances while the 1983 audit finding was directed at the form of documentation. The two issues are not the same. At any rate, the audit finding did not represent a serious deficiency in documentation (See Int. Ex. 29 at A9). Action was taken to correct any nonconforming work. (Cf., Stanish, Applicant's Prepared Testimony at 5-6, ff. Tr. 7549, 7750-7751.)[12]

---

[12] Mr. Stanish's testimony refers to the significance of a similar finding with respect to Hatfield. The reinspection audit as it applied to Hunter was not the subject of testimony before the Board because of the limited scope of the reopened hearings. As discussed infra, pp. 64-70, the hearings expressly were limited to issues involving Hatfield Electric Company; therefore the audit as it pertained to Hunter or any of the other contractors was not the subject of any oral testimony. Although Applicant's counsel examined Mr. Stanish on redirect examination concerning the reinspection audit as it encompassed Hatfield, (Stanish, Tr. 7750-51) no such examination regarding Hunter was deemed to be appropriate and consequently none was conducted. Moreover, the Board raised no questions involving Hunter. For the Board to rely on this information, without notifying Applicant it would do so or giving Applicant any opportunity to explain the audit finding, is fundamentally unfair.

The Board apparently gave great weight to this 1983 audit finding because it believed the use of "field problem sheets" might undercut the validity of the reinspection program. This assumption was just plain wrong, as described in detail below with respect to Hatfield (see pp. 60-62, infra). The record as a whole with regard to Hunter simply does not warrant a finding of serious and continuing documentation inadequacies.[13]

B. The Board Erred in Extrapolating its Interpretation of NRC Staff Inspection Findings Concerning Hatfield to a Conclusion that Hatfield's and Applicant's Quality Assurance Programs Are Inadequate.

Since the Board's findings with respect to other contractors at Byron do not provide any substantial basis for its conclusions regarding Applicant's overall quality assurance performance, it follows that Hatfield is the key to the Board's decision. However, the Board utterly failed to apply the controlling legal principles to its evaluation of the evidence on the Hatfield quality assurance history, misconstrued the record evidence concerning Hatfield's quality assurance activities, and erroneously concluded that Hatfield's and Applicant's programs are inadequate.

1. The Board failed to apply the principles enunciated in Callaway to evaluate the significance of the Hatfield quality assurance history.

As discussed at pp. 11-13, supra, the Board is constrained to evaluate the significance of record evidence con-

---

[13] Review of the CAT inspection (Applicant's Ex. 8) demonstrates that Hunter's overall performance at Byron has been satisfactory.

cerning Hatfield's quality assurance in light of controlling principles enunciated in Callaway, supra. That is, the Board must evaluate the safety significance of items of noncompliance and the corrective action taken, and it then must determine whether there is evidence of a sufficiently widespread breakdown in the overall quality assurance program to warrant withholding of the requisite safety findings. In reaching its ultimate conclusion regarding the inadequacy of Hatfield's program, and consequently Applicant's program, the Licensing Board simply ignored these principles. The Board's evaluation of the evidence under the Callaway principles was not merely inadequate; it was non-existent.

The Board's decisional logic consisted of three basic steps:

1. The Board made findings as to the history of Hatfield's quality assurance program, which were taken almost verbatim from a series of four NRC inspections of Hatfield. (ID, ¶D-306 to D-321.)

2. While recognizing the "random" nature of the record before it (ID, ¶D-433) and without any conscious or articulated application of the Callaway principles (that is, without any consideration of safety significance, corrective actions, and significance to the overall program), the Board then leapt from its findings on the NRC inspections to a conclusion that Hatfield's history was "long and bad." (ID, ¶D-434.)

3. In an apparent effort to buttress the conclusion it drew from the quality assurance history, the Board made reference to a finding from Applicant's own 1983 audit of the reinspection program concerning an erroneous documentation practice. From this, the Board drew the absolute, unalterable conclusion that Hatfield was "perpetually incapable" of maintaining reliable records of nonconforming conditions. (ID, ¶D-438.)

In the succeeding discussion it will be shown that in light of the Callaway principles, the Hatfield quality assurance history, while imperfect, is consistent with findings which would authorize the issuance of operating licenses for Byron. Next it will be shown that the Board failed to apply the Callaway principles to Applicant's 1983 audit finding, and was simply mistaken as to the potential effect of the documentation problem discovered in Ceco's audit of Hatfield's reinspection program. On those bases it will be demonstrated that the Board's decision was erroneous and must be reversed.

2. The Board's findings as to the NRC inspections of Hatfield cannot, in light of the Callaway principles, support withholding of the requisite safety finding.

The Board's findings regarding Hatfield span the time period from 1978 to 1983, but the evidence is episodic. The findings are terse and contain no evaluation of the significance of the evidence to the Board's ultimate conclusion. There are two underlying reasons for this phenomenon. First, the detailed findings are themselves almost verbatim extracts from Region

III inspection reports which contain basically undisputed facts regarding specific items of noncompliance which have been addressed by corrective action. Second, there was little cross-examination by any of the parties on the substance of these reports and virtually no questions by the Board to either Staff or Applicant witnesses regarding these issues.

There was simply no indication at the hearings that the Board considered these quality assurance episodes to be of particular concern to it, either individually or when considered in their entirety. The NRC Staff, which was responsible for the reports, obviously did not consider these matters to be sufficiently significant to undermine its conclusion that CECo's quality assurance program met regulatory requirements. Nor was there any evidence of widespread hardware problems which would give rise to concern. (ID, p. 7.)

As indicated at the outset, the inspection reports in question focus on items of noncompliance and are inherently negative in character. The reports, in fact, do not reflect a "long and bad" history. They reflect a quality assurance system functioning over the construction life of a major nuclear power plant project. Unfortunately, because the Board's decision failed to consider these reports in light of the Callaway principles the Applicant is now faced with the task of painstakingly reviewing the Hatfield history in light of these principles. This discussion will be long, but it will show that the Hatfield history is not sufficiently "bad" to support a conclusion that Ceco's quality assurance program was inadequate.

Each major element of the Board's decision concerning the Hatfield history is addressed in detail below in four major segments, the first three being: (1) the Board's evaluation of NRC Staff inspection reports prior to 1982; (2) the results of the 1982 CAT inspection (exclusive of recertification and reinspection issues); and (3) the recertification program which arose out of the 1982 CAT inspection. Following these sections, we discuss the reinspection program which arose out of the 1982 CAT inspection.

a. Hatfield's quality assurance program implementation in light of NRC Staff inspection reports prior to 1982.

The Licensing Board's evaluation of what is characterized as Hatfield's General Noncompliance History (ID, ¶D-307) prior to the CAT inspection in April, 1982, consists of six findings.[14] In the first five findings, each item of noncompliance identified by the NRC Staff was briefly described. There is no discussion in the findings of the seriousness of the item of noncompliance or of the effectiveness of the corrective action. Under the Callaway principles, however, the items, either considered individually or as a whole, do not evidence a widespread breakdown sufficient to warrant withholding of the requisite safety findings. In the interest of brevity we address separately the first, second, and remaining items, respectively.

---

[14] Attachment A to Region III, NRC Staff Prepared Testimony, ff. Tr. p. 3586, tabulated all open items, unresolved items and items of noncompliance discovered by Region III at Byron from 1978 forward. Attachment A does not indicate the severity level of the items of noncompliance.

1) The first Hatfield item of noncompliance discussed by the Licensing Board involved the failure of Hatfield to set forth in a Ceco-approved procedure how Hatfield intended to comply with ANSI standard N.45.2.6 regarding the qualification of quality control inspectors. (ID, ¶D-307.) The Board's finding is somewhat ambiguous since it is not clear whether it meant that there was no Hatfield procedure or whether such a procedure existed, but had not been approved by Ceco. Pages 19 and 20 of Inspection Report 78-07 (Int. Ex. 3) make clear, however, that a revised Hatfield procedure had been in place since April, 1978, four months prior to the inspection and that the procedure awaited Ceco comment and approval. Moreover, Ceco's response to the August, 1978 item of noncompliance indicated that the Hatfield procedure had been revised and approved on September 14, 1978. (Int. Ex. 3 at 3.) The item of noncompliance was identified as a "deficiency", then the least serious of the NRC's categories of noncompliances.[15] The NRC Staff testified that the item of noncompliance was closed to its satisfaction and that it was not necessary that further corrective action, in the form of a stop-work order, be taken.

---

[15] The Staff testified that if it were ranked today, it would be characterized as a Severity Level IV. (Hayes, Tr. 3647.) A Severity Level IV violation is one with "more than minor safety ... significance." 10 CFR Part 2, App. C, Supp. IID. Some appreciation of the significance of a Severity Level IV item of noncompliance can be made by comparing its description with that of Severity Level III, which normally involves multiple examples of deficient construction or construction of unknown quality due to inadequate program implementation. 10 CFR Part 2, App. C, Supp. IIC. See also, Forney, Tr. 3629 ("a level 4 is one that would be higher than level 5, but still not a major concern").

(Hayes, Tr. 3648.) Mr. Shewski testified that the lack of an approved procedure did not indicate a broader problem with the Hatfield quality assurance program. (Shewski, Tr. 2575.)

When viewed in light of the Callaway principles it is clear that this item was not of major safety significance, was addressed by appropriate corrective action, and was not indicative of a breakdown in quality assurance implementation.

2) The second Hatfield item of noncompliance described by the Licensing Board consisted of two "infractions", the intermediate level of noncompliance according to the NRC Staff categories then in use. (Hayes, Tr. 3594.) The Board's view of the record is that there were two noncompliances involving failure to document faulty installation of cable connectors and concrete expansion bolts and that the situation with respect to concrete expansion anchors indicated a "programmatic weakness". (ID, ¶D-308.) The NRC investigation which led to the issuance of the investigation report regarding this matter was prompted by allegations from a Hatfield employee. (Int. Ex. 4.) 24 separate allegations were reviewed by Region III and all but three were found to be unsubstantiated. Of the three allegations that were substantiated, two involved the adequacy of the documentation dispositioning nonconforming conditions and one involved a failure by Hatfield to actually inspect installation of concrete anchors for certain attributes. (See, Int. Ex. 4 at 14-15, 17-18.) It is this latter allegation which formed the basis for the second item of noncompliance in Int. Ex. 4 which was characterized by the NRC Staff as indicat-

ing a "programmatic weakness." (Hayes, Tr. 3650.) The documentation deficiencies were characterized by the NRC Staff as perhaps an "isolated case." (Hayes, Tr. 3650; See also, Shewski Tr. 2577.) Adequate corrective action was taken by Ceco and Hatfield to close out the item of noncompliance. (Hayes Tr. 3650.) Both of these items of noncompliance would be categorized as Severity Level IV today. (Hayes, Tr. 3650.) Accordingly, under Callaway there is no evidence of a breakdown.

3) The remaining Hatfield items of noncompliance prior to 1982 discussed by the Licensing Board relate to NRC Inspection Report 80-25 (Int. Ex. 5). This inspection report detected a substantial number of items of noncompliance, four Severity Level IV violations, two Severity Level V violations and one severity Level VI violation. Region III issued an immediate action letter confirming Ceco's commitments for corrective action, the most stringent of which was a stop-work order imposed by Ceco. (Shewski, Applicant's Prepared Testimony at 18-19, ff. Tr. 2364; Williams, Tr. 3654.) The most serious individual item of noncompliance involved the design, construction and installation of a cable frame for safety related equipment without any quality assurance requirements. The notice of violation pointed out that it was Ceco's quality assurance organization that identified the problem.[16] Ceco implemented extensive corrective action which was acceptable to

---

[16] There was additional evidence that the Hatfield and Ceco quality assurance programs were functioning. Observation of cable installation during the inspection satisfied the NRC Staff that it was being done in comformance with regulatory requirements. (Int. Ex. 5 at 7.)

the NRC Staff. Conceding that stopping work was the appropriate response, the Licensing Board's decision apparently diminished the significance of this action by observing that the NRC Staff participated in the deliberative process that led to that decision. (ID, ¶D-311.) While no conclusions in the Initial Decision explicitly flow from this observation, it exemplifies the Licensing Board's failure to focus on the adequacy of corrective action. There is uncontradicted evidence that the corrective action taken was adequate to provide reasonable assurance that regulatory requirements have been met. (See, e.g., Williams. Tr. 3655.) Any other conclusion would be unsupportable on this record. Under Callaway the corrective action was appropriate and the evidence evinces no adverse implications for the adequacy of Ceco's overall QA program.

b. Hatfield's quality assurance program implementation in light of the 1982 CAT inspection (82-05).

This section focuses on the Licensing Board's findings which address the issues raised by the 1982 CAT inspection report (82-05) other than those involving the recertification and reinspection programs. The latter programs are addressed separately in sections II(B)(3) and III, below. The CAT inspection report documented an extensive inspection by the NRC Staff to "assess the adequacy of certain aspects of the quality assurance/construction activities at the Byron Station." (Ceco Ex. 8.) The Board asserted that Hatfield brought "troubles upon Applicant" as a result of additional noncompliances identified during the inspection. (ID, ¶D-313.) The Board concluded

that these noncompliances involved a "pattern of unreliable and inadequate documentation of nonconfirming condition." (ID, ¶D-313.)

When the entire CAT inspection report is considered, the Licensing Board's conclusion of a "pattern" of unreliable Hatfield quality assurance documentation is unwarranted. The CAT inspection did not concentrate on Hatfield - it looked at all contractors on site. In the cover letter which accompanied the CAT inspection report, the NRC Staff concluded that "the quality assurance program appeared good," (Ceco Ex. 8 at 1) even though four Severity Level IV and five Severity Level V items of noncompliance were found.

The CAT inspection report is organized topically, and within each topic each contractor's activities are reviewed. The Board selected those portions of the report which, based on its incomplete evaluation of the evidence, suggested a pattern with respect to Hatfield, while ignoring other portions of the report inconsisten with any such pattern. All items of noncompliance, except those to be resolved by the reinspection program, have been closed to the satisfaction of the NRC Staff. (Stanish, Applicant's Prepared Testimony at 4, ff. Tr. 2619.) In the following discussing, the four major areas of the report discussed by the Board - the Hatfield discrepancy report system, the voiding of non-conformance reports, lack of hold tags on torque wrenches, and Hatfield's procedures for cable sidewall pressure and rework - are addressed in light of the Callaway principles. Thereafter, we shall address other conclusions of the report which were favorable to Applicant, ignored by the

Board, and of great importance to any rational evaluation of the significance of the noncompliances.

1) The Hatfield discrepancy report system.

The significance of the Board's finding in regard to this item of noncompliance is difficult to characterize. In the CAT inspection report itself, the use of the discrepancy report system ("trouble letters") was recognized by the Staff as an acceptable technique "to expedite some contractor functions." (Ceco Ex. 8 at 26.) It was only when the trouble letters were used to document inspection discrepancies that the Staff found that a procedure should be in place to control their use. (Ceco Ex. 8 at 26.) After reviewing 70 trouble letters, the NRC Staff concluded that 9 should have been documented as nonconformance reports. Ceco witness Stanish explained, in response to the single instance of Board questioning regarding Hatfield in the March and April quality assurance hearings, that the documents were in fact being controlled, in that they were sequentially numbered and issued in a controlled manner. (Stanish, Tr. 2685-86.) There was no evidence that the quality of work was in fact affected, but a written procedure formalizing the use of trouble letters was not in place at that time. (Stanish, Tr. 2686.) While the Licensing Board characterized this as "not very reassuring," (ID, ¶D-315) it ignored the uncontradicted evidence that use of these documents had no effect on the quality of the work, since inspection reports existed to verify that quality. (Stanish, Applicant's Prepared

Testimony at 9, ff. Tr. 2619.) Moreover, appropriate action was taken to correct this documentation practice. (Stanish, Applicant's Prepared Testimony at 9, ff. Tr. 2619.) Under Callaway, the lack of safety significance, the corrective action taken, and the uncontradicted evidence that work quality was in fact under control, demonstrate that this item does not in any way reflect adversely upon the adequacy of the overall quality assurance program.

2) Voiding of nonconformance reports.

In regard to this item the Board found that corrective action had been taken, but gave no hint as to its adequacy. (ID, ¶D-316 - D-317.)

Nonconformance reports ("NCRs") are the formal method of tracking deficiencies observed during a contractor's inspection process. After reviewing 180 Hatfield NCR forms, the CAT inspection discovered three voided NCRs. (Ceco Ex. 8 at 40.) The discrepancies identified by the voided NCRs were being tracked by Field Change Requests which provided for design changes. (Stanish, Applicant's Prepared Testimony at 13, ff. Tr. 2619.) The concern expressed by the CAT inspection report was that trending of NCRs would not occur if the NCRs were voided. (Ceco Ex. 8 at 40.) A new NCR was created to document the nonconforming conditions, thereby preserving the integrity of the trend program. (Ceco Ex. 8 at 40.) The CAT inspection report itself concluded that Hatfield's trend analysis for 1981

and 1982 was adequate. (Ceco Ex. 8 at 42.)[17] Although the Board was silent as to the significance of this item the record allows no conclusion other than that the corrective action was appropriate and that no adverse inferences can be drawn concerning overall program adequacy.

3) Lack of hold tags on Hatfield torque wrenches which were past due for recalibration.

The finding of the Board on this issue exemplies the flaw in its approach to the evidence before it. Although the Board made no explicit evaluation of Hatfield's failure to tag torque wrenches when they were past due for calibration, this may have been another example of the faulty documentation pattern that the Licensing Board discerned. (ID, ¶D-313, D-319.) Yet this discrepancy in Hatfield's implementation was one of five examples cited by the CAT inspection report to support a single Severity Level V item of noncompliance. (Ceco. Ex. 8 at 5.) A Severity Level V item of noncompliance is one which has "minor" safety significance. There was no cross-examination and no Board questioning on this issue. Mr. Stanish's prepared direct testimony established that there was documented proof that torque wrenches were not used past their recalibration due date, and showed, without any evidence to the contrary, the

---

[17] The other example on which the NRC based this item of noncompliance involved the improper recording of disposition of a nonconforming condition on one NCR. While the NCR indicated that replacement of a nonconforming cable had not taken place, in fact such replacement had occurred. (Stanish, Applicant's Prepared Testimony at 14, ff. Tr. 2619.) Thus, in fact there was no safety significance to the incorrect information on the NCR.

lack of safety significance of this matter. (Stanish, Applicant's Prepared testimony at 15, ff. Tr. 2619.) This item is clearly an isolated incident, and under Callaway it provides no basis whatsoever for a conclusion of program inadequacy.

4) Hatfield procedures regarding calculation of electrical cable sidewall pressure and cable rework.

The lack of procedures for calculating cable sidewall pressure and cable rework constituted one of four examples upon which the Staff based a Severity Level IV item of noncompliance.[18] Unlike the other items of noncompliance involving Hatfield discussed above, this issue went directly to the adequacy of procedures governing construction, rather than the manner in which documentation was processed. In such an instance, the concern should be even more pointedly with the safety significance of the absence of the procedure. While the Board's finding recited the corrective actions taken, it did not in any way evaluate their efficacy. Nor did the Board attempt to ascribe any significance to this item. (ID, ¶D-320, D-321.) In the absence of cross-examination and Board questions on this subject, the record establishes that the corrective action was appropriate. (Stanish, Applicant's Prepared Testimony at 10-11, ff. Tr. 2619.) Moreover, since documentation existed which enabled Hatfield to determine whether the maximum sidewall pressure had been exceeded, no conclusions of inadequate

---

[18] Other examples include Hatfield's use of "trouble letters" (see, pp. 42-43, supra).

documentation based on this item of noncompliance could be drawn by the Board. Accordingly, under Callaway no adverse inferences as to program adequacy can be drawn.

5) Other conclusions regarding Hatfield in the CAT Inspection Report.

The examples recited by the Board from the NRC inspection report in findings D-315 through D-321, without much more, might lead one to conclude that the CAT inspection report contained unremitting criticism of Hatfield's documentation and the quality of its work. Examination of portions of the report other than those upon which the Board freely relied for its negative conclusions shows this is simply not the case.

The Staff's review of Hatfield Field Change Requests verified that they were under Ceco control, as appropriate. No item of noncompliance was identified. (Ceco Ex. 8 at 45-46.) The inspection also included a review of Hatfield material traceability, which included a review of Hatfield's receiving and inspection procedures and various welding procedures; a review of Hatfield's weld material documentation; a review of welder qualifications; and a review of weld material control. No items of noncompliance were identified, although one open item was noted. (Ceco Ex. 8 at 47-48.) In a review of in-process inspection activities, the inspection team reviewed Hatfield procedures for cable pan and conduit installation as well as 33 inspection checklists, 50 concrete expansion anchor travellers and 85 conduit inspection reports. In addition, the team observed two Hatfield inspectors inspect conduit hangers in the control

room. (Ceco Ex. 8 at 63-64.) No items of noncompliance with respect to Hatfield were identified.

Quite apart from verifying that Hatfield's procedures and documentation were satisfactory in the above areas, the CAT inspection report also evaluated the quality of Hatfield's work. It conducted a review of Hatfield's cable reel yard to verify proper cable storage. (Ceco Ex. 8 at 60.) Further, an inspector verified that a specific electrical cable was routed in accordance with requirements. (Ceco Ex. 8 at 60.) Indeed, the NRC inspector observed that the Hatfield foreman and craftsperson involved in cable pulling were "very knowledgable and proud of their work." (Ceco Ex. 8 at 61.)

This evidence was before the Board, but was ignored. At a bare minimum, the aforementioned evidence of satisfactory performance by Hatfield in complying with written procedures and maintaining adequate documentation are inconsistent with the Board's selectively fashioned "pattern" of document deficiencies. More importantly, this evidence, while ignored by the Board, invalidates the Board's conclusion that Hatfield is "perpetually incapable" of maintaining reliable records of nonconforming conditions. (ID, ¶D-438.)

When all of the evidence concerning the 1982 CAT inspection is examined as a whole, it is apparent that none of the items of noncompliance, which the Board selectively drew from the inspection report, are sufficient to create any inference of a breakdown in either Hatfield's or Applicant's QA program. The inspection report merely reflects the routine

functioning of the NRC Staff's inspection program: identification of a number of essentially minor noncompliances, followed by implementation of appropriate corrective action. It is undoubtedly on this basis that the Staff was able to testify that the Applicant's QA program was acceptable. (Hayes, NRC Staff Prepared Testimony at 33-34, ff. Tr. 3586.) The Board simply ignored the Staff's testimony, which was the best evidence on the significance of the inspection reports. It is inconceivable that the Board could have extrapolated the information in the inspection reports concerning Hatfield to a conclusion of program inadequacy had it made any attempt to consider and apply the specific Callaway criterion which requires a licensing board to assess whether a quality assurance breakdown is of "sufficient dimensions" so that the requisite safety finding cannot be made. The Board did not make any finding of an overall "breakdown", let alone one of "sufficient dimensions" to preclude the requisite safety finding, and its conclusion denying Ceco's application is clearly erroneous.

3. Recertification.

The Board's decision devotes considerable attention to the NRC CAT inspection report finding which resulted in Applicant's inspector recertification and reinspection programs. While there are numerous erroneous findings concerning the recertification program, it is difficult to discern whether any such findings played a decisive role in the Board's con-

clusions.[19] The Board never stated that Applicant's recertification program is inadequate. Only one reference to recertification appears in the Board's conclusions. After discussing the matter of Hatfield's documentation of nonconformances in the reinspection program the Board indicated that it was "... also concerned that, despite all of its troubles, Hatfield still has not developed a practice of carefully assuring and documenting that its inspectors are qualified." (ID, ¶D-438.) To the extent that the Board relied upon this concern to support its conclusions as to the inadequacy of Hatfield's quality assurance program, the decision is erroneous for three reasons.

Current practice calls for Hatfield's quality assurance managers or supervisors to verify the information provided by a job applicant, such as employment history, which establishes an individual's qualification to be a QC inspector, before that individual can be hired. The quality assurance manager or

---

[19] The Board stated that it was "troubled and puzzled at the very low information content" of Mr. Stanish's prepared testimony regarding Hatfield's inspector recertification program. (ID, ¶D-395.) Yet the Board completely ignored the detailed testimony of Mr. Koca, Hatfield's Quality Assurance Supervisor, whose duties included the development of certification documents for inspection personnel. (Koca, Applicant's Prepared Testimony at 2, ff. Tr. 7418.) Mr. Koca's direct testimony described in general terms the certification practices in place in October, 1982 after the recertification program was in place. (Koca, Applicant's Prepared Testimony at 3-4, ff Tr. 7418.) Exhibit A attached to Mr. Koca's direct testimony is Hatfield Procedure #17 dealing with the Training and Qualification of Inspection and Audit Personnel. That procedure and its attachments detail the methods of qualifying inspector, the type of verification of past employment to be obtained, and a description of classroom and on-the-job training requirements, including testing requirements. Mr. Koca was briefly examined by Judges Cole and Callihan regarding Hatfield's certification practices. (Koca, Tr. 7520, 7526.)

supervisor then evaluates this information as part of the overall certification process. (Koca, Applicant's Prepared Testimony at 4, 5, and Exhibit A, Section 5.3.1, ff. Tr. 7418.) As part of the recertification program, Ceco's quality assurance department reviews 100% of all the contractor inspector certification packages. (Stanish, Applicant's Prepared Testimony at 4, 5, ff. Tr. 7549; Tr. 7633-7636.) There is no regulatory requirement for Ceco to re-verify the information contained in the packages. Moreover, the NRC Staff does its own investigation of inspector qualifications in the same way as Ceco, by documentation review. (Forney, Connaughton and Hayes, Tr. 7923-7928.) There is no basis whatever for an adverse inference about the adequacy of the recertification program, arising out of the documentation verification practices of Ceco. (See, ID, ¶D-402.)

Second, the Board's inference that the recertification program was ineffective because it failed to discover the lack of qualifications of the Hatfield Quality Assurance Manager and a Level II Quality Control Inspector (ID, ¶393) is erroneous. There was no testimony that the Quality Assurance Manager was subject to the recertification program. (See, Stanish, Applicant's Prepared Testimony at 4, ff. Tr. 749; but see, Forney, Tr. 7918-7919.) Applicant's apparent failure to discover that a Level II Quality Control Inspector was not properly certified was due not to any weakness in the program itself, but rather to the timing of the recertification effort. Ceco's review of the contractors' inspector certification packages did not begin

until late February, 1983 because the records first had to be placed in a more reviewable format. (Stanish, Tr. 7639-42.) As a result of an allegation directed to the NRC Staff, Mr. Forney reviewed the certification package of a Mr. Wells in early February, 1983 and discovered that he was not properly certified. (Forney, NRC Staff Prepared Testimony at Attachment D at 2-3, ff. Tr. 7801.) The NRC Staff simply got there before Ceco Quality Assurance, which itself subsequently identified two Hatfield inspectors whose documentation packages were not in order. (Stanish, Tr. 7726-27.)

Third, the Board implied that the program may be inadequate because about half of the Hatfield inspectors required retesting and at least half required additional training. (ID, ¶D-392.) The Board, however, ignored the fact that the retesting and additional training were necessary because Applicant had imposed new, more stringent requirements for recertification, and that therefore no inference of inadequate qualification can be drawn from the number of inspectors requiring additional training.[20]

In sum, the Board's conclusion expressing concern about documentation of inspector qualification is without

---

[20] The very purpose of the recertification program was to enable each contractor to meet the requirements of ANSI N45.2.6, the "moving target" described by Mr. Forney. (Forney, Tr. 7820.) The critical fact, established by the testimony of Mr. Koca, Mr. Stanish and Mr. Forney of the NRC Staff is that there was a satisfactory recertification process in place in accordance with the commitments made by Ceco to the NRC Staff. (Forney, NRC Staff Prepared Testimony at 8, ff. Tr. 7801.) Thus, the Board's findings that Mr. Stanish was vague in quantifying the number of Hatfield inspectors requiring recertification is an irrelevancy. (ID, ¶D-397.)

support in the record. To the extent that this conclusion, as it must have, played a role in the Board's conclusion concerning the adequacy of Hatfield's quality assurance program it is clearly erroneous.

III. THE REINSPECTION PROGRAM IMPLEMENTED BY CECO WAS AN ADEQUATE AND DELEGABLE METHOD FOR RESOLVING CONCERNS ABOUT THE QUALIFICATIONS OF QUALITY CONTROL INSPECTORS.

While the Board acknowledged that a reinspection program is a logical method by which doubts about Hatfield's quality assurance program could be resolved (ID, ¶D-435) it nevertheless refused to find that Applicant's program was adequate and delegable to the NRC Staff because: (a) the Staff did not find that the program is sufficient to assure that Hatfield's work is adequate (ID, ¶D-435); (b) in addition, the Board was concerned about several "unexplained elements" of the reinspection program (ID, ¶D-435); and (c) Applicant's audit disclosed that Hatfield's reinspection efforts involved improper documentation of non-comformances. (ID, ¶D-438.)

In the following segment of the brief, it will be shown that the Licensing Board wholly departed from the principles of the Callaway decision in its analysis of the reinspection program. It lost all perspective on the safety significance of the quality assurance issue before it, drew unsupportable adverse inferences regarding the effectiveness of the program, and wrongfully extrapolated essentially minor problems with implementation of the reinspection program by Hatfield to

a conclusion that the reinspection program itself was flawed and that the application for operating licenses should therefore be denied.

There are a number of undisputed facts concerning the reinspection program which necessarily place the evidence on that subject in its proper context. First, it bears emphasis that the reinspection program was part of a response to one Severity Level IV item of noncompliance identified in the CAT inspection report. (Ceco Ex. 8 at 5-6.) The program was developed because of concerns expressed by the NRC Staff, by virtue of deficiencies noted in the documentation of inspector qualification and training, that unqualified quality control inspectors may have been employed by all contractors at Byron and that therefore nonconforming construction or installation may not have been detected. (Teutken, Applicant's Prepared Testimony at 3-4; ff. Tr. 7760; Region III, NRC Staff Prepared Testimony at 4-5, ff. Tr. 7801; Forney, Tr. 7828.) In the absence of complete and consistent documentation of inspector qualification, the proof of the pudding was the quality of the inspections performed by quality control inspectors in the past. (Forney, Tr. 7828.) As stated in the Staff's prepared testimony:

> The Region considered that detection of inadequate inspections performed by improperly or inadequately certified inspectors could be achieved by selecting a sample number of QC inspectors from the total population for each contractor and reinspecting work the inspectors originally inspected during their first few months of their inspection activity.

(Forney, NRC Staff Prepared Testimony at 5, ff. Tr. 7801.)

Second, the program was applied to a number of site contractors, not just Hatfield.

Third, although the NRC Staff had not identified "significant hardware problems" during the CAT inspection, the reinspection program would nevertheless determine the existence of and assure correction of any hardware problems. (Forney, NRC Staff Prepared Testimony at 5, ff. Tr. 7801.)

With the foregoing established as context, the following discussion will address: (1) the NRC Staff's views on the reinspection program; (2) the Board's concerns with the so-called unexplained aspects of the reinspection program; and (3) the Hatfield documentation of noncomformances during the reinspection program. On this basis, we will show that the reinspection program is clearly adequate, and, under the Board's own reasoning, post-hearing inspection and review of the results of that program are delegable to the NRC Staff.

A. The Staff Accepted the Program as Adequate.

The Licensing Board's decision misread the Staff's normal sense of caution about the ultimate results of the program and found instead that the NRC Staff has accepted "only the basic premise" of the reinspection program. (ID, ¶D-410.) The Board then extended this finding to a conclusion that the Staff "does not find" that the reinspection program is sufficient to assure the adequacy of Hatfield's work, (ID, ¶D-435) a giant step beyond the question which gave rise to the reinspection program in the first instance: the qualifications of

quality control inspectors. (ID, ¶D-435.) Had the Board properly considered and appraised the entire evidentiary record regarding the Staff's position on the reinspection program, it would have discerned that the program, as a program, was acceptable and that the Staff was reserving its final judgment only with regard to the results of the program -- what the program would disclose regarding the qualification of quality control inspectors and, secondarily, about the quality of the work.

The reinspection program which was implemented at Byron was not begun without Staff concurrence. This is apparent from the fact that Ceco proposed two other plans to address the inspector qualification item of noncompliance, but neither was acceptable to the NRC Staff. (Stanish, Tr. 7697-7699.) The written communication from the NRC Staff evidencing that approval was read into the record at Tr. 8001; it contained no qualification other than the usual reservation that the reinspection program would be examined at a later NRC Staff inspection and set forth the Staff's definition of certain of the subjective attributes involved in the reinspection program. The Board's findings grudgingly acknowledged the Staff's acceptance of the program. While slighting Applicant's responsiveness, the Board did find that by February 4, 1983, Applicant had "proposed the reinspection program acceptable to the Region III Staff." (ID, ¶D-371.) (Emphasis added; the Board immediately qualified this statement in a footnote.)

In addition, the NRC Staff's testimony, taken as a whole, convincingly demonstrated acceptance of the program.

Thus, in the original quality assurance hearings, Mr. Forney agreed that the program was acceptable, assuming that Ceco met its stated commitments. (Forney, Tr. 3659.) A slightly different verbal formulation is found in the Staff's prepared testimony for the reopened hearing. There, the Staff stated that it has not made a "final determination" that the reinspection program will prove "successful towards alleviating the problems" addressed in the CAT inspection findings. (Forney, NRC Staff Prepared Testimony at 7, ff. Tr. 7801; See also, Hayes, Tr. 7809.) Mr. Forney articulated the same thought in agreeing that "the Staff is now awaiting the results of the reinspection program" in order to determine whether the original inspections were deficient and that it was "premature" to conclude that any Hatfield inspector performed inadequate inspections. (Forney, Tr. 7964.)[21] Thus, it is clear from all the evidence that the only significant reservation the NRC Staff expressed involved an evaluation of the results of the

---

[21] Mr. Forney went on to state, as noted in the Initial Decision, that the Staff had accepted the "basic premise" of the reinspection program, but that remark was made in the context of a discussion of the definition of those subjective inspection attributes for which a 90% passing rate was established (as opposed to the 95% passing rate for objective inspection attributes). (Forney, Tr. 7980-81.) Mr. Forney's differences with Ceco personnel regarding the definition of subjective inspection attributes was explored further at Tr. 7996-7998 and Mr. Forney admitted that his personal position regarding that matter was documented only in a draft letter to Ceco which was not sent. (Forney, Tr. 7998.) As explained by Mr. Hayes, this difference of opinion regarding the definiton of subjective inspection attributes may not be a "problem" (Hayes, Tr. 8002) and that in any event, the data is being gathered by the reinspection program such that all that is necessary is a decision on the criterion, 90% or 95%, for specific inspection attributes. (Hayes, Tr. 8007-08.)

reinspection, not the program itself. Such a reservation is perfectly appropriate and reflects only the Staff's normal abundance of caution; it does not translate into a finding by the Staff of program inadequacy. If many missed inspections were discovered, further efforts to resolve the issues of inspector qualification as well as the quality of the work itself might be needed.[22] There is, however, simply no evidence that the Staff would not regard acceptable results of the reinspection program as satisfying its concerns.

B. The Board's Concerns Regarding Elements Of The Reinspection Program Do Not Detract From Its Adequacy.

The Board concluded that it could not find that the reinspection program was adequate because:

(a) the basis for the sample selection was not supported in the record;

(b) half of the Hatfield inspectors needed retesting and retraining and not all of their work will be reinspected; and

(c) not every attribute of the original inspections was being sampled. (ID, ¶D-436-437.)

If there is a lack of explanation on the record regarding sample size it can be attributed to the Board itself. At the hearings the Licensing Board showed no interest in the

---

[22] In this regard, the program itself is self-executing. Not only will deficient work, if any, be reworked and/or re-evaluated, but if the reinspections yield unacceptable pass rates the program will result in expanded inspections. (ID, ¶D-371, D-372, D-374.)

statistical validity of the sample size. Judge Smith chastised Intervenors' counsel for pursuing a line of cross examination regarding sample size, observing that an examination which elicited the fact that sampling was less extensive than a 100% reinspection constituted "simplistic, syllogistic reasoning" which would not have "a big weight". (Tr. 7848.) There was no evidence that the sample selection process was a matter of dispute between Ceco and the NRC Staff or that it was in any way inadequate. More importantly, the record evidence stands uncontradicted that the Staff concluded that the reinspection program rested on a random sample and covers a wide period of time. (Hayes, Tr. 7891.) Accordingly, its results are a valid predictor of the qualifications of the total population of quality control inspectors and the quality of the work. (Hayes, Tr. 7891; Forney, Tr. 7848.)

The Licensing Board's reference to the retesting and further on-the-job training of Hatfield quality control inspectors (ID, ¶D-436) as somehow indicating the lack of validity of the sampling program is a non sequitur. The purpose of the reinspection program was to test the qualification of quality control inspectors whose certification could not be documented. If all the inspectors had been certified in accordance with ANSI N45.2.6-1978 initially there would be no need for any reinspection program. Conversely, if some of the inspectors were not so certified and a sample reinspection program is, for that reason alone, held insufficient, this amounts to a ruling that, as a matter of law, 100% reinspection is required.

Compare, Long Island Lighting Co. (Shoreham Nuclear Power Station Unit 1) LBP-83-57, ____ NRC ___ (slip op. at p. 297); Cf., Callaway, supra, (slip op. at 12-13).

As to the "unexplained" concern that not every attribute will be sampled, one must carefully search the record for any indication that this issue was a matter of concern to the Board. The only reference which relates to that issue involves the decision by Ceco to exclude the bolting inspection attribute from the reinspection program. Since the original bolting inspections were based on an unidentified 10% sample, it was not possible to recreate the original inspection on an inspector by inspector basis, without possibly biasing the results in one direction or the other. (Stanish, Tr. 7719-7721; Teutken, Tr. 7791.) As a result, reinspection of the bolts on a sample basis would not provide meaningful information about inspector qualifications and this attribute was necessarily eliminated from the reinspection program. However, Ceco independently had implemented a separate over-inspection of bolting by Pittsburgh Testing Laboratory in order to insure proper quality of that work. (Teutken, Tr. 7792.) Thus, the safety significance of the omission of bolting from the reinspection program was nil, and the Board's extrapolation of this evidence to a finding of reinspection program inadequacy was simply incorrect.[23]

---

[23] In finding that not every inspection attribute originally inspected by Hatfield will be reinspected, (ID, ¶383) the Licensing Board misunderstood Mr. Teutken's prepared testimony, which stated "[a]ttributes that were inspected by the Hatfield inspectors ... are being reinspected" and then listed the

(Footnote continued on following page)

When the Board's unexplained concerns are viewed in the context of the entire record it is clear that none involve the fundamental adequacy of the program.

C. The Board Misunderstood The Manner In Which The Nonconformance Documentation Systems Function And Erroneously Concluded That Hatfield's Documentation Deficiencies Detracted From The Adequacy Of The Reinspection Program.

The Licensing Board also based its finding regarding the inadequacy of the reinspection program on its perception that Ceco and Hatfield were not implementing the program in a satisfactory way. The Board's findings on this subject were based on an audit of the reinspection program performed by Ceco quality assurance personnel. The audit report included one audit finding and eight observations. (Int. Ex. 29.) The audit finding involved the fact that four contractors (Hatfield, PTL, and Hunter, Blount) were not documenting nonconforming conditions discovered during reinspection on discrepancy reports, but rather on "field problem sheets" which were not a part of the quality assurance program. (ID, ¶D-380.) It is significant

---

(Footnote 23 continued from preceding page)

attributes reinspected. (Teutken, Applicant's Prepared Testimony at 8, ff. Tr. 7760.) Moreover, Mr. Stanish testified that every accessible and recreatable inspection attribute for safety related items for Hatfield was subject to the reinspection program. (Stanish, Tr. 7719.) There was no contrary testimony. Finally, the Board's observations regarding the Staff's concern with respect to Hatfield's records (ID, ¶D-384) is, again only a partial reflection of the evidentiary record. Mr. Teutken stated, without contradiction, that Ceco had taken steps to enhance Hatfield's records so that their format would be more useful for the reinspection program. (Teutken, Tr. 7785-86.)

that Ceco quality assurance discovered this issue, indicating that its oversight of its contractors was satisfactory. Moreover, the Board simply mistook the significance of the audit finding. Applicant's witness, Mr. Stanish stated that use of field problem sheets rather than discrepancy reports meant that problems would not be put into the trend analysis. The Board jumped to the conclusion that this meant that "the main purpose of the reinspection program would be defeated." (ID, ¶D-380, D-438.) The Board's conclusion was erroneous because the reinspection program and the trend analysis are independent programs. (See, Stanish, Tr. 2646-2649, Tr. 7702-7704; Int. Ex. 29 at A-8, second paragraph, second, third and fourth sentences.) Although the Staff recognized that Applicant and its contractors do have a trend analysis program, it did not consider this program important enough to make it a requirement. (Spraul, NRC Staff Prepared Testimony at Attachment, p. 17-3, ¶7 and two succeeding paragraphs, ff. Tr. 3562; Forney, Tr. 3678-3682.) The "main purpose" of the reinspection program was not to tally deficiencies in a pre-existing trend analysis. It was to determine the qualification of quality control inspectors. Indeed, the Board could not find, nor was there any evidence, that discrepancies were not being accurately recorded for the purposes of the reinspection program.[24] In drawing

---

[24] The Licensing Board's findings on the other Ceco audit observations relating to Hatfield (which it mischaracterises as "findings") demonstrate that it did not understand the testimony on the subject. The reference in Finding D-382 to the audit observation regarding Hatfield QA/QC memorandum

(Footnote continued on following page)

adverse inferences about the adequacy of the reinspection program, based on its mistaken understanding of the documentation systems, the Board clearly erred.[25]

D. Inspection And Review Of The Reinspection Program Results Are Properly Delegable To The NRC Staff.

The Licensing Board correctly summarized NRC case law regarding delegation of hearing issues to the Staff. (ID, ¶D-418 to D-428.) However, it misapplied the principle in this case. The three reasons the Board gave for not finding the reinspection program adequate and delegating to the Staff the task of post hearing verification of Applicant's compliance program are: the Staff witness' hesitancy in providing an unequivocal endorsement of the program until the results are available (ID, ¶D-435); certain unexplained aspects of the reinspection program (ID, ¶D-436, D-437); and improper documentation practices which it thought might undercut the realiability of the reinspection

---

(Footnote 24 continued from preceding page)

295 is the same observation referred to in the first sentence of Finding D-381. As is clear from the audit report itself and Mr. Stanish's testimony, this memorandum refers to inspections and not to the reinspection program. (Int. Ex. 29 at A-2; Stanish, Tr. p. 7707.) Further, there was uncontradicted evidence that fireproofing was removed for the reinspection program, contrary to Finding D-382. (Teutken, Applicant's Prepared Testimony at 5, ff. Tr. 7760.) The other matter the Board discussed (which was not classified by the auditors as any kind of deficiency) related to an interpretation of the sample size increase and was resolved long before any expansion of the sample was contemplated. (ID, ¶D-381; Int. Ex. 29 at 1, A-6.)

[25] The Board also extended this inference to draw similarly erroneous conclusions as to the inadequacy of Hunter's QA program. See, pp. 30-32, supra.

program. (ID, ¶D-438.) As we have shown, none of these reasons is valid.

Moreover, the Board gave too much weight to the Staff witness' reservations when they described the reinspection program. The Licensing Board found that in any event, "the rule against delegation would appear to require that the Board decide, rather than the Staff decide, when the reinspection program is adequate." (ID, ¶D-425.) Inconsistently, the Board refused to find the reinspection program to be adequate, when the entire record concerning the reinspection program supports that result, simply because one Staff witness expressed vague reservations concerning its results. This turns the principle of Board primacy on its head.

The delegation cases cited by the Board do not stand for the proposition that nothing can ever be left to the Staff for post hearing verification. That would be tantamount to a rule that when faced with a contested quality assurance issue, a Licensing Board could never render a decision until construction is completed. The record in this case is sufficient to find that Applicant's reinspection program is adequate. The Staff can be entrusted to ensure that Applicant carries out that program in accordance with its commitments. Compare, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) LBP 83-57, - NRC - (Sept. 21, 1983) (slip op. p.282); Commonwealth Edison Co. (Zion Station, Units 1 and 2), LBP-80-7, 11 NRC 245 (1980), aff'd. ALAB-616, 12 NRC 419 (1980).

IV. THE BOARD'S FINDINGS REGARDING ALLEGATIONS OF FRAUD ARE BASED ON A MISINTERPRETATION OF ITS OWN ORDERS REOPENING THE RECORD.

The Board expressed its dissatisfaction with Applicant's evidentiary presentation on the allegations of fraud which had been raised in the proceedings, concluding that "Applicant's evidentiary response to the issue in the reopened hearing has been weak and borders on default." (ID, ¶D-404.) Although the Board acknowledged that it had "no basis on this record upon which it can find that fraudulent practices existed at Hatfield," (ID, ¶D-403) its unfounded conclusions regarding Ceco's evidentiary presentation on this issue may well have colored its evaluation of all the evidence presented at the reopened hearings. Accordingly, we address the issue although we are mindful of the Appeal Board's admonition that CECo not address issues which were decided in its favor.

The Board's inquiry into alleged fraudulent practices at Byron derived from allegations made by Intervenors' witness John Hughes, a former Pittsburgh Testing Laboratory quality assurance inspector who was assigned to Hatfield during his brief tenure at the site. First in a handwritten affidavit and later during a special deposition session conducted before the Board Mr. Hughes levelled a series of charges against Hatfield. The Board found most of Hughes' allegations to be without substance, going so far as to conclude "The Board's ultimate finding with respect to Mr. Hughes' allegations is that he has been very unreliable and inaccurate." (ID, ¶D-354.) Nonetheless the Board determined that further inquiry into a general

area raised by Hughes was warranted, the area of certification and training of inspectors by Hatfield. The Board reopened the evidentiary record, however, "with serious doubts about the accuracy of [Hughes'] memory and with low confidence in his candor.." (ID, ¶D-334.)

The specific parameters of the reopened proceedings were delineated in two Board orders, those of June 21 (the shorter of the two orders issued that day) and July 7, 1983. In its June 21 order the Board stated:

> In addition, as we noted in our order allowing a portion of Mr. Hughes' testimony [the other June 21 order], his deposition suggests that Hatfield Electric may have followed a practice of certifying that QA inspectors received training which was not actually provided to the inspectors. Mr. Hughes also alleged that a Hatfield employee may have defeated QA certification testing by providing test answers to QA inspector candidates.

(Memorandum and Order Reopening Evidentiary Record, June 21, 1983, at 2.)

The June 21 Memorandum and Order also noted the existence of ongoing NRC investigations and inspections being conducted by Region III and OI referred to by the NRC Staff in its prepared testimony submitted in April, 1973. (Forney, NRC Staff Prepared Testimony at 6, ff. Tr. 3586.) The Board directed the parties to present "a full evidentiary showing and explanation of the pertinent investigations of Hatfield Electric's quality assurance program and the subsequent reinspections." The Board, "for the guidance of the NRC Staff," made it clear this was meant to include "wrongdoing". Finally, the Board requested

further evidence on the CAT inspection report dealing with inspector recertification and the reinspection program (82-05-19), especially if there were any relationship between 82-05-19 and the NRC inspections and investigations discussed elsewhere in its order. (Memorandum and Order Reopening Evidentiary Record, June 21, 1983, at 3-5.)

In an effort to modify and clarify the scope of the reopened hearings defined by the Board's June 21 Order, the Board issued its order of July 7. This order stated:

> 1. Evidence may be limited to Hatfield Electric Company. This would include Pittsburgh Testing Laboratory employees and similar personnel, if any, assigned to Hatfield.
>
> * * *
>
> 5. The Board is particulary interested in any fraudulent training, qualification, or certification practices.
>
> 6. This limitation should not be construed as a limitation of the evidentiary showing required pertaining to the investigation and inspection referred to in Region III's testimony, ff. Tr. 3586 at 6. 26/
>
> * * *
>
> 7. The Board does not require the parties to perform new investigations, inspections, evaluations, or research to comply with this directive.

(Memorandum and Order, July 7, 1983, at 2-3.)[27] Thus, as Ceco approached the reopened hearings the scope of those hearings

---

26 The Board cited its June 21 Memorandum and Order Reopening Record, at 1-2 and its July 1 Memorandum and Order.

27 In its order the Board apparently confused Region III's findings in I&E Report 82-05, which did not make any mention of allegedly fraudulent training, qualification, or certification practices, with the allegations made by Mr. Hughes.

with regard to fraud, as far as it knew, encompassed only any fraudulent training, qualification, or certification practices of Hatfield, and the parties were expressly instructed that they were not required to perform additional investigations in order to respond to the issue.

The only allegations in the record which pertained to fraud in Hatfield's training, qualification, and certification of inspectors were those of John Hughes. In its Initial Decision, however, the Board stated:

> Our June 21 order reopening the hearing explicitly broadened the issue beyond the Hughes' (sic) allegation to encompass the allegations of other individuals referred to in Region III testimony during the main hearing relative to the issue of alleged fraudulent training, testing and certification practices. As Applicant has known at least since early in the main hearing, these allegations have been and are still under investigation and continuing inspections by the Office of Investigations and Region III, respectively. Region III Testimony, ff. Tr. 3586, at 6.

(ID, ¶D-399.) Yet the Region III testimony cited simply does not mention allegations of fraud, whether made by Hughes or anybody else. Granted, the testimony does refer to allegations made concerning "QC inspector qualification and certification," yet it is hardly apparent from the context of the testimony that such allegations encompassed fraud.[28] (Forney, NRC Staff Prepared Testimony at 6, ff. Tr. 3486.) Furthermore, if allegers

---

[28] Moreover, Region III's testimony at the reopened hearings regarding the Hatfield allegations for which the Staff's investigation had been completed indicated that none (other than Hughes') involved fraudulent training, qualification, and certification of inspectors. (Region III, NRC Staff Prepared Testimony at 12-13, ff. Tr. 7801.)

in addition to Mr. Hughes had charged fraudulent practices at Hatfield, Applicant could not know of this fact. Until allegations have been fully investigated by the NRC, they are kept secret and Applicant is not privy to them. To Applicant's knowledge the only investigations involving fraud that had been or were being conducted by Region III or the Office of Investigations pertained to the allegations of Mr. Hughes.

At the reopened hearings on August 9-12, 1983, Applicant introduced substantial testimony in response to the allegations concerning fraud made by Mr. Hughes.[29] (See, Koca, Applicant's Prepared Testimony, ff. Tr. 7418.) In addition, Region III testified concerning an extensive investigation of Mr. Hughes' training, qualification, and certification by Hatfield. (Region III, NRC Staff Prepared Testimony, ff. Tr. 7810.) Based on the testimony of Allen Koca, Hatfield's quality control supervisor at the time of Hughes' training and certification, and the testimony of Region III the Board concluded that "Mr. Hughes' allegation with respect to the amount and timing of his training at Hatfield is unsubstantiated." (ID, ¶D-345.)

With regard to the issue of the failed test subsequently retaken by Hughes the Board stated that it could not resolve the matter. (ID, ¶D-351.) It stated that it could not accept the testimony of Hughes, or the stipulated testimony of

---

[29] Testimony of Applicant concerning its general efforts to detect fradulent practices is discussed at n.32, below.

Irvin Souders, "as being sufficiently reliable to conclude that the questioned document represents a practice of providing corrected failed tests as cribs in retesting." (ID, ¶D-351.) However, the Board stated that, although Mr. Koca vehemently denied the Hughes allegation, "Mr. Koca has a strong interest in defending whatever practice then existed and his memory is uncertain." (ID, ¶D-351.) Hughes passed the test in question on October 12, 1982. (Koca, Applicant's Prepared Testimony at Ex. K, ff. Tr. 7418.) At the hearings the Staff produced a test in the custody of the Office of Investigations, stating that it was the actual test failed by Hughes; it was dated October 8, four full days before he passed the same examination. (Int. Ex. 27.)[30]

In sum, the Board was unable to find that Mr. Hughes' allegations were substantiated. Yet other than the allegations of Hughes the record contains no reference to fraudulent training, qualification, and certification of Hatfield inspectors. Thus, the Board had no choice but to conclude, as it did, that it "has no basis on this record upon which it can find that fraudulent practices existed at Hatfield." (ID, ¶D-403.)

The Board, however, commented that Applicant should have "addressed the Board's broader concern about the general integrity of the Hatfield training and certification proce-

---

[30] In its Initial Decision, however, the Board concluded that it "erred" in receiving the October 8 test into evidence, saying that the test's authenticity had not been established and that portions of the document were illegible. (ID, ¶D-351.)

dures." (ID, ¶D-400.)[31] Yet the Board explicitly had stated in its July 7 order that further investigations by the parties on the issues to be raised in the reopened hearings were not required, (Memorandum and Order, July 7, 1983, at 3) and it was Applicant's assumption that demonstrating that the allegations of fraud which were of record could not be substantiated would satisfy the obligation imposed upon it in the Board's orders reopening the proceedings. In any event, during Judge Cole's questioning of Mr. Stanish the following exchange occurred:

> Q. I believe you've already answered this question, but I'm going to ask it again anyway. In all of your experience in dealing with Hatfield Electric Company, your participation both direct and indirect in the audits of the Hatfield Electric Company, did you get any indication of any fraudulant (sic) practice, sir?
>
> A. No, I have not.

(Stanish, Tr. 7739.)[32]

---

31 The Licensing Board also observed that "Applicant's counsel initially made very strong objections to Intervenors' cross-examination of Mr. Stanish on alleged fraudulent practices on procedural grounds that there was inadequate foundation for such questioning." (ID, ¶D-400.) The Board's implied criticism of Applicant's counsel for objecting to Intervenors' cross-examination is inappropriate. As the record demonstrates, counsel objected to the question asked Mr. Stanish by Intervenors' counsel on the dual bases that the question exceeded the scope of the reopened hearings and that the question in any event lacked foundation. (Stanish, Tr. 7649.) Counsel for Applicant made clear to the Board that Applicant had no objection to inquiry into the question of fraud, so long as the inquiry was premised on a proper foundation. (Stanish, Tr. 7642.) Incredibly, the Board failed to note that it sustained Applicant's objection. (Stanish, Tr. 7656.)

32 Contrary to the Licensing Board's implication, (ID, ¶D-403) Applicant is not disinterested in the possibility of fradulent practices at the Byron site. Mr. Shewski testified

(Footnote continued on following page)

If the Board believed that additional testimony from Applicant was warranted on the issue of fraudulent training, qualification, and certification of Hatfield inspectors, it should have so indicated during the reopened hearings. In the alternative, the Board could have asked its own questions of Applicant's witnesses; other than the one question by Judge Cole to Mr. Stanish the Board showed no inclination to pursue the type of evidence which it now claims should have been presented.

In sum, the record discloses that the only allegations of fraudulent practices involving Hatfield inspectors were the allegations of John Hughes, and the Initial Decision discloses that the Board was unable to find those allegations substantiated. Moreover, the Board noted that it "does not suggest that Applicant's officials have uncovered evidence of fraud in Hatfield's quality assurance program and that this information has been willfully withheld from the hearing." (ID, ¶D-403.) Yet, without a basis either in the record or in the orders delineating the scope of the reopened hearings, the Board castigated Applicant for its evidentiary presentation on the fraud issue. The Board's statements in its Initial Decision are inexplicable and they are wrong.

(Footnote 32 continued from preceding page)

that, as a result of allegations of fradulent conduct at the LaSalle plant, Applicant's quality assurance personnel at Byron, performed audits which looked for possible falsification of Byron data. (Shewski, Applicant's Prepared Testimony at 21-22, ff. Tr. 2364.) In addition, Mr. Shewski testified to the training of Ceco quality assurance auditors to detect alteration of documents. (Shewski, Tr. 2376.)

V. THE EX PARTE HEARING CONCERNING WORKER ALLEGATIONS RESULTED IN A VIOLATION OF APPLICANT'S HEARING RIGHTS

On August 9 and 10, the Board conducted in camera and ex parte hearings at which members of the NRC Office of Inspection and Enforcement, Region III, and of the Office of Investigations presented the Board with documentary information and oral testimony concerning their investigations of certain worker allegations. Following the close of the record, the Board released a "sanitized" version of the transcript of the ex parte hearings to the parties, which deleted significant portions of testimony and all of the documentary evidence which had been presented.[33] The Board also informed the parties that based upon the information it had received it would not order further evidentiary presentations on the pending investigations. (Tr. 7615-7619, Memorandum and Order, LBP-83-51, _____ NRC _____ (August 17, 1983).)

The Board stated in its Initial Decision that it did not "use" the secret information communicated to it in the ex parte, in camera session in its decision. (ID, ¶D-440 n. 75.) Applicant nevertheless believes the Board was improperly influenced by this information.

First, the Board's discussion in the Initial Decision of the significance of the pending investigations into worker allegations is internally inconsistent. The Board noted its awareness of the pending investigations, and correctly stated

---

[33] To date, CECo has not been informed of the substance of these allegations.

that the mere existence of the allegations cannot appropriately serve as a basis for its decision to deny Edison's operating licenses. (ID, ¶D-439, D-440.) However, the Board went on to explain that the pendency of the NRC investigations and inspections into these allegations is "simply added concern." (ID, ¶D-440.) Although it is far from clear what the Board meant by this statement, the Board seemed to be relying to some unexplained degree on the existence of the investigations as added support for its decision not to authorize licensing of Byron.

Second, the Board's puzzling and unjustified criticism of Applicant's evidentiary presentation on the possible existence of fraudulent practices at Hatfield (even though it accepted Applicant's witness Mr. Stanish's testimony that Applicant knows of no such fraudulent practices) strongly suggests that the Board was influenced by information unavailable to Applicant. (ID, ¶D-403 to D-404.) See also, pp. 64-71, supra.

Third, the Licensing Board's statements during the course of the ex parte hearing show the impact of the secret information as it was being received. For example, following an apparent discussion of the worker allegations, the substance of which was deleted from the "sanitized" transcript provided to CECo, Judge Smith made the following statement:

> But one did not get the sense from reading the reinspection report of the Hatfield Electric work that it was as bad as you suggest tonight. (Tr. 7367). 34/

---

34 All citations are to the "sanitized" transcript. Applicant continues to object to the Appeal Board's looking at the unexpurgated transcript.

Later on, Judge Smith stated:

> What is shining through so far in this case to us is that there is an aroma about Hatfield Electric Company, and I think we are getting a little bit close to it. (Tr. 7381.)

Finally, at another point during the session Judge Smith commented regarding the reinspection program:

> So your feeling, then, is that the reinspection program as you finally accept it will take care of the [deleted] allegations. But do the [deleted] allegations give you any cause to be concerned about anything else? I mean, you know, the adequacy of the sample or anything like that?" (Tr. 7368.)

The Staff inspector's response to these inquiries, due to deletions, is not understandable.

Finally, as discussed elsewhere in this brief, Applicant does not believe that the public record in this proceeding supports the Board's ultimate conclusions regarding the quality of the Hatfield work and the validity of the reinspection program. We are thus led to conclude that, as suggested by the above quoted portions of the ex parte transcript, matters privately discussed with the Board influenced its decision.

The unfairness to Applicant which has resulted from this situation is manifest. It is well established that reliance upon evidence considered ex parte as the basis for a decision is fundamentally inimical to due process of law. See, Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 300 (1937). One of the basic reasons ex parte contacts in administrative hearings are generally prohibited is to assure that a party is aware of all of the arguments and informa-

tion presented to the decision maker which may be relevant to its decision so as to permit the party to respond effectively and ensure that its position is fairly considered. PATCO v. Federal Labor Relations Authority, 685 F.2d 547 at 563 (D.C. Cir. 1982). The Licensing Board's action and its subsequent decision are also in flagrant violation of the pertinent provisions of the Administrative Procedure Act. See, 5. U.S.C. §§ 554(b) and (c), 556(d) and (e), 557(c) and (d), and 558; See also, 10 C.F.R. §2.780.[35]

As Edison suggested in presenting its objections to the ex parte session, the proper course would have been to await the completion of the investigations by the NRC Staff prior to deciding whether reopening the record for litigation of the worker allegations was warranted. (Tr. 7281-7282.) Ultimately, the Board decided that the completion of investigations would be necessary in order for evidentiary hearings to be productive. Unfortunately, this decision was rendered following the ex parte session, and the Board's consideration of secret information has fatally infected its Initial Decision.

VI. THE LICENSING BOARD ERRED IN DENYING CECO'S APPLICATION FOR OPERATING LICENSES, RATHER THAN RECEIVING ADDITIONAL EVIDENCE

On January 13, 1984 when the Licensing Board issued its Initial Decision, it had full knowledge of all of the following facts and circumstances:

---

[35] The ex parte hearing was also inconsistent with this Appeal Board's ruling in ALAB-735. The Commission declined to review ALAB-735, and it became final agency action on September 6, 1983.

1. The Board harbored doubts about Hatfield and Hunter and the adequacy of the reinspection program;

2. The Board had not previously communicated these concerns to the parties; 36/

3. The results of the reinspection program were imminent; 37/ and

4. Upon receipt of these results, the parties would have been able to address the Board's concerns about Hatfield and Hunter and the adequacy of the reinspection program. 38/

The Licensing Board also knew, or should have known, that 10 CFR Part 2, Appendix A, § V(g)(1) states:

> If, at the close of the hearing, the board should have uncertainties with respect to the matters in controversy because of a need for a clearer understanding of the

---

36 See, ID, p. 410 (first full paragraph, second sentence). There are suggestions in the Initial Decision that Applicant defaulted, or nearly defaulted, on certain evidentiary issues. (ID, ¶D-404 (not looking for fraudulent practices at Hatfield); D-143 (not addressing Hunter "tabling" practice with rebuttal witness); D-242, D-248, D-300 (not clarifying whether tendon storage barns had fans); D-280 (not addressing allegation concerning Mr. Stomfay-Stitz' requests for pay increases and overtime)). The underlying facts concerning these issues have been addressed elsewhere in this brief. For present purposes we simply note that Applicant was misled by the Licensing Board as to the evidentiary presentation required on the first issue. See, July 7, 1983 Memorandum and Order, ¶7. Prior to January 13, 1984, the Licensing Board never suggested that the record was insufficient concerning the middle two issues. As for the last issue, the Board did at the hearing express the desire for better information on this allegation. (Tr. 2939, 3753-3756.) However, its criticisms were directed at Intervenors as well as Applicant, and in any event this allegation, which concerned Blount, was not significant to its decision.

37 See, December 30, 1983, Staff transmittal to Board of I&E Reports 50-454/83-39 (DE), 50-455/83-29 (DE).

38 (ID, pp. 5, 6, ¶D-435, D-444.) In addition to receiving the Staff's opinion, the Board would have been able to ask the questions it had not previously asked concerning the statistical reliability of the program, (ID, ¶D-436 to D-437) and the manner in which it had been carried out. (ID, ¶D438.)

> evidence which has already been presented, it is expected that the board would normally invite further argument from the parties - oral or written or both - before issuing its initial decision. If the uncertainties arise from lack of sufficient information in the record, it is expected that the board would normally require further evidence to be submitted in writing with opportunity for the other parties to reply or reopen the hearing for the taking of further evidence, as appropriate. If either of such courses is followed, it is expected that the applicant would normally be afforded the opportunity to make the final submission.

(Emphasis added.) This provision reflects the Commission's policy that cases which come before its adjudicatory boards should be resolved whenever possible on the merits.[39] This policy is of course not unique to the NRC. It is part of the mainstream of American administrative law. As stated long ago in Isbrandtsen v. United States, 96 F.Supp. 883, 892 (1951):

> [Administrative agencies] are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or non-representative record. As the sole representative of the public, which is a third party in these

---

[39] This policy is also reflected, for example, in the Commission's standards for reopening the records, see, Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) ALAB-728, 17 NRC 777, 800 n. 66 (1983); and in the licensing boards' and Appeal Board's wide-ranging exercise of their sua sponte authority. 10 CFR §§ 2.760a, 2.785(b)(2); Offshore Power Systems (Manufacturing License For Floating Nuclear Power Plants) ALAB-689, 16 NRC 887, 890 (1982). Moreover, none of the cases cited by the Licensing Board in support of its conclusion that the quality assurance issues could not be delegated to the Staff for post-hearing resolution (ID, ¶D-419 to D427) remotely suggests that the proper result in such circumstances is denial of the application. In all those cases a remand for further proceedings, a stay pending remand, or supplementation of the record by official notice took place.

> proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in ... The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible. 40/

In spite of this knowledge, and this binding legal authority, the Licensing Board washed its hands and walked away from this proceeding, denying the application for operating licenses. Yet if the record was insufficient to support issuance of operating licenses for Byron, it certainly was insufficient to support the Licensing Board's result.

In explaining the significance of its Initial Decision, the Licensing Board suggested it was doing Applicant a favor:

---

40 Frank, J. quoting Commissioner Aitchison of the Interstate Commerce Commission testifying before the Senate Subcommittee Hearings on S. 674, S.675 and S.918, April 29, 1941, pp. 465-466. Isbrandtsen was affirmed by an equally divided Supreme Court. A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen, 342 U.S. 950 (1952). See also Scenic Hudson Preservation Conference v. FPC, 354 F. 2d 608, 612-613, 620-621 (2d Cir. 1965); Calvert Cliffs' Coordinating Committee v. AEC, 449 F. 2d 1109 (D.C. Cir. 1971). In Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1074-1080 (D.C. Cir. 1974) the Court of Appeals held that a licensing board's duty in NRC operating license proceedings is to assess the sufficiency of the record to support its findings, rather than to compile the record itself. This is not contrary to Applicant's position in this case, since the Licensing Board knew that the evidence needed to resolve its uncertainties was being compiled by Applicant and the Staff and would be available in the forseeable future. Moreover, as stated previously, the record is insufficient to support the denial of Commonwealth Edison's application for operating licenses.

> ... The Board considered the alternative of informing the parties now of the substance of our views on the quality assurance issues, retaining jurisdiction over them, and providing for further proceedings before us when the various inspections, investigations and remedial actions become ripe for consideration. Perhaps a partial initial decision on all other issues could have been rendered.
>
> We have determined, instead, that the remedy most responsive to the circumstances of this case, and the remedy least harsh to the Applicant yet still appropriate, is to decide the issue now. This, we say, is the least harsh appropriate remedy, as compared to the traditional practice of reserving jurisdiction, because it permits the parties to test immediately on appeal the quality of our decision. To reserve jurisdiction and to postpone final decision, in face of the impending completion of construction at Byron, would impose unilaterally upon the parties, particularly the Applicant, our own view of the facts, law and appropriate remedy. Unless Applicant could mount a difficult interlocutory appeal from such a determination (to postpone our decision), it would have been denied due process.

(ID, p. 410, emphasis added.)

The Board misjudged the severe adverse consequences of its decision for the Company and its ratepayers and investors, and for other electric utilities with nuclear power plants under construction. The Licensing Board should have followed the course it outlined in the first paragraph quoted above. If the Board wished to aid Applicant in seeking interlocutory review, it should have elected the far less severe remedy of referring its decision to the Appeal Board pursuant to 10 CFR ¶ 2.764(f).[41]

---

[41] See, e.g., Memorandum and Order (Quality Assurance for Design), Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81 (December 28, 1983) (slip opinion at pp. 1-2, 75).

Under the circumstances of this case the Licensing Board's action in denying Ceco's Application for operating licenses was in conflict with longstanding Commission policy and basic fairness.

VII. CONCLUSION

For all the foregoing reasons, the Licensing Board's Initial Decision should be reversed and the Director of Nuclear Reactor Regulation should be authorized to issue operating licenses for Byron.[42]

Respectfully submitted,

Michael I. Miller,
one of the attorneys
for Applicant
Commonwealth Edison Company

Isham, Lincoln & Beale
Three First National Plaza
Suite 5200
Chicago, Illinois 60602
(312) 558-7500

Dated: February 13, 1984

---

[42] By separate motion, Applicant today requests the Appeal Board, if it finds that the record is insufficient to support issuance of operating licenses in this case, to allow Applicant to supplement the record with the evidentiary showing described therein. We also bring to the Appeal Board's attention the fact that the Initial Decision did not indicate whether the Board reviewed uncontested unresolved generic safety issues. Pacific Gas & Electric Co. (Diable Canyon Nuclear Power Plant, Units 1 and 2) ALAB-728, 17 NRC 777, 807 (1983).

supervisor then evaluates this information as part of the overall certification process. (Koca, Applicant's Prepared Testimony at 4, 5, and Exhibit A, Section 5.3.1, ff. Tr. 7418.) As part of the recertification program, Ceco's quality assurance department reviews 100% of all the contractor inspector certification packages. (Stanish, Applicant's Prepared Testimony at 4, 5, ff. Tr. 7549; Tr. 7633-7636.) There is no regulatory requirement for Ceco to re-verify the information contained in the packages. Moreover, the NRC Staff does its own investigation of inspector qualifications in the same way as Ceco, by documentation review. (Forney, Connaughton and Hayes, Tr. 7923-7928.) There is no basis whatever for an adverse inference about the adequacy of the recertification program, arising out of the documentation verification practices of Ceco. (See, ID, ¶D-402.)

Second, the Board's inference that the recertification program was ineffective because it failed to discover the lack of qualifications of the Hatfield Quality Assurance Manager and a Level II Quality Control Inspector (ID, ¶393) is erroneous. There was no testimony that the Quality Assurance Manager was subject to the recertification program. (See, Stanish, Applicant's Prepared Testimony at 4, ff. Tr. 749; but see, Forney, Tr. 7918-7919.) Applicant's apparent failure to discover that a Level II Quality Control Inspector was not properly certified was due not to any weakness in the program itself, but rather to the timing of the recertification effort. Ceco's review of the contractors' inspector certification packages did not begin

until late February, 1983 because the records first had to be placed in a more reviewable format. (Stanish, Tr. 7639-42.) As a result of an allegation directed to the NRC Staff, Mr. Forney reviewed the certification package of a Mr. Wells in early February, 1983 and discovered that he was not properly certified. (Forney, NRC Staff Prepared Testimony at Attachment D at 2-3, ff. Tr. 7801.) The NRC Staff simply got there before Ceco Quality Assurance, which itself subsequently identified two Hatfield inspectors whose documentation packages were not in order. (Stanish, Tr. 7726-27.)

Third, the Board implied that the program may be inadequate because about half of the Hatfield inspectors required retesting and at least half required additional training. (ID, ¶D-392.) The Board, however, ignored the fact that the retesting and additional training were necessary because Applicant had imposed new, more stringent requirements for recertification, and that therefore no inference of inadequate qualification can be drawn from the number of inspectors requiring additional training.[20]

In sum, the Board's conclusion expressing concern about documentation of inspector qualification is without

---

[20] The very purpose of the recertification program was to enable each contractor to meet the requirements of ANSI N45.2.6, the "moving target" described by Mr. Forney. (Forney, Tr. 7820.) The critical fact, established by the testimony of Mr. Koca, Mr. Stanish and Mr. Forney of the NRC Staff is that there was a satisfactory recertification process in place in accordance with the commitments made by Ceco to the NRC Staff. (Forney, NRC Staff Prepared Testimony at 8, ff. Tr. 7801.) Thus, the Board's findings that Mr. Stanish was vague in quantifying the number of Hatfield inspectors requiring recertification is an irrelevancy. (ID, ¶D-397.)

support in the record. To the extent that this conclusion, as it must have, played a role in the Board's conclusion concerning the adequacy of Hatfield's quality assurance program it is clearly erroneous.

III. THE REINSPECTION PROGRAM IMPLEMENTED BY CECO WAS AN ADEQUATE AND DELEGABLE METHOD FOR RESOLVING CONCERNS ABOUT THE QUALIFICATIONS OF QUALITY CONTROL INSPECTORS.

While the Board acknowledged that a reinspection program is a logical method by which doubts about Hatfield's quality assurance program could be resolved (ID, ¶D-435) it nevertheless refused to find that Applicant's program was adequate and delegable to the NRC Staff because: (a) the Staff did not find that the program is sufficient to assure that Hatfield's work is adequate (ID, ¶D-435); (b) in addition, the Board was concerned about several "unexplained elements" of the reinspection program (ID, ¶D-435); and (c) Applicant's audit disclosed that Hatfield's reinspection efforts involved improper documentation of non-comformances. (ID, ¶D-438.)

In the following segment of the brief, it will be shown that the Licensing Board wholly departed from the principles of the Callaway decision in its analysis of the reinspection program. It lost all perspective on the safety significance of the quality assurance issue before it, drew unsupportable adverse inferences regarding the effectiveness of the program, and wrongfully extrapolated essentially minor problems with implementation of the reinspection program by Hatfield to

a conclusion that the reinspection program itself was flawed and that the application for operating licenses should therefore be denied.

There are a number of undisputed facts concerning the reinspection program which necessarily place the evidence on that subject in its proper context. First, it bears emphasis that the reinspection program was part of a response to one Severity Level IV item of noncompliance identified in the CAT inspection report. (Ceco Ex. 8 at 5-6.) The program was developed because of concerns expressed by the NRC Staff, by virtue of deficiencies noted in the documentation of inspector qualification and training, that unqualified quality control inspectors may have been employed by all contractors at Byron and that therefore nonconforming construction or installation may not have been detected. (Teutken, Applicant's Prepared Testimony at 3-4; ff. Tr. 7760; Region III, NRC Staff Prepared Testimony at 4-5, ff. Tr. 7801; Forney, Tr. 7828.) In the absence of complete and consistent documentation of inspector qualification, the proof of the pudding was the quality of the inspections performed by quality control inspectors in the past. (Forney, Tr. 7828.) As stated in the Staff's prepared testimony:

> The Region considered that detection of inadequate inspections performed by improperly or inadequately certified inspectors could be achieved by selecting a sample number of QC inspectors from the total population for each contractor and reinspecting work the inspectors originally inspected during their first few months of their inspection activity.

(Forney, NRC Staff Prepared Testimony at 5, ff. Tr. 7801.)

Second, the program was applied to a number of site contractors, not just Hatfield.

Third, although the NRC Staff had not identified "significant hardware problems" during the CAT inspection, the reinspection program would nevertheless determine the existence of and assure correction of any hardware problems. (Forney, NRC Staff Prepared Testimony at 5, ff. Tr. 7801.)

With the foregoing established as context, the following discussion will address: (1) the NRC Staff's views on the reinspection program; (2) the Board's concerns with the so-called unexplained aspects of the reinspection program; and (3) the Hatfield documentation of noncomformances during the reinspection program. On this basis, we will show that the reinspection program is clearly adequate, and, under the Board's reasoning, post-hearing inspection and review of the results of that program are delegable to the NRC Staff.

A. The Staff Accepted the Program as Adequate.

The Licensing Board's decision misread the Staff's normal sense of caution about the ultimate results of the program and found instead that the NRC Staff has accepted "only the basic premise" of the reinspection program. (ID, ¶D-410.) The Board then extended this finding to a conclusion that the Staff "does not find" that the reinspection program is sufficient to assure the adequacy of Hatfield's work, (ID, ¶D-435) a giant step beyond the question which gave rise to the reinspection program in the first instance: the qualifications of

quality control inspectors. (ID, ¶D-435.) Had the Board properly considered and appraised the entire evidentiary record regarding the Staff's position on the reinspection program, it would have discerned that the program, as a program, was acceptable and that the Staff was reserving its final judgment only with regard to the results of the program -- what the program would disclose regarding the qualification of quality control inspectors and, secondarily, about the quality of the work.

The reinspection program which was implemented at Byron was not begun without Staff concurrence. This is apparent from the fact that Ceco proposed two other plans to address the inspector qualification item of noncompliance, but neither was acceptable to the NRC Staff. (Stanish, Tr. 7697-7699.) The written communication from the NRC Staff evidencing that approval was read into the record at Tr. 8001; it contained no qualification other than the usual reservation that the reinspection program would be examined at a later NRC Staff inspection and set forth the Staff's definition of certain of the subjective attributes involved in the reinspection program. The Board's findings grudgingly acknowledged the Staff's acceptance of the program. While slighting Applicant's responsiveness, the Board did find that by February 4, 1983, Applicant had "proposed the reinspection program acceptable to the Region III Staff." (ID, ¶D-371.) (Emphasis added; the Board immediately qualified this statement in a footnote.)

In addition, the NRC Staff's testimony, taken as a whole, convincingly demonstrated acceptance of the program.

Thus, in the original quality assurance hearings, Mr. Forney agreed that the program was acceptable, assuming that Ceco met its stated commitments. (Forney, Tr. 3659.) A slightly different verbal formulation is found in the Staff's prepared testimony for the reopened hearing. There, the Staff stated that it has not made a "final determination" that the reinspection program will prove "successful towards alleviating the problems" addressed in the CAT inspection findings. (Forney, NRC Staff Prepared Testimony at 7, ff. Tr. 7801; See also, Hayes, Tr. 7809.) Mr. Forney articulated the same thought in agreeing that "the Staff is now awaiting the results of the reinspection program" in order to determine whether the original inspections were deficient and that it was "premature" to conclude that any Hatfield inspector performed inadequate inspections. (Forney, Tr. 7964.)[21] Thus, it is clear from all the evidence that the only significant reservation the NRC Staff expressed involved an evaluation of the results of the

---

21 Mr. Forney went on to state, as noted in the Initial Decision, that the Staff had accepted the "basic premise" of the reinspection program, but that remark was made in the context of a discussion of the definition of those subjective inspection attributes for which a 90% passing rate was established (as opposed to the 95% passing rate for objective inspection attributes). (Forney, Tr. 7980-81.) Mr. Forney's differences with Ceco personnel regarding the definition of subjective inspection attributes was explored further at Tr. 7996-7998 and Mr. Forney admitted that his personal position regarding that matter was documented only in a draft letter to Ceco which was not sent. (Forney, Tr. 7998.) As explained by Mr. Hayes, this difference of opinion regarding the definiton of subjective inspection attributes may not be a "problem" (Hayes, Tr. 8002) and that in any event, the data is being gathered by the reinspection program such that all that is necessary is a decision on the criterion, 90% or 95%, for specific inspection attributes. (Hayes, Tr. 8007-08.)

reinspection, not the program itself. Such a reservation is perfectly appropriate and reflects only the Staff's normal abundance of caution; it does not translate into a finding by the Staff of program inadequacy. If many missed inspections were discovered, further efforts to resolve the issues of inspector qualification as well as the quality of the work itself might be needed.[22] There is, however, simply no evidence that the Staff would not regard acceptable results of the reinspection program as satisfying its concerns.

B. The Board's Concerns Regarding Elements Of The Reinspection Program Do Not Detract From Its Adequacy.

The Board concluded that it could not find that the reinspection program was adequate because:

(a) the basis for the sample selection was not supported in the record;

(b) half of the Hatfield inspectors needed retesting and retraining and not all of their work will be reinspected; and

(c) not every attribute of the original inspections was being sampled. (ID, ¶D-436-437.)

If there is a lack of explanation on the record regarding sample size it can be attributed to the Board itself. At the hearings the Licensing Board showed no interest in the

---

[22] In this regard, the program itself is self-executing. Not only will deficient work, if any, be reworked and/or re-evaluated, but if the reinspections yield unacceptable pass rates the program will result in expanded inspections. (ID, ¶D-371, D-372, D-374.)

statistical validity of the sample size. Judge Smith chastised Intervenors' counsel for pursuing a line of cross examination regarding sample size, observing that an examination which elicited the fact that sampling was less extensive than a 100% reinspection constituted "simplistic, syllogistic reasoning" which would not have "a big weight". (Tr. 7848.) There was no evidence that the sample selection process was a matter of dispute between Ceco and the NRC Staff or that it was in any way inadequate. More importantly, the record evidence stands uncontradicted that the Staff concluded that the reinspection program rested on a random sample and covers a wide period of time. (Hayes, Tr. 7891.) Accordingly, its results are a valid predictor of the qualifications of the total population of quality control inspectors and the quality of the work. (Hayes, Tr. 7891; Forney, Tr. 7848.)

The Licensing Board's reference to the retesting and further on-the-job training of Hatfield quality control inspectors (ID, ¶D-436) as somehow indicating the lack of validity of the sampling program is a non sequitur. The purpose of the reinspection program was to test the qualification of quality control inspectors whose certification could not be documented. If all the inspectors had been certified in accordance with ANSI N45.2.6-1978 initially there would be no need for any reinspection program. Conversely, if some of the inspectors were not so certified and a sample reinspection program is, for that reason alone, held insufficient, this amounts to a ruling that, as a matter of law, 100% reinspection is required.

Compare, Long Island Lighting Co. (Shoreham Nuclear Power Station Unit 1) LBP-83-57, ____ NRC ___ (slip op. at p. 297); Cf., Callaway, supra, (slip op. at 12-13).

As to the "unexplained" concern that not every attribute will be sampled, one must carefully search the record for any indication that this issue was a matter of concern to the Board. The only reference which relates to that issue involves the decision by Ceco to exclude the bolting inspection attribute from the reinspection program. Since the original bolting inspections were based on an unidentified 10% sample, it was not possible to recreate the original inspection on an inspector by inspector basis, without possibly biasing the results in one direction or the other. (Stanish, Tr. 7719-7721; Teutken, Tr. 7791.) As a result, reinspection of the bolts on a sample basis would not provide meaningful information about inspector qualifications and this attribute was necessarily eliminated from the reinspection program. However, Ceco independently had implemented a separate over-inspection of bolting by Pittsburgh Testing Laboratory in order to insure proper quality of that work. (Teutken, Tr. 7792.) Thus, the safety significance of the omission of bolting from the reinspection program was nil, and the Board's extrapolation of this evidence to a finding of reinspection program inadequacy was simply incorrect.[23]

---

[23] In finding that not every inspection attribute originally inspected by Hatfield will be reinspected, (ID, ¶383) the Licensing Board misunderstood Mr. Teutken's prepared testimony, which stated "[a]ttributes that were inspected by the Hatfield inspectors ... are being reinspected" and then listed the

(Footnote continued on following page)

When the Board's unexplained concerns are viewed in the context of the entire record it is clear that none involve the fundamental adequacy of the program.

C. The Board Misunderstood The Manner In Which The Nonconformance Documentation Systems Function And Erroneously Concluded That Hatfield's Documentation Deficiencies Detracted From The Adequacy Of The Reinspection Program.

The Licensing Board also based its finding regarding the inadequacy of the reinspection program on its perception that Ceco and Hatfield were not implementing the program in a satisfactory way. The Board's findings on this subject were based on an audit of the reinspection program performed by Ceco quality assurance personnel. The audit report included one audit finding and eight observations. (Int. Ex. 29.) The audit finding involved the fact that four contractors (Hatfield, PTL, and Hunter, Blount) were not documenting nonconforming conditions discovered during reinspection on discrepancy reports, but rather on "field problem sheets" which were not a part of the quality assurance program. (ID, ¶D-380.) It is significant

---

(Footnote 23 continued from preceding page)

attributes reinspected. (Teutken, Applicant's Prepared Testimony at 8, ff. Tr. 7760.) Moreover, Mr. Stanish testified that every accessible and recreatable inspection attribute for safety related items for Hatfield was subject to the reinspection program. (Stanish, Tr. 7719.) There was no contrary testimony. Finally, the Board's observations regarding the Staff's concern with respect to Hatfield's records (ID, ¶D-384) is, again only a partial reflection of the evidentiary record. Mr. Teutken stated, without contradiction, that Ceco had taken steps to enhance Hatfield's records so that their format would be more useful for the reinspection program. (Teutken, Tr. 7785-86.)

that Ceco quality assurance discovered this issue, indicating that its oversight of its contractors was satisfactory. Moreover, the Board simply mistook the significance of the audit finding. Applicant's witness, Mr. Stanish stated that use of field problem sheets rather than discrepancy reports meant that problems would not be put into the trend analysis. The Board jumped to the conclusion that this meant that "the main purpose of the reinspection program would be defeated." (ID, ¶D-380, D-438.) The Board's conclusion was erroneous because the reinspection program and the trend analysis are independent programs. (See, Stanish, Tr. 2646-2649, Tr. 7702-7704; Int. Ex. 29 at A-8, second paragraph, second, third and fourth sentences.) Although the Staff recognized that Applicant and its contractors do have a trend analysis program, it did not consider this program important enough to make it a requirement. (Spraul, NRC Staff Prepared Testimony at Attachment, p. 17-3, ¶7 and two succeeding paragraphs, ff. Tr. 3562; Forney, Tr. 3678-3682.) The "main purpose" of the reinspection program was not to tally deficiencies in a pre-existing trend analysis. It was to determine the qualification of quality control inspectors. Indeed, the Board could not find, nor was there any evidence, that discrepancies were not being accurately recorded for the purposes of the reinspection program.[24] In drawing

---

[24] The Licensing Board's findings on the other Ceco audit observations relating to Hatfield (which it mischaracterises as "findings") demonstrate that it did not understand the testimony on the subject. The reference in Finding D-382 to the audit observation regarding Hatfield QA/QC memorandum

(Footnote continued on following page)

adverse inferences about the adequacy of the reinspection program, based on its mistaken understanding of the documentation systems, the Board clearly erred.[25]

D. Inspection And Review Of The Reinspection Program Results Are Properly Delegable To The NRC Staff.

The Licensing Board correctly summarized NRC case law regarding delegation of hearing issues to the Staff. (ID, ¶D-418 to D-428.) However, it misapplied the principle in this case. The three reasons the Board gave for not finding the reinspection program adequate and delegating to the Staff the task of post hearing verification of Applicant's compliance program are: the Staff witness' hesitancy in providing an unequivocal endorsement of the program until the results are available (ID, ¶D-435); certain unexplained aspects of the reinspection program (ID, ¶D-436, D-437); and improper documentation practices which it thought might undercut the realiability of the reinspection

---

(Footnote 24 continued from preceding page)

295 is the same observation referred to in the first sentence of Finding D-381. As is clear from the audit report itself and Mr. Stanish's testimony, this memorandum refers to inspections and not to the reinspection program. (Int. Ex. 29 at A-2; Stanish, Tr. p. 7707.) Further, there was uncontradicted evidence that fireproofing was removed for the reinspection program, contrary to Finding D-382. (Teutken, Applicant's Prepared Testimony at 5, ff. Tr. 7760.) The other matter the Board discussed (which was not classified by the auditors as any kind of deficiency) related to an interpretation of the sample size increase and was resolved long before any expansion of the sample was contemplated. (ID, ¶D-381; Int. Ex. 29 at 1, A-6.)

[25] The Board also extended this inference to draw similarly erroneous conclusions as to the inadequacy of Hunter's QA program. See, pp. 30-32, supra.

program. (ID, ¶D-438.) As we have shown, none of these reasons is valid.

Moreover, the Board gave too much weight to the Staff witness' reservations when they described the reinspection program. The Licensing Board found that in any event, "the rule against delegation would appear to require that the Board decide, rather than the Staff decide, when the reinspection program is adequate." (ID, ¶D-425.) Inconsistently, the Board refused to find the reinspection program to be adequate, when the entire record concerning the reinspection program supports that result, simply because one Staff witness expressed vague reservations concerning its results. This turns the principle of Board primacy on its head.

The delegation cases cited by the Board do not stand for the proposition that nothing can ever be left to the Staff for post hearing verification. That would be tantamount to a rule that when faced with a contested quality assurance issue, a Licensing Board could never render a decision until construction is completed. The record in this case is sufficient to find that Applicant's reinspection program is adequate. The Staff can be entrusted to ensure that Applicant carries out that program in accordance with its commitments. Compare, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) LBP 83-57, - NRC - (Sept. 21, 1983) (slip op. p.282); Commonwealth Edison Co. (Zion Station, Units 1 and 2), LBP-80-7, 11 NRC 245 (1980), aff'd. ALAB-616, 12 NRC 419 (1980).

IV. THE BOARD'S FINDINGS REGARDING ALLEGATIONS OF FRAUD ARE BASED ON A MISINTERPRETATION OF ITS OWN ORDERS REOPENING THE RECORD.

The Board expressed its dissatisfaction with Applicant's evidentiary presentation on the allegations of fraud which had been raised in the proceedings, concluding that "Applicant's evidentiary response to the issue in the reopened hearing has been weak and borders on default." (ID, ¶D-404.) Although the Board acknowledged that it had "no basis on this record upon which it can find that fraudulent practices existed at Hatfield," (ID, ¶D-403) its unfounded conclusions regarding Ceco's evidentiary presentation on this issue may well have colored its evaluation of all the evidence presented at the reopened hearings. Accordingly, we address the issue although we are mindful of the Appeal Board's admonition that CECo not address issues which were decided in its favor.

The Board's inquiry into alleged fraudulent practices at Byron derived from allegations made by Intervenors' witness John Hughes, a former Pittsburgh Testing Laboratory quality assurance inspector who was assigned to Hatfield during his brief tenure at the site. First in a handwritten affidavit and later during a special deposition session conducted before the Board Mr. Hughes levelled a series of charges against Hatfield. The Board found most of Hughes' allegations to be without substance, going so far as to conclude "The Board's ultimate finding with respect to Mr. Hughes' allegations is that he has been very unreliable and inaccurate." (ID, ¶D-354.) Nonetheless the Board determined that further inquiry into a general

area raised by Hughes was warranted, the area of certification and training of inspectors by Hatfield. The Board reopened the evidentiary record, however, "with serious doubts about the accuracy of [Hughes'] memory and with low confidence in his candor.." (ID, ¶D-334.)

The specific parameters of the reopened proceedings were delineated in two Board orders, those of June 21 (the shorter of the two orders issued that day) and July 7, 1983. In its June 21 order the Board stated:

> In addition, as we noted in our order allowing a portion of Mr. Hughes' testimony [the other June 21 order], his deposition suggests that Hatfield Electric may have followed a practice of certifying that QA inspectors received training which was not actually provided to the inspectors. Mr. Hughes also alleged that a Hatfield employee may have defeated QA certification testing by providing test answers to QA inspector candidates.

(Memorandum and Order Reopening Evidentiary Record, June 21, 1983, at 2.)

The June 21 Memorandum and Order also noted the existence of ongoing NRC investigations and inspections being conducted by Region III and OI referred to by the NRC Staff in its prepared testimony submitted in April, 1973. (Forney, NRC Staff Prepared Testimony at 6, ff. Tr. 3586.) The Board directed the parties to present "a full evidentiary showing and explanation of the pertinent investigations of Hatfield Electric's quality assurance program and the subsequent reinspections." The Board, "for the guidance of the NRC Staff," made it clear this was meant to include "wrongdoing". Finally, the Board requested

further evidence on the CAT inspection report dealing with inspector recertification and the reinspection program (82-05-19), especially if there were any relationship between 82-05-19 and the NRC inspections and investigations discussed elsewhere in its order. (Memorandum and Order Reopening Evidentiary Record, June 21, 1983, at 3-5.)

In an effort to modify and clarify the scope of the reopened hearings defined by the Board's June 21 Order, the Board issued its order of July 7. This order stated:

> 1. Evidence may be limited to Hatfield Electric Company. This would include Pittsburgh Testing Laboratory employees and similar personnel, if any, assigned to Hatfield.
>
> * * *
>
> 5. The Board is particulary interested in any fraudulent training, qualification, or certification practices.
>
> 6. This limitation should not be construed as a limitation of the evidentiary showing required pertaining to the investigation and inspection referred to in Region III's testimony, ff. Tr. 3586 at 6. 26/
>
> * * *
>
> 7. The Board does not require the parties to perform new investigations, inspections, evaluations, or research to comply with this directive.

(Memorandum and Order, July 7, 1983, at 2-3.)[27] Thus, as Ceco approached the reopened hearings the scope of those hearings

---

[26] The Board cited its June 21 Memorandum and Order Reopening Record, at 1-2 and its July 1 Memorandum and Order.

[27] In its order the Board apparently confused Region III's findings in I&E Report 82-05, which did not make any mention of allegedly fraudulent training, qualification, or certification practices, with the allegations made by Mr. Hughes.

with regard to fraud, as far as it knew, encompassed only any fraudulent training, qualification, or certification practices of Hatfield, and the parties were expressly instructed that they were not required to perform additional investigations in order to respond to the issue.

The only allegations in the record which pertained to fraud in Hatfield's training, qualification, and certification of inspectors were those of John Hughes. In its Initial Decision, however, the Board stated:

> Our June 21 order reopening the hearing explicitly broadened the issue beyond the Hughes' (sic) allegation to encompass the allegations of other individuals referred to in Region III testimony during the main hearing relative to the issue of alleged fraudulent training, testing and certification practices. As Applicant has known at least since early in the main hearing, these allegations have been and are still under investigation and continuing inspections by the Office of Investigations and Region III, respectively. Region III Testimony, ff. Tr. 3586, at 6.

(ID, ¶D-399.) Yet the Region III testimony cited simply does not mention allegations of fraud, whether made by Hughes or anybody else. Granted, the testimony does refer to allegations made concerning "QC inspector qualification and certification," yet it is hardly apparent from the context of the testimony that such allegations encompassed fraud.[28] (Forney, NRC Staff Prepared Testimony at 6, ff. Tr. 3486.) Furthermore, if allegers

---

[28] Moreover, Region III's testimony at the reopened hearings regarding the Hatfield allegations for which the Staff's investigation had been completed indicated that none (other than Hughes') involved fraudulent training, qualification, and certification of inspectors. (Region III, NRC Staff Prepared Testimony at 12-13, ff. Tr. 7801.)

in addition to Mr. Hughes had charged fraudulent practices at Hatfield, Applicant could not know of this fact. Until allegations have been fully investigated by the NRC, they are kept secret and Applicant is not privy to them. To Applicant's knowledge the only investigations involving fraud that had been or were being conducted by Region III or the Office of Investigations pertained to the allegations of Mr. Hughes.

At the reopened hearings on August 9-12, 1983, Applicant introduced substantial testimony in response to the allegations concerning fraud made by Mr. Hughes.[29] (See, Koca, Applicant's Prepared Testimony, ff. Tr. 7418.) In addition, Region III testified concerning an extensive investigation of Mr. Hughes' training, qualification, and certification by Hatfield. (Pegion III, NRC Staff Prepared Testimony, ff. Tr. 7810.) Based on the testimony of Allen Koca, Hatfield's quality control supervisor at the time of Hughes' training and certification, and the testimony of Region III the Board concluded that "Mr. Hughes' allegation with respect to the amount and timing of his training at Hatfield is unsubstantiated." (ID, ¶D-345.)

With regard to the issue of the failed test subsequently retaken by Hughes the Board stated that it could not resolve the matter. (ID, ¶D-351.) It stated that it could not accept the testimony of Hughes, or the stipulated testimony of

---

[29] Testimony of Applicant concerning its general efforts to detect fradulent practices is discussed at n.32, below.

Irvin Souders, "as being sufficiently reliable to conclude that the questioned document represents a practice of providing corrected failed tests as cribs in retesting." (ID, ¶D-351.) However, the Board stated that, although Mr. Koca vehemently denied the Hughes allegation, "Mr. Koca has a strong interest in defending whatever practice then existed and his memory is uncertain." (ID, ¶D-351.) Hughes passed the test in question on October 12, 1982. (Koca, Applicant's Prepared Testimony at Ex. K, ff. Tr. 7418.) At the hearings the Staff produced a test in the custody of the Office of Investigations, stating that it was the actual test failed by Hughes; it was dated October 8, four full days before he passed the same examination. (Int. Ex. 27.)[30]

In sum, the Board was unable to find that Mr. Hughes' allegations were substantiated. Yet other than the allegations of Hughes the record contains no reference to fraudulent training, qualification, and certification of Hatfield inspectors. Thus, the Board had no choice but to conclude, as it did, that it "has no basis on this record upon which it can find that fraudulent practices existed at Hatfield." (ID, ¶D-403.)

The Board, however, commented that Applicant should have "addressed the Board's broader concern about the general integrity of the Hatfield training and certification proce-

---

[30] In its Initial Decision, however, the Board concluded that it "erred" in receiving the October 8 test into evidence, saying that the test's authenticity had not been established and that portions of the document were illegible. (ID, ¶D-351.)

dures." (ID, ¶D-400.)[31] Yet the Board explicitly had stated in its July 7 order that further investigations by the parties on the issues to be raised in the reopened hearings were not required, (Memorandum and Order, July 7, 1983, at 3) and it was Applicant's assumption that demonstrating that the allegations of fraud which were of record could not be substantiated would satisfy the obligation imposed upon it in the Board's orders reopening the proceedings. In any event, during Judge Cole's questioning of Mr. Stanish the following exchange occurred:

> Q. I believe you've already answered this question, but I'm going to ask it again anyway. In all of your experience in dealing with Hatfield Electric Company, your participation both direct and indirect in the audits of the Hatfield Electric Company, did you get any indication of any fraudulant (sic) practice, sir?
>
> A. No, I have not.

(Stanish, Tr. 7739.)[32]

---

31 The Licensing Board also observed that "Applicant's counsel initially made very strong objections to Intervenors' cross-examination of Mr. Stanish on alleged fraudulent practices on procedural grounds that there was inadequate foundation for such questioning." (ID, ¶D-400.) The Board's implied criticism of Applicant's counsel for objecting to Intervenors' cross-examination is inappropriate. As the record demonstrates, counsel objected to the question asked Mr. Stanish by Intervenors' counsel on the dual bases that the question exceeded the scope of the reopened hearings and that the question in any event lacked foundation. (Stanish, Tr. 7649.) Counsel for Applicant made clear to the Board that Applicant had no objection to inquiry into the question of fraud, so long as the inquiry was premised on a proper foundation. (Stanish, Tr. 7642.) Incredibly, the Board failed to note that it sustained Applicant's objection. (Stanish, Tr. 7656.)

32 Contrary to the Licensing Board's implication, (ID, ¶D-403) Applicant is not disinterested in the possibility of fradulent practices at the Byron site. Mr. Shewski testified

(Footnote continued on following page)

If the Board believed that additional testimony from Applicant was warranted on the issue of fraudulent training, qualification, and certification of Hatfield inspectors, it should have so indicated during the reopened hearings. In the alternative, the Board could have asked its own questions of Applicant's witnesses; other than the one question by Judge Cole to Mr. Stanish the Board showed no inclination to pursue the type of evidence which it now claims should have been presented.

In sum, the record discloses that the only allegations of fraudulent practices involving Hatfield inspectors were the allegations of John Hughes, and the Initial Decision discloses that the Board was unable to find those allegations substantiated. Moreover, the Board noted that it "does not suggest that Applicant's officials have uncovered evidence of fraud in Hatfield's quality assurance program and that this information has been willfully withheld from the hearing." (ID, ¶D-403.) Yet, without a basis either in the record or in the orders delineating the scope of the reopened hearings, the Board castigated Applicant for its evidentiary presentation on the fraud issue. The Board's statements in its Initial Decision are inexplicable and they are wrong.

(Footnote 32 continued from preceding page)

that, as a result of allegations of fradulent conduct at the LaSalle plant, Applicant's quality assurance personnel at Byron, performed audits which looked for possible falsification of Byron data. (Shewski, Applicant's Prepared Testimony at 21-22, ff. Tr. 2364.) In addition, Mr. Shewski testified to the training of Ceco quality assurance auditors to detect alteration of documents. (Shewski, Tr. 2376.)

V. THE EX PARTE HEARING CONCERNING WORKER ALLEGATIONS RESULTED IN A VIOLATION OF APPLICANT'S HEARING RIGHTS

On August 9 and 10, the Board conducted in camera and ex parte hearings at which members of the NRC Office of Inspection and Enforcement, Region III, and of the Office of Investigations presented the Board with documentary information and oral testimony concerning their investigations of certain worker allegations. Following the close of the record, the Board released a "sanitized" version of the transcript of the ex parte hearings to the parties, which deleted significant portions of testimony and all of the documentary evidence which had been presented.[33] The Board also informed the parties that based upon the information it had received it would not order further evidentiary presentations on the pending investigations. (Tr. 7615-7619, Memorandum and Order, LBP-83-51, _____ NRC _____ (August 17, 1983).)

The Board stated in its Initial Decision that it did not "use" the secret information communicated to it in the ex parte, in camera session in its decision. (ID, ¶D-440 n. 75.) Applicant nevertheless believes the Board was improperly influenced by this information.

First, the Board's discussion in the Initial Decision of the significance of the pending investigations into worker allegations is internally inconsistent. The Board noted its awareness of the pending investigations, and correctly stated

---

[33] To date, CECo has not been informed of the substance of these allegations.

that the mere existence of the allegations cannot appropriately serve as a basis for its decision to deny Edison's operating licenses. (ID, ¶D-439, D-440.) However, the Board went on to explain that the pendency of the NRC investigations and inspections into these allegations is "simply added concern." (ID, ¶D-440.) Although it is far from clear what the Board meant by this statement, the Board seemed to be relying to some unexplained degree on the existence of the investigations as added support for its decision not to authorize licensing of Byron.

Second, the Board's puzzling and unjustified criticism of Applicant's evidentiary presentation on the possible existence of fraudulent practices at Hatfield (even though it accepted Applicant's witness Mr. Stanish's testimony that Applicant knows of no such fraudulent practices) strongly suggests that the Board was influenced by information unavailable to Applicant. (ID, ¶D-403 to D-404.) See also, pp. 64-71, supra.

Third, the Licensing Board's statements during the course of the ex parte hearing show the impact of the secret information as it was being received. For example, following an apparent discussion of the worker allegations, the substance of which was deleted from the "sanitized" transcript provided to CECo, Judge Smith made the following statement:

> But one did not get the sense from reading the reinspection report of the Hatfield Electric work that it was as bad as you suggest tonight. (Tr. 7367). 34/

---

34 All citations are to the "sanitized" transcript. Applicant continues to object to the Appeal Board's looking at the unexpurgated transcript.

Later on, Judge Smith stated:

> What is shining through so far in this case to us is that there is an aroma about Hatfield Electric Company, and I think we are getting a little bit close to it. (Tr. 7381.)

Finally, at another point during the session Judge Smith commented regarding the reinspection program:

> So your feeling, then, is that the reinspection program as you finally accept it will take care of the [deleted] allegations. But do the [deleted] allegations give you any cause to be concerned about anything else? I mean, you know, the adequacy of the sample or anything like that?" (Tr. 7368.)

The Staff inspector's response to these inquiries, due to deletions, is not understandable.

Finally, as discussed elsewhere in this brief, Applicant does not believe that the public record in this proceeding supports the Board's ultimate conclusions regarding the quality of the Hatfield work and the validity of the reinspection program. We are thus led to conclude that, as suggested by the above quoted portions of the ex parte transcript, matters privately discussed with the Board influenced its decision.

The unfairness to Applicant which has resulted from this situation is manifest. It is well established that reliance upon evidence considered ex parte as the basis for a decision is fundamentally inimical to due process of law. See, Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 300 (1937). One of the basic reasons ex parte contacts in administrative hearings are generally prohibited is to assure that a party is aware of all of the arguments and informa-

tion presented to the decision maker which may be relevant to its decision so as to permit the party to respond effectively and ensure that its position is fairly considered. PATCO v. Federal Labor Relations Authority, 685 F.2d 547 at 563 (D.C. Cir. 1982). The Licensing Board's action and its subsequent decision are also in flagrant violation of the pertinent provisions of the Administrative Procedure Act. See, 5. U.S.C. §§ 554(b) and (c), 556(d) and (e), 557(c) and (d), and 558; See also, 10 C.F.R. §2.780.[35]

As Edison suggested in presenting its objections to the ex parte session, the proper course would have been to await the completion of the investigations by the NRC Staff prior to deciding whether reopening the record for litigation of the worker allegations was warranted. (Tr. 7281-7282.) Ultimately, the Board decided that the completion of investigations would be necessary in order for evidentiary hearings to be productive. Unfortunately, this decision was rendered following the ex parte session, and the Board's consideration of secret information has fatally infected its Initial Decision.

VI. THE LICENSING BOARD ERRED IN DENYING CECO'S APPLICATION FOR OPERATING LICENSES, RATHER THAN RECEIVING ADDITIONAL EVIDENCE

On January 13, 1984 when the Licensing Board issued its Initial Decision, it had full knowledge of all of the following facts and circumstances:

---

[35] The ex parte hearing was also inconsistent with this Appeal Board's ruling in ALAB-735. The Commission declined to review ALAB-735, and it became final agency action on September 6, 1983.

1. The Board harbored doubts about Hatfield and Hunter and the adequacy of the reinspection program;

2. The Board had not previously communicated these concerns to the parties; 36/

3. The results of the reinspection program were imminent; 37/ and

4. Upon receipt of these results, the parties would have been able to address the Board's concerns about Hatfield and Hunter and the adequacy of the reinspection program. 38/

The Licensing Board also knew, or should have known, that 10 CFR Part 2, Appendix A, § V(g)(1) states:

> If, at the close of the hearing, the board should have uncertainties with respect to the matters in controversy because of a need for a clearer understanding of the

---

36 See, ID, p. 410 (first full paragraph, second sentence). There are suggestions in the Initial Decision that Applicant defaulted, or nearly defaulted, on certain evidentiary issues. (ID, ¶D-404 (not looking for fraudulent practices at Hatfield); D-143 (not addressing Hunter "tabling" practice with rebuttal witness); D-242, D-248, D-300 (not clarifying whether tendon storage barns had fans); D-280 (not addressing allegation concerning Mr. Stomfay-Stitz' requests for pay increases and overtime)). The underlying facts concerning these issues have been addressed elsewhere in this brief. For present purposes we simply note that Applicant was misled by the Licensing Board as to the evidentiary presentation required on the first issue. See, July 7, 1983 Memorandum and Order, ¶7. Prior to January 13, 1984, the Licensing Board never suggested that the record was insufficient concerning the middle two issues. As for the last issue, the Board did at the hearing express the desire for better information on this allegation. (Tr. 2939, 3753-3756.) However, its criticisms were directed at Intervenors as well as Applicant, and in any event this allegation, which concerned Blount, was not significant to its decision.

37 See, December 30, 1983, Staff transmittal to Board of I&E Reports 50-454/83-39 (DE), 50-455/83-29 (DE).

38 (ID, pp. 5, 6, ¶D-435, D-444.) In addition to receiving the Staff's opinion, the Board would have been able to ask the questions it had not previously asked concerning the statistical reliability of the program, (ID, ¶D-436 to D-437) and the manner in which it had been carried out. (ID, ¶D438.)

> evidence which has already been presented, it is expected that the board would normally invite further argument from the parties - oral or written or both - before issuing its initial decision. If the uncertainties arise from lack of sufficient information in the record, it is expected that the board would normally require further evidence to be submitted in writing with opportunity for the other parties to reply or reopen the hearing for the taking of further evidence, as appropriate. If either of such courses is followed, it is expected that the applicant would normally be afforded the opportunity to make the final submission.

(Emphasis added.) This provision reflects the Commission's policy that cases which come before its adjudicatory boards should be resolved whenever possible on the merits.[39] This policy is of course not unique to the NRC. It is part of the mainstream of American administrative law. As stated long ago in Isbrandtsen v. United States, 96 F.Supp. 883, 892 (1951):

> [Administrative agencies] are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or non-representative record. As the sole representative of the public, which is a third party in these

---

[39] This policy is also reflected, for example, in the Commission's standards for reopening the records, see, Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) ALAB-728, 17 NRC 777, 800 n. 66 (1983); and in the licensing boards' and Appeal Board's wide-ranging exercise of their sua sponte authority. 10 CFR §§ 2.760a, 2.785(b)(2); Offshore Power Systems (Manufacturing License For Floating Nuclear Power Plants) ALAB-689, 16 NRC 887, 890 (1982). Moreover, none of the cases cited by the Licensing Board in support of its conclusion that the quality assurance issues could not be delegated to the Staff for post-hearing resolution (ID, ¶D-419 to D427) remotely suggests that the proper result in such circumstances is denial of the application. In all those cases a remand for further proceedings, a stay pending remand, or supplementation of the record by official notice took place.

> proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in ... The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible. 40/

In spite of this knowledge, and this binding legal authority, the Licensing Board washed its hands and walked away from this proceeding, denying the application for operating licenses. Yet if the record was insufficient to support issuance of operating licenses for Byron, it certainly was insufficient to support the Licensing Board's result.

In explaining the significance of its Initial Decision, the Licensing Board suggested it was doing Applicant a favor:

---

40 Frank, J. quoting Commissioner Aitchison of the Interstate Commerce Commission testifying before the Senate Subcommittee Hearings on S. 674, S.675 and S.918, April 29, 1941, pp. 465-466. Isbrandtsen was affirmed by an equally divided Supreme Court. A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen, 342 U.S. 950 (1952). See also Scenic Hudson Preservation Conference v. FPC, 354 F. 2d 608, 612-613, 620-621 (2d Cir. 1965); Calvert Cliffs' Coordinating Committee v. AEC, 449 F. 2d 1109 (D.C. Cir. 1971). In Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1074-1080 (D.C. Cir. 1974) the Court of Appeals held that a licensing board's duty in NRC operating license proceedings is to assess the sufficiency of the record to support its findings, rather than to compile the record itself. This is not contrary to Applicant's position in this case, since the Licensing Board knew that the evidence needed to resolve its uncertainties was being compiled by Applicant and the Staff and would be available in the forseeable future. Moreover, as stated previously, the record is insufficient to support the denial of Commonwealth Edison's application for operating licenses.

> ... The Board considered the alternative of informing the parties now of the substance of our views on the quality assurance issues, retaining jurisdiction over them, and providing for further proceedings before us when the various inspections, investigations and remedial actions become ripe for consideration. Perhaps a partial initial decision on all other issues could have been rendered.
>
> We have determined, instead, that the remedy most responsive to the circumstances of this case, and the remedy least harsh to the Applicant yet still appropriate, is to decide the issue now. This, we say, is the least harsh appropriate remedy, as compared to the traditional practice of reserving jurisdiction, because it permits the parties to test immediately on appeal the quality of our decision. To reserve jurisdiction and to postpone final decision, in face of the impending completion of construction at Byron, would impose unilaterally upon the parties, particularly the Applicant, our own view of the facts, law and appropriate remedy. Unless Applicant could mount a difficult interlocutory appeal from such a determination (to postpone our decision), it would have been denied due process.

(ID, p. 410, emphasis added.)

The Board misjudged the severe adverse consequences of its decision for the Company and its ratepayers and investors, and for other electric utilities with nuclear power plants under construction. The Licensing Board should have followed the course it outlined in the first paragraph quoted above. If the Board wished to aid Applicant in seeking interlocutory review, it should have elected the far less severe remedy of referring its decision to the Appeal Board pursuant to 10 CFR ¶ 2.764(f).[41]

---

41 See, e.g., Memorandum and Order (Quality Assurance for Design), Texas Utilities Generating Company (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-81 (December 28, 1983) (slip opinion at pp. 1-2, 75).

Under the circumstances of this case the Licensing Board's action in denying Ceco's Application for operating licenses was in conflict with longstanding Commission policy and basic fairness.

VII. CONCLUSION

For all the foregoing reasons, the Licensing Board's Initial Decision should be reversed and the Director of Nuclear Reactor Regulation should be authorized to issue operating licenses for Byron.[42]

Respectfully submitted,

Michael I. Miller,
one of the attorneys
for Applicant
Commonwealth Edison Company

Isham, Lincoln & Beale
Three First National Plaza
Suite 5200
Chicago, Illinois 60602
(312) 558-7500

Dated: February 13, 1984

---

[42] By separate motion, Applicant today requests the Appeal Board, if it finds that the record is insufficient to support issuance of operating licenses in this case, to allow Applicant to supplement the record with the evidentiary showing described therein. We also bring to the Appeal Board's attention the fact that the Initial Decision did not indicate whether the Board reviewed uncontested unresolved generic safety issues. Pacific Gas & Electric Co. (Diable Canyon Nuclear Power Plant, Units 1 and 2) ALAB-728, 17 NRC 777, 807 (1983).