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April 25, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

APPLICANTS' BRIEF IN OPPOSITION TO SUNFLOWER ALLIANCE INC.'S APPEAL OF PARTIAL INITIAL DECISION (QUALITY ASSURANCE CONTENTION)

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Pursuant to 10 C.F.R. § 2.762(c), The Cleveland Electric Illuminating Company (CEI), Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company (collectively referred to as Applicants) submit this brief in opposition to the exceptions and supporting brief filed by intervenor Sunflower Alliance, Inc. et al. (Sunflower).1/

1/ Sunflower Alliance's Brief in Support of Exceptions to 'Partial Initial Decision', dated March 20, 1984 (Sunflower Brief). Although the exceptions and brief are identified as being submitted only by Sunflower Alliance, Inc., Applicants presume that the other parties jointly admitted with Sunflower Alliance, Inc. continue to be joined with that organization. Compare Petition For Leave To Intervene, dated March 15, 1981, with Special Prehearing Conference Memorandum and Order, LBP-81-24, 14 N.R.C. 175, 177 (1981).

I. Applicants' Statement of The Case

Because Sunflower's statement of the case fails to accurately convey the background, scope, and post-hearing consideration of the quality assurance issue, Applicants believe it is necessary to provide the following statement of the case.

This appeal grows out of the first phase of evidentiary hearings in the operating license proceeding for the Perry Nuclear Power Plant, Units 1 and 2. The appeal relates to the Licensing Board's disposition of Issue #3, involving CEI's quality assurance (QA) and quality control (QC) at Perry. Appellant Sunflower was the lead intervenor for Issue #3, which was also actively litigated below by intervenor Ohio Citizens for Responsible Energy (OCRE).

As originally admitted by the Licensing Board, Issue #3 stated:

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

LBP-81-24, 14 N.R.C. 175, 210 (1981). The contention was drafted by the Licensing Board based on Sunflower's generalized allegations concerning QA, together with a reference during the Special Prehearing Conference to a 1978 voluntary stop work order and alleged faulty QA concerning concrete. Id. at 209. In admitting the contention the Licensing Board required the intervenors to show that "quality assurance deficiencies have led to some safety defect at Perry." Id. at 212.

In response to Applicants' objection to the admission of Issue #3, the Licensing Board clarified its intent, stating that Issue #3 was intended to be limited to the stop work order issued by CEI in February 1978,2/ and to steps taken by CEI to remedy alleged deficiencies leading to the stop work order. LBP-81-35, 14 N.R.C. 682, 686-87 (1981). The Licensing Board stated that Sunflower had not provided the basis for any other QA allegations and that it would "not be permitted to launch a generalized attack on the Applicant's entire quality assurance program." Id. at 687. In addition, the Board stated, "Should Applicant move for summary judgment on this issue, Sunflower would need to demonstrate the existence of a genuine issue of fact concerning the existence of unsafe conditions as a result of a quality assurance deficiency." Id.

In March 1982, the Licensing Board denied a motion by Sunflower to expand the scope of Issue #3, but stated that the scope of discovery under Issue #3 gave intervenors broad discovery rights "to permit investigation of serious quality assurance deficiencies with safety or environmental implications." LBP-82-15, 15 N.R.C. at 555-57, 564 (1982). The Licensing Board went on to say that Sunflower could add to its

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2/ A summary of the facts surrounding the February 1978 stop work order is set forth in Applicants' Answer In Support of NRC Staff's Motion for Summary Disposition of Issue No. 3, dated December 3, 1982, and in the affidavit and letters attached thereto.

contention either by filing a new contention based on information obtained through discovery, or "[u]pon a motion for summary disposition, [by offering] genuine issues of fact relevant to the contention but not falling strictly within it." Id. at 564.

In October 1982, the NRC Staff filed a summary disposition motion on Issue #3, focusing on the 1978 voluntary stop work order and the NRC Staff's contemporaneous immediate action letter. In opposition to the motion, Sunflower's answer included a September 24, 1982 Notice of Violation, and related portions of an NRC Systematic Assessment of Licensee Performance report, dated July 13, 1982 (SALP Report), dealing with an NRC investigation of CEI's electrical contractor, L.K. Comstock.

By Memorandum and Order (Concerning Summary Disposition: Quality Assurance, Corbicula and Scram Discharge Volume Contentions), dated December 22, 1982, the Licensing Board granted, in part, the NRC Staff's motion for summary disposition of Issue #3. Based on a review of Staff's and Applicants' affidavits in support of the Staff's summary disposition motion, which fully described the February 1978 stop work and the comprehensive corrective action taken by CEI in response thereto, the Licensing Board concluded that "there is no genuine issue of fact concerning the safety of work performed up to July 13, 1978." Id. at 5-6. However, the Licensing Board concluded that there were remaining issues of material fact in the area

of CEI's control of Comstock. The admitted issues of material fact stemmed from the Board's review of the Notice of Violation and SALP Report. The Board accepted Sunflower's assertion, based solely on the Notice of Violation and SALP Report,3/ that "one deficiency noted in the February 8, 1978 staff letter, confirming applicant's stop-work order, appears to have recurred recently." See id. at 6-9. The issues of material fact framed and admitted by the Licensing Board were as follows:

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

3/ Sunflower did not provide the Licensing Board with the Investigation Report underlying the Notice of Violation and SALP Report, and the Licensing Board had not reviewed the Investigation Report prior to admitting the issues of material fact. See Memorandum and Order (Concerning Summary Disposition: Quality Assurance, Corbicula and Scram Discharge Volume Contentions), dated December 22, 1982, slip op. at 7-8.

Id. at 9-10. Other than the issues raised by the Notice of Violation and SALP Report, the Licensing Board held that "Sunflower has failed to show that any other aspects of the 1978 confirmation [of the stop work order] and [1978] Notice of Violation have caused a continuing problem or have resulted in unsafe conditions at Perry." Id. at 10.

In LBP-83-3, 17 N.R.C. 59 (1983), the Licensing Board denied Applicants' motion to reconsider the admission of the four issues of material fact. The Board, however, clarified "that applicant need not be concerned that quality assurance of all contractors' performances is as yet at issue." Id. at 64. The Board indicated that it was not then concerned with the contractors' QA programs, but rather with CEI's oversight program, and especially CEI's QA overview program as applied to Comstock. Further, the Board stated that it would not be interested in receiving evidence of "individual instances of nonconformances" of other contractors, unless it were to find that "management's role in QA has been sufficiently suspect to require that we descend to that further level of detail." Id. at 64-65 (emphasis added).

The scope of the issues was also discussed in a telephone conference call shortly before the evidentiary hearing. In the context of intervenors' attempt to obtain additional discovery in the weeks immediately preceeding the hearing, Staff counsel summarized the scope of the four issues of material fact as follows:

> And my understanding, based on my reading of the Board's orders [is] that the first step of the process was to see if there is evidence of a loss of control of the electrical contractors' activities by the Applicants, and then only if there was evidence of that, with a look see broadened, to see whether there were loss of control of your contractors.

Tr. 875 (May 9, 1983) (emphasis added). Based on this discussion, the Licensing Board granted discovery to Sunflower -- over Applicants' objections -- but limited the discovery to documents involving Comstock. Tr. 877-78.4/

The Licensing Board conducted an evidentiary hearing on May 24-27, 1983, in Painesville, Ohio. Applicants and Staff each produced witnesses who testified on CEI's QA overview

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4/ The discovery period for Issue #3 commenced with the original admission of the issue by the Licensing Board in its July 28, 1981 order, LBP-81-24, 14 N.R.C. 175. In a marked departure from the norm, favorable to Sunflower, discovery was not cut off until after the filing of Applicants' and Staff's pre-filed testimony. During this lengthy discovery period, in response to Interrogatory #13 of Sunflower Alliance et al. Third Set of Interrogatories (With Request For Production of Documents) to Applicants, dated September 30, 1982, Applicants opened virtually all of their QA/QC files to Sunflower and OCRE. Less than two weeks before the start of the Issue #3 hearings, over Applicants' and Staff's strenuous objections, OCRE's Ms. Hiatt, acting on behalf of OCRE and Sunflower, and others (including Sunflower representatives) were at the Perry site reviewing hundreds of audit reports from the electrical area. Prior to that time, on at least four separate visits to the site, Ms. Hiatt and others (again on behalf of both OCRE and Sunflower) had already been permitted unfettered access to inspect CEI's QA/QC records, in the electrical and other areas. Representatives of Sunflower and OCRE copied some 3500 pages of QA documents representing over 1000 separate documents. See Tr. 862-78.

program, and the program's application in the electrical area. Neither Sunflower nor OCRE presented testimony at the hearing. Following the hearing, proposed findings of fact and conclusions of law were filed by Applicants, Staff, Sunflower, and OCRE.

On August 18, 1983, the Licensing Board denied as untimely a motion by OCRE to reopen the Issue #3 record. LBP-83-52, 18 N.R.C. 256 (1983). The motion was based on several documents produced by OCRE, relating to QA/QC in the electrical area.5/ However, the Licensing Board on its own motion reopened the record to receive affidavits from Staff and Applicants addressing certain issues raised by OCRE's documents. After reviewing the requested affidavits, the Licensing Board, by Memorandum and Order (Dismissing Additional Quality Assurance Issues and Closing The Quality Assurance Record), dated November 10, 1983, LBP-83-__, 18 N.R.C. ___, concluded "that the full QA procedure worked properly and that no unsafe condition in the Perry plant has resulted from the discrepancies that were found." Id., slip op. at 19. Consequently, the Board dismissed the issues raised by OCRE's documents, and closed the Issue #3 record.

5/ The documents included (1) a June 1982 Engineering Change Notice involving cable tray fill specifications; (2) an August 6, 1982 letter discussing Comstock Task Force review findings regarding uncertified inspectors; and (3) several pages of unsigned, undated notes discussing CEI's Quality Assurance Advisory Committee (QAAC).

By Memorandum and Order (Procedural Objections and Staff Witness Question), dated August 30, 1983, the Licensing Board denied procedural objections which had been included in Sunflower's and OCRE's proposed findings of fact and conclusions of law. The issues raised involved claims of prejudice because of (1) the Board's asserted "activism" in questioning witnesses during the hearing, (2) the withdrawal of Sunflower's lead counsel on the eve of the hearing, and (3) the admission of certain alleged hearsay evidence.

On December 2, 1983, the Licensing Board issued its Partial Initial Decision (Quality Assurance Contention), LBP-83-77, 18 N.R.C. ___, (PID), dismissing the issues of material fact admitted under Issue #3. The Board's conclusion was as follows:

> The uncontradicted evidence is that applicant's quality assurance program has provided adequate overview and control of Comstock's activities at Perry, and that applicant's program has prevented, and will continue to prevent, unsafe conditions at the plant. We therefore conclude that there is no serious safety issue that requires us to undertake further inquiry into applicant's QA control of Comstock or other safety-related contractors at Perry.

PID at 56.

On December 8, 1983, Sunflower filed exceptions to the Partial Initial Decision.6/ In an order issued December 13,

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6/ Exceptions which Sunflower had filed to the Licensing Board's August 30, 1983 Memorandum and Order had been previous-

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1983, the Appeal Board deferred briefing of Sunflower's appeal pending a ruling by the Licensing Board on an outstanding motion to reopen filed by OCRE. The motion was based on newspaper allegations by former QC inspectors of Comstock and another contractor. By Memorandum and Order dated January 20, 1984, LBP-84-3, 19 N.R.C. ___, the Licensing Board denied OCRE's motion Thereafter, in an order dated February 15, 1984, the Appeal Board established the schedule for briefing of Sunflower's appeal.

II. Sunflower Has Waived Its Exceptions By Failing to Brief Them

The Commission's Rules of Practice, at 10 C.F.R. § 2.762(d)(1), require that:

> An appellant's brief must clearly identify the errors of fact or law that are the subject of the appeal. For each issue appealed, the precise portion of the record relied upon in support of the assertion of error must also be provided.

Subsection (g) of 10 C.F.R. § 2.762 provides:

> A brief which in form or content is not in substantial compliance with the provisions of this section may be stricken, either on motion of a party or by the Commission on its own initiative.

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ly dismissed as interlocutory by the Appeal Board. Appeal Board Memorandum and Order, dated September 13, 1983.

Appeal Boards often have held that unbriefed exceptions should be disregarded as waived.7/

The Appeal Boards have strongly emphasized the explicit requirement that an appellant must cite record evidence in support of the assertions made in his brief. See, e.g., Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-693, 16 N.R.C. 952, 954-57 (1982); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 N.R.C. 453, 480-81 (1982). Moreover, it is clear that the requirements of 10 C.F.R. § 2.762(d)(1) are not satisfied by a brief which fails to discuss the licensing board's decision, or which relies solely on proposed findings and conclusions. The defects of such an appeal were explained by the Appeal Board in Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-573, 10 N.R.C. 775, 805-06 (1979), where appellant's brief was "simply a verbatim restatement of the proposed findings of fact and conclusions of

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7/ See e.g., Public Service Electric & Gas Company (Salem Nuclear Generating Station, Unit 1), ALAB-650, 14 N.R.C. 43, 49-50 (1981), aff'd sub nom., Township of Lower Alloways Creek v. Public Service Electric & Gas Co., 687 F.2d 732 (3d Cir. 1982) (cited with approval in Wisconsin Electric Power Company (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 N.R.C. 335, 338 n.4 (1983), and in Louisiana Power and Light Company (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 N.R.C. 1076, 1083 n.2 (1983)); Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-644, 13 N.R.C. 903, 979-80 (1981); Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 N.R.C. 313, 315 (1978); and cases cited therein.

law they had submitted to the Board below." Id. at 805. The Appeal Board stated:

> Needless to say, such a brief does not deal with the Licensing Board's decision. It attempts neither to demonstrate how that Board erred nor to "specify . . . the precise portion of the record relied on in support of [each] assertion of error" as the Rules requires [sic]. 10 CFR 2.762(a)(2).
>
> This is a serious failing, evidencing a misapprehension of the nature of the review process. We have stressed before that we may not "make an appellate determination on a clean slate without regard to the Licensing Board's opinion" and do not "weigh each piece of evidence de novo." Rather, "the decision below is 'part of the record'; we may, indeed must, attach significance to a licensing board's evaluation of the evidence and to its disposition of the issues. By neglecting to address their brief to the decision under review and by omitting adequate record citations, intervenors leave us (and the appellees) guessing about the precise nature of their arguments and ignorant of the evidence they rely on to support them.

Id. at 805 (footnotes omitted).8/

8/ See also Union Electric Company (Callaway Plant, Unit 1), ALAB-740, 18 N.R.C. 343, 347 n.7 (1983) ("As we have noted, a brief that merely indicates reliance on previously filed proposed findings, without meaningful argument addressing the Licensing Board's disposition of issues, is of little value in appellate review."); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 N.R.C. 341, 360 (1978) ("The fact that intervenors adverted to paragraphs 15-107 of their proposed findings and conclusions in support of exception 24 does not save that exception. We have held that a mere statement of reliance upon proposed findings and conclusions does not satisfy the requirement contained in 10 C.F.R.

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Under the above-cited authorities, Sunflower, as appellant, has an obligation to submit a brief containing sufficient information and argument to permit fair rebuttal by appellees, and to enable the appellate tribunal to fairly evaluate competing arguments. The Commission's Rules of Practice are for these purposes, and "are not mere niceties." See ALAB-739, supra, 18 N.R.C. at 338 n.4. Accordingly, Applicants' obligation, as an appellee, is to respond to Sunflower's brief, not to its exceptions. See Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-409, 5 N.R.C. 1391, 1395 (1977).

With few exceptions, discussed below, Sunflower has failed totally to meet its briefing obligation as appellant. Sunflower's brief either restates verbatim the proposed findings and conclusions submitted by Sunflower to the Licensing Board, or contains no meaningful discussion or analysis of the exception. In either case, the brief fails to meet the requirements of the Commission's Rules of Practice. Sunflower's brief on Exceptions 1, 2 and 3 is no more than verbatim repetitions of Sunflower's proposed findings, and fails to address the Licensing

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2.762(a) that a brief in support of exceptions be filed. Public Service Electric Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-394, 5 NRC 769 (1977)"); and other cases cited therein.

Board's August 30, 1983 Memorandum and Order which dealt at length with these issues. Exceptions 4, 9, 10, 11 and 12 are supported in Sunflower's brief by one sentence each, with not a single detail or citation. With respect to Exceptions 5, 6 and 7, Sunflower's brief does no more than repeat its proposed findings.

Although Applicants have attempted to assist the Appeal Board with responses to some of Sunflower's inadequately briefed contentions,9/ we nonetheless believe that Sunflower's failure to brief its exceptions "virtually precludes an intelligent response by appellees." Salem, ALAB-650, supra, 14 N.R.C. at 50. We therefore urge the Appeal Board to "disregard unbriefed issues as waived." Id. at 50. Applicants' specific responses are set forth below.

III. Sunflower's Brief and Exceptions Provide No Basis to Overturn, Modify, or Supplement the Licensing Board's Partial Initial Decision

A. Exception No. 1 (The Board's Activism)

Sunflower asserts, inter alia, that "[t]here are numerous examples in the record where the Licensing Board interfered

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9/ Exceptions 4, 9, 10, 11, and 12 are so unspecific and Sunflower's brief on them totally lacking in information, that no meaningful response is possible, other than to refer the Appeal Board to Applicants' proposed findings and other responsive pleadings.

with the direction of cross-examination, or elicited a conclusion from the experts who testified, or simply protected Staff or Applicant from relevant disclosures." Sunflower Brief at 3. The arguments and record citations set forth in support of these assertions, at pages 3-4 of Sunflower's brief, are taken verbatim from Sunflower's proposed findings of fact and conclusions of law.10/ Sunflower's previous assertions were answered in detail by the Licensing Board's August 30, 1983 Memorandum and Order. Sunflower has chosen to ignore the Board's decision, and simply to rehearse its proposed findings.

The Licensing Board has more than satisfied its obligation to articulate in reasonable detail the basis for the procedural course of action taken. See Waterford, ALAB-732, supra, 17 N.R.C. at 1087 n.12. However, Sunflower has failed to respond in its brief to the legal positions articulated by the Board. Thus, although Applicants must assume from Sunflower's refiling of its proposed findings that Sunflower disagrees with the Board on every point, Applicants and the Appeal Board are nonetheless in the dark as to Sunflower's basis for its continued disagreements. Although Applicants do not believe Sunflower has followed the rules, we will now address Sunflower's proposed findings as if they constituted an adequate appeal.

10/ See Sunflower Alliance's Proposed Findings of Fact and Conclusions of Law, dated July 15, 1983 (Sunflower PFC), at 16-17.

Sunflower's criticisms of the Licensing Board's alleged "activism" fall into two basic categories. First, Sunflower complains that the Licensing Board improperly limited cross-examination, i.e., that "the Licensing Board interfered with the direction of cross-examination11/ . . . or simply protected Staff or Applicant from relevant disclosures." Sunflower Brief at 3. Second, Sunflower complains that the Licensing Board improperly "led" Applicants' and Staff's witnesses, i.e., that it "elicited a conclusion from the experts who testified." Sunflower Brief at 3. Sunflower asserts, without any evidence, offer of proof, or linkup to the Partial Initial Decision, that these alleged errors caused "changes of a substantive nature to the record in this case." Sunflower Brief at 4.

Sunflower's first claim, that the Board improperly limited cross-examination, is without merit. The test is as stated by the Appeal Board in Waterford, ALAB-732 supra:

> Cross-examination must be limited to the scope of the contentions admitted for litigation and can appropriately be limited to the scope of direct examination. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 698, affirmed, CLI-82-11, 15 NRC 1383 (1982); Prairie Island, ALAB-244 . . .,

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11/ Based on the portions of the record on which Sunflower relies, we interpret this objection to be that the Board allegedly interfered with the direction of cross-examination by not permitting certain lines of inquiry, i.e., by limiting cross-examination, as discussed below.

> 8 AEC at 867, 869 n.16. In exercising its discretion to limit what appears to be improper cross-examination, a licensing board may insist on some offer of proof or other advance indication of what the cross-examiner hopes to elicit from the witness. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 316 (1978); San Onofre, ALAB-673, supra, 15 NRC at 697; Prairie Island, ALAB-244, supra, 8 AEC at 869. Even if cross-examination is wrongly denied, however, such denial does not constitute prejudicial error per se. San Onofre, CLI-82-11, supra, 15 NRC at 1384. The complaining party must demonstrate actual prejudice -- i.e., that the ruling had a substantial effect on the outcome of the proceeding. San Onofre, ALAB-673, supra, 15 NRC at 697 & n.14.

ALAB-732, 17 N.R.C. at 1096.

Sunflower cites five examples in the record where, allegedly, the Licensing Board improperly limited cross-examination. Sunflower's brief fails to address the Board's disposition of these claims. See August 30, 1983 Memorandum and Order at 2-14. Applicants agree with the Licensing Board's treatment of these objections and see little purpose in repeating the Board's responses here. We would, however, offer the following additional rationale in support of the Board's actions, based on the tests set forth in Waterford, supra.

Of the five examples stated by Sunflower, three examples12/ involved limitations on cross-examination of OCRE, not

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12/ They are (1) "Tr. 1069, 1074, where intervenor Ohio Citizens for Responsible Energy ('OCRE') attempted to link the per-

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Sunflower. OCRE has not appealed, and, even in its proposed findings and conclusions, OCRE did not claim prejudice from any of the procedural rulings cited by Sunflower. See, e.g., August 30, 1983 Memorandum and Order at 5. Under Waterford, supra, it is "[t]he complaining party [who] must demonstrate actual prejudice." ALAB-732, 17 N.R.C. at 1096 (emphasis added). Thus, if there was any prejudice from these claimed restrictions on cross-examination, the claim could only have been brought by OCRE if it was to be brought by anyone.

Testimony at Tr. 1464-66, cited in a fourth example,13/

(Continued)

sons behind a 1978 stop-work order to Applicant's overview system and was blocked by the Board;" (2) "Tr. 1112-1117, where the Board refused to allow OCRE to adduce a quality engineer audit from the Perry Public Documents Room into the record for purposes of cross-examination because it was not identified in prefiling as a proposed exhibit . . ."; and (3) "Tr. 1145-52, 1156, where the Board seized upon a technical proceduralism with the directive to OCRE to ask questions on documents not included on its prefiled list without putting the documents into evidence, an anomaly of no small moment." Sunflower Brief at 3. See August 30, 1983 Memorandum and Order at 5-6 (discussing Tr. 1071 et seq. (first example)), 6 (discussing Tr. 1112 et seq. (second example)), 7-10 (discussing Tr. 1145 et seq. (third example)).

13/ The fourth example is as follows: "Tr. 1164-5 [We assume, from the context, that this was a typographical error, and should refer to 1464-5. This was also the Licensing Board's inference. See August 30, 1983 Memorandum and Order at 10.], the Board's decision to short-circuit cross-examination concerning Pullman Power where the Board concludes in the midst of hearing, prior to completion of the record, that it need not follow the sequence of issues set forth in its summary disposition motion (see also Tr. 1466, where the Board admits it has

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involved a general statement by the Board, re-stating the scope of Issue #3, and explaining what would be required by Sunflower's attorney on the following day. No specific documents or cross-examination was excluded at Tr. 1466. See August 30, 1983 Memorandum and Order at 10. Testimony at Tr. 1530, cited in the fifth example,14/ involved a general statement by Sunflower's representative that "Sunflower and OCRE are concerned about the time to prepare questions" on Applicants' testimony responding to the Board's questions. There is no indication on the record of any specific areas of cross-examination excluded, or missed, as a result of Sunflower's "concern." See August 30, 1983 Memorandum and Order at 12-13. Moreover, Sunflower has now had access to the transcript of the testimony for 11 months, and the Licensing Board's decision for 7 months, and still fails to identify any specific areas of cross-examination it wishes to pursue.

In all these instances, if the Licensing Board's rulings prevented the admission of what Sunflower believed was crucial

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set up a 'harsh criterion' by wanting to know that 'there's a reason to go into further hearing on Comstock' before allowing it) (footnote omitted)." Sunflower Brief at 3. See August 30, 1983 Memorandum and Order at 10-11.

14/ "Tr. 1530, where the Board inconsistently rules on the time needed for preparation of cross-examination by the parties." Sunflower Brief at 3-4. See August 30, 1983 Memorandum and Order at 12-13.

evidence, Sunflower could have followed up and sought the particular evidence during its cross-examination, or subsequent to the hearing. It did not do so.

Further, Sunflower has failed to show error in the Board's procedural rulings, i.e., that cross-examination was "wrongly denied." Waterford, supra, 17 N.R.C. at 1096. The Board's explanations in its August 30, 1983 Memorandum and Order provide ample justification for its bases in limiting the cross-examination to relevant, non-repetitive, non-cumulative evidence, pursuant to 10 C.F.R. §§ 2.743(c) and 2.757. See portions of the Licensing Board's Memorandum and Order cited supra notes 12-14. Moreover, in each instance cited, the Licensing Board properly asked OCRE or Sunflower for "some offer of proof or other advance indication of what the cross-examiner hope[d] to elicit from the witness." Waterford, supra, 17 N.R.C. at 1096.15/ In each case the information sought involved matters

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15/ The parties were clearly forewarned prior to the hearing that

> a party should be prepared to indicate to the Board the relevance and significance of its questions, whether asked as cross-examination, redirect or re-cross. If a party cannot explain the relevance and importance of its questions, they may be disallowed.

Memorandum and Order (Procedural Matters Affecting the Hearing), dated April 18, 1983, at 1. See also supra Section I (discussing the Licensing Board's earlier rulings that intervenors would be required to show that alleged QA/QC deficiencies led to unsafe conditions at the plant.)

which were either irrelevant to the limited scope of the issues of material fact admitted for trial, and beyond the scope of Applicants' and Staff's direct testimony16/ (e.g, the names of persons behind the 1978 stop-work order (the first example above, supra note 12) and cross-examination on matters involving Pullman Power (the second and fourth examples, supra notes 12, 13), or involved matters which were otherwise objectionable (such as the third example, Tr. 1145-52, 1156, supra note 12), involving a failure to comply with the Licensing Board's directive to identify before the hearing documents that would be used for cross-examination.) In any case, Sunflower has failed to proffer procedural or substantive matters of safety significance which were excluded at trial, and it has now had almost a year to do so.

Finally, even if Sunflower were somehow able to demonstrate error in the Licensing Board's procedural rulings, which it has not yet done, it still is obligated to show that the Board's rulings "had a substantial effect on the outcome of the proceeding." Waterford, supra, 17 N.R.C. at 1096. Sunflower's brief does not even address the substantive outcome of the Issue #3 proceeding, i.e., the Board's Partial Initial

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16/ See, Waterford, supra, 17 N.R.C. at 1096 ("Cross-examination must be limited to the scope of the contentions admitted for litigation and can appropriately be limited to the scope of direct examination.")

Decision; and surely gives no indication that the outcome would have been different, but for the Board's procedural rulings. There is no indication, from any of Sunflower's filings to date, that it is aware -- after almost two years of discovery, followed by evidentiary hearings, and post-hearing motions to reopen -- of any serious QA/QC procedural or hardware deficiencies in the electrical area, or in any other area of the plant. Certainly Sunflower's brief provides no evidence or suggestion that such information exists. Such a showing is mandatory under Waterford, supra, and under the Licensing Board's rulings defining the scope of Issue #3, before Sunflower can establish reversible error. See also Callaway, ALAB-740, supra, 18 N.R.C. at 346 ("[I]n examining claims of quality assurance deficiencies one must look to the implication of those deficiencies in terms of safe plant operation.").

As to Sunflower's other procedural objection, that the Licensing Board "led the witnesses," Sunflower has again done no more than repeat its proposed findings without indicating where and why it disagreed with the Licensing Board's reasoning. Again, we agree with the conclusions set forth in the Licensing Board's August 30, 1983 Memorandum and Order, which were in response to the precise same arguments, and we will not restate the Board's analysis. We wish to stress the following points.

First, Sunflower has failed to cite any authority for the proposition that a Licensing Board may not ask leading

questions, and Applicants are aware of none. The Licensing Board has the right and obligation to assure itself that all relevant and material evidence bearing on Issue #3 was fully developed. See Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 N.R.C. 741, 751-52 (1977); South Carolina Electric and Gas Company (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 N.R.C. 1140, 1163 (1981). Although we agree with the Chairman's observation at the hearing, that this Licensing Board generally tended to assume a more active role in proceedings than others do, see Tr. 1073 (cited in August 30, 1983 Memorandum and Order at 3), we do not believe the Chairman's questioning in any way prejudiced the intervenors' case or affected the outcome. Certainly Sunflower has failed to establish any prejudice whatsoever from the alleged "leading" of witnesses. (Indeed, if there were any improper "leading" of witnesses, the prejudice would have been to the party sponsoring those witnesses, and not to Sunflower).

In fact, Applicants do not believe the Board "led" the witnesses. Most of the Board's questions in the portions of the record cited by Sunflower were for the purpose of the Board's clarification, or were an effort by the Board to summarize and explain to intervenors areas in which their cross-examination had become repetitious or cumulative.17/ Moreover,

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17/ See, e.g., Tr. 1066 (regarding format changes in the QA manual. Judge Bloch: "I'm just trying to understand what you

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none of the examples cited in Sunflower's brief involve any conceivable safety problems, nor does Sunflower assert that they do. Thus, Sunflower's examples of alleged "leading" of witnesses by the Board are misplaced, constitute no prejudice to Sunflower, and had no effect on the outcome of the proceeding.

Finally, Applicants would comment on Sunflower's implicit reliance on the separate views of Board Member Kline in the August 30, 1983 Memorandum and Order. See Sunflower Brief at 2-3. Although Dr. Kline took issue with portions of the majority's memorandum, he "agree[d] with the conclusion of the board that the record should not be reopened in this proceeding for the reasons cited by Sunflower." See August 30, 1983 Memorandum and Order, separate views of Dr. Kline (Dr. Kline) at 1. He joined in the Board's reasoning and conclusions regarding Sunflower's "narrowly focused objections" based on specific pages and text in the record. Dr. Kline at 1. He also stated:

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were saying."); Tr. 1130-31 (wherein Judge Bloch attempted to restate for Ms. Hiatt the witnesses' answers to repetitive cross-examination regarding use-as-is QA/QC dispositions); Tr. 1160-61 (wherein Judge Bloch summarized for Ms. Hiatt previous answers given to repetitive cross-examination regarding nonconformance disposition); Tr. 1477, 1482-83 (Judge Bloch and Judge Kline clarifying the use of the master deficiency list in closing out minor NRs), etc.

> It is clear from the record in this case that the board's participation resulted in a thorough examination of the witnesses. We have a factually adequate record. I therefore believe no ultimate harm was done to Sunflower or OCRE by the board's actions even though some of Sunflower's narrowly drawn assertions are factually correct.

Dr. Kline at 3. He further stated:

> At this point, in light of the subjective nature of this matter, there appears to be no remedy that would be effective regarding the complaints about the conduct of the quality assurance hearings nor is one needed. We have adequate facts before us to fairly decide the technical issues and thus I would not reopen. My objection is intended to alter the future, not the past.

Dr. Kline at 6.

Dr. Kline's views were not addressed to the substance of the hearing, but to the Licensing Board Chairman's philosophical approach in conducting a hearing. While Applicants would agree with the more restrained approach favored by Dr. Kline, the Chairman's technique did not prejudice Sunflower. Indeed, if there were prejudice, it was suffered by Applicants as a result of the more adversarial questioning of Applicants' and Staff's case than the restrained approach would have produced.

For all the above reasons, Exception No. 1 is deficient and should be denied.

B. Exception No. 2 (Sunflower's Loss of Counsel)

Sunflower asserts, without any specific evidence, that the loss of its "lead counsel" on the eve of the evidentiary hearing "was devastating to Sunflower's case." Sunflower Brief at 4. Once again, rather than fulfill its obligation as appellant to file a legally adequate brief addressing the Board's rationale, Sunflower has chosen to merely refile its proposed findings and conclusions. See Sunflower PFC at 14-15. Sunflower's brief completely ignores the Licensing Board's August 30, 1983 Memorandum and Order, which addressed precisely the same arguments. Sunflower's reliance on its proposed findings and conclusions fails to satisfy the Commission's briefing requirements, for the reasons set forth in Section II above.

Applicants agree with the Licensing Board's conclusion that "Mr. Wilt's resignation was a regrettable event but we do not think it prejudiced the intervenors' joint efforts to pursue their case." August 30, 1983 Memorandum and Order at 15. Sunflower's is essentially a legal argument: that because of Mr. Wilt's withdrawal, the hearing must be reopened to permit additional cross-examination. Thus, Sunflower's argument is similar to the one advanced under Sunflower's first exception. The argument fails for the same reasons as before, i.e., the test as stated in Waterford, supra, 17 N.R.C. at 1096, has not been satisfied.

First, Sunflower's brief of its second exception does not identify any instance in the record where cross-examination was "wrongly denied." Id., 17 N.R.C. at 1096. Indeed, Sunflower grudgingly recognizes that the Licensing Board "may have occasionally demonstrated a solicitous demeanor to Sunflower as a result of its attorney's resignation." Sunflower Brief at 5. Sunflower understates the Board's solicitude.18/ Sunflower's implicit argument is that, notwithstanding the Board's solicitude, the extensive familiarity of Sunflower's representatives with QA/QC issues as a result of lengthy discovery,19/ and Sunflower's reliance on Ms. Hiatt of OCRE to "spearhead" discovery,20/ it nonetheless required Mr. Wilt to frame necessary questions at the hearing. However, there is no indication in the record of cross-examination wrongly limited or denied. There was no suggestion, as of the time of the Board's August 30, 1983 Memorandum and Order, of "any line of cross-examination that would have been pursued if Mr. Wilt had not resigned." See August 30, 1983 Memorandum and Order at 15.

18/ See Applicants' Proposed Findings of Fact and Conclusions of Law in the Form of a Partial Initial Decision, dated July 1, 1983 (Applicants' PFC) at 57-60 (summarizing, with appropriate citations to the record, the Licensing Board's solicitude in the circumstances of Mr. Wilt's withdrawal).

19/ See supra note 4.

20/ See Tr. 864, 872, 877-78 (May 9, 1983 telephone conference call); see also supra note 4.

Today, eleven months since the close of the hearing (and with the assistance of counsel),21/ Sunflower still has not suggested any additional areas of cross-examination it wishes to pursue.22/

Even if Sunflower could show that it had been unable to adequately cross-examine Applicants' and Staff's witnesses without Mr. Wilt, in order to have its exception granted, it would still have to show that the outcome of the proceeding was substantially affected. See Waterford, supra, 17 N.R.C. at 1096. Again, Sunflower fails even to attempt to argue that there exists information relevant to Issue #3, not elicited because of Mr. Wilt's absence, which could change the Licensing Board's substantive conclusions in its Partial Initial Decision.

For all these reasons, and for the additional reasons set forth in Applicants' proposed findings,23/ Exception No. 2 is

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21/ Mr. Lodge has actually been involved with this case since Sunflower first petitioned for leave to intervene. See Petition for Leave to Intervene, dated March 5, 1981, p.8. Sunflower's brief acknowledges Mr. Lodge's prior involvement as "co-counsel." See Sunflower Brief at 5.

22/ In addition to extensive assistance provided to Sunflower by Ms. Hiatt prior to the hearing (see, e.g., supra notes 4, 20), OCRE during the hearing conducted extensive cross-examination. See, e.g., Tr. 1032-1282, 1730-1857.

23/ See Applicants' PFC at 57-62; Applicants' Reply to Findings of Fact and Conclusions of Law Submitted by the Other Parties (Issue #3), dated August 5, 1983 (Applicants Reply) at 32-34.

deficient and should be denied.

C. Exception No. 3 (Request for Additional Staff Witness)

Sunflower raises a third procedural argument, that it "was prejudicially and improperly deprived of the opportunity to cross-examine" an NRC Staff inspector who participated in the Staff's 1981-82 electrical inspection, but who was not produced as a witness. In what can only be described as a distortion of the record (and with no supporting record citations), Sunflower asserts that the NRC inspector "had known, strongly dissenting views as to QA/QC practices at Perry," and "had frequently expressed strong dissent to the conclusions of the Region III hierachy that Perry QA/QC practices were cleaned up." Sunflower PFC [illegible] Sunflower also objects to the admission of testimony b[illegible] Staff's witness panel concerning the inspector's views, arguing that such testimony constitutes inadmissible hearsay.

In support of the third exception, Sunflower once again relies almost entirely on its proposed findings.24/ Sunflower completely ignores the Licensing Board's August 30, 1983 Memorandum and Order, where the Licensing Board explains why the NRC inspector was not called, and why his supervisors were

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24/ Compare Sunflower PFC at 9-14, with Sunflower Brief at 5-10.

permitted to testify at the hearing regarding the inspector's views.25/ Thus, Sunflower's brief is deficient under 10 C.F.R. § 2.762 for the reasons set forth in Section II above. Since Applicants have already addressed Sunflower's proposed findings and conclusions at some length in their reply findings,26/ it is not necessary to burden the Appeal Board with a lengthy restatement of Applicants' position. We would emphasize the following points.

First, as the Licensing Board correctly states, the Commission's Rules of Practice preclude a presiding officer from calling an NRC witness not designated as a witness by the Executive Director for Operations, except "upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses . . ." 10 C.F.R. § 2.720(h)(2)(i) (emphasis added). It was not only reasonable, but necessary, for the Licensing Board to permit cross-examination of the inspector's supervisors, in order to determine whether the inspector might have "direct personal knowledge of a material fact not known to the witnesses," before calling the inspector to testify. Thus, "[t]he purpose of admitting the testimony was solely to assist the Board in

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25/ See August 30, 1983 Memorandum and Order at 16-17.

26/ See Applicants' Reply at 20-26.

determining whether it should require the staff inspector to appear . . . ." August 30, 1983 Memorandum and Order at 16. The Board did not place any evidentiary weight on testimony concerning the views of the inspector, once it was established that all material facts were before it. Id. at 17. Thus, the admission of testimony about the inspector's views was for a limited purpose, and was not considered as part of the Licensing Board's substantive findings in the Partial Initial Decision.

Moreover, it was clear from the cross-examination that the Staff's witnesses could accurately testify to whether the inspector had "direct personal knowledge of a material fact not known to the witnesses," and that the inspector did not have such knowledge. There was extensive testimony concerning the inspector's views. See, e.g., Tr. 1588-91, 1691-95, 1797-1819, 1832-35 (Williams, Board, parties). In particular, Mr. Williams, the inspector's supervisor, and a principal reviewer of and signatory to the NRC investigation report summarizing the results of the Staff's 1981-82 electrical investigation,27/ was extensively involved in supervising the inspector's work, and reviewing his findings. See e.g., Tr. 1576-78, 1608-10,

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27/ See letter dated September 27, 1982, James Keppler (NRC) to Dalwyn Davidson (CEI), enclosing Notice of Violation (September 24, 1982) and Investigation Report 50-440/81-19 (EIS); 50-441/81-19 (EIS) (Report No. 81-19) (Licensing Board Ex. 3).

1692-94, 1855 (Williams, Konklin). The primary differences between the inspector and the NRC witness panel related to tone and not substance. See, e.g., Tr. 1693-94, 1801-02 (the witness's testimony that the differences were of "nuance rather than substance," such as choosing between words like "specific" and "isolated"); Tr. 1800 (choosing between the characterizations "several" and "most"); Tr. 1801 (using terminology that would emphasize the completeness of the inspector's investigation). See Tr. 1799-1800 (Board).28/ There was no testimony suggesting that the inspector could in any way supplement the facts presented in the Staff's voluminous investigation report and during cross-examination. See Tr. 1716-17, 1752-53, 1814-15 (Board, Williams).

28/ Such subtle distinctions hardly constitute "a genuine scientific disagreement" of the type at issue in Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), ALAB-715, 17 N.R.C. 102 (1983), cited by Sunflower at page 6 of its brief. In that case, the Appeal Board agreed to subpoena a representative of an NRC staff office holding technical views on the efficiency and reliability of a key safety system which differed from those held by the NRC witnesses already testifying. The Appeal Board determined that there was a genuine scientific disagreement, and that the differing views were necessary to help resolve a central safety issue to be litigated in a reopened hearing.

The Licensing Board in the instant case heard no evidence suggesting the existence of "a genuine scientific disagreement" of the type that existed in Three Mile Island, ALAB-715. Nor had the inspector conducted a separate investigation, nor sponsored a separate report, as was the case with the subpoened witness in ALAB-715. Indeed, the staff's witnesses had supervised the inspector, had participated in the same investigation, and were thoroughly knowledgeable and competent to testify to the findings and conclusions of the investigation report, which one of the witnesses had co-signed with the inspector.

Nor is there any support in the record for Sunflower's unwarranted assertion that Mr. Williams' testimony was "self-serving" or otherwise unreliable. See Sunflower Brief at 9. Compare PID at 3 ("The staff witnesses impressed us by their candor and their concern with the safety of this plant."). In fact, the testimony of Mr. Williams and the other panel members was corroborated by the inspector, Mr. Naidu, in his June 29, 1983 memorandum to the Licensing Board, cited by Sunflower at page 9 of its brief. (Staff counsel distributed a copy of the memorandum to the service list by letter dated July 6, 1983.) Mr. Naidu's memorandum, which was filed in response to the Board's invitation at Tr. 1024, leaves no hint of any material inaccuracies or gaps in the staff's testimony. Mr. Naidu stated in the memorandum that his views with respect to the Staff's prefiled direct testimony "have been adequately expressed in the revisions to the written testimony enclosed with Mr. Keppler's memorandum of May 18, 1983 to Mr. Cunningham." (The Keppler memorandum is discussed at Tr. 1011-24, 1565-66, 1797-1819; Applicants' Reply at 20-21). Mr. Naidu further stated that he had reviewed the transcript of the Staff's testimony on cross-examination and "have only identified" one "clarification," which he then described in the memorandum.29/

29/ The clarification concerned his reason for suggesting the insertion of "significant" before "breakdown" at pp. 13 and 25

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Thus, the record indicates that the Staff's testimony was "relevant, material and reliable,"30/ and therefore admissible, for the purpose of determining whether Mr. Naidu had "direct personal knowledge of a material fact not known to the witnesses," under 10 C.F.R. § 2.720(h)(2)(i).31/

Finally, even if there was, as Sunflower suggests, a discretionary basis during the hearing for the Licensing Board to take testimony from Mr Naidu, which Applicants believe was not the case, there still would be no present basis to reopen the record for the purpose of taking Mr. Naidu's testimony, unless Sunflower could show that the exclusion of Mr. Naudi's

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of the Staff's prefiled testimony. See "Testimony of NRC Region III on the Quality Assurance Issues of Fact Contained in the Licensing Board's Order of December 22, 1982," dated May 2, 1983, following Tr. 1568 (Konklin et al. Testimony) at 13, 25. Originally, the Staff's written testimony had stated that the NRC noncompliances in Report No. 81-19 "do not constitute a breakdown of the contractor's QA Program." Id. at 13. Mr. Naidu suggested insertion of the word "significant" before "breakdown" in this passage, and in a similar passage at page 25 of the Staff's testimony. He stated that this was to conform with the statement in the Staff's cover letter to Report No. 81-19 containing the same language. In any case, at the hearing the Staff removed the reference to "breakdown" that was contained in its prefiled testimony, and substituted "loss of control." Id. at 13, 25; Tr. 1565-67 (Staff panel, Cutchin).

30/ See 10 C.F.R. § 2.743(c).

31/ Moreover, Sunflower correctly observes that hearsay is generally admissible in administrative proceedings, including NRC proceedings. See Sunflower Brief at 6 (and cases cited therein).

testimony "had a substantial effect on the outcome of the proceeding," to Sunflower's prejudice. Cf. Waterford, ALAB-732, supra, 17 N.R.C. at 1096. There has been no such showing. The Licensing Board's decision was based on facts placed before it by Staff's and Applicants' witnesses, and on documentary evidence sponsored by the witnesses (principally Report No. 81-19, which was signed by Mr. Naidu, Mr. Williams, and others). Sunflower offers not a shred of evidence, or even an offer of proof, suggesting that Mr. Naidu's testimony might affect the Licensing Board's Partial Initial Decision.

For these reasons, Sunflower has failed to prove either error in the Licensing Board's rulings or actual prejudice to their case. Thus, Exception No. 3 is deficient and should be denied.

D. Exception No. 4 (Licensing Board's Decision Not to Reopen the Record)

Sunflower's brief urges in a single sentence, with no support or citation to the record, that the Licensing Board's November 10, 1983 and December 2, 1983 determinations were "based upon an insufficient evidence [sic]," and that the QA/QC record should be reopened. Sunflower Brief at 10. Sunflower's brief of this exception fails to satisfy the requirements, and underlying purposes, of 10 C.F.R. § 2.762, for the reasons set forth in section II above. The two decisions referenced by

Sunflower cover a total of 77 pages, and rely on more than a thousand pages of documentary and testimonial evidence. From Sunflower's brief, Applicants cannot possibly guess the basis of Sunflower's appeal. A party should not be forced to speculate as to the arguments being advanced. Applicants therefore request dismissal of this exception for failure to brief.

E. Exception No. 5 (Interpretation of 10 C.F.R. Part 50, Appendix B, Criterion XVI)

Sunflower's brief urges the Appeal Board to interpret the requirement in 10 C.F.R. Part 50, Appendix B, Criterion XVI, that adverse conditions and nonconformances be "promptly identified and corrected," to mean that adverse conditions and nonconformances be identified "as quickly as humanly possible." See Sunflower Brief at 10-11. Sunflower's brief merely restates its proposed findings on the same issue. See Sunflower PFC at 5-6. The Licensing Board rejected Sunflower's position, and accepted Applicants' position that a reasonableness test should be applied to the interpretation and application of the Criterion XVI requirement. See PID at 4-5, 13-15; Applicants' PFC at 12-13; Applicants' Reply at 5-7. Sunflower's brief fails to discuss the Licensing Board's decision resolving the issue. Thus, for the reasons set forth in Section II, this exception should be deemed waived for failure to brief. In any case, the exception should be dismissed for the reasons set

forth in the Partial Initial Decision, in which Applicants concur.32/

F. Exception No. 6 (Timeliness of Corrective Action -- Audit Reports and Corrective Action Requests)

Sunflower's exception (though not its brief) alleges that corrective action in response to Audit Reports (ARs) and Corrective Action Requests (CARs) in the electrical area was not timely. See Sunflower Brief at 11. The Licensing Board rejected this argument, and accepted Applicant's position, that, inter alia, "[t]he uncontradicted evidence is that open ARs and CARs are not a current problem with respect to Comstock." See PID at 37-38, 41-44; Applicants' PFC at 40-41, 43-47; Applicants' Reply at 16-18. Sunflower's brief, instead of discussing the subject matter of its exception, restates that part of its proposed findings relating to another issue, the relationship between CEI and Comstock. Compare Sunflower Brief at 10-11 with Sunflower PFC at 6-7.33/ Sunflower fails to address

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32/ Sunflower's argument that its "as quickly as humanly possible" interpretation is justified by "a dollars-and-cents perspective," Sunflower Brief at 10, is misplaced. Consideration of costs is irrelevant.

33/ It appears that Sunflower inadvertently copied the wrong section of its proposed findings. Sunflower's proposed findings relating to "Corrective Action Responsiveness of Applicant," the subject of this exception, merely incorporated by reference OCRE's proposed findings. See Sunflower PFC at 7.

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the Partial Initial Decision.

Thus, the exception is not properly briefed, and should be dismissed for the reasons stated in Section II above. In any event, the positions argued in the exception, and in the brief, should be dismissed for the reasons set forth in the Partial Initial Decision, in which Applicants concur.

G. Exception No. 7 (CEI's Oversight of Comstock)

Again, Sunflower relies solely on its proposed findings in support of this exception. Compare Sunflower Brief at 12-13, with Sunflower PFC at 8-9. However, as with the previous exception, Sunflower appears to rely on the wrong portion of its proposed findings.34/ In any case, Sunflower's brief fails to address either the portion of the Partial Initial Decision dealing with the relationship between CEI and Comstock (see PID at 15-37), or the portion dealing with the seriousness of

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In any case, the Licensing Board also adopted Applicants' proposed findings, and rejected Sunflower's and OCRE's, on the subject briefed (but not excepted to) by Sunflower. See PID at 15-37; Applicants' PFC at 15-40; Applicants' Reply at 11-16 (relationship between CEI and Comstock)

34/ Sunflower's brief restates that portion of its proposed findings relating to the issue of the "Seriousness of Report 81-19." Sunflower used different arguments and record citations in proposed findings addressing the subject addressed in this exception, the relationship between Comstock and CEI. See Sunflower PFC at 6-7.

Report No. 81-19 (see PID at 44-52).35/

The Partial Initial Decision contains a thorough discussion of the Staff's 1981-82 electrical investigation and its results. PID at 44-52. The investigation was initiated in response to allegations of an Individual "A." The individual's allegations were not substantiated by the Staff's investigations.36/ However, the Staff expanded its review into detailed inspections of the electrical program, as part of their oversight of the plant. After 711 hours of inspection by six NRC inspectors, over a period of five months,37/ the Staff found 9 items of noncompliance38/ The findings involved mostly procedural deficiencies,39/ and were assigned low severity levels.40/ The Staff identified no "hardware" problems, and issued no civil penalty.41/ Experienced witnesses of Staff and

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35/ See Applicants' PFC at 47-56; Applicants' Reply at 18-31.

36/ Board Ex. 3, Report No. 81-19, at 6-29.

37/ Board Ex. 3, Report No. 81-19, at 2. See Konklin et al. Testimony at 12; PID at note 135.

38/ Board Ex. 3, Notice of Violation.

39/ Id. See Konklin et al. Testimony at 12-13; Applicants' Testimony of Murray R. Edelman and Gary R. Leidich on The Cleveland Electric Illuminating Company's Quality Assurance Program for Control of Safety-Related Contractors At Perry Nuclear Power Plant (Issue #3), dated March 2, 1983, following Tr. 1031 (Edelman/Leidich Testimony) at 30.

40/ Board Ex. 3, Notice of Violation; Testimony at 13; Tr. 1812-13 (Williams).

41/ See Tr. 1774, 1817-18 (Williams).

Applicants,42/ knowledgeable in national electrical standards and industry practice, and familiar with Perry's electrical program, testified that the problems identified in Report No. 81-19 were neither unusual nor serious.43/ Moreover, many of the problems identified during the Staff's 1981-82 investigation occurred during the start-up of a new phase of activity (pulling of power cables through duct banks).44/ They were not recurring problems. And the problems were recognized and addressed by Applicants on a timely basis45/ There were no indications of any unsafe conditions at the plant as a result of the procedural problems that occurred.46/ There was also persuasive evidence of Applicants' positive attitude and actions in response to the findings set forth in Report No. 81-19.47/

42/ For example, Mr. Leidich, one of Applicants' witnesses, is an experienced nuclear electrical engineer, serving as secretary on a national electrical code committee. Edelman/Leidich Testimony at 3-5 (and attached professional qualifications); Tr. 1544-51. Other witnesses were similarly well equipped to address nuclear electrical QA/QC issues at Perry and other plants. PID at 3, 11-12, 16, 19.

43/ See, e.g. Tr. 1354, 1544-51 (Leidich); Tr. 1632, 1647-56, (Williams); Tr. 1794 (Konklin and Williams); PID at 47-52.

44/ Tr. 1276, 1283 (Leidich)

45/ Tr. 1659-60 (Williams); Edelman/Leidich Testimony at 29, Tr. 1527-28, 1532 (Leidich); PID at 48-49.

46/ Konklin et al. Testimony at 27; PID at 47-52.

47/ See e.g., Edelman/Leidich Testimony at 30-32; Konklin et al. Testimony at 15-20, 23-24; Tr. 1587, 1672, 1769-71 (Williams); Tr. 1861-62 (Gildner); PID at 51-52.

Thus, the uncontradicted evidence demonstrated that the Staff's 1981-82 electrical investigation did not reveal problems with Applicants' control of Comstock, nor did the evidence reveal any unsafe conditions in the electrical area, after intensive reviews by Applicants and the Staff.

For the reasons noted herein and in Section II above, Sunflower's exception should be dismissed and its brief should be disregarded. In any case, the relevant portions of the Partial Initial Decision, which adopt Applicants' proposed findings and conclusions, should be affirmed.

H. Exception No. 8 (Restriction of Testimony to the Electrical Area)

Sunflower argues in its brief that Licensing Board rulings during the hearing, limiting cross-examination to the electrical area, constituted a "changeup at trial" involving "a new standard" which "flew in the face of at least two of the Licensing Board's specified fact issues" (citing the third and fourth issues of material fact, as listed supra pp. 5-6). See Sunflower Brief at 13. The only portions of the record cited in Sunflower's brief are "Tr. 1041, 1711, 1713, 1719, 1735, 1741."48/ There is no discussion of the relevance of any of

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48/ Tr. 1041 involved denied cross-examination concerning a QA/QC inspection report pertaining to suppression pool welding. Three of the examples (Tr. 1711, 1713, and 1719) involved argu-

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these citations with respect to Sunflower's exception.

Sunflower's brief in support of this exception fails to discuss any of the relevant background defining the scope of the issues for trial. This background is central to deciding Sunflower's exception. Thus, Sunflower has once again failed to satisfy its briefing obligation. See supra Section II.

Sunflower's assertions are entirely inconsistent with the facts, as set forth in Applicants' statement of the case, supra Section I. See also PID at 6-9. Sunflower was on notice, from the time Issue #3 was first admitted, that Sunflower would "not be permitted to launch a generalized attack on the Applicant's entire quality assurance program." LBP-81-35, supra, 14 N.R.C. at 687. Sunflower was well aware, at the time of the Licensing Board's December 22, 1982 partial summary disposition decision,

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ments by Mr. Lodge on the last day of the hearing, regarding motions to reopen the record to consider additional, unspecified electrical area matters, and other unspecified topics. Tr. 1741 likewise involved cross-examination on a document in the electrical area. The document discussed a QC inspector's allegation that he had been personally threatened, and his subsequent withdrawal of the charge. After investigation, the NRC concluded that he had not been threatened. The document was thus of no relevance. Tr. 1735 involved cross-examination of Staff witnesses concerning the Staff's inspections of non-safety related areas. Ms. Hiatt, the cross-examiner, was unable to suggest how Staff's lack of inspections in non-safety related areas was relevant to CEI's control of Comstock (or any other contractor). Thus, with the exception of the first example, none of the record relied upon is relevant to the exception or brief, which allege "a changeup at trial" which improperly limited cross-examination to the electrical area.

that Report No. 81-19, and the SALP Report sections pertaining to Comstock, were the sole bases for admitting the four remaining issues of material fact. See December 22, 1982 Memorandum and Order, discussed supra pp. 4-6. In its decision on Applicants' motion for reconsideration, the Licensing Board clarified the intent of the issues which the Licensing Board itself had framed, stating that "further level of detail," concerning individual instances of nonconformances of contractors other than Comstock, would not be admissible at trial unless the Licensing Board detected serious problems in the electrical area, or in CEI's general QA overview program. See LBP-83-3, discussed supra p. 6, 17 N.R.C. at 64-65.

Applicants and Staff interpreted these rulings in precisely the same manner, as evidenced by their prefiled direct testimony.49/ In their testimony, both Applicants' and Staff's witnesses discussed the principal elements of CEI's QA overview program (the Staff also discussed its general inspections of the plant), and then discussed how the program had been applied and implemented in the electrical area, with special emphasis on issues relating to Inspection Report No. 81-19. Pursuant to the Licensing Board's instructions, neither party's prefiled testimony discussed specific QA/QC deficiencies in areas

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49/ See Edelman/Leidich Testimony and Konklin et al. Testimony.

outside the electrical area, since both Applicants and the Staff considered such information to be beyond the scope of the issues of material fact which the Licensing Board had framed, admitted, and explained. See supra pp. 6-7 (discussing the May 9, 1983 conference call, in which Staff counsel recounted the limited scope of the issues of material fact admitted for trial).

Thus, Sunflower's assertions, that it was without prior notice of the limited scope of the issues of material fact admitted for trial, and that there was "a changeup at trial" which unfairly limited cross-examination, are unsupported by Sunflower's brief, and are wholly at odds with the facts. Similarly, Sunflower's assertions, at page 14 of its brief, that the Licensing Board refused to "admit evidence proffered against the parameters which the panel has itself set," and that Sunflower was "irreparably damaged," are unsupported by proper citations to the record.

For these reasons, the Licensing Board should disregard or reject Sunflower's exception.

I. Exception No. 9 (Timely Identification of Nonconforming Conditions)

Sunflower's brief, in one sentence, invites the Appeal Board "to weigh the evidence in the record, and as a result to require the QA/QC record to be reopened." Sunflower Brief at

14. Sunflower fails to identify "the evidence" supporting this exception, and requires Applicants and the Appeal Board to blindly search the record. Sunflower's one sentence plea, absent of any record citations, does not constitute a proper brief, for the reasons set forth in section II above. The exception should therefore be disregarded or dismissed.50/

J. Exception No. 10 (Seriousness of Report No. 81-19 Findings)

Sunflower urges in support of this exception, in a single sentence, that the Appeal Board search Report No. 81-19 for evidence sufficient to overturn the Partial Initial Decision. Sunflower Brief at 14. That task is neither the Appeal Board's obligation, nor Applicants'. For the reasons set forth in Section II above, the Appeal Board should disregard or dismiss this exception as unbriefed.51/

50/ The subject matter of this exception was thoroughly addressed by Applicants proposed findings, which were accepted by the Licensing Board. See PID at 38-40; Applicants' PFC at 40-43; Applicants' Reply at 16-18.

51/ The subject matter of this exception was thoroughly addressed in Applicants' proposed findings, which were accepted by the Licensing Board. See PID at 44-52; Applicants' PFC at 47-56; Applicants' Reply at 18-31, see also supra Section III(G).

K. Exception No. 11 (Weight of the Evidence)

The exception claims that the Partial Initial Decision "is against the manifest weight of the evidence, arbitrary and contrary to law." In support of this claim, Sunflower merely "incorporates by reference the entirety of its foregoing argument in this brief" and urges reversal of the Partial Initial Decision. Sunflower Brief at 14. Sunflower's exception and brief raise no new issues or arguments, and are devoid of any record references. The Appeal Board should dismiss this exception as unspecified and unbriefed, for the reasons set forth in Section II above.

L. Exception No. 12 (Rejection of Sunflower's Proposed Findings And Conclusions)

The exception claims that "[t]he Licensing Board erred in failing to adopt the proposed 'Partial Initial Decision' of Sunflower." In support of this claim, Sunflower asks the Appeal Board to review its proposed findings and to adopt them "in all respects to which exception herein has been taken." Sunflower Brief at 14. Thus, Sunflower's brief merely incorporates earlier arguments, and is devoid of details or citations to the record. For the reasons discussed in connection with the previous exception, and in Section II above, the Appeal Board should disregard or dismiss this final exception as unbriefed.

IV. Conclusion

For the reasons set forth above, Applicants submit that each of Sunflower's exceptions to the Licensing Board's Partial Initial Decision has either been waived for failure to brief, or is without merit. Accordingly, Applicants respectfully request that the Appeal Board deny Sunflower's exceptions and affirm the Licensing Board's Partial Initial Decision.

Respectfully submitted,

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Dated: April 25, 1984

April 25, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Brief in Opposition to Sunflower Alliance Inc.'s Appeal of Partial Initial Decision (Quality Assurance Contention)" were served by deposit in the United States Mail, First Class, postage pre-paid, this 25th day of April, 1984, to all those on the attached Service List.

Harry H. Glasspiegel

HARRY H. GLASSPIEGEL

DATED: April 25, 1984

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	)	

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