

ORIGINAL
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

in the matter of:

COMMONWEALTH EDISON COMPANY

(Byron Nuclear Power Station,
Units 1 & 2)

Docket No. 50-454 OL
50-455 OL

Location: Rockford, Illinois

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Date: Wednesday, May 30, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING BOARD PANEL

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 In the matter of: :
 : Docket Nos. 50-454 OL
 COMMONWEALTH EDISON COMPANY : 50-455 OL
 :
 (Byron Nuclear Power Station, :
 Units 1 and 2) :
 :
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Courtroom 270
Federal Building
211 South Court Street
Rockford, Illinois

Wednesday, May 30, 1984

Hearing in the above-entitled matter convened
at 2:00 p.m., pursuant to notice.

BEFORE:

JUDGE IVAN SMITH, ESQ.
Chairman, Atomic Safety & Licensing Board

JUDGE A. DIXON CALLIHAN,
Member, Atomic Safety & Licensing Board

1 APPEARANCES:

2 Appearing on behalf of the Applicant:

3 MICHAEL I. MILLER, ESQ.
4 BRUCE BECKER, ESQ.
5 ALAN BIELAWSKI, ESQ.
6 Isham, Lincoln & Beale
7 Three First National Plaza
8 Chicago, Illinois 60602

9 -and-

10 JOSEPH GALLO, ESQ.
11 Isham, Lincoln & Beale
12 1120 Connecticut Avenue NW, Suite 840
13 Washington, D.C. 20036

14 Appearing on behalf of the NRC Staff:

15 RICHARD RAWSON, ESQ.
16 STEPHEN LEWIS, ESQ.
17 Office of the Executive Legal Director
18 U.S. Nuclear Regulatory Commission
19 Washington, D.C. 20555

20 Appearing on behalf of the Intervenor:

21 JANE WHICHER, ESQ.
22 DIANE CHAVEZ
23 BETTY JOHNSON
24 Business and Professional People for
25 the Public Interest
109 N. Dearborn Street, Suite 1300
Chicago, Illinois 60602

P R O C E E D I N G S

1
2 JUDGE SMITH: All parties appear to be present
3 and it is the appointed time, so we will begin.

4 You have noted, I am sure, the absence of Judge
5 Cole. He will be a full participating Board member in this
6 reopened hearing, and he had hoped to be here today, but he
7 has a conflict in another hearing, the Limerick operating
8 license hearing, and he felt that he could not miss very
9 important testimony transpiring this week.

10 We have consulted at length with him about our
11 preliminary view of the scope of the remanded issues, and
12 he will participate on formulating the Board's position on
13 the final issues.

14 MS. WHICHER: Your Honor, if I might interrupt
15 for a moment, does that mean that you will not be ruling
16 from the bench today or tomorrow on the scope?

17 JUDGE SMITH: We will try to give as much guidance
18 as we can. However, we could not cover every conceivable
19 aspect, and we need advice from the parties, too. But we
20 have arranged to have prompt consultation with Judge Cole.
21 But it's going to be more like a -- perhaps more like a veto,
22 you know, things he might find objectionable or things that
23 perhaps we have overlooked he would want to add.

24 But we have a fairly good idea of his views
25 on what the scope of the -- but we will try to give as
much guidance this afternoon as we can.

1 I do have a report. It seems to be public
2 information, that the Commission has decided that financial
3 qualifications will not be heard in hearings before the
4 issuance of an operating license. That was informal
5 information from the General Counsel to the Boards, and
6 also was in one of the trade papers, so apparently that is
7 the case.

8 The order is in preparation. I know nothing more
9 about it except that is the conclusion, and the order has
10 not issued because there is at least one dissenting
11 Commissioner who has to prepare a decision.

12 MS. WHICHER: Judge Smith, I am sorry to keep
13 interrupting, but --

14 JUDGE SMITH: Please, if it is relevant to the
15 subject.

16 MS. WHICHER: I'm wondering. I had not heard
17 this. The last I heard was from Mr. Rawson, and it was
18 completely to the contrary.

19 JUDGE SMITH: Is that right?

20 MS. WHICHER: Yes. And I have not seen anything
21 in any trade papers, but then again I don't read them on a
22 regular basis, as I am sure you do. So I must admit it
23 seems to me to be a 180 degree reversal from what --

24 JUDGE SMITH: Yes.

25 MS. WHICHER: -- what I had understood the

1 Commission had in fact voted on. And while I realize that
2 such meetings are not citable as authority, Mr. Rawson in
3 fact read me the paragraph that he was -- this has taken us
4 completely by surprise, and I am wondering --

5 JUDGE SMITH: I am getting the impression Mr.
6 Rawson has more specific and therefore more reliable
7 information.

8 MR. RAWSON: Judge Smith, I'd be happy to try
9 to clarify the situation.

10 When I spoke with Ms. Whicher and Mr. Miller, as
11 well, it was approximately three weeks ago. At that time
12 it was, as I recall, shortly after the oral argument before
13 the Appeal Board and we in ELD were given to understand
14 from the Office of General Counsel that there was a draft
15 policy statement which the Commission had in fact voted on
16 and approved which, as Ms. Whicher points out, did take the
17 opposite position with respect to the effect of the
18 decision of the Court of Appeals.

19 We understood at the time also -- and I also
20 informed Intervenor and the Applicant of this -- that the
21 actual language of the policy statement was still being
22 worked out by the Commissioners and that it would be
23 available shortly.

24 Since that time, we have been in a state of --
25 in the dark, in essence, on the position being taken down

1 at the Commission, and I learned late yesterday from the
2 Office of General Counsel, Mr. Schlage, as your Honor has
3 indicated, that in fact the Commission has reversed its
4 earlier indication and has adopted the position which the
5 matter will not be litigated in pending cases.

6 I understand again that the actual language of
7 the policy statement, as you have just indicated, is still
8 being worked up, that there is a matter of a dissenting
9 Commissioner's opinion being prepared, and that that paper
10 will be issued, again, shortly.

11 So when I found out was late yesterday, and I
12 have not had a chance to convey that to the other parties.

13 JUDGE SMITH: All right. Thank you.

14 I note that Mr. Lewis, Steve Lewis, of the Office
15 of Executive Legal Director, has joined the proceeding, and
16 I understand will be with us for some time and that Mr.
17 Rawson will be leaving.

18 Whenever it is, it will be soon, and it seems
19 like the fact is the Commission has decided not to require
20 hearings.

21 We asked the participants who were doing the
22 emergency planning work to be prepared for a report this
23 afternoon and I see that they are present.

24 Who would make that report?

25 MR. BIELAWSKI: On behalf of the Applicant, your

1 Honor, I'd be more than happy to present my views and if
2 Ms. Chavez and Mr. Rawson would like to add to them, they
3 can do so.

4 The resolution process, as I think you have been
5 informed through copies of the correspondence to the
6 Intervenors, is ongoing. The company sent its view that
7 it has met five commitments about two or three weeks ago,
8 and is sending another letter today, in fact, with respect to
9 the school commitments, Commitments A through E, and it
10 expects to have completed its submissions with respect to all
11 of the commitments by June the 13th.

12 We have used the issuance of the supplement to
13 the Safety Evaluation Report by the Staff which was sent
14 to the Company on May the 23rd as the document which triggers
15 the company's responsibility to have demonstrated the
16 commitments have been met within 15 days of the issuance
17 of the Staff's statement endorsing basically FEMA's view
18 with respect to the status of emergency planning at Byron.

19 That is essentially it. If you'd like me to go
20 into any detail with respect to --

21 JUDGE SMITH: I don't believe it's necessary.

22 Ms. Chavez, do you have anything else to report?

23 MS. CHAVEZ: No. I think that pretty much sums it
24 up.

25 JUDGE SMITH: Could you just generally express

1 your summary view? Do you believe that the commitments
2 will be acceptable to the Intervenor?

3 MS. CHAVEZ: At this point in time, the commit-
4 ments that we have received, we feel that although there is
5 some dispute about them, that in the long run that it will
6 be resolved satisfactorily.

7 With respect to the upcoming commitments we really
8 can't say, because --

9 JUDGE SMITH: Certainly.

10 MS. CHAVEZ: The only thing we can say is it
11 looks like those are more likely to require more time.

12 JUDGE SMITH: Certainly.

13 MR. BIELAWSKI: Your Honor, if I may just add
14 one statement with respect to Ms. Chavez' remarks. We have
15 been meeting over the past six to eight months relatively
16 regularly with the Intervenor, to try to give them a sense
17 of how the company was going to be resolving the commitments,
18 so it is not as though they are totally in the dark with
19 respect to our approach on the commitments. It is simply
20 that they have not received the final letter which states
21 the manner in which the commitments will be resolved.

22 JUDGE SMITH: Is there any further preliminary
23 business?

24 MR. MILLER: Judge Smith, I have one preliminary
25 matter. In the first conference call following the issuance

1 of the Appeal Board's decision in this proceeding, I
2 informed the Board and the parties of the change in
3 Commonwealth Edison Company's estimated fuel load date
4 for Byron Unit 1 and promised that I would document it.

5 I would like to pass out to the Board and the
6 parties a communication or letter from Mr. Cordell Reed of
7 the Commonwealth Edison Company to Mr. Harold Denton, dated
8 May 21st, 1984 which discusses the change in fuel load date.

9 JUDGE SMITH: You will be serving this in the
10 case, or is this --

11 MR. MILLER: This is by way of information, sir.
12 If additional copies are required for any party, we will be
13 happy to provide them.

14 (Pause.)

15 MS. WHICHER: Judge Smith, I have one preliminary
16 matter.

17 JUDGE SMITH: Please.

18 MS. WHICHER: I received in my mail this morning
19 at my office a copy of a letter from Mr. Spessard, Director
20 of Division of Engineering of Region III, dated May 25th,
21 1984. I have made copies sufficient, I hope, to serve on
22 the Board and the parties, and ask that you consider this to
23 be our McGuire notification, because apparently neither
24 Edison nor the Staff consider it to be of sufficient
25 significance to be such notification.

1 Apparently there has been a 50.55(e) report
2 issued at Byron. The details of the report are not clear.
3 The first indication we received of this was from Mr.
4 Spessard's letter this morning. I did not have time to
5 prepare a McGuire notification letter nor service certificate.
6 I can do that when I get back to my office.

7 I must say I am shocked that the Intervenors
8 and the Board were not notified of the 50.55(e) report of
9 deficiency.

10 The letter accompanying Mr. Spessard's letter
11 from Mr. Farrar of Commonwealth Edison -- it's impossible
12 to tell from that letter the details of exactly what the
13 problem is. It appears to be in the electrical system, in
14 the splicing of electrical cables.

15 We don't know the contractor involved, we don't
16 know the nature of the problem, but I think that the
17 Applicant and the Staff owe this Board and Intervenors an
18 explanation as to why this has not been in the McGuire
19 document. The original notification was made to Mr. Hahns
20 on May 10th, 20 days ago.

21 JUDGE SMITH: Any other business, preliminary
22 business?

23 I propose a discussion or an agenda roughly in
24 the following sequence:

25 That we begin with a general discussion as to the

1 scope of the remand, followed by an issue-by-issue discussion,
2 and then followed by a discussion of the schedule for the
3 evidentiary hearing.

4 With that, then, we will call upon counsel for
5 Commonwealth Edison to give us their views as the general
6 scope of the remand.

7 MR. MILLER: Judge Smith, I want to start by
8 saying that Commonwealth Edison stands prepared to present
9 evidence on whatever issues the Board believes are necessary
10 or appropriate for it to consider in order to make a
11 determination as to the reasonable assurance finding
12 regarding construction of the Byron Station.

13 We suggested in our letter to the Board, dated
14 May 9th, 1984, denying the issues, as some of them were
15 quite specific, some more general, as can be seen by the
16 submission made by Intervenors. They do not purport to be
17 exhaustive in any way.

18 I regarded them simply as a way, if you will, of
19 stimulating everyone's thought processes on what the scope
20 of the hearing might be, and I want to say I did not intend
21 them to be limiting, nor did I believe them to be required
22 for your consideration. But they are simply matters which
23 we put forward based on our analysis of the initial decision
24 of this Board as matters that might be of interest to the
25 Board in the remand hearing.

1 It seems to me that under the Appeal Board's
2 decision, the Board has virtually carte blanche as to the
3 issues which it is going to consider.

4 JUDGE SMITH: That seems to be the case. I was
5 hoping, however, for some particular guidance as to what
6 you believe is the required scope of the remand. We can
7 take the authority given to us in Footnote 72, which I agree
8 is quite broad with respect to issues, particular issues, but
9 I would like to have the view of the parties as to what the
10 parties believe to be the intent of the Appeal Board --
11 well, let's see. It's on page 27, Footnote 62 on that page.
12 Let me read it so it's in the record now, and for the
13 public observers.

14 On page 27 of the remand order, the Appeal Board
15 stated:

16 "As matters now stand, not only is the
17 Applicant's final report on the reinspection program on
18 file, but in addition the Staff has concluded an appraisal
19 of the program and its results."

20 Footnote, which is not especially relevant.

21 Then the next sentence is:

22 "In the totality of circumstances, the appropriate
23 course is a further hearing, to permit a full exploration
24 of the significance of the program, in terms of whether
25 there is currently reasonable assurance the Byron facility

1 has been properly constructed."

2 The program referred to, in context, is the
3 reinspection program, I would think you all would agree.

4 This is followed by a footnote, Footnote 62,
5 which I will quote:

6 "To avoid any possible misunderstanding, we stress
7 that this conclusion rests entirely upon the particular
8 circumstances of this case, as discussed in the text. In
9 sum, it seems to us that the public interest would be ill
10 served were final judgment to be passed on the operating
11 license application without a full evidentiary consideration
12 of the reinspection program and its results."

13 Now, I would read from that that we have to
14 receive evidence not just on the three contractors which
15 were referred to as the minimum that the Appeal Board said
16 we must consider, but every contractor which was the subject
17 of the reinspection program. At least that is our feeling.

18 However, looking at the ALAB in its entirety,
19 you might draw another inference. I am not sure that it is
20 clear one way or the other from the entirety of that just
21 what our requirements are, what we are required to do. Not
22 what we think we should do, but what we are required to do
23 by the Appeal Board, and that is the language that is
24 troublesome to us.

25 MR. MILLER: Judge Smith, the final sentence in

1 that paragraph that begins on page 27 and continues over to
2 page 28 does seem to indicate that it is -- there is at
3 least a suggestion of a limitation to Hatfield and Hunter.

4 JUDGE SMITH: Okay, let's read that, too.

5 "Stated otherwise, the focus of the inquiry
6 should be upon whether, as formulated and executed, the
7 reinspection program has now provided the requisite
8 degree of confidence that the Hatfield and Hunter quality
9 assurance inspectors were competent, and could be presumed
10 to have uncovered any construction defects and possible
11 safety consequences."

12 I agree with you, if that sentence is intended
13 to be an alternative statement of the sentence before it,
14 which it purports to be, that would seem to limit it.

15 MS. WHICHER: Judge Smith, I don't know if you
16 wanted to make this more of a round table discussion or a
17 formal argument by the partics.

18 JUDGE SMITH: I would prefer to have it informal
19 and round table, unless it becomes necessary to be more
20 formal.

21 MS. WHICHER: Well, I have a comment at this
22 point. Mr. Miller -- I believe Mr. Miller signed this
23 letter, this letter of May 25th, concerning additional
24 information on the Systems Control Corporation situation,
25 and it appears to me -- and I just received the letter

1 recently -- that given the facts disclosed in this letter,
2 the Pittsburgh Testing Laboratories ought to be the subject
3 of the litigation in the remanded hearing.

4 I believe that PTL was one of the contractors
5 that was subject to the 82-0519 reinspection program.
6 It appears that they were not doing their job, from Mr.
7 Miller's letter of May 25th.

8 I think that given the facts disclosed so far
9 in the Systems Control and PTL's involvement with the
10 inspection of Systems Control, ought to give this Board
11 plenty of reason to extend, if in fact Mr. Miller's view
12 prevails in that only Hunter and Hatfield be litigated --
13 I think the facts disclosed in this letter ought to give
14 the Board reason to include PTL with Hunter and Hatfield.

15 JUDGE SMITH: Did you mean to omit Systems
16 Control?

17 MS. WHICHER: No, no, I think that is unconnected
18 with the reinspection. I am arguing now only about the
19 reinspection portion of the remanded proceeding. I assume
20 that Mr. Miller is also.

21 JUDGE SMITH: Do you go any farther in your
22 position?

23 MS. WHICHER: Of course, I agree with the
24 Board's original reading, that the reopened hearings ought
25 to include every contractor, and I do that particularly

1 with respect to whether this program has validly shown
2 what it intends or purports to show.

3 We have already received some documents through
4 discovery, and although our analysis of those documents
5 is not complete, and neither is Mr. Miller's production, we
6 believe that there are problems with the implementation of
7 the program with respect to contractors other than Hunter
8 and Hatfield.

9 We don't believe we should have to meet any
10 special sort of requirements in order to bring those problems
11 to the Board's attention. We would like this Board to hear
12 every piece of evidence about the reinspection program.
13 We are concerned with the safety of the entire plant, and
14 because Edison puts forth this reinspection program as
15 demonstrating the safety of the entire Byron Plant, we believe
16 that that is what this hearing ought to include, and it
17 ought not to be limited to Hunter and Hatfield.

18 MR. MILLER: Judge Smith --

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MS. WHICHER: My understanding and my position is that we don't yet have reasonable assurance on the record. And, I think the Appeal Board agrees with me and I think the Staff agrees with me. And, to the extent Edison has new evidence that gives us that reasonable assurance that evidence exists -- at least part of it -- exists in the reinspection program. And, I believe that entire program should be litigated.

The focus of the remanded hearing should be on reasonable assurance and whether that assurance exists now and what has happened since the close of the hearings in August to provide the assurance that has been missing.

JUDGE SMITH: Ms. Whicher, that is broader than your position on appeal, however, isn't it? I mean, on appeal hadn't you somewhat narrowed your position and agreed in some instances with the Board that even though there may be concerns about other contractors they were not really the subject of the hearing, the litigation, and as such were not really within our jurisdiction to decide.

MS. WHICHER: I don't believe it was a concession of no jurisdiction, Your Honor. In our appeal we supported the Board's decision with respect to Hunter and Hatfield but I don't believe that we took a position with respect to the Board's decision that -- and, correct me if I am wrong -- I don't believe I brought the briefs with me -- that Systems

jt-2 1 Control, or not Systems Control, the contractors that were
2 subject to 100 percent reinspection such as Reliable Sheet
3 Metal were beyond the jurisdiction of the Board or properly
4 delegable to the Staff.

5 JUDGE SMITH: No, no, we never felt that that was
6 the case either. There were some, however, which the
7 reinspection program simply was not litigated and was not
8 raised as an issue. Those are the contractors that I am
9 referring to. Reliable, certainly, we made full findings on
10 Reliable and we said that it was a matter that was delegable.
11 I am talking about those which did not rise to the level of
12 being a matter litigated by us.

13 MS. WHICHER: Well, Your Honor, you, as I am sure
14 you will recall, limited the reopened hearings to Hatfield
15 Electric Company. And, it was only evidence about Hunter
16 that came out inadvertently in the form of Mr. Stanish's
17 audit that resulted in findings with respect to the reopened
18 phase about any contractor other than Hatfield. So, there
19 was at a time when we moved to reopen the record, based on
20 Mr. Hughes' testimony, and Edison and the Staff resisted that
21 motion on the grounds that the reinspection program would
22 resolve any outstanding deficiencies.

23 The record was reopened and then at Edison's
24 request the reopening order was narrowed to Hatfield Electric
25 only. So, we have never taken the motion, and did not take

jt-3 1 it at the time we presented Mr. Hughes' testimony, that
2 Hatfield Electric was the only contractor with whom we had
3 concern.

4 JUDGE SMITH: Then you are saying that my memory
5 of your position before the Appeal Board is apparently faulty?

6 MS. WHICHER: Your Honor, I --

7 JUDGE SMITH: And, I think it is relevant what
8 your position was before the Appeal Board because that might
9 give some insight to what the Appeal Board was deciding too.

10 MR. MILLER: Judge Smith, I was just going to --

11 MS. WHICHER: Well, if I --

12 MR. MILLER: Are you finished? I don't have the
13 briefs either.

14 MS. WHICHER: I don't have the briefs here either.

15 JUDGE SMITH: All right.

16 MS. WHICHER: Maybe the Staff does.

17 MR. RAWSON: I do but it may take a while for the
18 parties to dig that out. I will be happy to lend them to Ms.
19 Whicher.

20 JUDGE SMITH: It might be a matter that we can
21 come back to.

22 MS. WHICHER: Fine. Perhaps we can take a break
23 this afternoon.

24 JUDGE SMITH: Yes. I wouldn't stop now.

25 MR. MILLER: Judge Smith, as I recall the scope of

jt-4 1 the reopened hearings, the aspects of the hearings that dealt
2 with the reinspection program and the recertification of
3 quality control inspectors really arose from the Licensing
4 Board's own consideration of the prior record before it and
5 the references to that program generally in the testimony of
6 Mr. Shewsky and a reference to it in the Staff's first
7 prefiled quality assurance testimony.

8 The intervenor's position, at least in moving for
9 the reopened hearings was limited to Mr. Hughes and his
10 alleged faulty training and certification by Hatfield Electric
11 Company. It is correct that at our request the scope of the
12 reopened hearings was limited altogether to Hatfield Electric.
13 But it was never the intervenor's that raised an issue
14 generally about the scope or the propriety of the
15 reinspection program. And, it seems to me that the Board has
16 made findings with respect to such contractors as Powers Azco
17 Pope, Johnson Controls, Blount Brothers and so on, the ones
18 that were not actually litigated in terms of the reason for
19 or the findings of the reinspection program as to those
20 contractors.

21 Once again, if the Board believes that the scope
22 of the hearing should be --

23 JUDGE SMITH: No.

24 MR. MILLER: No, no, no.

25 JUDGE SMITH: I want to separate that.

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MR. MILLER: Okay. I think that we are obviously prepared to present evidence. There is one other matter that I would just like to respond to quite briefly. Ms. Whicher suggests that PTL should be a subject matter of litigation on the reinspection program because of the Systems Control situation. I would like to point out that the activities of Pittsburgh Testing Laboratory with respect to Systems Control involved source inspections at the plant of Systems Control in Iron Mountain, Michigan. That is a very different function from Pittsburgh Testing Laboratory's activities on site which were the subject of the reinspection program.

I don't necessarily disagree that the question of what Pittsburgh Testing Laboratory did with respect to Systems Control products is not something that ought to be explored in the remanded proceedings, but I don't think that -- I think that it stands on its own as the Systems Control piece of the reopened hearing rather than somehow coming in on the reinspection program aspect.

MS. WHICHER: Well, Judge Smith, if I might respond to Mr. Miller's latter point, if PTL inspectors were doing inspections, no matter whether they were doing them at the plant or they were doing them in Iron Mountain, Michigan, and PTL was the subject of the reinspection program and the reinspection program purports to show that everything that PTL did was just fine, well, I think Mr. Miller's own letter

jt-6 1 shows that not everything PTL did may have been so fine. And,
2 for that reason alone, I think that the results and the conduct
3 of the reinspection program with respect to Pittsburgh
4 Laboratory is a perfectly appropriate item for adjudication
5 in this remanded proceeding.

6 If PTL's performance at Systems Control
7 Corporation is any indication of their performance at the
8 Byron site, I think that is something the Board ought to know
9 about.

10 JUDGE SMITH: Mr. Rawson.

11 MR. RAWSON: Judge Smith, it strikes me that the
12 starting point for an assessment of what the scope of the
13 proceeding ought to be in the remanded proceedings really has
14 to be the Board's -- this Board's -- initial decision. And,
15 it is my understanding of that decision that the flaws which
16 caused the Board to deny the license in the first instance
17 related to the performance or the lack of reasonable
18 assurance with respect to Hatfield and Hunter.

19 Now, that was certainly the focus of the Appeal
20 Board's decision and I think that the Appeal Board's
21 paragraph that you and Mr. Miller had discussed, in its
22 entirety, supports that view, that they are talking about the
23 reinspection program as it relates to Hunter and to Hatfield.

24 Having said that, I recognize that this is an
25 entire program which took into account inspectors, or rather

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1 contractors, other than Hunter and Hatfield. Judge Wilbur,
2 during the appellate argument, asked me directly the question
3 of what the scope would be with respect to the reinspection
4 program. And, it is my recollection that I answered as I
5 have here, that the focus ought to be Hunter and Hatfield
6 because those were the contractors as to which the specific
7 problems were identified which caused the Board to deny the
8 license.

9 However, I also told Judge Wilbur, as I recall,
10 that there may be specific pieces of evidence which the Board
11 or the intervenors will want to inquire into concerning the
12 performance of the reinspection program as it relates to one
13 of these other contractors for some flaw that that episode
14 identifies in the methodology of the reinspection program,
15 again, because it would be a flaw which casts doubt on the
16 ability of the Board to draw reasonable assurance with
17 respect to Hunter and Hatfield. But I think the starting
18 point is Hunter and Hatfield.

19 JUDGE SMITH: So, your point is if, for example,
20 the reinspection program should be demonstrated to be
21 unreliable with respect to, say, another contractor, that
22 would be an area in which reasonable inquiry would be made
23 because it might indicate an unreliability with respect to
24 Hunter or Hatfield.

25 MR. RAWSON: I guess it really depends on the

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1 reasons, Your Honor. If there is a methodological flaw in
2 the program which becomes evident through discussion of the
3 program as it relates to Johnson Controls, just as an
4 example, a reasonable inquiry might be raised as to whether
5 that same methodological flaw causes the Board to doubt the
6 results of the program with respect to Hunter and Hatfield.

7 However, I don't think that we ought to be
8 undertaking wholesale litigation of the reinspection program
9 as it relates to each and every one of these contractors.
10 As you pointed out earlier, the Board's findings with respect
11 to Johnson Controls and Powers Azco Pope were that they were
12 not significant issues in the proceeding. The Board did not
13 lack reasonable assurance on the record as to those
14 particular contractors.

15 With respect to Blount Brothers, the Board found
16 that the applicant had prevailed. I see no reason for going
17 back into those matters absent a sharply focused inquiry, for
18 example, line of cross-examination by the intervenor into a
19 methodology concern which can be connected to a flaw which
20 relates to Hunter and Hatfield. I think the use of cross-
21 examination plans, for example, will facilitate the Board in
22 being sure that that sort of narrow distinction can be
23 followed.

24 MS. WHICHER: Well, I think that Mr. Rawson has
25 essentially admitted my position. Using Mr. Rawson's own

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1 hypothetical, let's say that the intervenor's find a flaw
2 in the methodology that was used with respect to Johnson
3 Controls and that flaw cast doubt on whether Johnson Controls
4 or the program with respect to Johnson Controls can provide
5 reasonable assurance. Now, the fact that this Board's
6 decision, this Board's prior initial decision, was focused
7 on Hunter and Hatfield ought not to preclude it from making
8 a similar finding with respect to Johnson Controls in the
9 remanded proceeding.

10 And, until we have the latitude to take discovery
11 on other contractors and do cross-examination on other
12 contractors, we cannot answer that question as to whether it
13 provides reasonable assurance with respect to every contractor.
14 I don't intend to pursue contractors as to whom I am satisfied
15 the program was well carried out and the results are valid
16 and the program proves what it purports to prove.

17 However, I believe that the intervenors ought to
18 be given the chance to show -- if Mr. Rawson's hypothetical
19 is correct -- that there indeed is no reasonable assurance
20 as to that contractor, that the reinspection program does
21 not provide reasonable assurance as to contractors other than
22 Hunter and Hatfield.

23 MR. MILLER: Well, Judge Smith, I guess I am a
24 little bit puzzled now because I thought that the original
25 premise of Ms. Whicher's argument was that other contractors

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1 would have a bearing here because of some methodological
2 flaw which would indicate that the approach or results for
3 Hatfield and Hunter were somehow suspect. I think everyone,
4 all the parties, are agreed that the Board should consider
5 Hatfield and Hunter.

6 I think everyone has been exposed to the
7 reinspection program documents at this point in time to know
8 that it is a program that was applied consistently to each of
9 the site contractors. The methodology did not vary from
10 contractor to contractor. But, it seems to me, if
11 intervenors believe that to be the case, I agree with Mr.
12 Rawson that that would be a legitimate subject for cross-
13 examination with respect to the presentations that are made
14 on Hatfield and Hunter.

15 But to expand the scope of the hearing to
16 consider -- and, you know, if they are right, if the premise
17 of the cross-examination is right, perhaps it does call the
18 entire program into question. If that is so, obviously the
19 applicant has a problem that goes beyond Hatfield and Hunter.
20 But at the outset of this hearing to simply say, well, let's
21 litigate each contractor or each contractor that the
22 intervenors feel like litigating is an unnecessary and
23 unwarranted expansion of the scope of the proceeding.

24 JUDGE SMITH: I think that I had indicated language
25 or I had identified language which I thought raised a

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1 reasonable argument or would support a reasonable argument
2 that the Appeals Board intended that the entire reinspection
3 program be the subject of the reopened hearing.

4 Mr. Miller then pointed out the following
5 sentence which would seem to qualify that language. And, I
6 think there are other bases upon which we can conclude that
7 the Appeals Board intended only the three contractors which
8 they specifically named.

9 Going back to our initial decision, we did not
10 find one way or the other that there was reasonable assurance
11 or lack of reasonable assurance with respect to Johnson
12 Controls and Powers Azco Pope. We just simply said that on
13 the face of it there are circumstances there that could be as
14 bad or even perhaps even worse than Hatfield, but it was not
15 a part of our litigation.

16 We also pointed out in the introduction to the
17 initial decision that the status inspection program is a
18 very big one relative to this hearing and that they might
19 be inspecting for matters of even much more significant
20 safety or even greater safety significance than when it was
21 litigated. The Appeal Board did not disturb our reasoning
22 or the Appeal Board did not disturb our finding that Blount,
23 for example, that that was a litigation as to which the
24 intervenors lost and that with respect to the reinspection
25 program it did not rise to the level of an issue in our

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1 hearing. It did not disturb our finding with respect to
2 Johnson Controls and Powers Azco Pope. They did not say we
3 erred there, that we should have expanded the proceeding to
4 incorporate those.

5 They specifically focused on the two contractors
6 that we affirmatively found had failed to demonstrate a
7 correct and reasonable assurance, and they focused on what
8 they perceived to be an error in our decision with respect
9 to Systems Control. I think that the better reasoning, the
10 way we sit here, without a final Board determination on it,
11 but I think the better reasoning is that the Appeal Board
12 expected us or required us to look at the three named
13 contractors and the reinspection program with respect to them
14 and permits us to do anything else we feel is necessary to
15 appropriately resolve the quality assurance issue.

16 But as far as being a mandatory requirement of
17 the remand, I believe that we are only required to look at
18 Systems Control, Hatfield and Hunter. There is another
19 reason for that. Footnote 72, which gives the Board very
20 broad authority, and let me read that -- footnote 72 --
21 although the hearing must address those specific questions
22 alluded to in part II(c) of this opinion, the Licensing Board
23 is free to include any other question relative to the
24 reinspection program or otherwise as it deems relevant to the
25 ultimate issue of whether notwithstanding quality assurance

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1 deficiency reasonable assurance exists at the prior facilities
2 that have been properly constructed.

3 The reason I read that -- did I misstate it, Ms.
4 Whicher?

5 MS. WHICHER: (Nodding head side to side.)

6 JUDGE SMITH: The reason I am reading that now is
7 if the Appeal Board had intended part II(c) of their decision
8 to be as broad as you urge, why then would they feel it is
9 necessary to give the Board additional authority in footnote
10 72? All of these factors put together has led the Board up
11 till this afternoon, with the exception of that troublesome
12 language which I read at the beginning, to the preliminary
13 conclusion that we are required to look at the three named
14 contractors.

15 I might say that as obvious as it might seem now,
16 reading that paragraph beginning on page 27, the simple phrase
17 following the last sentence -- as stated otherwise -- simply
18 escaped me when I read it. I mean, to me, it seems to be
19 quite clear now that they are describing the program which
20 has to be the subject of a hearing as being the Hatfield and
21 Hunter quality assurance. Then they get to Systems Control
22 in a separate section.

23 That was a preliminary determination of the Board
24 from reading the Gremant (phonetic) decision. Our final
25 determination of course would depend upon the arguments

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1 presented today in consultation with Judge Cole. Is there
2 anything else on this subject?

3 MS. WHICHER: I take it, Judge Smith, that given
4 the fact that apparently we are going to be dividing up into
5 things that must be litigated under the remand and what this
6 Board desires to do in its discretion to litigate under the
7 remand that there would be no difference in the way those
8 would be litigated?

9 JUDGE SMITH: Not unless -- I am not aware of what
10 the difference would be. I don't see any difference in
11 burdens. I think that the parties, if we raise an issue
12 which we do not feel is a required issue, I think the parties
13 would be well justified to inquire very carefully of the
14 Board as to what kind of evidence we want on it, you know.
15 But the problem that the applicant has complained about I
16 think would be present there.

17 MS. WHICHER: Well, I --

18 JUDGE SMITH: Let's say, for example, you
19 convinced us that PTL shouldn't be a subject. I think that
20 the other parties should say okay, if you insist, all right.
21 Now, tell us what you want to know about PTL.

22 MR. RAWSON: Judge Smith, if I might --

23 JUDGE SMITH: Yes.

24 MR. RAWSON: -- one thought occurs to me in terms
25 of differences that might exist between what the Board must

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1 take up under the Appeal Board's remand and matters which
2 the Licensing Board may take up permissively. If the
3 intervenors, for example, came upon information which led
4 them to want to relitigate, for example, the question of the
5 reasonable assurance which the Board found with respect to
6 Blount Brothers, it seems to me that the Licensing Board
7 certainly can take up that sort of matter but it also seems
8 to me that it would be incumbent on the intervenors in such
9 a situation to meet the traditional tripartite test for
10 reopening the record.

11 It seems that the record on Blount is a closed
12 matter. And, if the intervenors seek to relitigate that, it
13 would be only after meeting a reopening standard. So, that
14 is one procedural area in which there might be a difference
15 in approach depending on whether the Board has been ordered
16 to take something up and may take something up.

17 MR. MILLER: Well, with all due respect to the
18 Staff's position, I disagree. I think that footnote 72 of
19 the Appeal Board's decision really encourages the Licensing
20 Board, to the extent it sees fit, to identify issues. And,
21 then it is the applicant's view that once those issues are
22 identified, while we appreciate the opportunity to be able
23 to inquire of the Licensing Board the precise scope of any
24 such issues so that we can shape our evidentiary presentation
25 to be certain that we meet the Board's interests, I don't

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1 believe that any party would then be required to make some
2 sort of showing about reopening the record.

3 JUDGE SMITH: As I understood Mr. Rawson was
4 saying that -- were you saying that -- well, do you agree?

5 MR. RAWSON: If there are areas, Judge Smith, in
6 which the Licensing Board believes it needs additional
7 information, I think that the parties all agree that footnote
8 72 gives the Board a blank check in that regard. What I am
9 suggesting is that that doesn't necessarily mean that we are
10 going to embark on a relitigation of everything that came
11 before. And, if in fact there is new information that the
12 intervenors but no one else on first glance think should be
13 a part of this litigation, there may be something akin to a
14 reopening test that ought to be satisfied under those
15 standards.

16 JUDGE SMITH: All right. You are suggesting then,
17 if I may state it my way, you are suggesting then that before
18 we exercise the authority of footnote 72 in a manner which
19 does not arise from us or is not sua sponte within the scope
20 of the remand by the Board, we should require the intervenors
21 to meet the three part test.

22 MR. RAWSON: I guess what I am suggesting as a
23 preliminary thought, Judge -- I was trying to think of a
24 situation in which there might be some difference between the
25 situation of mandatory versus permissive authority to take a

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1 matter up. Once we have agreed upon the issues here, and
2 the Board has indicated the matters that it wants to have
3 heard, if there comes to anyone's attention a matter which
4 is not within the scope of those issues, even though it may
5 be within the scope of this contention broadly, it may be
6 that something akin to the reopening test is appropriate.

7 But it is a preliminary thought and perhaps we
8 are best off just leaving it for a concrete situation.

9 JUDGE SMITH: Yes, I think that would be better.
10 All right.

11 MR. MILLER: Well, Judge Smith, I would just like
12 to add for the benefit of the Board really and the parties,
13 there are certain suggestions in the intervenors letter that
14 seem to me to go so far beyond any issue that was considered
15 by the Board previously that we don't think it is appropriate
16 for the Licensing Board to consider them. And, we will take
17 that position when the time comes. But if the Board is
18 persuaded otherwise, then I think that you will respond
19 appropriately with evidence on those subjects.

20 JUDGE SMITH: Okay. If that concludes our
21 arguments on the general scope, may we move now to an issue
22 by issue discussion beginning with the -- let's begin with
23 the applicant's proposals.

24 MS. WHICHER: Judge Smith, I would like to make
25 a statement about the applicant's proposals. In my view

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1 Edison is doing two things in its proposal. First, it is
2 asking this Board for an advisory opinion as to what evidence
3 it believes would mandate a finding of reasonable assurance.
4 I don't know of any precedent for advisory opinions in any
5 judiciary body including the NRC. I think it is entirely
6 inappropriate for Edison to make such a suggestion. They are
7 not doing it explicitly but implicitly, in my view, they are
8 asking for an advisory opinion, what will it take for us to
9 convince you to issue a license. I think that is
10 inappropriate.

11 Secondly, they are attempting to relitigate
12 certain findings that are adverse to them. To the extent
13 they litigated in March and April and in August, they had
14 every opportunity to put on a full evidentiary presentation.
15 They had an obligation to do that. We assume that they did
16 that. We believe that any evidence Edison puts on ought to
17 be limited to evidence that is truly new, that has truly come
18 about since the close of the hearing. For example, the
19 reinspection report.

20 To give an example of what I mean, Edison's number
21 eight, Commonwealth Edison Company's general control of its
22 site contractors. Well, that was clearly in issue during
23 the quality assurance phase of these hearings. And, if it
24 failed to put in evidence on that issue, it ought not be given
25 a third chance to do so. And, by asking this Board to allow

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1 it to do that, it is first asking this Board to advise it
2 will this suffice. And, secondly, to litigate for a third
3 time.

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1 JUDGE SMITH: Let's follow your second point.
2 I hear your first point, but let's come back.
3 We'll follow your second point. Let's say that there is no
4 new evidence. There simply isn't any.

5 MS. WHICHER: Are we talking about No. 8?

6 JUDGE SMITH: Well, you are talking about the
7 general scope of the Applicant's -- let's just use that as
8 our basis for our discussion.

9 MS. WHICHER: Fine.

10 JUDGE SMITH: Let's say that there is no new
11 evidence, that the only information that they have available
12 is information that existed before the close of the record.

13 MS. WHICHER: Right.

14 JUDGE SMITH: And let's say that they believe
15 if we had had the whole story, in their view, our result
16 would have been different. And let's say -- let's make it
17 even worse. Let's say that they didn't ask for
18 reconsideration, and here they sit.

19 Does that mean that if our decision was wrong,
20 that they are forever stuck with it?

21 MS. WHICHER: No, your Honor, it means the same
22 thing that I think if you allow Commonwealth Edison to
23 litigate something of this nature, you have to allow the
24 Intervenors to litigate the Johnson Control situation,
25 because we did not put evidence in on that the first and

1 second round of hearings. And Edison is asking now to put
2 in evidence that they did not put in before. They want to
3 litigate a new issue. If you allow them that courtesy, I
4 believe you ought to allow Intervenors the courtesy of
5 litigating the reinspection reports to all contractors.

6 It is the same principle. We chose not to put in
7 evidence on Johnson Control. We chose not to examine on
8 Powers, Osgood, Pope, or why the Hatfield --

9 JUDGE SMITH: Yes, but you are a voluntary
10 participant. The Licensee has no choice but to be a party
11 to the hearing.

12 MS. WHICHER: But we have full rights in this
13 hearing, your Honor.

14 JUDGE SMITH: Yes, you do.

15 MS. WHICHER: And to the extent that Edison is
16 allowed to introduce or to litigate issues that it could
17 have litigated in March and April and August, we believe
18 that the Intervenors ought to be allowed the same courtesy,
19 and I think the Johnson Control situation or the Reliable
20 Sheet Metal situation are perfect examples of that.

21 JUDGE SMITH: Of course, the question we'll put
22 to everyone is why didn't you litigate those people -- why
23 didn't you litigate those contractors.

24 MS. WHICHER: At that time we had no whistle-
25 blowers for those contractors, and our evidence was

1 essentially --

2 JUDGE SMITH: Nor did the Board.

3 MS. WHICHER: Our evidence was essentially limited
4 and focused on the evidence that we presented in our
5 direct case to the Board through our whistleblowers from
6 Blount and from Hatfield, from Hunter.

7 JUDGE SMITH: Well, what do you want to litigate
8 about those contractors, for example, now?

9 MS. WHICHER: What? Reliable Sheet Metal?

10 JUDGE SMITH: All right, take Reliable Sheet
11 Metal.

12 MS. WHICHER: Why no 100 percent reinspection
13 program was required.

14 JUDGE SMITH: You knew that at the close of the
15 record and you didn't seek to litigate it then.

16 MS. WHICHER: Edison knew that its general
17 oversight of contractors was an issue and it did not seek to
18 put in evidence then. I think the same principles ought to
19 apply to the Intervenors' case that do to Edison's case.
20 I don't think Edison ought to be allowed any special
21 privileges.

22 It is true we are here because we want to be here.
23 We have concerns about the safety of Pyron.

24 JUDGE SMITH: Is it that you are having second
25 thoughts now about your litigation that you had last May

1 and August?

2 MS. WHICHER: Your Honor, we believe we can put
3 on an even stronger case at this point than we could last
4 August.

5 JUDGE SMITH: Is that what you want to do?

6 MS. WHICHER: We will put on as full a case as
7 the Board allows us to.

8 JUDGE SMITH: What type of case? I mean you
9 can't -- that doesn't make any sense. You'll put on as
10 full a case as we allow you to do. You can't create facts
11 because we allow you to create facts. I mean because we
12 would allow you to.

13 MS. WHICHER: Your Honor let's back up for a
14 minute.

15 The focus of these quality assurance hearings
16 all along has been reasonable assurance, and to the extent
17 we can show lack of reasonable assurance in, for example,
18 Johnson Controls or Reliable Sheet Metal, Intervenor
19 believe we ought to have that opportunity. And even if
20 that evidence depends solely upon our cross examination or
21 our expert testimony concerning the reinspection report,
22 then we ought to be allowed to put that evidence in.

23 JUDGE SMITH: Mr. Miller, do you agree?

24 MR. MILLER: No, I don't.

25 JUDGE SMITH: I thought your silence was an

1 indication.

2 (Laughter.)

3 MR. MILLER: Well, let me just start off by
4 saying that we are not asking for an advisory opinion.
5 What we attempted to do in my letter to the Board and
6 the parties of May 9th is to set forth issues as to which
7 the Board expressed some concern in its initial decision,
8 and the issues ran the gamut from very specific questions
9 concerning the procedures under the reinspection program
10 to concerns expressed about the quality of the company's
11 evidentiary presentation on such matters as alleged fraudulent
12 conduct.

13 I think that we do stand -- that the Applicant
14 does stand in a different position in these hearings than
15 other hearings, and that is expressed in Appendix A to Part
16 2, which talks about the -- if you will, the last chance
17 that the Applicant gets to present evidence sustaining his
18 burden of proof. As everyone in this room knows, these
19 are very peculiar proceedings. While the Applicant is
20 somewhat in the nature of a defendant, in that it is
21 responding to contentions that are put forward by Intervenors,
22 it has the burden of proof, and very often that burden
23 involves proof of the negative, which is a very difficult
24 burden to discharge.

25 So it seems to me that just on the terms of

1 Appendix A, Part 2, that we do stand in a somewhat different
2 position.

3 JUDGE SMITH: Well, it's even the law in this
4 case, isn't it?

5 MR. MILLER: I was just about to say in this
6 case alone, in specific you made quite clear in your initial
7 decision that your findings would not be regarded as
8 collateral estoppel or res judicata, and you specifically
9 contemplated the possibility that remanded hearings might
10 take place.

11 Really, Judge Smith, at the risk of repeating
12 myself, I have different views about each of the issues
13 that are identified in my letter, but I put them forward
14 not to say please let us relitigate that issue, but if the
15 Board believes that further evidence with respect to any one
16 of these issues will be of use to it in making a determina-
17 tion as to whether or not reasonable assurance exists, it
18 seems to me that the Board is free, under the expressed
19 reservation in your own initial decision and in Footnote 72
20 of the Appeal Board decision, to call for additional
21 evidence.

22 These are not trials in traffic court, where
23 you put on your witnesses, the judge decides, and if you
24 think about something as you walk out of the courtroom,
25 that's tough luck.

1 JUDGE SMITH: All right. As to her first point,
2 though, there is no purpose in belaboring it any more. You
3 are not asking for an advisory opinion. You have perceived
4 some problems that the Board had, and you are trying -- and
5 you understand that we could give you all the guidance you
6 seek today and it still could be possible we would find
7 the record inadequate.

8 MR. MILLER: That is understood. That's the
9 essence of the overall litigation process. But we are, I
10 think, entitled, generally and specifically in this case,
11 to guidance from the Board as to matters as to which the
12 parties ought to address themselves in the reopened hearings,
13 and our list and Ms. Whicher's list were designed to
14 stimulate everybody's thinking.

15 If the Board tells us that they do not wish to
16 hear anything further on one or all of the issues we
17 suggested, obviously we will abide by that.

18 MS. WHICHER: Judge Smith, if I might just sum
19 up our position:

20 We are concerned with the safety of the Byron
21 Plant. Our concern does not end with Hunter and Hatfield.
22 We believe that this Board ought not to think of this proceed-
23 ing in terms of limiting evidence, but I think that it must
24 give some consideration to the fact that Edison has come
25 before it twice trying to prove that reasonable assurance.

1 JUDGE SMITH: Well, Ms. Whicher, if this Board
2 were to sit in full continuous session for the foreseeable
3 years, the three of us would never arrive at a decision
4 to the effect that reasonable assurance has been
5 presented that the Byron Plant can be operated safely.
6 Because there is so much about the inspection of that plant
7 that is beyond the purview of this Board, and beyond our
8 abilities to hear from the point of view of time, technical
9 competence, and everything else. We would look at the
10 issues, the issues litigated, the issues either raised by
11 you or those that we may select. But we cannot be the
12 substitute of a very large inspection staff, and I am
13 making this point now -- I think you understand it, but I
14 also think that the public in this area should understand,
15 too. And we said in our initial decision that we do not
16 make the final determination, nor can we make the final
17 determination the Byron Plant is safe to operate. That is
18 beyond the scope of our jurisdiction, unless it's raised
19 in all of the issues, and it is beyond any human abilities
20 that two or three people can bring to it. It's a large
21 operation, as you know.

22 Now, would you address that? Do you disagree
23 with what we do here? And for that matter, is Jane Whicher
24 competent of making that judgment?

25 MS. WHICHER: Your Honor, I am here to put Edison

1 to its proof. I am not here to make judgments about the
2 safety or not of the Byron Plant. I am here on behalf of
3 my clients who are concerned about the safety and who want
4 to put Edison to its proof that Byron is a safe plant, and
5 Edison has not been able to make that proof thus far. I
6 think the record is clear, and we ask this Board to hear
7 more evidence with respect to every contractor that was
8 subject to the reinspection program, in order to make that
9 finding a reasonable assurance.

10 We are not asking that this Board find that
11 Byron is 100 percent safe. We don't think that kind of
12 finding can ever be made about anything. But reasonable
13 assurance is where we ought to focus our energies. And to
14 the extent that, for example, Johnson -- the reinspection
15 program with respect to Johnson Controls cast a cloud over
16 the reasonable assurance of Johnson Controls' work, we
17 believe the Board ought to hear evidence on that. We
18 believe that is the Board's duty.

19 But to the extent Edison wants to put in general
20 evidence on its general control of site contractors, it's
21 had its chance to do that twice.

22 JUDGE SMITH: All right. Now let's wait until we
23 come to that issue.

24 In the first place, in your first point, you've
25 prevailed. They are not seeking an advisory opinion of what

1 it takes to get the license wrested from our control, so
2 that part is done.

3 Now let's take the relitigation issue. I see
4 no reason, no logical reason, why we would be required to
5 ignore evidence or facts or information that existed
6 prior to the close of the record in August if it is relevant
7 to the issues identified on remand.

8 I mean you are asking for an unreal circumstance.

9 MS. WHICHER: No, your Honor, we are asking for
10 proof through this reinspection program of reasonable
11 assurance of Byron's safety. And I think that to the extent
12 this Board allows Edison to introduce evidence that existed
13 at the close of the record that it did not introduce then,
14 it ought to at least give this Board and the parties and
15 the Commission some explanation why it did not do that.

16 As this Board said, it was nearly in default
17 in its evidentiary presentation in August. I think it owes
18 the Board and the parties an explanation.

19 JUDGE SMITH: That, in our view, was in a very
20 narrow area we felt they were in default. Now our purpose
21 now is not to belabor that or belabor the initial decision
22 at all, but our purpose now is to determine which issues
23 have to be litigated and when that determination is made,
24 I see no reason of having an artificial cut-off time, nor
25 do I see necessarily a logical connection between your

1 asserted right to relitigate whatever you choose with the
2 need that the utility has to present a full record on those
3 issues that will be heard here. I mean, they will be
4 required, whether the information is old or new, they will
5 be required to give a full presentation. The Appeal Board
6 said so. We would insist upon it, anyway. But the language
7 I quoted earlier is clear about that, that they want a full
8 evidentiary presentation on the reinspection program, at
9 least with respect to Hunter and Hatfield. If it's old
10 information or new information, it must be full and complete,
11 and there is no logical reason.

12 MS. WHICHER: I agree with that. I agree with
13 that. My problem, your Honor, comes with suggestions such
14 as No. 8, where there appears to be no new evidence.

15 JUDGE SMITH: Well, let's wait until we come to
16 No. 8.

17 MS. WHICHER: Now with --

18 JUDGE SMITH: No. 8 is very broad, too, I agree.

19 MS. WHICHER: Your Honor has made a point that
20 he believes that there ought to be no artificial cut-off
21 time with respect to the Applicant but apparently from what
22 I understand, you don't agree that that ought to be the case
23 with respect to Intervenors.

24 JUDGE SMITH: There is certain law as to what
25 is required to reopen an evidentiary record. Now the Appeal

1 Board has determined that in this instance it is our
2 responsibility to hold the record open and that we erred in
3 failing to do it, so the Applicant does not have to demon-
4 strate -- nor am I convinced that the same test would even
5 apply, but that's a different matter -- but the Applicant
6 does not have to demonstrate that the three tests for
7 reopening an evidentiary record are met. It is open.

8 MS. WHICHER: I agree.

9 JUDGE SMITH: And they have to come out with a
10 full presentation on those issues.

11 MS. WHICHER: What I am unclear on, and perhaps
12 it is a misunderstanding on my part and not a disagreement,
13 concerns the artificial cut-off factor that your Honor
14 mentioned.

15 Now it seems to me that if, for example, --
16 again I return to No. 8 --

17 JUDGE SMITH: Well, my sense of neatness likes
18 1 through 7 to be considered first.

19 (Laughter.)

20 MS. WHICHER: Maybe I can make the point in a
21 more abstract way.

22 We believe that to the extent Edison is allowed
23 to put on evidence that existed at the time the record was
24 closed, that it chose not to put on --

25 JUDGE SMITH: All right.

1 MS. WHICHER: -- Intervenors must also be allowed
2 to put on evidence that meets that same standard. It can
3 be in existence --

4 JUDGE SMITH: Unrelated evidence?

5 MS. WHICHER: Unrelated to what?

6 JUDGE SMITH: Let us say that the Applicant
7 failed to put on evidence of apples. As a matter of
8 judgment it did not believe that it was necessary to
9 present apples, and now they believe that to respond to the
10 Appeal Board order and the scope of the remand as we define
11 it, that apples are relevant. You indeed, then, would put
12 on bananas?

13 MS. WHICHER: If we believed that putting on
14 bananas as well as apples are required. If evidence as to
15 apples and bananas -- I have always done it apples and
16 oranges -- are both required for finding of reasonable
17 assurance, then, yes, we believe that apples, bananas and
18 oranges ought to be heard.

19 JUDGE SMITH: Yes, I understand your position.

20 Mr. Rawson.

21 MR. RAWSON: Judge Smith, I think our position
22 on this issue -- and I guess we will get back to it when we
23 get up to No. 8 again -- is set out in the letter which I
24 filed with the Board on May 23rd, commenting on the list of
25 possible issues which the Applicant had tossed out for

1 consideration.

2 I think the focus is on what the Licensing Board
3 believes it needs in order to make a reasoned decision
4 on the full record on the issues before it. And if the
5 Board feels that there is an inadequate record, that it
6 needs to have the record supplemented or added to with
7 respect to an area such as general oversight of contractors,
8 then the parties would be required to address that.

9 But I think that the focus of the remand is
10 the reinspection program and the fact that the reinspection
11 program is what I think the Appeal Board is contemplating
12 at this point will provide whatever may have been missing
13 before. It is the focus of the investigation at this point.

14 MS. WHICHER: To that extent, I must say I agree
15 with Mr. Rawson that the focus of this remanded proceeding
16 ought to be on whether this report provides the assurance
17 that has been lacking. I think that is the overall focus
18 of this hearing, this remanded proceeding.

19 MR. RAWSON: The first part of my point, however,
20 was that if the Board finds that some aspect of the
21 existing record requires explanation or supplementation
22 in the Board's view, then the Board ought to make that known
23 and the parties have to address it.

24 JUDGE SMITH: Well, may we begin, then, with the
25 numbered issues presented by the Applicant?

1 Number one question, I would call it, rather
2 than an issue, you suggest that the Board might have is
3 the Staff's acceptance of the reinspection program. The
4 Intervenors have taken a position that to the extent
5 Edison wishes to relitigate the Staff's final views of
6 the reinspection program and how and why the views changed
7 in the course of the program, we believe this to be
8 appropriate as a part of litigating a reinspection program
9 generally.

10 The Staff's initial acceptance or nonacceptance
11 has already been ruled on by the Board and essentially need
12 not be relitigated.

13 Well, I think that that tends to be a quibble.
14 I don't think there is going to be any difficulty in
15 arriving at a consensus on this being an appropriate issue.
16 The Board does have some concerns that we expressed in our
17 initial decision about the reinspection program and in this
18 instance I think this would be a good time to go over them
19 and permit you to talk about them and ask for further
20 guidance.

21 The one that was the most noticeable, I believe
22 the one that you have complained the most about, was the
23 adequacy of the sample, and indeed I believe that -- the
24 Board believes there should be evidence as to why the Staff
25 and the -- I think we should, under No. 1, where you have

1 Staff acceptance, this would be a good caption to look at
2 the Board's concerns about the reinspection program, too.

3 So I believe that both the Staff and the
4 Applicant should present evidence as to why they believe
5 that the sample is adequate.

6 I am not suggesting that we believe or thought
7 that the sample was inadequate. We are speaking here
8 largely in a statistical sense. What is there about one
9 out of five, for example? That happened to be hit upon.
10 But anything else that might suggest the inadequacy of
11 the sample would be appropriate.

12 But we were commenting in the initial decision
13 as to what we view as to a void of evidence as to inadequacy
14 of the statistical -- I mean -- I'm running in a circle.
15 My difficult is a sample is by definition, as I understand
16 it, a selection of statistically sufficient specimens to
17 reflect the whole.

18 MR. MILLER: But, Judge Smith, I think perhaps
19 if I might just suggest a possible distinction. Obviously
20 we looked at less than all of the inspectors and less than
21 all of the inspections of the inspectors that we looked at.
22 If I understand the Board's inquiry, it is whether the
23 sample that we selected was based on a rigorous application
24 of statistical methodology, or whether there were other
25 factors that led to the sample selection that actually took

1 place. Is that --

2 JUDGE SMITH: Well, I guess it's not exactly
3 that. Looking at your sample, it seems to be logical, one
4 out of five of the inspectors, chronologically, in the date
5 that they're hired, or certification. That seems logical.
6 The first months of their work, that's when there's more
7 likely to be inexperience. That seems logical.

8 Normally when I have heard about samples, one out
9 of five would be a lot, but it depends upon the universe,
10 I guess, whether one out of five is a lot.

11 MR. MILLER: I think that's what the problems
12 are that we tend to address in our evidentiary presentation,
13 is that statistics tend to speak in terms of confidence at
14 a certain reliability level, 95 percent confidence, or 95
15 percent reliability level, or 99 percent reliability level.
16 And while those statistics have been accumulated in the
17 reinspection report, I think it is fair to say there is a
18 large dash of judgment -- judgment in the first instance
19 by Commonwealth Edison Company as to how extensive an
20 investigation was required, and later supplemented by the
21 Staff's evaluation of Commonwealth Edison's judgment in
22 deciding the sample size. And we are never going to be
23 able to demonstrate, I don't think, that if you talk about
24 the science of statistics, with its requirements of
25 homogenous samples -- homogenous populations, rather, that

1 we need a statistically rigorous test.

2 But we would be prepared to discuss at length
3 what it was that led us to determine the sample that we did
4 select gives us confidence about the population as a whole
5 which is, after all, as you pointed out, the essence of a
6 sample selection.

7 But I don't want to misrepresent to the Board
8 or the parties that somehow we are going to be able to
9 rigorously apply statistical methodology and satisfy what a
10 statistician applying pure statistics might believe was
11 required in sample selection.

12 MS. WHICHER: Well, if I understand what the
13 Board's proper role is here, as I see it, it would be not
14 to answer Mr. Miller's question, but merely to indicate to
15 Mr. Miller that it wishes to be convinced that the sample
16 that was chosen was a representative sample, and not to
17 tell Mr. Miller whether it considers that certain types of
18 statistical evidence is required or is not required.
19 But that is a choice for Commonwealth Edison. And the
20 more detail Mr. Miller wants, the more and more this is
21 looking like an advisory opinion.

22 JUDGE SMITH: I didn't hear any remarks from
23 Mr. Miller which led to that view in my mind, nor in my
24 discussion. I think he simply has a right to know what our
25 reaction to it was.

1 The basic problem was that there was nothing
2 in the direct testimony which addressed it. It is suggested
3 that we prevented you from cross examining on the point of
4 sample adequacy. A reading of the transcript might very
5 well suggest that. That, however, was a communication
6 problem.

7 What my remark at the time -- which I recall
8 was somewhat irritable -- was, you were, I thought,
9 belaboring the obvious, and a sample is not 100 percent, and
10 I thought that you were quarreling. I see that you
11 perceived it to be otherwise, however.

12 Be that as it may, we don't know from the record
13 as it exists how it was determined, if it was, that the
14 sample was reliable, and we are not suggesting what has to
15 be shown. We don't know.

16 MS. WHICHER: As long as the record is clear here
17 today that this Board is not in any sense suggesting to
18 Commonwealth Edison what is sufficient, what it considers
19 to be a sufficient sample or how it might go about demon-
20 strating that.

21 JUDGE SMITH: You haven't heard us say that,
22 either. But I also think it is fair for them to know that
23 we did not find the sample to be inadequate.

24 MS. WHICHER: No, I agree with that, and that
25 is helpful for Intervenors as well.

1 JUDGE SMITH: Mr. Rawson?

2 MR. RAWSON: I don't have anything further to
3 add, Judge. I think this is one of the issues specifically
4 focused on by the Appeal Board and clearly something we
5 ought to take up.

6 (Board conferring.)

7 JUDGE SMITH: Also, if it turns out that we
8 simply did not understand the evidentiary record as it
9 existed, and you can point that out to us -- don't even
10 do it gently, just say, "Well, you know, dummies, you don't
11 understand what we were telling you."

12 I recommend that you don't put it exactly that
13 way.

14 (Laughter.)

15 The second item I had under the reinspection
16 program is, what was the basis, if any, of determining that
17 the 95 percent and 90 percent levels were adequate levels;
18 and what is the basis -- conversely, what is the basis for
19 concluding that the 5 and 10 percent do not present a
20 problem?

21 I am referring here to the passed rates for
22 subjective and objective attributes in welding inspections,
23 particularly welding was in our mind.

24 Any questions on that point?

25 At the time of the close of the record, there was

1 still an open matter as to whether the Staff had worked
2 out with the Applicant a definition of what is a subjective
3 attribute, and whether indeed a subjective attribute was one
4 that didn't carry with it safety significance. That, we
5 believe, is a matter of update, but we want to know how that
6 came out.

7 MR. MILLER: Excuse me, Judge Smith, at that
8 point I'm afraid I am a little puzzled as to your comment
9 about safety significance.

10 MS. WHICHER: I also didn't understand it.

11 JUDGE SMITH: Well, all right. There was --
12 there were two closely related points, and you may recognize
13 it as one point, and I believe it was in the testimony of
14 Mr. Forney who was explaining that although Region III
15 had accepted the basic premise of the reinspection program,
16 that there were still -- it was until the reinspection
17 program was completed that they came to the final determination,
18 and it wasn't simply a matter of a statistical result, but
19 there was still an open item as to what was and what was not
20 a subjective item and there still, I believe, was somewhat
21 of a difference of opinion as to whether a subjective item
22 was one that was without safety significance.

23 Is there a difference in those ideas, or is there
24 not?

25 MR. MILLER: Well, let me see if I can clarify it,

1 and I think I am getting the thrust of the Board's
2 inquiry.

3 As I recall the cross examination of Mr. Forney
4 on this subject, there was some discussion of various
5 visual weld attributes, as to whether some of them were
6 cosmetic only, and others of which -- such as undercut and
7 overlap -- had safety significance. That was discussed, and
8 I think it was addressed in the reinspection program.

9 He also discussed the question of whether
10 certain visual weld attributes were properly characterized
11 as objective or subjective attributes. Weld length, for
12 example. That was an open matter, and one that was under
13 discussion, and something that is addressed in the
14 reinspection program. We would be prepared to do that, as
15 well.

16 JUDGE SMITH: Ms. Whicher?

17 MS. WHICHER: No, my understanding was that
18 everything that the reinspection program looked at was
19 of potential safety significance; otherwise, it would not
20 have been looked at in the first place.

21 MR. MILLER: Well, that simply is not the case,
22 but that is something that is going to be addressed in our
23 evidentiary presentation.

24 JUDGE SMITH: That was the issue.

25 Anything else on item No. 1?

1 (No response.)

2 Item No. 2 is to quote, the basis for
3 determination of inaccessible and nonrecreatable inspection
4 attributes in the reinspection program. Intervenors and
5 Staff both agree that that is an appropriate issue and, of
6 course, the Board does.

7 The Board has two questions, subquestions, under
8 that issue:

9 One is, is there a special case for inspection
10 methodology, or inspection theory present where workers
11 and the inspectors know their respective work and inspection
12 will be covered up and not recreated -- recreatable -- I
13 mean not accessible or recreatable?

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1 Is there a special industrial concern for that
2 circumstance? For example, let's say that you have a welder
3 who is welding some matter, some reinforcement materials,
4 and he knows that the following day there will be concrete
5 put over it, and the inspector knows that too, is that
6 circumstance one that the science of inspection takes into
7 account when they address the significance of inaccessible
8 and unrecratable inspections?

9 (Brief pause.)

10 I think the record would be well served by
11 demonstrating whatever the basis there may be for believing
12 that there is no problem or the problem is not likely to be
13 a significant one, inaccessible and unrecratable attributes.
14 Although I believe that we are not faulting the record as it
15 is now, I think that the invited inference is that it is a
16 statistical matter.

17 However, I think there should be a full showing
18 of whatever evidence is available on that point. All right.
19 Any comments?

20 MS. WHICHER: Your Honor, I had understood you,
21 when you began your discussion of this point, that the Board
22 had two questions on the point of acceptable and non-
23 creatable.

24 JUDGE SMITH: Yes.

25 MS. WHICHER: And, I am not sure that I have the

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1 second point.

2 JUDGE SMITH: Well, the first point --

3 MS. WHICHER: The first point, as I understand it,
4 is whether there is a special concern when an inspector knows
5 that, or a worker and then subsequently an inspector, knows
6 that his or her work the next day will be covered over by
7 concrete, for example, is there some kind of industrial
8 concern?

9 JUDGE SMITH: Yes.

10 MS. WHICHER: Okay. Have you gotten to the second
11 point?

12 JUDGE SMITH: Yes.

13 MS. WHICHER: Okay.

14 JUDGE SMITH: The second point --

15 MS. WHICHER: The second point I missed. I'm
16 sorry.

17 JUDGE SMITH: Yes. Separate from that is there
18 any basis other than the inference to be drawn from sampling
19 that there is no -- or has any judgment been made other than
20 the inference to be drawn from sampling that there is no
21 problem, safety problems, in inaccessible and unrecratable
22 inspection attributes. That is the second.

23 MS. WHICHER: Yes, thank you. I understand now.

24 JUDGE SMITH: All right. Now, of course, as we
25 go over these we welcome explanations, questions, whatever

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1 the parties wish.

2 MR. MILLER: Judge Smith, one point of
3 clarification that goes to your discussion of point number
4 one of my letter as well. It may not fit exactly but I
5 assume until the Board rules otherwise that a limitation of
6 Hatfield and Hunter is what is contemplated in our responses
7 or our evidentiary presentation on these points as well?

8 JUDGE SMITH: Until we rule otherwise.

9 MR. MILLER: All right.

10 MS. WHICHER: Judge Smith, in what context do you
11 foresee such a ruling?

12 JUDGE SMITH: Well, I would like to wait until
13 this session is over. Maybe something will occur to us. I
14 will also consider the possibility of making a ruling and
15 referring. I don't know.

16 MS. WHICHER: All right. It is a matter that I
17 would like to give some thought to and see whether it is a
18 matter that we believe we may want to submit some evidence to
19 the Board on in the form of evidence in support of a motion
20 to expand the litigation of the reinspection program beyond
21 Hatfield and Hunter. I would like to give that some
22 consideration and review some evidence that I have in my
23 office.

24 JUDGE SMITH: All right.

25 MR. MILLER: Well, Judge Smith, excuse me. It

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1 seems to me that if there is a ruling that limits the scope
2 of the reopened hearing to Hatfield and Hunter that -- I
3 don't know whether the motion would be classified as a motion
4 to add a new contention or to reopen the evidentiary record,
5 but it would be something apart from the process that we are
6 engaged in this afternoon.

7 JUDGE SMITH: Well, perhaps not, but in the
8 meantime I would like to proceed on some type of
9 recognizable organization. We can't discuss every aspect
10 with respect to every issue. For now we will take up what
11 we believe to be the mandated issues. And, within those
12 mandated issues, what are the sub issues. Then we will come
13 to your day. We haven't come to that yet.

14 MS. WHICHER: All right. Okay.

15 MR. MILLER: All right.

16 MS. WHICHER: I had thought we had come to it and
17 passed it.

18 JUDGE SMITH: No, it began with the utility. For
19 your -- well, we will come to yours.

20 (Brief pause.)

21 All right. I invited any comments. Again, I don't
22 wish to suggest that by asking these questions, particularly
23 this last question, do we believe that the inference to be
24 drawn from sampling is necessarily inadequate, but it is just
25 that that is one area where there should be a full evidentiary

jt-4-5

1 presentation. Well, do we believe one way or the other that
2 the sampling inference is inadequate, but we just want all
3 there is. Well, take that with a bit of judgment too. Okay.
4 Anything more on the second issue?

5 (No response.)

6 All right. The third issue is the relationship
7 of deficiencies identified during the reinspection program
8 through a trend analysis. We have already ruled on the
9 intervenor's position which is "While unclear, intervenors
10 assume that this is an item Edison wishes to explain in
11 greater detail than it bothered to in August and, as such,
12 is not an appropriate topic for relitigation."

13 I see that the staff believes it is an appropriate
14 sub issue. I see from monitoring the arguments on appeal that
15 the applicant believed -- counsel for the applicant believed
16 that we had confused a formal trend analysis, which was
17 alluded to during the evidentiary hearing, which I hesitate
18 to describe, but as I recall it was a formal way to identify
19 problems which may arise in construction, as compared to our
20 concern that documentation practices may have interfered with
21 a trend in the reinspection program. And, in that sense, we
22 simply meant a trend is a trend, as you might find it in the
23 dictionary.

24 If you would have a situation, for example, where
25 an inspector's work is being reinspected to determine whether

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1 he meets the pass rate for the period of time, and if the
2 documentation as to the results of that reinspection is not
3 reliable you have a reliable trend of that inspector's work.
4 Maybe it's a bad word but we didn't mean that much by it. It
5 is just that --

6 MR. MILLER: Yes, sir. I think the reason that I
7 included this as a possible subject for a reopened record was
8 the statement that is found in the initial decision which
9 referred to the documentation practices of Hatfield, and
10 perhaps Hunter as well -- I am looking for it but can't find
11 it right now -- said that that would defeat the trend
12 analysis which I believe the Board believed to be the main
13 purpose of the reinspection program.

14 JUDGE SMITH: All right.

15 MR. MILLER: I think those were the words that were
16 used in the initial decision.

17 JUDGE SMITH: Well, on page 247, paragraph d.3.1.4,
18 we stated that as we have noted throughout this decision a
19 system of maintaining documentation of nonconforming
20 conditions is central to the reliable tracking and trending
21 of nonconforming conditions. Is that the statement?

22 MR. MILLER: No, sir. Let me see if I can't find
23 it quickly.

24 (Brief pause.)

25 It is found at the bottom of page 275, sir. It is

jt-4-7 1 finding d.3.8.0.

2 (Brief pause.)

3 JUDGE SMITH: All right. Yes, we did use the
4 word trend analysis. And here you wish to explain that trend
5 analysis, as that term was used in the evidence in this case,
6 was not the objective of that inspection program.

7 MR. MILLER: I would just -- let me clarify.
8 Deficiencies that were observed during the reinspection
9 program itself, there were at least two paths that they
10 followed. In each instance there was a nonconformance
11 report issued and that nonconformance report got into the
12 overall quality assurance trend analysis program. In
13 addition, the individual deficiencies that were found in the
14 reinspection program were reviewed, and I don't know whether
15 you call it a formal trend analysis program or not, but they
16 were reviewed to see if there were trends, if you will, that
17 suggested areas for further exploration.

18 We would be happy to present evidence on both
19 subjects if that, you know, is what the Board was concerned
20 about.

21 JUDGE SMITH: I'm sorry. I will just ask you to
22 repeat your statement. Just say it again.

23 MR. MILLER: The deficiencies that were identified
24 during the reinspection program followed two paths. In one
25 path a formal Commonwealth Edison Company NCR was issued to

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1 track the deficiency. And, it was then -- it then became a
2 part of the overall quality assurance program trend analysis.

3 JUDGE SMITH: That is one purpose of it.

4 MR. MILLER: That was one path that was followed
5 by the deficiency. That was not the main purpose of the
6 reinspection program.

7 JUDGE SMITH: Right.

8 MR. MILLER: In addition, the deficiency --

9 JUDGE SMITH: The trend analysis in that sense
10 made a management tool for construction purposes --

11 MR. MILLER: Right.

12 JUDGE SMITH: -- in quality assurance?

13 MR. MILLER: Which encompassed many more
14 deficiencies observed during construction than simply those
15 that came up during the reinspection program.

16 JUDGE SMITH: Yes.

17 MR. MILLER: All right. In addition then, the
18 deficiencies that were identified during the reinspection
19 program were analyzed by the responsible individuals to see
20 if there was -- I don't know -- some sort of widespread and
21 recurring type of deficiencies which indicated that further
22 investigations ought to be taken within the scope of the
23 reinspection program itself. I don't know whether you call
24 that a trend analysis or not but, as I say, we would be
25 prepared to address both subject matters assuming that that

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1 is what the Board or that that is what was troubling the
2 Board when it authored paragraph d.3.3.0 of its initial
3 decision.

4 MS. WHICHER: Your Honor, I must repeat that this
5 particular paragraph, as I recall it, has to do with the
6 findings of Mr. Stanish's audit. And, the fact that Hunter
7 and Hatfield were not issuing appropriate documentation. And,
8 it was not getting into any trend analysis. So, I think Mr.
9 Miller's testimony about trend analyses is simply beside the
10 point. The fact that that was at issue was that Mr. Stanish
11 had audited the program and he found problems with what
12 Hatfield and Hunter were doing with their documentation.

13 Now, to the extent that Mr. Miller wants to
14 introduce evidence about how that deficiency was corrected,
15 I don't have any objection to that.

16 JUDGE SMITH: Okay. I think maybe perhaps the
17 discussion itself indicates the need to clarify it but I will
18 tell you what the Board's particular concern is. Whether you
19 use the word trend or not it was that did unreliable
20 documentation, if such situation existed, as we found that it
21 did, interfere with reliability of the inspection program as
22 it demonstrated the skills of the inspectors.

23 And, of course, there was another purpose too.
24 And, that is the Staff viewed the reinspection program as
25 not only a test of the inspectors but also a test of the work.

jt-4-10 1 Now, the evidence is not perfectly clear that that was an
2 essential ingredient of it, but they were using it for that
3 purpose too.

4 MR. MILLER: With that statement I think that I
5 understand what the Board's interest is and would be prepared
6 to present evidence on that subject.

7 JUDGE SMITH: All right. Anything further on that
8 point?

9 (No response.)

10 Item number four, "A number of Hatfield inspectors
11 required recertification and retraining at the inception of
12 the recertification program." The intervenor makes the same
13 objection. The Staff says that that is an appropriate issue.
14 It certainly is one with the Board. I will point out,
15 however, that this goes beyond the required. Unless I have
16 overlooked it I see nothing in the remanding order of the
17 Appeal Board which requires us to inquire into the
18 recertification program.

19 MR. MILLER: Well, I did not propose, unless the
20 Board wishes to hear evidence on it, to go back over the
21 details of the recertification program, although there is an
22 Appeal Board question which deals with a time interval --

23 JUDGE SMITH: Oh, that is correct.

24 MS. WHICHER: Yes, Your Honor.

25 MR. MILLER: -- between the time the recertification

jt-4-11 1 began and it was complete.

2 JUDGE SMITH: That is correct.

3 MR. MILLER: Perhaps this point number four is not
4 very artfully stated. It really is the relationship between
5 the number of Hatfield inspectors requiring recertification
6 and retraining as that relates to the reinspection program.
7 That is the issue that --

8 MS. WHICHER: The number -- I'm sorry -- made no
9 sense to me -- whether Mr. Miller is backing off his position
10 since the Board indicated that it didn't view the
11 recertification portion of the reinspection program --

12 JUDGE SMITH: Well, I was wrong. I can see quite
13 clearly on page 29 the Appeal Board -- midway down the first
14 partial paragraph -- the Appeal Board stated that inasmuch
15 as the reinspection program only covered inspectors certified
16 up to September, 1982 and the recertification program was not
17 completed until early 1983 has the applicant insured that
18 inspectors certified between these dates are capable of
19 performing their tasks.

20 MS. WHICHER: Your Honor, I don't see the
21 relationship between that statement and suggestion number
22 four by Commonwealth Edison. Now, suggestion number four,
23 they have already put on evidence probably half and about
24 half required retraining and recertification. The statement
25 by the Appeal Board on page 29, in my opinion, refers to the

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1 argument made in the intervenor's brief about the number of
2 inspectors who seem to slip through the cracks of the
3 recertification program.

4 I don't see that number four in Edison's list is
5 related to the slipping through the cracks argument that we
6 made in our brief.

7 MR. MILLER: No, I didn't mean to suggest that it
8 was, Judge Smith. I was really trying to pick up on a
9 concern expressed by this Board in its initial decision on
10 page 300 in paragraph d.4.3.6. And, I will state that the
11 concern in the initial decision is somewhat obliquely
12 stated but it comes in a discussion of the Board's conclusions
13 with respect to quality assurance and the Board's conclusions
14 regarding the reinspection program. In that sense, when
15 reading the initial decision for the first time, the concern
16 expressed about the number of Hatfield inspectors that were
17 found to require retraining and retesting seemed out of place.
18 And, the reason for including this item number four was to
19 try and make a determination as to whether further
20 explanation of the relationship between the number of
21 inspectors that required that retesting and retraining and
22 the reinspection program itself was necessary.

23 I should state that the underlying premise of the
24 reinspection program is that Commonwealth Edison Company and
25 its contractors was unable to demonstrate to the satisfaction

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1 of the staff that any of the inspectors were properly
2 certified. The premise of the reinspection program is that
3 the qualifications of each inspector was indeterminate. And,
4 it was for that reason that we went back and looked at their
5 work prior to the date when the recertification was
6 accomplished.

7 The reason for including item number four was to,
8 if the Board wished to hear evidence on this, clear up the
9 relationship between the need for recertifying inspectors
10 and the reinspection program which assumed that none of them
11 had been properly certified.

12 MS. WHICHER: Well, Your Honor, then if indeed
13 Mr. Miller's description now of what number four means is why
14 at least half the Hatfield inspectors were found to need
15 retesting and retraining and their work was not included in
16 the reinspection program, if he means to explain why that
17 fact happened, then I agree that evidence should be heard on
18 that fact.

19 MR. MILLER: I don't believe that there is any
20 evidence of record nor is it a fact that those individuals'
21 work was excluded from the reinspection program.

22 MS. WHICHER: But not all of these inspectors --

23 JUDGE SMITH: No, the statement is that they were
24 not included or I mean not specifically included.

25 MR. MILLER: Not specifically, that is correct.

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1 They were a part of the population from which the sample was
2 drawn.

3 MS. WHICHER: I would like to hear evidence on
4 that. I think that is a perfectly appropriate --

5 JUDGE SMITH: Well, not only would you like to
6 hear evidence on it but you did hear evidence on it because
7 you cross-examined on that point during the hearing.

8 MS. WHICHER: But not quite -- there was no
9 evidence given as to why they were not included. As I recall
10 there was no specific reason. They just weren't.

11 JUDGE SMITH: The testimony as to how they were
12 selected was quite clear and not much in dispute, including
13 Mr. Forney's addition to the sample. And you cross-examined
14 I know -- I wouldn't estimate how much -- but you cross-examined
15 significantly establishing the point that the sample did not
16 necessarily include those who weren't qualified. And, you
17 briefed it at length.

18 I think we know the answer to the question. It
19 was not the basis for the sampling. If Commonwealth Edison
20 wishes to present evidence on that point I think they should
21 be permitted to. I don't see that the Board requires it. I
22 think that the record is clear on how the sample was selected.
23 I also think that you framed the issue here, the number of
24 Hatfield inspectors requiring recertification and retraining,
25 about half or almost half. I don't know. If you are going

it-4-15 1 to change it to 40 percent or 60 percent I don't know if that
2 is going to be any big deal. The significance to the Board
3 was twofold.

4 One, it did seem like large numbers. And, two,
5 it seemed significant that -- oh, what is the man's name --

6 MS. WHICHER: Stanish.

7 JUDGE SMITH: Mr. Stanish did not have that
8 information more exactly. We would hear evidence on it if
9 you wish to present it pursuant to our discussion and put a
10 particular or for a particular interest would be with
11 respect to the contractors who would be the subject of the
12 reinspection program is that where inspectors failed in the
13 reinspection program, if any did, did they go back to the
14 certification package to see if the certification package
15 was accurate.

16 That is a very narrow point but is a point of
17 interest that occurred to the Board. Is that helpful?

18 MR. MILLER: Yes, sir, although I will state for
19 the record that I do not believe that any inspector from any
20 contractor -- well, I can't say that -- but certainly none
21 from Hatfield or Hunter failed to meet the 90 or 95 percent
22 pass rate in the reinspection program.

23 JUDGE SMITH: Yes. You might expect in this
24 reopened hearing that we have not absorbed the Board
25 notification. I mean we have all read it but we are not

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1 competent and it will have to be explained to us in the
2 reopened hearing. I understand generally the last report
3 was that both Hatfield and Hunter did not have any that
4 failed to meet it.

5 MS. WHICHER: After six months.

6 JUDGE SMITH: But that has got to be subject to
7 litigation. Is there anything else on item number four?

8 (No response.)

9 Item number five is Hunter documentation practices
10 regarding discrepant conditions identified during the
11 reinspection program. That is a good issue and we have got
12 to hear about it, notwithstanding intervenor's objection to
13 it. The Staff agrees that that is a good issue or a
14 satisfactory issue. Any questions on that?

15 (No response.)
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1 (No response.)

2 No. 6 is further evidence regarding possible
3 fraudulent practices by contractors in certification of
4 quality control and quality assurance personnel.

5 MR. MILLER: Judge Smith, let me just -- I don't
6 mean to interrupt, but I believe that a fair reading of the
7 Board's findings on that issue is that Commonwealth Edison
8 Company prevailed. Nonetheless, the Board was obviously
9 troubled and dissatisfied with the content of the
10 evidentiary presentation. This is an issue where as far
11 as Commonwealth Edison Company is concerned, we are content
12 with the evidentiary record, we are content with the
13 Board's findings with possible further review by the
14 Appeal Board and the Commission, or review by the court.

15 But having said all that, if there remains
16 concern that perhaps it rises to a greater level than is
17 expressed in the decision, we would be prepared to address
18 that concern, if you want us to.

19 JUDGE SMITH: You say you prevailed on that
20 issue, and as I recall our initial decision, you pointed out
21 that in our clarification order for the reopened hearing,
22 that we said that no new inspections need be conducted. That
23 is to be distinguished between our comments that the evidence,
24 I guess, is in dispute -- don't hold me to too precise a
25 memory of it -- it has to be distinguished between the

1 finding that Commonwealth Edison had made no inspection for
2 fraudulent practices.

3 MS. WHICHER: Neither found nor looked for.

4 JUDGE SMITH: Yes, right.

5 MR. MILLER: There is an earlier section in your
6 finding where you discuss Mr. Shewsky's testimony about
7 general inspections that were conducted in the contractor
8 certification practices. So there is evidence in the record
9 that no one had examined Mr. Shewsky on that, and as I say,
10 I think that the ultimate conclusion of the Board with
11 respect to fraudulent conduct was that you did not find
12 that any existed.

13 JUDGE SMITH: That is correct, that is what we
14 found. I just did not accept your characterization that
15 you had prevailed on that issue, and I don't know if our
16 decision can be dissected quite that clean, Mr. Miller.
17 You know, prevailed or didn't prevail.

18 I thought it was significant that Mr. Stannish --
19 it was his testimony which is cited there in the initial
20 decision -- did testify that other than auditing, I think,
21 some training classes, that that is about what the company
22 did. Whatever our finding says, it speaks for itself. I
23 don't want to try to rewrite or redefine our initial
24 decision.

25 I think you would do well to add evidence on

1 that issue. The question would be with respect to which
2 contractors. I think that any evidence of fraudulent
3 quality assurance practices, if any exist, must be weighed
4 or must be looked at, in addition to a reinspection program.
5 It would be difficult to explain a concrete nexus in a
6 vacuum between the reliability of the reinspection program
7 and the existence of fraud in a vacuum.

8 But, logically, it seems to me that both of those
9 factors should be looked at.

10 MR. MILLER: Judge Smith, it is certainly possible ,
11 albeit not likely, that my definition of fraud and yours may
12 not coincide. I take it in the legal sense of the word
13 a misrepresentation of a material fact made with intent to
14 deceive.

15 If something more expansive than that definition
16 is contemplated by your use of the words "fraudulent
17 conduct," that will shape the scope of our evidentiary
18 presentation as well.

19 JUDGE SMITH: I think we are getting to the area
20 here as to which Ms. Whicher has been warning the parties.
21 I know what fraud is. I think you have described the way
22 we would understand it, and I would say if you have some
23 evidence, that you'd better bring it out.

24 MR. MILLER: Yes, sir.

25 JUDGE SMITH: Because I do think that there is a

1 logical connection, if there is any fraud, between the
2 reliability of the reinspection program, assuming a factual
3 connection.

4 That doesn't really say what I am trying to
5 express. It is difficult to express it in a void unless it
6 is in context. If the reinspection program somehow depends
7 in whole or in part on fraudulent records, then you'd wonder
8 if the reinspection program is valid.

9 Do we have a situation where the quality assurance
10 manager cheats on his travel voucher? I mean, now, really --
11 I don't know. You are going to have to look at the context
12 of the facts. The question is which contractors? And I
13 would say whether it is a factual nexus between fraud or any
14 record on reliability and the reinspection program -- I'm
15 broadening it now, you'd better pay attention.

16 Excuse me. Do you want an opportunity to consult?

17 MR. MILLER: May I, for just a second?

18 (Counsel conferring.)

19 MR. MILLER: I'm sorry, Judge Smith. Excuse me.
20 You said there was something I ought to be paying attention
21 to, and I wasn't. I apologize.

22 JUDGE SMITH: You asked earlier if we viewed
23 fraud as being something broader, and I certainly described
24 circumstances in which I believe fraud could be related
25 to the validity of the reinspection program. But then the

1 same logical procession would take you to any unreliability
2 in records which you are aware of, which would affect
3 reliability of the reinspection program would be germane.

4 So I don't know where we've arrived at. I don't
5 know if I can give you any more guidance.

6 MS. WHICHER: Judge Smith, is it my understanding
7 that the scope of this proceeding would include, based on
8 your last comment, any unreliability of any record, dealing
9 with the reinspection program, no matter what contractor?

10 JUDGE SMITH: The Appeal Board has mandated a
11 full evidentiary hearing on the reliability of the
12 reinspection program. Certainly reliability of documents
13 upon which the reinspection program is grounded would be
14 relevant to that issue. Fraud would also be relevant to it,
15 if it is relevant.

16 Couldn't somebody help me?

17 MS. WHICHER: Your Honor, let me try it. Let me
18 try it.

19 If the fraud relates to an aspect of the
20 reinspection program on certification of an inspection or a
21 worker or a welder, for example, then that type of fraud
22 would be relevant to what the Board wants to hear.

23 However, using your example, if a quality
24 assurance manager cheats on his travel vouchers, that is
25 completely unrelated, as far as I know, to the reinspection

1 program and need not be presented. Is that --

2 JUDGE SMITH: That sums up my view, yes.

3 MS. WHICHER: Okay.

4 JUDGE SMITH: I don't know why, but I am concerned
5 that I have caused a problem or left a void or something
6 here. I need some reassurance that I haven't.

7 MR. MILLER: Well, I think Ms. Whicher's
8 formulation really broadened the scope of what we have
9 been discussing earlier, in the sense that she included
10 certification packages, I believe, and welders' records,
11 when really the scope of the reinspection program, as I
12 said, assumed that the certification of everybody subject
13 to the program was indeterminate.

14 JUDGE SMITH: That's right. We know what the
15 relevance of the certification program was within the
16 relationship.

17 MS. WHICHER: Your Honor, I put in that point
18 specifically -- and I'm not trying to trick anyone -- but if
19 in fact, as I believe part of the reinspection program
20 included not only were the inspectors doing their job, were
21 they able to do their job, but were there trends in some
22 particular workers who were not able to do their job well,
23 I believe that that is a fruitful inquiry for fraud as well.
24 If a welder consistently fails -- consistently miswelds or
25 has consistent bad welds, failing welds, then perhaps that

1 welder's certification package has been fraudulently put
2 together.

3 MR. MILLER: Excuse me, but we've never
4 represented that the reinspection program had anything to
5 do with the crafts people, and there was no representation
6 ever made that there would be a check of those certification
7 packages or that the work of a particular welder would
8 somehow be singled out. It was only the inspectors that
9 were subject to the reinspection program.

10 MS. WHICHER: I understand that. But, your
11 Honor, my understanding was that the Region considered that
12 the inspection program went beyond that and would in fact
13 look at crafts people that it felt were not up to snuff.

14 JUDGE SMITH: That was our finding, except that
15 we found somewhat in a different direction; that is, allega-
16 tion as to poor craftsmanship might be resolved by the
17 reinspection program.

18 MR. MILLER: There were three objects that were
19 described in the initial decision and by the Appeal Board
20 as well in terms of what the reinspection program was
21 supposed to accomplish:

22 First of all, it was supposed to demonstrate
23 that inspectors were qualified.

24 Secondly, it would permit some conclusions about
25 the quality of the work generally.

1 And, third, it would be used by the Regional
2 Staff to dispose of certain allegations. But that is a far
3 cry from saying that it was to check the certification
4 packages or, indeed, the qualifications of any specific
5 craft people or welder of any sort.

6 MS. WHICHER: Well, Mr. Miller has overstated my
7 case. If you look in the second two examples, the quality
8 of the work and being used by the Staff to dispose of
9 allegations, if in fact the quality of the work shows that
10 particular welders were consistently failing, then that to
11 me would be a fruitful area for Commonwealth Edison to
12 inquire as to whether that welder had been fraudulently
13 certified.

14 I am not trying to make the statement that the
15 reinspection program demanded recertification or review of
16 certification packages of crafts people.

17 JUDGE SMITH: I wonder if all this discussion is
18 necessary. I think we are talking here about the reinspec-
19 tion program. We did not litigate -- I agree with Mr.
20 Miller, we did not litigate any aspect of checking the
21 credentials of welders. I don't see that even as a practical
22 direction to go in. I don't think you do, either.

23 MS. WHICHER: Well, your Honor, I would like to
24 have the Region's view, particularly Mr. Hayes, because I
25 believe that is where I got that idea. And if I am

1 mistaken, I take back what I have been saying. But my
2 belief was that the reinspection program results were to be
3 used to check on the quality of work and to see if there
4 were trends in certain crafts people whose work was
5 consistently below quality.

6 JUDGE SMITH: The point that I thought Mr. Miller
7 was making, and with which I agree, is it may very well be
8 that may be another issue, and that is worker allegation
9 issues and that type of consideration. We haven't come to
10 that yet, but with respect to the reinspection program, I
11 don't see -- with respect to that narrow area, I don't see
12 any point in inquiring into worker certification packages.
13 I just don't think it is practical. It was not a part of
14 the original litigation, it was not a part of our initial
15 decision. But the more we talk about it, the more I think
16 that we are analyzing it too finely.

17 I think that when the Appeal Board remanded to us
18 the issue of the adequacy and reliability of the reinspec-
19 tion program, I think that it has become your responsibility
20 then not only to tell us about the reinspection program, but
21 also to come forward with any evidence that you have which
22 would indicate that the inspection program is not reliable,
23 be it fraud, be it sloppiness, inaccurate records, or what-
24 ever.

25 MR. MILLER: I understand that.

1 Excuse me. I didn't mean to cut you off.

2 I really, just for the sake of the record, have
3 to say one more thing in the nature of the reinspection
4 program. Individual crafts persons' deficiencies probably
5 never surfaced because, by nature, they were inspected
6 once, and then passed, presumably they were rectified, and
7 they were reinspected. And the whole program was organized
8 around inspectors, not around individual crafts people.

9 JUDGE SMITH: As I recall -- yes, ma'am?

10 MS. WHICHER: I think the Region can answer this.

11 JUDGE SMITH: And if I forget, I am sure I can
12 count on you to remind me.

13 MS. WHICHER: I'm sorry, your Honor, I didn't mean
14 to be rude.

15 JUDGE SMITH: As I recall, there was a considerable
16 amount of difficulty, at least with respect to Hatfield,
17 because of the recordkeeping on identifying which inspectors
18 did the work.

19 MR. MILLER: That is correct. That is correct.

20 JUDGE SMITH: Let alone who the welder -- although
21 that may have been a different problem. As I recall, that
22 was unrelated. That was followed according to the type of
23 work.

24 All right, with that observation, then you want
25 to hear what the Staff has to say on this point?

1 MS. WHICHER: Yes, because if I am mistaken, I
2 will withdraw my comments. I believe I got that impression
3 from Mr. Hayes and Mr. Forney.

4 MR. RAWSON: Mr. Hayes and perhaps Mr. Forney
5 as well gave testimony on the record before the Board last
6 summer to the effect that the reinspection program would
7 provide a wealth of data on the certification of the
8 inspectors, but also on the quality of the work. And what
9 Mr. Hayes testified to -- and I'm sorry, I don't have the
10 record transcript at my fingertips -- was that the Staff
11 would be examining that data and, if in fact there were
12 indications that there were problems with the crafts people's
13 work -- welds, for example -- the Staff then left open the
14 possibility that it would examine further whether a pattern
15 existed as to a particular welder.

16 But I don't think Mr. Hayes ever got into the
17 question of going back into certification packages of welders
18 and things of that sort.

19 MS. WHICHER: I'm not saying that he did. And Mr.
20 Rawson's recitation of the testimony is exactly what I was
21 referring to. And I repeat again, I am not claiming that
22 there was any inference that crafts people's certification
23 packages were to be reviewed as a result of the reinspection
24 program.

25 JUDGE SMITH: Ms. Whicher, I am afraid I have

1 lost the track of your argument now.

2 To retrace it, we said a moment ago that we are
3 overanalyzing this Item No. 6 by selecting, for example,
4 fraudulent practices. But the responsibility now will be
5 upon the Applicant and upon the Staff when they present
6 evidence on the reinspection program to present also evidence
7 as to reasons why the reinspection program does not accomplish
8 what it was intended to do, and what the Staff expected it
9 was going to use it for. If it includes welders, that is
10 fine.

11 Does that satisfy your scope of No. 6?

12 MS. WHICHER: Yes.

13 JUDGE SMITH: Anything further on No. 6?

14 (No response.)

15 No. 8.

16 MR. MILLER: Did we pass over No. 7?

17 JUDGE SMITH: Yes, I have it. Disposition of
18 allegations as of August 10th, 1983. Intervenors would
19 agree that it is appropriate, but should not be limited
20 to the disposition of allegations, nor to those open as of
21 August 10, 1983.

22 MR. MILLER: Judge Smith, excuse me. The reason
23 for including that was the statement in the Board's
24 initial decision that the existence of the open allegations
25 was a matter of added concern. I believe those are the

1 Board's words.

2 Once again, as the Staff points out, and quite
3 correctly, virtually all the allegations except those that
4 are within the purview of OI, have now been dispositioned.
5 This is like No. 6. If the Board believes that further
6 evidence on what has happened to those allegations since
7 the Board heard about them last August is appropriate,
8 then there ought to be additional evidence in the record.

9 MS. WHICHER: Your Honor, I have two points:

10 First, I don't believe that the disposition of
11 the allegation is what ought to control this particular issue.
12 And, as the Board noted in its initial decision, there in
13 fact were allegations by workers that ought to have been
14 substantiated by the Staff and in fact were not, and I
15 refer --

16 JUDGE SMITH: Wait a minute. Would you restate
17 that, please.

18 MS. WHICHER: Yes. That there were allegations,
19 worker allegations, that ought to have been substantiated
20 by the Staff that were not substantiated by the Staff,
21 specifically Mr. Smith's tabling allegation is a case in
22 point.

23 I believe the fact that the Staff has substantiated
24 or not substantiated an allegation, while relevant, ought
25 not to govern whether that allegation is the subject of

1 further litigation.

2 JUDGE SMITH: So what do you want? Just --

3 MS. WHICHER: I don't think that it ought to be
4 limited to the disposition of the allegations, whether the
5 Staff has substantiated or not substantiated it.

6 Secondly, I don't believe it should be limited
7 to allegations that were open as of the close of the record.
8 There are allegations that have come in, in the meantime,
9 and those also ought to be the subject of litigation and
10 we will be getting to those, I think, when we get to my
11 list.

12 MR. RAWSON: Judge Smith, I have some additional
13 words as well, unless you have something specific.

14 I think that we were quite clear in our May 23rd
15 letter on our position with respect to these allegations.
16 The Board, after hearing the information it could last
17 summer, said that these matters ought to go through the
18 normal Staff inspection process and the investigation
19 process, and they should be dealt with as new information
20 on a case-by-case basis, as the reports became available
21 to the parties.

22 Now in the April 16th, 1984 motion of the Staff
23 for protective order and for release of portions of in camera
24 transcripts in this proceeding, the Staff supplied an
25 affidavit of Kevin Connaughton, one of the resident

1 inspectors at the Byron Station. And in that affidavit
2 we set forth the status of all of the allegations that were
3 in the Staff's hands for inspection that were open as of the
4 close of the hearing last year.

5 We identified the disposition of those matters.
6 We identified the inspection reports in which those matters
7 were to be found. Those inspection reports have been served
8 on all the parties.

9 It seems to me that rather than articulating a
10 broad issue such as all allegations or all allegations that
11 were open at the close of the hearing, the thing the Board
12 ought to be asking the parties is that they review that
13 material, and if there is a specific allegation as to
14 disposition that a party believes ought to be litigated
15 that is within the scope of the proceeding or not, the party
16 ought to be bring it forward and let's talk about whether
17 the specific allegation and the specific disposition ought
18 to be litigated, rather than trying to articulate some-
19 thing in general. The information is in the record and we
20 ought to deal with it as information, rather than as some
21 general class of "allegations."

22 Now, one additional comment I should have
23 mentioned at the outset as a preliminary matter, with
24 respect to those that are in the hands of the Office of
25 Investigations, you will recall that I informed the Board

1 and the parties during our prehearing conference telephone
2 call about three weeks ago, that I had been informed by OI
3 that the investigation report would be out within two weeks.

4 I was informed this morning by Roger Fortuna,
5 the Deputy Director of the Office of Investigations, that
6 the report will be out early next week. I will see that
7 the parties get it.

8 JUDGE SMITH: Okay. Well, our last ruling was
9 that we would take allegations on a case-by-case basis. I
10 see no reason to change that. I think that about the most
11 guidance the Board can provide is that we don't want any
12 raw allegations unless they are serious or have safety
13 significance and they are a matter of concern to the Staff.
14 But we certainly don't want a listing -- I don't know what
15 has happened at Region III, but a simple listing of allegations
16 will be of no value to the Board or the parties or the record.
17 Uninvestigated and uninspected allegations.

18 Inspected allegations and investigated allegations
19 I assume will continue to be provided to the parties under
20 the Board notification procedure. With respect to those,
21 the Board will see if we believe that we want to have
22 evidence on them, and I think previous guidance given to
23 Intervenors is still valid. We will take it up on a
24 case-by-case basis.

25 Now what better guidance can we give you as to

1 those open as of August 10th? We are going to have those, I
2 believe, in due course.

3 MR. RAWSON: I'm sorry, Judge, I missed the last
4 comment. I apologize.

5 JUDGE SMITH: I'm wondering what better guidance
6 the Board can give.

7 MR. RAWSON: Judge Smith, the question about
8 something you just said. I apologize. Was the Board
9 indicating that the Board is not interested in receiving
10 Board notifications from the Staff, for example, about
11 uninspected allegations unless they are serious?

12 JUDGE SMITH: Yes. Right. We do not want raw
13 uninspected allegations.

14 MR. RAWSON: Even on a Board notification basis?

15 JUDGE SMITH: Well, Board notification basis with
16 respect to raw allegations is a very complicated problem,
17 and the various components of the Commission are now trying
18 to resolve just what there might be -- the standards might
19 be. It is being left up to individual Boards. As I
20 understand it right now, the Staff has a very low threshold
21 for forwarding worker allegations to Boards, and in some
22 cases it may forward all of them.

23 MR. RAWSON: Yes, sir. I guess I am stating we
24 take a broad view of our responsibilities to notify, and we
25 try to err on the side of notification.

1 JUDGE SMITH: The point that this Board is
2 making is the mere fact that an allegation has been made
3 does not place a duty upon the Staff to bring it to our
4 attention. The mere fact of an allegation. There has
5 to be a threshold somewhat higher than that. We don't
6 want any frivolous allegations. If you believe that they
7 meet the traditional Board notification standards, and that
8 is they have -- they are a concern of the Staff and they
9 have potential safety significance, I guess you will have
10 to bring them to our attention. We should not receive
11 allegations that have -- you need not send them that say --
12 they're cumulative and they've already been inspected and
13 found not to be a problem, they're too general to be of any
14 use, or even if true, they're just not important. I mean
15 you can use some judgment. That is with respect to
16 uninvestigated and uninspected allegations.

17 We would expect the Board notification procedure
18 as to inspected and investigated allegations to continue.

19 I think I have digressed from the guidance asked
20 for on this issue, however.

21 MR. RAWSON: Well, it is useful to us, sir, and
22 we appreciate it.

23 MR. MILLER: Judge Smith, I have got a question
24 about a comment that you made before you addressed the
25 question of raw allegations, as you characterized it.

1 Did I understand you, sir, to say that the
2 Board would be considering itself the investigated allegations
3 and advising the parties as to whether there were any on a
4 case-by-case basis, as to which it wished to hear evidence?

5 JUDGE SMITH: Yes. We have been reading the
6 inspection reports as they come in, and we will reread them,
7 I hope timely. We haven't seen the Office of Investigations --
8 we have not -- we don't know what significance those might
9 have, but we do not foreclose the possibility of the Board
10 seeing an inspection report on an allegation and asking
11 that it be the subject of a reopened hearing.

12 MR. MILLER: Thank you.

13 JUDGE SMITH: As to the Intervenor, however,
14 Intervenor has already been given guidance, and I just don't
15 see any reason to change that guidance, Ms. Whicher, that
16 you do it on a case-by-case basis.

17 MS. WHICHER: The problem the Interveors have
18 is that we are not privy to the Staff's investigation, and
19 if we believe the Staff's investigation technique has
20 precluded the Staff from substantiating an allegation that
21 would ordinarily be substantiated, we have no way of even
22 delving into that. Therefore, the bare inspection report
23 does us no good. We have to wait until the Staff witness is
24 on the stand.

1 JUDGE SMITH: I'd help you if --

2 MS. WHICHER: No, I am talking -- let's separate
3 this now into the case-by-case, which is my understanding --
4 correct me if I am wrong. The allegations that were open
5 as of August 10 that have now all been inspected and
6 investigated, except for the OI allegations. Intervenors
7 have no way of taking the Staff's I&E reports that either
8 substantiate or do not substantiate those allegations and
9 making a judgment on the basis of that report alone, whether
10 we feel it is an item that ought to be litigated, without
11 taking the deposition or cross examining the investigator.

12 JUDGE SMITH: Well, isn't that the nature of
13 all of the adjudications, litigations of the NRC? I mean
14 you have different problems, different levels of discovery
15 rights as hearings progress, as time goes on. How is this
16 different from traditional NRC practice?

17 MS. WHICHER: All right. Well, then, I guess
18 at this point I would move the Board for leave to take
19 the deposition of the inspector on all the inspections that
20 have been completed on the allegations that were open as
21 of August 10th.

22 JUDGE SMITH: Just blanket leave?

23 MS. WHICHER: Yes, to depose --

24 JUDGE SMITH: No, you are going to have to --
25 this is an ongoing practice. These men are professional

1 investigators, professional inspectors. They inspect daily,
2 all the time. They produce reports in the matter of due
3 course in their business. You look at those reports, and
4 if those reports justify further inquiry, you have to make
5 your case.

6 MS. WHICHER: Would the Board be willing to give
7 me some guidance as to what type of case --

8 JUDGE SMITH: Certainly not. Just as we won't
9 tell Mr. Miller what he has to do to get the ticket, we are
10 not going to tell you what you have to do to keep him from
11 getting it.

12 MS. WHICHER: Well, your Honor, I believe that
13 the Board is coming awfully close to giving Mr. Miller advice
14 or opinions, and I hoped for the same type of guidance from
15 this Board as to what sort of showing --

16 JUDGE SMITH: How can I? How can I? I don't
17 know what the allegation or inspection report is going to
18 say. What kind of advice could I conceivably give you?
19 Suggest some guidance.

20 MS. WHICHER: See, the problem we have with the
21 reports, your Honor, is that very often they are so sketchy
22 that we cannot tell what type of investigation was done.

23 Now if we submit to you the report and say we
24 cannot tell what type of investigation is done, we would
25 like to depose the investigator, then that is --

1 JUDGE SMITH: I don't think we have the
2 authority to do that. I think you have to make a showing
3 on a case-by-case basis. That's the --

4 MS. WHICHER: But, you see, Your Honor, we are
5 limited by what is in the report.

6 JUDGE SMITH: Yes, that's right. This is the
7 duly constituted NRC Staff who has the statutory duty of
8 inspecting these places and making reports on them. The
9 discovery rules provide the basis for your inquiry into
10 the Staff's activity, and others.

11 We simply cannot, even if we were so inclined,
12 which we are not, give you the blanket authority to depose
13 Staff inspectors as to their reports. You have a showing
14 to make.

15 In the first place, we have the Executive Director
16 for Operations who has the right to designate who the Staff
17 witnesses for a hearing and depositions would be, and you
18 have to make a deposition under 2.720 that you need the
19 deposition of a named person before you have that right.
20 And the Board has no right to give you the blanket -- to
21 waive -- we have no right to make a blanket waiver of the
22 Staff's prerogatives under the discovery rules. Those
23 discovery rules are well thought out, but even if they're not,
24 we are bound by them.

25 MS. WHICHER: Would the Board then allow

1 interrogatories to the Staff, so that I may at least
2 discover the identities and basic information about the
3 scope of the Staff's investigation of these allegations?

4 JUDGE SMITH: If we had allegations, one of
5 them popped up, I remember it, it sticks out quite well --
6 what is it, this plant is going to be another Zimmer.

7 MS. WHICHER: That's not the type of --

8 JUDGE SMITH: That is exactly the point. That's
9 exactly the point I'm making. Now you can give us a
10 standard.

11 MS. WHICHER: That is not the type of allegation
12 I am interested in pursuing, your Honor. I have limited
13 time constraints as well.

14 JUDGE SMITH: Well, I don't see any possibility of
15 us giving you a blank check. I don't see any possibility of
16 us giving you a standard. I just can't think of any. If
17 you want to give it a try for a standard, I don't recommend
18 that you do it, but we'll listen. But we cannot do it in
19 advance. I think that you know that. I'm certain that
20 you are very well versed in Commission discovery law.
21 I think you should recognize as a matter of practicality we
22 can't.

23 We will leave this discussion with the observation
24 that you are invited to provide a standard.

25 Have we given sufficient guidance on that? I
believe we have. We have given a lot.

1 (Pause.)

2 I guess there is no further discussion on No. 7.
3 No. 8, Commonwealth Edison's general control of
4 its pipe contractors. This I am sure you can see if the
5 Board should accept that, I am sure you can see perhaps
6 history revisited. You remember the testimony of Mr. Stannish
7 who described the general inspection program and then we
8 had the problem of, well, if he testified about that,
9 Intervenors can address it in its entirety, and I don't
10 think that is where you want to go. Nor does the Board.

11 MR. MILLER: Judge Smith, what I was particularly
12 referring to in suggesting this as a possible topic for
13 the reopened hearings was the observation that the Licensing
14 Board made in its initial decision that Commonwealth Edison
15 has freely availed itself of its prerogative to delegate
16 quality assurance functions to its contractors.

17 However, the company has not overseen the
18 activities of those contractors the way it should, and then
19 the Board made the further observation that as the hearing
20 was coming to a close, you observed that the company was
21 beginning to catch up in terms of its oversight of contractors.

22 Once again, this is one as to which we do not
23 advocate that the Board receive further evidence, only
24 inquire as to whether you wish further evidence on the
25 subject.

1 MS. WHICHER: Then I would move that it be
2 withdrawn. The Board has heard evidence on it. That's
3 what the QA litigation was all about.

4 JUDGE SMITH: Well, then, you and Mr. Miller are
5 in agreement?

6 MS. WHICHER: That's right. I think you will
7 find that he is trying to relitigate what has already gone on.

8 JUDGE SMITH: He doesn't want this.

9 MS. WHICHER: I don't know why he put it in his
10 list, then.

11 MR. MILLER: Well, I thought I made it very clear
12 why I created this list, and if there is, as there was with
13 respect to the issue of possible fraudulent conduct by
14 contractors, continuing concern on the Board's part as to
15 which additional evidence would be appropriate, we would be
16 prepared to present it.

17 JUDGE SMITH: The Board has no desire to relitigate
18 the whole issue. We want to focus on the three contractors,
19 unless there is a specific exception which we will discuss
20 later. You can present testimony and I think it would be
21 helpful if you would bring us up to date as to your delegation
22 of quality assurance functions to those contractors and
23 your oversight of them. I think that would be an appropriate
24 area to go into.

25 As to your general practices, that I don't believe

1 is necessary. We stated the reason why we believe that
2 your controls were deficient in the initial decision.

3 No. 9.

4 Is there any more on 8?

5 No. 9, supplemental evidence regarding Hunter
6 tabling practices and any pattern of nonconformance by
7 Hatfield.

8 The Staff says, well, that is not necessary,
9 because the reinspection program will take care of it.
10 Intervenors object for the continuing reason that it is an
11 attempt to relitigate. We think that that is important
12 information that the Board should have.

13 We are speaking -- we have -- No. 9 relates
14 to the reinspection program -- no, no, No. 9 relates to
15 pattern of tabling during construction -- during construction
16 inspections, and No. 5 relates to the reinspection program.

17 MR. MILLER: Yes, sir.

18 JUDGE SMITH: No. 9 relates to, I think, our
19 partial initial decision, page 176, according to my notes.

20 MR. MILLER: Yes, sir, that is where the
21 discussion of Mr. Smith's allegations about tabling begin.

22 JUDGE SMITH: Well, No. 5 would relate to 179,
23 page 179.

24 MR. MILLER: Yes, sir. Finding D.1.45.

25 JUDGE SMITH: Yes. I think that I described an

1 important matter.

2 My notes also say look at Footnote 63 with respect
3 to this issue, and I don't recall why.

4 Oh, all right. Look at No. 63. It gives us
5 guidance, of course, if you haven't already looked at it.
6 Footnote 63 says with regard to identified deficiencies in
7 Hatfield and Hunter document control, the finding as a result
8 of the reinspection program that the quality of work performed
9 by these contractors is acceptable would indicate that these
10 deficiencies did not adversely affect the quality of the
11 product.

12 Well, that can pretty well apply across the
13 board to most of these issues.

14 All right, is there anything further?

15 MR. MILLER: I'm sorry, sir, perhaps I just didn't
16 catch it. Did you say that you wished supplemental evidence
17 on the topics in --

18 JUDGE SMITH: I think so, yes.

19 MS. WHICHER: Your Honor, it seems to me that
20 Footnote 63 indicates that such things as Hunter tabling
21 practices ought not to be relitigated.

22 JUDGE SMITH: That's right. I don't think it says
23 ought not to be, but could render those matters irrelevant.
24 I think that is how I would read Footnote 63. I think
25 Footnote 63 simply is a recognition, which we also made, of a

1 valid reinspection program is a demonstration that the
2 work was all right, and the record was all right -- the
3 records were all right, that everything was all right,
4 production was all right.

5 MR. MILLER: Judge Smith, just for further
6 clarification, if I understand your comments, it really is
7 that we should relate this subject matter to the findings
8 of the reinspection program, and that is the evidence that
9 you are looking for; is that correct?

10 MS. WHICHER: The tabling issue?

11 MR. MILLER: Well, that was a documentation
12 deficiency.

13 JUDGE SMITH: I think -- yes, I think that
14 Footnote 63 is logical also. It is a command, too. It
15 tells us that even if there was an unacceptable tabling
16 program, that if the reinspection program demonstrates
17 that the work was -- the inspections were adequate, then
18 the tabling allegation becomes irrelevant. But, nevertheless,
19 I think that if your concern is that we didn't understand
20 the tabling practice, it would still be relevant. I don't
21 think things always fall so clean one way or the other.

22 MS. WHICHER: I take it, then, Your Honor, you
23 wouldn't allow Intervenors to put in evidence on the tabling
24 issue as well?

25 JUDGE SMITH: Anywhere the evidence goes, you may

1 follow it as a general rule. I'm trying to think of the
2 exceptions you are allowed.

3 (Laughter.)

4 MS. WHICHER: I'll be thinking of some tonight.

5 JUDGE SMITH: Considering the relative burdens
6 and other controls.

7 All right, is there any further guidance on items
8 1 through 9?

9 We haven't had a break. It's ten till 6:00.
10 Shall we adjourn for the evening at 6:00? So obviously
11 we will have to come back tomorrow.

12 MS. WHICHER: It's ten to 5:00. It's a different
13 time schedule. We are willing to stay with you. I am
14 willing to go on Eastern time for this session if you like.

15 JUDGE SMITH: Well, let's work until 6:00 o'clock.
16 How about a five-minute break? Until 6:00 o'clock, central
17 time, Central Daylight time.

18 MS. WHICHER: All right, so we will be going
19 another hour. Fine.

20 (Recess.)

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JUDGE SMITH: May we resume, please, ladies and gentlemen.

Now we will begin with the Intervenor's list of proposed issues. The first item is protective information. I don't know how we can discuss it on its merits this afternoon, but we can discuss under the assumption that all participants are familiar with it.

MS. WHICHER: My understanding is that there will be some inspection reports out shortly. Perhaps the Staff could give us an update.

MR. RAWSON: Judge Smith, I would be happy to address the status of those in a general sense, given the parties are all aware of the -- certain of the parties are aware of the specifics, in terms of the status of them. However, in respect to dealing with them as one of the Intervenor's suggested issues, it seems to me that the Board's suggestion or ruling with respect to the allegations that were open as of August 31st of last year -- the principle involved there really ought to govern the disposition of these matters as well.

These are allegations which are in the process of being inspected. When the results become available, they will be provided to all parties and can be dealt with as new information at that time.

Having said that, let me tell you about the status.

1 There were two sets of allegations discussed
2 in the April 11th Board notification from the Staff. As
3 to the second set of those, those inspections have been
4 completed and the Staff has reported on the results of its
5 inspection in Inspection Report 84-19, which I understand
6 has been released just in the last few days. Perhaps
7 Intervenors --

8 MS. WHICHER: We have not received it.

9 MR. RAWSON: They should be receiving it shortly.
10 We will be providing it to the Board very shortly. Since it
11 is in the inspection report, I can give further specifica-
12 tion and say those are the allegations relating to Johnson
13 Controls. That is a matter of public record at this point.

14 With respect to the other set of allegations
15 discussed in the April 11th notification, the Staff is
16 working on those matters and it expects to take approximately
17 another month in its inspection process.

18 MS. WHICHER: Your Honor, may we approach the
19 bench?

20 JUDGE SMITH: Yes.

21 (Bench conference, off the record.)

22 end 7
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1 JUDGE SMITH: Ms. Whicher, would you care to
2 make your statement?

3 MS. WHICHER: Yes. Well, I was requesting
4 from the Staff a statement on the record as to
5 when the inspection reports on the allegations that are
6 presently under protective order are expected to be issued
7 publicly.

8 MR. RAWSON: Judge Smith, we have provided
9 in camera Board notifications to the Board on April 11th
10 and April 16th of this year. Certain of the allegations
11 discussed in those notifications have already been inspected,
12 and the results of those inspections reported in Inspection
13 Reports No. 84-13 and 84-19.

14 With respect to the remaining allegations, the
15 matters discussed in the Board notification of April 11th,
16 the Staff at the present time expects to take approximately
17 another month in inspecting and analyzing and resolving
18 those and preparing a report on those allegations.

19 With respect to the allegations which are the
20 subject of the April 16th Board notification, the Staff --
21 the best estimate the Staff can give at this point is that
22 we expect to have the matter reviewed and reported on in
23 the July time frame. That is the best we can do on those
24 at this point.

25 JUDGE SMITH: I guess we can return to the agenda

1 then.

2 Therefore, Issue No. 1, as proposed by the
3 Intervenors, we cannot simply rule on it as an issue of
4 the Board's making, of the Board's initiative until we have
5 the reports, completed investigation reports.

6 As to whether Intervenors may make it an issue,
7 we will just have to fall back on the previous guidance.
8 You must convince the Board that it should be added.

9 Item No. 2 is an open matter, public matter.

10 MS. WHICHER: Your Honor, this is a motion to
11 reopen the record that was never ruled on, I assume because
12 the responses did not come in until shortly before -- in fact,
13 I think I received the Staff's response the day after the
14 initial decision was issued.

15 It is a motion that Intervenors filed December
16 22nd entitled "Motion to Reopen Record and For Order
17 Imposing Commitments."

18 I have dropped the portion of the motion regarding
19 imposing commitments. I understand the Staff's position
20 on that.

21 The Staff's position on the remainder of it
22 appears to be that it has been overtaken by events. My main
23 concern that I am raising with Item 2 in my list concerns
24 the Board notification filed by Commonwealth Edison
25 concerning Mr. Koka, and to the extent that the Board agrees

1 that that is within the scope of the reinspection program,
2 since Mr. Koka did testify about the program to a certain
3 extent, I then believe it is encompassed within the Appeal
4 Board's order.

5 MR. MILLER: Excuse me. Just for the record,
6 Mr. Koka offered no testimony on the reinspection program.
7 He did speak to the recertification program and generally --
8 and at Hatfield and to Mr. Hughes' certification specifically.

9 MS. WHICHER: And to the fraud issue, I believe.

10 MR. MILLER: But not as it related to any
11 inspection data, only as it related to --

12 MS. WHICHER: But as it related to Mr. Hughes'
13 certification.

14 MR. MILLER: That is correct.

15 It seems to me that this issue, once again, was
16 thoroughly discussed in submissions of all the parties to the
17 Board. It is our position that adding to the remanded hearing
18 an issue as to the circumstances of Mr. Koka's termination
19 at Hatfield Electric Company is not going to add anything
20 to the record on quality assurance, and simply discusses a
21 tangential issue as to which there has been no showing, or
22 even a suggestion that it goes to his credibility as a
23 witness before the Board.

24 MS. WHICHER: To the extent that Mr. Koka was
25 in charge of the reinspection-recertification program at

1 Hatfield, until the time of his termination, I think it is
2 very relevant, that issue.

3 JUDGE SMITH: What type of evidentiary showing
4 would you want?

5 MS. WHICHER: Well, I have some discovery outstanding
6 about this very question, and I would like more information
7 as to the reasons for Mr. Koka's termination from his
8 position, and would attempt to develop, if possible, any
9 evidence as to exactly what effect he had on the program,
10 any bad effect, if you will, before his termination. And
11 whether that has been remedied.

12 JUDGE SMITH: You want that as a part of the
13 utility's showing?

14 MS. WHICHER: Well, to the extent I get it on
15 discovery and cross examination, I'm -- you know, if they
16 don't want to put it on direct.

17 JUDGE SMITH: Would you be more practical?
18 Exactly what would you like for the Board to do? Do you
19 want to put this as a --

20 MS. WHICHER: Just merely that this is
21 encompassed within the reinspection program, the circum-
22 stances of Mr. Koka's termination.

23 JUDGE SMITH: I think that your response,
24 Mr. Miller, misses the thrust of it. You argue that there
25 is nothing about his separation which would go to his

1 credibility as a witness during the hearing. That may be
2 the case, I don't know. Then you argue that his testimony
3 was more narrow than the reinspection program, which comports
4 with our memory. I think that we commented, actually commented
5 on the scope of his testimony, knowing that it was particularly
6 to Mr. Hughes and recertification.

7 However, those events do not take away the fact
8 that he was directing quality assurance official for Hatfield
9 at the time.

10 MR. MILLER: I am not certain that that is
11 accurate. There was a quality assurance manager above Mr.
12 Koka at Hatfield.

13 JUDGE SMITH: Well, that is the point that I
14 thought the record was a little bit confused on. So,
15 therefore, if there is relevance to Mr. Koka's competence,
16 to the reinspection program, why it seems to me something
17 you would have to address.

18 MR. MILLER: If that is the Board's ruling, why,
19 then, we will.

20 JUDGE SMITH: And that would have fallen in a
21 broader request earlier, too, I believe. But it doesn't
22 seem to me that if the reinspection program at Hatfield
23 is an appropriate issue, that the Intervenors, as I recall
24 the motion that Mr. Koka was -- as a matter of fact, his
25 duties were changed, but it was at the instance of the NRC

1 Staff.

2 MS. WHICHER: I have the Board notification here,
3 your honor. I could read from that.

4 JUDGE SMITH: They were concerned that he had
5 not established a good working relationship with the
6 inspectors, and there was a morale problem.

7 MS. WHICHER: His ability to function effectively.

8 JUDGE SMITH: That's right, and the -- his
9 ability and their abilities to function correctly. I think
10 it is related to their efficiency and effectiveness in the
11 reinspection program.

12 MR. MILLER: As I sit here today, I am not clear
13 myself about Mr. Koka's role in the reinspection program
14 itself.

15 JUDGE SMITH: Okay.

16 MR. MILLER: And I think I understand what the
17 Board's interest in the circumstances of Mr. Koka's
18 termination is. They are limited to any relationship that
19 that termination, and the reasons for the termination may have
20 to the implementation of the reinspection program at
21 Hatfield.

22 Have I characterized that properly?

23 MS. WHICHER: Could you repeat that?

24 MR. MILLER: Why don't we let the reporter do it.

25 JUDGE SMITH: All right, would you read it back.

1 (Whereupon, the reporter read from the
2 record, as requested.)

3 JUDGE SMITH: This is an area where the potential
4 for Mr. Koka to have information or to have a role relevant
5 to the reinspection program is very substantial. He was
6 the chief inspector, I guess, the highest one that we know
7 about, and I also understand that he was -- held that role
8 during a significant part of the reinspection program. I
9 think under his direction they were actually performing some
10 of the reinspections.

11 MR. MILLER: As I sit here, I cannot recall
12 -- his title changed at some point. He was quality control
13 superintendent, and then he was quality assurance superintendent
14 I simply don't know, as I said, what his role is. It is true
15 that in one sense he was --

16 MS. WHICHER: Quality assurance supervisor?

17 MR. MILLER: Quality assurance superintendent.

18 MS. WHICHER: According to your letter.

19 MR. MILLER: Yes.

20 JUDGE SMITH: And then he was the manager,
21 subsequently. He testified he was the --

22 MR. MILLER: I believe that it was Mr. Buchanan,
23 the gentleman whose qualifications were found to be lacking,
24 who was the quality assurance manager, who was at the top
25 of the hierarchy at Hatfield.

1 Well, I don't know quite what the role was, but
2 we will find out and we will address the issue.

3 JUDGE SMITH: In any event, I do not believe
4 that our discussion should lead to the conclusion that you
5 will bring Mr. Koka here, or anybody else here, and explain
6 why he was fired or reassigned, whatever the case was.

7 However, I believe that it is an area where
8 Ms. Whicher should be allowed to inquire and find out.

9 Does that satisfy you, Ms. Whicher?

10 MS. WHICHER: Yes.

11 JUDGE SMITH: Is that agreeable to everyone?

12 Is that -- does anyone object to that approach?

13 (No response.)

14 Okay, preoperational testing results of NRC
15 inspections.

16 MS. WHICHER: Judge Smith, if I might make some
17 general remarks about Nos. -- I believe 3 through -- well,
18 at least 3 through 10, which stemmed from the informal
19 discussion that Intervenors and the Staff and attorneys for
20 Edison had last week.

21 As I understand Mr. Miller's position, he believes
22 that these are all beyond the scope of the Appeal Board's
23 ruling. My position is that -- and I think the Board and
24 Edison and the Staff will agree with this premise -- that
25 events in the life of construction of a nuclear plant

1 cannot be frozen in time, and that new evidence is new
2 evidence.

3 To the extent that the Appeal Board ruled that
4 this Board erred by not leaving the record open, I believe
5 the record should have been kept open to receive any new
6 evidence that occurred from the date of the August hearings,
7 when the record was closed and should not have been, until
8 this date, and that is what is encompassed in the following
9 items in my list.

10 Some of them are Board notifications, some of
11 them pertain particularly to Hatfield Electric, and non-
12 compliances against Hatfield for overstressing of cables,
13 and for that reason, if for no other, we believe that
14 because it is new evidence going to the quality assurance of
15 Byron, it ought to be allowed in this remanded proceeding.

16 That position applies to the remainder of the
17 items on the list on page 3 of my letter to the Board.

18 JUDGE SMITH: Your position you have taken,
19 you are drawn in by the same -- well, let's hear from Mr.
20 Miller.

21 MR. MILLER: The written materials that are
22 referred to in paragraphs 3 through 10 are a stack probably
23 about 18 inches high. They relate to a variety of subjects.
24 Some of them relate, arguably, to the scope of the reopened
25 hearings. Many do not. And I had understood at the

1 conclusion of our conference last Thursday on issues that
2 Ms. Whicher was going to reconsider these and try and sharpen
3 up the precise issues that she wished to have the Licensing
4 Board consider as candidates for litigation.

5 That hasn't been done, obviously. What we are
6 told is that it all somehow relates to the quality of the
7 plant, and therefore since they are new evidence you should
8 consider them.

9 That sort of a shotgun approach really is going
10 to lead us nowhere. I would just observe that the same
11 inspection reports, for example, are referenced in more than
12 one paragraph of her submittal, and there has been absolutely
13 no discrimination exerted in trying to determine what issues
14 might be relitigated and be within the scope of the Board's
15 interest, nor is there any clue to the Licensing Board.

16 We are left to sift through, as I say, 18 inches
17 of paper as are you, to make some sort of reasoned
18 determination.

19 I don't think that this is of assistance to the
20 Licensing Board at all in determining the scope of the
21 reopened hearings, and really the approach that the Intervenor
22 is taking is you might as well just look at paragraph 12
23 which says any evidence newly developed by the Intervenor
24 or the Staff.

25 That kind of says it all. Let's just keep this

1 hearing open, and as new evidence is created in the form of
2 inspection reports or whatever, keep the hearing open, and
3 let's talk about it. That, I don't believe, is the way -- is
4 what the Appeal Board or this Board contemplated for reopened
5 hearings.

6 MS. WHICHER: Your Honor, to the extent that this
7 Board erred in not keeping the record open, then it also
8 erred -- it would err in excluding any evidence that
9 developed while the record was erroneously closed. That is
10 my position.

11 JUDGE SMITH: Well, let's analyze that position.
12 The Appeal Board did say that we erred in closing the
13 record, but the reason that they asserted for that we
14 alluded to the reinspection final report down the road. Our
15 decision found that the Applicant was not institutionally
16 incapable of running their quality assurance program, that a
17 reinspection program could be the assurance which is needed,
18 and they said that as long as knew that information was
19 coming and was on its way, we should have kept the record
20 open.

21 They did not say that the record should be kept
22 open for all purposes. You could read into the Appeal
23 Board's decision that the record should have been closed,
24 if we did not have some assurance down the line that
25 there would be more information on the inspection program.

EVENING SESSION

(6:00 p.m.)

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3 JUDGE SMITH: (Continuing) You did not suggest
4 -- they did not suggest at all that we had an incomplete
5 record. To the contrary, they remarked in the ALAB that it
6 was a large record and it was a large decision, and the
7 criticism of the Board was that we didn't give the Applicant
8 a chance to come in with its reinspection program results.

9 So I don't think your argument there is valid.
10 I think that you have issues which will have to rest upon
11 the three-part test for a reopened record.

12 Assuming even that we had jurisdiction under
13 that -- which is another matter, but -- I guess we do --

14 MS. WHICHER: Your Honor, my position is to the
15 extent that Edison is allowed the third opportunity to come
16 in here and show reasonable assurance, we also have an
17 opportunity to show that assurance does not exist, as part
18 of our evidence.

19 JUDGE SMITH: Argue with the Appeal Board. Argue
20 with the Appeal Board.

21 MS. WHICHER: Will you certify the question?

22 JUDGE SMITH: No. I don't mean that seriously.
23 You argued with the Appeal Board, you had your opportunity.
24 You see what their decision is. They told us why we erred,
25 and now we are here to correct that. They didn't suggest

1 in the slightest that we erred in turning down another
2 motion. We denied one of your motions for reopening.
3 As a matter of fact, it was an preoperational testing and
4 results of the NRC inspection.

5 MS. WHICHER: That's right. And more evidence
6 has come out since the decision on the denial on that very
7 issue.

8 JUDGE SMITH: You will just have to go ahead
9 and file your motion for reopening the record. This is not
10 the other side of the coin of the remand advice.

11 MS. WHICHER: Excuse me just a moment. May I
12 consult?

13 (Counsel conferring.)

14 MS. WHICHER: Your Honor, in my opinion, your
15 rulings - which I realize are not final until you have had
16 an opportunity to consult with the third member of the
17 panel -- you have allowed Edison to go beyond the reinspection
18 report. My objection is that you do not appear to allow
19 Intervenors that same opportunity.

20 I believe you are applying a double standard. I
21 don't believe that is fair. I don't believe you are treating
22 us equally. I admit Edison wants a license. I admit we
23 are trying to make sure the plant is safe before the license
24 is granted.

25 I think that this Board is under an obligation

1 to allow us to present evidence of no reasonable assurance
2 to the same extent it allows evidence from Edison beyond
3 the reinspection program dealing with the issue of reasonable
4 assurance, and I think that any other ruling by this Board
5 is applying a double standard.

6 JUDGE SMITH: Well, I disagree.

7 MS. WHICHER: Would you certify that question to
8 the Appeal Board?

9 JUDGE SMITH: You will not be precluded in
10 demonstrating that the reinspection program with respect to
11 the two contractors that are involved, Hatfield and Hunter,
12 is inadequate, is not reliable. It is not a double standard.

13 MS. WHICHER: No, that's not --

14 JUDGE SMITH: We are going to permit the Applicant
15 to come in with information as to whether the reinspection
16 program provides reasonable assurance, and we are going to
17 permit you to come in with information as to why it does not.
18 It is not a double standard.

19 MS. WHICHER: That's right, your Honor, but in
20 my view, you have in your ruling on Edison's list of issues
21 gone beyond the reinspection program, yet you refuse to go
22 beyond the reinspection program with respect to the
23 Intervenors' proposed issues. That is where I see the
24 double standard.

25 I understand that we will be allowed full

1 cross examination rights and right to present evidence on
2 the reinspection program. But to the extent that your
3 ruling on Edison's list of suggested issues encompasses
4 facts and events beyond the reinspection program, then that
5 is where the double standard comes in.

6 JUDGE SMITH: Everything that we have allowed as
7 an issue is one way or the other related to -- with a
8 reasonably close nexus, is related to the reinspection
9 program.

10 For example, the tabling practice. You asked
11 what does it have to do with the reinspection program. To
12 the degree that the reinspection program offers assurance
13 that Hunter's work is adequate, the other aspects of the
14 adequacy of the work is also germane.

15 For example, if we should find that there
16 really was not a tabling problem, as we found, if we should
17 find that that was not as bad as it seemed, or were mistaken
18 about it, or whatever, then what the reinspection program
19 has to accomplish by way of reassurance is somewhat diminished.

20 Take, for example, Blount. I suppose that's
21 pronounced "Blunt." You lost on that issue almost completely.
22 We don't even know why there is a reinspection program for
23 Blount. We don't have any evidence why Blount was brought
24 into the program, except apparently some of their inspectors
25 fell into that category.

1 MS. WHICHER: Your Honor, you limited us in the
2 reopened procedure to Hatfield Electric. That is why there
3 was no evidence about the reinspection program to Blount.

4 JUDGE SMITH: I didn't make my point. My point
5 is -- let's assume we had a contractor like Blount before us
6 now, which we don't, but we have no evidence to begin with
7 to indicate that the reinspection program was necessary for
8 any purpose. Therefore, whether a reinspection program with
9 respect to Blount is reliable or not in our view would be
10 irrelevant. And that is the point I am trying to make with
11 respect to Hunter.

12 MR. MILLER: Judge Smith, just so the record is
13 clear, I do not believe that Ms. Whicher, the Intervenors, or
14 any party, was deprived of an opportunity to cross examine
15 witnesses about all the contractors that were subject to the
16 reinspection program.

17 Applicant's Exhibit No. 8 was introduced by us
18 in the May quality assurance hearings. That is the
19 reinspection -- the inspection report by the NRC Staff
20 which deals with reinspection program, and each of the
21 contractors -- Blount, Powers, Asgood, Pope, as well as
22 Hunter and Hatfield -- are discussed. The opportunity for
23 cross examination of Staff and Applicant witnesses was
24 there and was not availed of. So it is a tangential point,
25 but it seems to me that is a mischaracterization of the way

1 this proceeding unfolded, to say that the Intervenor
2 were somehow deprived of their opportunity to cross-examine
3 on contractors other than Hatfield and Hunter.

4 MS. WHICHER: The reason the record was
5 reopened on the reinspection program was because its
6 significance initially escaped the attention of the Board,
7 and I confess that initially it escaped the attention of
8 the Intervenor as well. It was limited to Hatfield
9 Electric Company. Therefore, our cross examination as to
10 the details of that program was limited to Hatfield Electric
11 Company. By this Board's own order. We had no choice.

12 That is why we were unable to develop any
13 information about the reinspection program with respect to
14 any contractor other than Hatfield. The only reason that
15 Hunter came up was because of Mr. Stannish's audit.

16 JUDGE SMITH: Be that as it may, our initial
17 decision and our ruling in that regard survived appellate
18 review, as I understand the Appeal Board decision. You are
19 arguing those matters on appeal. You see the remand and
20 that is what you have.

21 MS. WHICHER: Your Honor, to the extent that any
22 inspection report dealing with Hunter or Hatfield has been
23 issued by Region III, is it this Board's position that
24 that inspection report is irrelevant to the remanded proceed-
25 ings?

1 JUDGE SMITH: I'm sorry, would you say that
2 again?

3 MS. WHICHER: I'll put it in hypothetical terms:
4 An inspection report is issued by Region III
5 that concerns a violation by Hatfield Electric Company. Is
6 it this Board's view that my cross examination of a witness
7 on that report would not be allowed?

8 JUDGE SMITH: Not necessarily, no. If the question
9 is does the reinspection program provide reasonable assurance
10 that the Hatfield work is adequate and you have evidence
11 that it is not, obviously it is relevant.

12 MS. WHICHER: That the Hatfield work is inadequate,
13 irrespective of the reinspection program.

14 JUDGE SMITH: The relevance of the reinspection
15 program, as I understand our decision and as I understand
16 the Appeal Board's decision, is that a reinspection program
17 can provide reasonable assurance that the Hatfield work is
18 adequate, and that is an issue that we are bound to decide,
19 is the reinspection program -- does it provide adequate
20 assurance.

21 If, indeed, the work is not adequate, then the
22 reinspection program would never provide assurance that it is
23 adequate.

24 Isn't that a truism?

25 MS. WHICHER: I imagine it's a truism. My

1 question to the Board is trying to get at whether we are
2 limited in our cross examination to reinspection report --
3 I&E reports that concern only the reinspection program.

4 MR. MILLER: Excuse me. I have heard a lot
5 about advisory opinions, and that seems to me to be truly
6 one. I think we have switched from what should be the issues
7 of the reopened hearings to what the permissible scope of
8 cross examination on issues that everyone believes are
9 within the scope of the remanded hearings are. Those are
10 two very different questions, and there is no indication in
11 the list submitted by Intervenors that they wish to litigate
12 as an issue or believe that this Board should litigate as
13 an issue an inspection report or any other document that
14 deals with discrepant conditions for Hatfield and Hunter.
15 There is simply no indication of any such document in this
16 list, and if there was such, we'd all be much more able to
17 address the specifics of the issue.

18 JUDGE SMITH: I think she switched gears on us.
19 Didn't you, Ms. Whicher? Now you are looking at some of
20 these more recent inspection reports, finding some other
21 problems with Hatfield. Isn't that what you are claiming
22 the basis for?

23 MS. WHICHER: Yes.

24 JUDGE SMITH: So you are through 3 through 10 now?

25 MS. WHICHER: No, it relates to 3 through 10.

1 3 through 10 all relate to developments since the initial
2 decision.

3 JUDGE SMITH: No. 6, for example, is that what
4 you are after, the overtensioning?

5 MS. WHICHER: No. 6 is a good example.

6 JUDGE SMITH: I don't know, I just have to wait
7 until you try to do it in context.

8 MS. WHICHER: So I must prepare my cross
9 examination on every document and then wait for an objection?

10 JUDGE SMITH: Ms. Whicher, I can't help you
11 other than to repeat the advice I gave you in chambers,
12 and that is select your issues carefully. Do not dump on
13 the Board every conceivable issue you can think of and
14 expect us to untangle it. We can't do it. And that is
15 the tendency of your litigation. Throw it in, see what
16 happens, see if the Board will pick it up and run with it.
17 It is not going to work. You be your own litigator.

18 I restate that advice. I think the best you can
19 do for your clients, the best you can do to assure that
20 the reinspection program is reliable, and the best you can
21 do to assure, if you wish, that the Byron Plant is safe
22 within the scope of the issues we can consider, is to select
23 carefully your issues. Just don't dump them on us. We are
24 telling you that we are not capable of what you are asking
25 us to do.

1 Not only that, but we are not authorized to do
2 what you are asking us to do.

3 MS. WHICHER: My position is the footnote in
4 the Appeal Board authorizes the Board to go well beyond
5 the reinspection program, and I am asking this Board to
6 consider all the evidence on inspections at Byron that
7 have occurred since the close of the record.

8 I think that the Board certainly has jurisdiction
9 to do that under the footnote in ALAB. I am asking the
10 Board to do that.

11 JUDGE SMITH: I agree. We will look at them and
12 we will decide if they move us to take them up.

13 MS. WHICHER: I would like an opportunity to brief
14 that issue in writing, if I might, so that I can point to
15 the Board what I feel are the significant safety issues that
16 have come out in inspection reports since the close of the
17 record.

18 JUDGE SMITH: When do you want to do that?

19 MS. WHICHER: I will do it next week.

20 JUDGE SMITH: The difficulty is, Ms. Whicher,
21 in this reopened hearing, the Board is going to concentrate
22 on issues that we believe are important. We are not going
23 to concentrate on any more things, I'll tell you that, in
24 the series of allegations that you carried to the last
25 minute, you have never dropped one of them. We are going

1 to decide what is important. We will listen to your advice,
2 but we are not going to get bogged down with a lot of
3 paper.

4 You told the Appeal Board and you told us, and
5 I believe you, that you are not interposing this intervention
6 for delay and you have not acted in a delaying way.

7 MS. WHICHER: And I don't intend to.

8 JUDGE SMITH: But you know we are three people
9 here. We cannot take every issue you decide to dump on us
10 and analyze it. We are not inspectors, we are not Region III
11 engineers, we are adjudicators, and that is exactly what we
12 are going to be. And this time you are on warning that you
13 will have to act as a litigator.

14 MS. WHICHER: That is why I am offering to brief
15 this issue for the Board.

16 JUDGE SMITH: As a practical matter --

17 MS. WHICHER: I don't know what more I can do.

18 JUDGE SMITH: Yes, what more you can do is to make
19 your arguments today or tomorrow. But we are going to look,
20 whether you will allow us or not, but on behalf of your
21 clients, we are going to look at the safety issues that are
22 within our jurisdiction, and we are not going to look at a
23 lot of junk that you dumped on us the last time.

24 MS. WHICHER: Your Honor, let me state for the
25 record --

1 JUDGE SMITH: And this is our responsibility.
2 This is our responsibility and this should be your
3 responsibility. And I want to ask you this:

4 I want you to consult with your clients and
5 discuss with your clients the Board's admonition to you
6 and discussion with you, and you come back here tomorrow or
7 whenever you have had that opportunity, and tell me what
8 your position is.

9 MS. WHICHER: Your Honor, let me state for the
10 record what my position is. My position is I have never
11 dumped on the Board a lot of junk. I have taken the
12 witnesses that have come to me and presented them to the
13 Board as they have asked me to. I cannot --

14 JUDGE SMITH: You are not going to do it any more.

15 MS. WHICHER: I cannot control the evidence of
16 workers at the plant. I cannot control what they say. I
17 do not necessarily vouch for the truth of everything they
18 say. I can only facilitate their bringing their concerns
19 to the Board.

20 JUDGE SMITH: Then, Ms. Whicher, I agree that
21 that is the correct rule, that you do not have to vouch for
22 their credibility when you bring them here. But if you are
23 not prepared to filter your allegations and filter your
24 issues, then the Board must do it for you, and by golly we
25 will.

1 MS. WHICHER: Your Honor, I am offering to do
2 that filtering process in writing with this list. I am sorry
3 I do not have these inspection reports with me. I cannot
4 do it this evening. I will do it --

5 JUDGE SMITH: The difficulty is you brief this,
6 they will respond, then the Board is looking at paper again.
7 We are looking at papers and pleadings and that is not what
8 we want to look at. We want to look at safety issues
9 and the inspection report. We want to look at the hardware
10 problems, not your papers.

11 We will give you full opportunity, but this is
12 what a prehearing conference is for. This is what it was
13 noticed for today, to discuss the issues and the subissues.

14 You have had the remand now for what, three or
15 four weeks. I think this is your opportunity. I thought
16 there was a good chance of winding up tonight, but we will
17 continue to tomorrow and let you make your arguments as to
18 why the Board should exercise its discretion.

19 Other than that, you are going to be back to the
20 standards for reopening the record.

21 MS. WHICHER: Just so I am clear what your Honor
22 desires of me tomorrow, do you desire a presentation on each
23 one of these tomorrow?

24 JUDGE SMITH: No, it's not that I desire anything
25 from you. It's just that we will give you that opportunity

1 tomorrow. I do not wish a brief.

2 MS. WHICHER: Your Honor, let me reiterate. I
3 do not have these inspection reports with me. I did not
4 bring them from Chicago with me. You're asking me really
5 to do the impossible.

6 MR. MILLER: I'll facilitate it. We have them with
7 us. We will turn them over to you overnight.

8 MS. WHICHER: Fine. Fine.

9 MR. MILLER: I might add, Judge Smith, I had
10 understood this was something that was going to be done
11 between last Thursday and today so we wouldn't be faced with
12 this kind of vague --

13 MS. WHICHER: Well, I'm sorry, you were mistaken.

14 JUDGE SMITH: Ms. Whicher, then we are asking
15 that you give serious consideration as to what your position
16 in this case is, what your clients want, and how we should
17 proceed. And if this is really what you want, if your
18 clients really want every issue that you are alleging to be
19 litigated in full, and if they are satisfied, having read
20 that initial decision, if they are satisfied, if the
21 League of Women Voters is satisfied with having presented
22 Mr. Stitts in this proceeding to this Board, and if that
23 is the kind of litigation you want in a reopened hearing --
24 I just want that to be a considered position.

25 MS. WHICHER: Your Honor, as I understand it,

1 tomorrow I will present you with a full explanation of what
2 we intend by our listing of actions that have been taken
3 since the close of the record August 10th that we consider
4 to be valid prospects for litigation in this remanded
5 proceeding.

6 Is there anything further that the Board would
7 like me to present it with tomorrow morning during that
8 presentation? I will be glad to, whether it is the views
9 of my clients as to the adequacy of my legal representation,
10 I'll be glad to provide that also; or if you would like to
11 talk with my clients personally about that --

12 JUDGE SMITH: No, no, absolutely not. I would
13 not suggest that you are not capable of representing your
14 clients. You are very capable. But having seen our initial
15 decision, knowing what our reaction is to the long list of
16 issues you have now, knowing what the admonition of the
17 Board is to you, or the advice, I should say, as to how you
18 can be most effective in this hearing, in gaining greater
19 assurance that the plant is built safely, I ask you to
20 consider it carefully, discuss it with your clients, and
21 determine whether or not you should not be focusing on
22 the issues that can make a difference.

23 You recognize that we cannot hear all those
24 issues, that we cannot do it.

25 MS. WHICHER: Might I ask why not?

1 JUDGE SMITH: Because if you follow your previous
2 track record, you will not see them through. We are not a
3 grand jury, we are not investigators. We are adjudicators,
4 and that is exactly what we are going to be in this reopened
5 proceeding, and I am going by your track record, your
6 proposed findings and your briefs.

7 MS. WHICHER: You are not referring it, I take it,
8 to the time constraint?

9 JUDGE SMITH: I am referring to -- never mind.
10 Our initial decision stands for itself. I am not going to
11 defend it and I am not going to quarrel with you any more.
12 I think we have given you fair admonition and good advice.
13 You can accept it or not. If you don't accept it, we will
14 exercise our own discretion and control.

15 MS. WHICHER: I will make my presentation to the
16 Board first thing in the morning.

17 JUDGE SMITH: Anything further this evening, or we
18 will adjourn.

19 MR. MILLER: Judge Smith, I just have one
20 suggestion:

21 My letter of May 25th regarding Systems Control
22 tries to deal in two pages with a complex subject matter,
23 and I would just like to urge the Board and the other parties
24 to look at my letter so that perhaps tomorrow we can
25 discuss what the views are on the scope of the Systems

1 Control Corporation issues. It's just that there are a lot
2 of different aspects to it, and once again we are looking
3 for, if you will, a round table discussion as to where
4 this might go.

5 JUDGE SMITH: Yes. This is an issue where the
6 advice will come the other way, because it is not an issue
7 that we recognized in time, and then you have given us
8 information we had not been aware of. So we really don't
9 know. So it will in fact be a round table discussion. We
10 will be sitting around the table.

11 Anything further this evening?

12 MR. LEWIS: What time are you reconvening
13 tomorrow morning?

14 JUDGE SMITH: 9:00 a.m.

15 All right. We will adjourn for this evening.

16 (Whereupon, at 6:30 p.m., the prehearing
17 conference was adjourned, to reconvene at
18 9:00 a.m., Thursday, May 31, 1984.)

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REPORTER'S CERTIFICATE

THIS CERTIFIES that the foregoing proceedings
held before the NRC Commission

In the matter of: Byron Nuclear Power Station

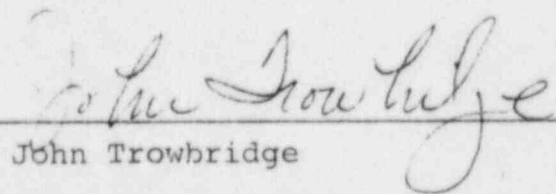
Date: Wednesday, May 30, 1984

Location: Rockford, Illinois

is a true and accurate transcript of said proceedings.



Ann Riley



John Trowbridge