

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

Pages: 8182 - 8281

Date: Thursday, May 31, 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: :
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COMMONWEALTH EDISON COMPANY : Docket Nos. 50-454 OL
: 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

Thursday, May 31, 1984

Hearing in the above-entitled matter convened at
9:00 a.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

3

Appearing on behalf of the Applicant:

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-and-

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Appearing on behalf of the NRC Staff:

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STEPHEN LEWIS, ESQ.

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Office of the Executive Legal Director
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Appearing on behalf of the Intervenor:

18

JANE WHICHER, ESQ.

19

DIANE CHAVEZ

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BETTY JOHNSON

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109 N. Dearborn Street, Suite 1300
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P R O C E E D I N G S

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2 JUDGE SMITH: Good morning. After we adjourned
3 last night, Dr. Callihan recalled another area of Board
4 interest in the reinspection program that we had overlooked.
5 And that is the reinspection program testimony committed
6 to a repair of any defects discovered in the reinspection.
7 A report on the effectiveness and compliance with that
8 commitment would be appropriate. I take it there are
9 no comments on that?

10 MR. MILLER: No, sir.

11 JUDGE SMITH: Is there any preliminary business?

12 MS. JOHNSON: Your Honor, I have a statement that
13 I would like to read from the League of Women Voters.

14 At the prehearing conference held -- I can give
15 copies if you want them. At the prehearing conference held in
16 Rockford, Illinois on May 30, 1984, you asked the Rockford
17 League of Women Voters about its support for actions taken by
18 our attorney, Jane Whicher, in these operating license
19 proceedings. The following statements are made in answer
20 to your question.

21 The League of Women Voters of Rockford strongly
22 supports the excellent representation on quality assurance
23 issues that our attorney, Jane Whicher, provided for us during
24 the 1983 hearings on the operating license for the Byron
25 facility.

1 Using the limited resources available to the
2 Intervenors, Jane Whicher was able to substantiate and
3 bring to the attention of the Atomic Safety and Licensing
4 Board serious quality assurance deficiencies that would not
5 have been litigated otherwise. The Rockford League thinks
6 that the January 13, 1984 decision denying the operating
7 license for the Byron Nuclear Power Station on the basis of
8 these quality assurance deficiencies is proof of the
9 excellence of the work that Jane Whicher did for us.

10 At all times, the Rockford League's attorney,
11 Jane Whicher, has worked closely with the Rockford League
12 and other intervenors to attain the goal of all parties to
13 these licensing proceedings, that there be "reasonable
14 assurance that the Byron facility has been properly
15 constructed" before an operating license is granted.

16 Neither the Rockford League or our attorney
17 wish to burden the Court with prolonged and/or unnecessary
18 proceedings. The Rockford League has confidence that
19 Jane Whicher is representing and will continue to represent
20 us in a responsible manner in any future proceedings
21 related to the granting of an operating license for the
22 Byron facility.

23 JUDGE SMITH: You may proceed, Ms. Whicher.

24 MS. CHAVEZ: Your Honor, I wish also to address
25 the Board. I don't think my comments, on behalf of Citizens

1 Alliance for the Safe Environment are going to be quite
2 as polished as the comments that Betty Johnson has just
3 addressed on behalf of the League of Women Voters. The
4 reason for that, I think, is that I have a very gut feeling
5 about what went on yesterday in the courtroom here, with
6 respect to Your Honor's comments directed towards Ms. Whicher,
7 our attorney.

8 Basically, I think the comments made by Your Honor
9 iast evening far exceeded admonishment to an attorney. It
10 was unprofessional and uncalled for, in relation to the
11 concerns Ms. Whicher was addressing. Ms. Whicher was in
12 obvious dispute with the Board, concerning the Board's
13 rulings during the day, but I think that the Board went
14 far beyond disagreement with Ms. Whicher, in characterizing
15 the qualifications and equality of Ms. Whicher's participation
16 in these proceedings, I think that in terms of sensationalism
17 it was uncalled for --

18 JUDGE SMITH: In terms of what?

19 MS. CHAVEZ: Sensationalism -- it was uncalled
20 for and puts to the pale any sensationalism which the
21 Intervenor has thus far brought to the proceeding, in terms
22 of participation. In fact, from someone who has expressed
23 concerns concerning the public spectacle and bringing in the
24 media, I find your behavior last night to be totally
25 incomprehensible.

11b4

1 And basically, I'm wondering -- at this point in
2 time -- whether or not the Board has any intention -- whether
3 or not you have any intention right now of apologizing to
4 Ms. Whicher, because I feel that an apology is not only
5 required, but also a striking of the record of those comments
6 made last night.

7 The Citizens Alliance for the Environment, has
8 participated in these proceedings upon the assumption that its
9 participation, in playing along and being reasonable and not
10 delaying the power plant and so forth -- that there is a point
11 to all this. Your comments last night make us wonder whether
12 or not the process here, and your openness towards this
13 evidence and towards getting to the bottom of whether or not
14 the plant is safe, or not, are actual or merely for the
15 record's sake.

16 JUDGE SMITH: I can assure you, Ms. Chavez, if
17 I may interrupt at this point -- I'm somewhat confused about
18 your remarks, but you've used the word sensationalism, some
19 reference to the press attendance, and the sincerity of my
20 remarks. I can assure you that my remarks were made in my
21 perception of what my responsibilities are in this case and
22 for no other purpose. And I don't have any other motivation.

23 But let me cut it short. What you're talking about
24 is an accusation of prejudice, and there are provisions for
25 you to deal with that. I will help you with it. You

11b5

1 can move that I disqualify myself from the proceeding, and
2 I will consider it. I will review the remarks. And if I
3 believe that -- I will also search my own feelings, and if I
4 feel that I have prejudged the presentation of the
5 Intervenor in this case, or if I have given the appearance
6 of it to such an extent that there can no longer be public
7 confidence, or your confidence, I will consider a refusal.

8 MS. CHAVEZ: I want to set the record straight --

9 JUDGE SMITH: Is that what you're seeking?

10 MS. CHAVEZ: No, actually it's not. I'm confident
11 that you will go over, in your mind, and reflect upon your
12 behavior.

13 JUDGE SMITH: No, I will not do it unless you make
14 the motion. I think you need to consult with counsel on this.
15 If you simply wish to criticize the Board, then we don't have
16 time for that. If you wish to have a remedial effect, and that
17 is bring the Board's attention to a problem that you perceive,
18 that's another thing. If you wish to make the allegation of
19 prejudice and seek remedy there, that would be that I, at
20 least, remove myself from the proceeding, there is a procedure
21 for that which I will explain to you and help you in, or
22 advise your counsel in, but I don't know what you want right
23 now. I think you just wish to criticize.

24 MS. CHAVEZ: No, I don't just wish to criticize,
25 or present the appearance of doing that. If I want to make a

11b6

1 motion today, it would be a motion to strike the portions
2 of the record that were this -- this conversation that
3 transpired last night. I am not concerned with the prejudice
4 of the Board, with respect to deciding the issues and the
5 evidence that's going to be presented today. I think that
6 what my concern is is the personal nature of the Board's
7 comments to Ms. Whicher.

8 And I think that those are uncalled for and I
9 think that --

10 JUDGE SMITH: I'm going to ask you to be more
11 specific on that, and I'll give you a copy of the transcript.
12 If I made personal remarks to Ms. Whicher, that certainly
13 was not intended. I don't feel any personal animosity toward
14 Ms. Whicher, nor to anyone in this proceeding. I don't recall
15 any.

16 I made strong remarks about her tactics and her
17 strategy and her responsibilities as counsel in this case.
18 No question. But Ms. Whicher, I'll say now, if anything
19 I said was inferred by you to be a personal disparagement,
20 I do regret it and did not intend it.

21 MS. WHICHER: Judge Smith, each of my clients
22 approached me last night about that very issue --

23 JUDGE SMITH: But you're going to have to be
24 more specific.

25 MS. WHICHER: I'm sorry. I don't have a copy of

11b7

1 the transcript, but they each expressed a desire to press the
2 Board on the issue this morning. And I assured them the
3 Board would allow them to do that, and then we can proceed
4 with my presentation.

5 JUDGE SMITH: We're just not going to have Ms.
6 Chavez stand -- rise and make suggestions, as she has, and
7 then say that's fine and then just leave it, as you seem to
8 be suggesting.

9 Just proceed, and tell me what you want.

10 MS. CHAVEZ: Well, I would like to review the
11 transcript, as you suggested, if that is appropriate and make
12 a motion to strike those portions of the transcript that we
13 find objectionable, based upon personal characterizations
14 that Your Honor made with respect to Ms. Whicher and the
15 quality of her participation in these proceedings.

16 Secondly, I want to go on record as saying that
17 on behalf of Citizens Alliance for a Safe Environment, we
18 are totally pleased with the representation of Ms. Whicher
19 of us in these proceedings.

20 I want to correct one part of the record in that,
21 I think, up to this point in time at least, I think Your
22 Honor mentioned that -- alluded to the League of Women Voters
23 as Ms. Whicher's client and implied that the League might
24 question or regret Ms. Whicher's representation of them.

25 JUDGE SMITH: . . . , I did not. I simply did not.

1 You're mischaracterizing my remarks. I wish to have a studied
2 consideration -- a careful consideration as to the direction
3 of your intervention. I asked you to stop, consider, regroup,
4 consult, and come back and tell us how you want to proceed.
5 This is our responsibility and it will happen again. This is
6 one of the methods by which we control the case.

7 Now we have come to the point where Ms. Whicher
8 has made it clear that she feels free to put witnesses on the
9 stand, as to whom she will not vouch, and she considers herself
10 free to propose findings to this Board that we find -- based
11 upon the testimony -- as to which she will not vouch --
12 findings.

13 And under the Federal Rules of Evidence, she is
14 not required to vouch for the veracity of a witness. But there
15 comes a point where, as a party to the proceeding, if you were
16 putting on evidence and making proposals to the Board based
17 upon evidence which you did not believe in, then I think we
18 have passed the point that we will accept in a proceeding.

19 This is what I've asked you to do; consider whether
20 you believe that all of the issues that you're putting forth --
21 whether you really believe that you wish to litigate them, and
22 what your course of action is going to be. And I made that
23 admonition and it still carries today. But if you are
24 unwilling to screen your issues and if you are unwilling to
25 present evidence as to which you vouch and if you are unwilling

1 to screen from your proposed findings and your briefs,
2 arguments^{as to} which you do not have a moral conviction, and your
3 clients do not have a moral conviction -- if you're unwilling
4 to do that, or if I misunderstood, then that puts a different
5 light on the Board's control.

6 MS. CHAVEZ: Your Honor, CASE from the beginning
7 of this process carefully considered its options, as to
8 raising issues on the quality assurance/ quality control
9 contentions. To this point in time, largely, these issues
10 that we wish to raise have been raised and all the issues
11 that we wish to raise, we have not been able to do so, either
12 through lack of time, lack of expertise, or lack of ability --
13 financial ability -- to go out and actually present this
14 evidence to Your Honor.

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1 So, we feel that Ms. Whicher is giving adequate
2 representation for our case. We carefully sat down last night
3 and looked at the issues and the laundry list that
4 Ms. Whicher brought to the Board.

5 Personally, I sat down and went through I don't
6 know how many I&E reports, looking to see whether or not, in
7 the words of Your Honor, there were issues there with no
8 basis.

9 And personally, I have to say that every single
10 allegation that I looked at contained some merit. In fact,
11 I only found two which were very general, on the order of
12 this Byron plant as another Zimmer that I could find the
13 Board to object to.

14 And when I looked through the rest, the SALP
15 reports and the other items on our list, those are all
16 pertaining to the quality assurance, quality control
17 attention. They all go to the root of the matter the
18 Appeal Board expressed in its concern, that it expressed
19 during oral argument in Washington. And that was when it
20 sat down to look at the Callaway. Unlike previous decisions,
21 it looked at all the paperwork that has been submitted up
22 to this point, and it was unable to come up with anything of
23 substantial analysis or substantial study submitted by
24 Applicant which would go to allow it to prove whether or not
25 the plant had been built safely or whether there were any

1 indications of problems.

2 And I think the Board is being unreasonable in the
3 process it has indicated it's taking right now, because I
4 don't think any profit will result in any such demonstration
5 being made to this point. I felt that Ms. Whicher should be
6 allowed, in her own way, to present this evidence.

7 JUDGE SMITH: Ms. Whicher, I don't really understand
8 Ms. Chavez recommendations for the procedural approach. I
9 think you're going to have to help. I don't think Ms. Chavez
10 understands very well our conversation yesterday either.

11 MS. WHICHER: She expressed to me a desire to
12 address the Board this morning. I offered to facilitate that
13 to the greatest extent that I could. All I can do is request
14 that Your Honor hear her out. She and I consulted about these
15 issues, as I have with Ms. Johnson, as I have with
16 Dr. Von Zellen. And Dr. Von Zellen has also expressed a
17 desire to address this Board.

18 I think each of these people were quite upset about
19 the remarks made about me last night. And my understanding
20 was that -- they asked me if they could address the Board.
21 My understanding was that their remarks were to be made to
22 that issue.

23 As to the legal portion of our presentation this
24 morning, Ms. Chavez and I have consulted. And I can assure
25 you I will carry the ball on that.

1 JUDGE SMITH: Okay. So, I think I understand quite
2 clearly that all Intervenors wish Ms. Whicher to proceed as
3 she is proceeding.

4 All right. Fine.

5 MS. CHAVEZ: Thank you.

6 MR. VON ZELLEN: For the record, I wanted to express
7 our complete confidence in Ms. Whicher. She expresses our
8 concerns for the safety of the Byron Nuclear Power Plant.

9 I would urge that if the Board were to err, it
10 always err on the side of safety, never on the side of
11 expedience. We are the persons who have to live with the
12 consequences of your decision.

13 Thank you.

14 JUDGE SMITH: Would you state your name, please.

15 MR. VON ZELLEN: Bruce Von Zellen.

16 JUDGE SMITH: Now, Ms. Whicher, apparently, then,
17 you have consulted and you wish to proceed on all issues
18 advanced, as strong as you can.

19 MS. WHICHER: Your Honor, I have prepared for the
20 Board, this morning, a presentation of those issues which we
21 believe ought to be litigated in this remanded proceeding.

22 If I may proceed with that presentation --

23 JUDGE SMITH: Would you also, please, be very
24 careful as to describing which issues that your clients not
25 only wish to have litigated in this reopened hearing, but as

1 to which you will see through to the very end.

2 In our initial decision -- and this is what I think
3 has caused the confusion -- in our initial decision, we
4 pointed out what I believe was an unnecessary amount of
5 instances in which issues would seem to be important to
6 Intervenors during the hearing occupied a lot of hearing time
7 did not receive a commensurate amount of attention in your
8 proposed findings.

9 Now -- go ahead.

10 MS. WHICHER: I would remind Your Honor that at the
11 time I became involved in this case as legal representative,
12 the League had an attorney at that time; DAARE/SAFE did not.
13 Discovery had already closed. And therefore, I would remind
14 the Board that I had no opportunity to undertake discovery of
15 any witness that would put on by either the Applicant or the
16 Staff.

17 And therefore, to the extent that the Board
18 interprets my pursuit of issues which did not result in my
19 submission of findings as wasting the Board's time, I
20 apologize for the waste of that time, but --

21 JUDGE SMITH: No, it wasn't only that.

22 MS. WHICHER: -- because I was unable to undertake
23 any discovery in this case, because discovery had already
24 closed.

25 JUDGE SMITH: The observation I had made was not

1 that. It was something different than that.

2 But you did ^{Present summary} ~~not draw up summary~~ issues in your
3 proposed findings. You set them out there whether you
4 believed in them or not, it seemed to me -- and in many
5 instances, without support. That is what I want to resolve.

6 Now, you proceed.

7 I hoped that I was giving you good advice, advice
8 which would benefit your clients, advice which would benefit
9 the public as a whole, and advice which would benefit the
10 Board. And that is to select issues which you believe in,
11 which you feel are important, which you feel that you have
12 the resources to litigate effectively, rather than a broad
13 range, as was pointed out, as could be described as a shotgun
14 approach.

15 I think I will stand by that advice. You may
16 accept it or you may not. However, I do believe that we have
17 a right and a duty to ascertain just exactly what is the
18 theory of your intervention and the theory of your
19 litigation, and we will be doing it.

20 MS. WHICHER: Your Honor, our intent is to ensure
21 a safe plant. We believe that is the Board's intents as well.
22 And we rest assured that the Board will not make any
23 decisions prior to consulting with Dr. Cole, who is not with
24 us today, and prior to Dr. Cole's opportunity to review the
25 transcript.

1 This Board has been given jurisdiction to hear
2 anything it deems relevant to the issue of whether reasonable
3 assurance exists, and that is precisely what we want this
4 Board to do.

5 Thus far, all of the issues -- nearly all of the
6 issues as to which Edison has asked to present evidence that
7 it contends shows reasonable assurance has, in fact, been
8 admitted, no matter how tangential its relationship to the
9 reinspection program.

10 And I point to a specific example, to an update on
11 general contractor oversight. Edison is apparently being
12 allowed to present evidence which was in existence at the
13 time of the last hearings, but which it did not submit.

14 If this Board declines to hear evidence that has
15 come to light since the record closed in August and which is
16 favorable to intervenors, that, to us, is a double standard.
17 And anything short of that is failure of full and fair
18 litigation.

19 I wish that statement to be clear on the record as
20 to our position.

21 There have been quality assurance developments at
22 Byron since August. And to deprive the Intervenor of the
23 opportunity of litigating those developments deprives them
24 of showing a failure of reasonable assurance, that there is
25 no reasonable assurance except through cross-examination of

1 Edison's witnesses.

2 I would further remind the Board that it has thus
3 far been, at least in my view, willing to tell Commonwealth
4 Edison what types of evidence it would like to hear from it
5 in order to make the finding of reasonable assurance.

6 However, it has declined to so much as hint as to
7 what type of showing intervenors ought to make in order to
8 have this Board consider allegations that have been
9 investigated by the Staff.

10 And contrary to the Board's apparent opinion, we
11 have not tried to raise every issue under the sun with respect
12 to quality assurance, but we have selected those which concern
13 us most and as to which we have evidence or can develop
14 evidence, such as through a whistle-blower. Whether or not
15 the Board believes that whistle-blower, that whistle-blower
16 helps focus this Board's attention on that contractor. And
17 in this respect, I would remind the Board of the testimony
18 of Mr. Hughes.

19 While most of his testimony was not accepted as
20 true by the Board, Mr. Hughes, himself, served as a catalyst
21 for this Board to focus on the quality of the work of
22 Hatfield Electric.

23 And we feel, in that sense, Mr. Hughes was
24 invaluable, whether or not this Board believed him.

25 I would like now to turn to the specifics in my

1 list that I submitted to the Board. And I believe yesterday
2 we got as far as number 3. I will begin with number 4.

3 Number 4 is enforcement actions, civil penalties
4 assessed against Commonwealth Edison, described in --

5 JUDGE SMITH: Before you proceed with number 3 --

6 MS. WHICHER: Number 4.

7 JUDGE SMITH: Before you depart from number 3, I
8 provided Mr. Campbell, I believe, with a copy of the Board's
9 opinion in the Union of Concerned Scientists because of the
10 collateral discussion of preoperational testing, knowing that
11 the matter would come up this morning. And I wanted the
12 parties to be informed of what I viewed as being the current
13 law on the litigability of such issues. And apparently I
14 didn't communicate very well.

15 MS. WHICHER: I have not seen that decision.

16 JUDGE SMITH: Okay.

17 MS. WHICHER: I will take Your Honor's --

18 JUDGE SMITH: May I ask

19 MR. CAMPBELL: Your Honor, we copied it off. We
20 have the copies; we are reviewing them now. We are seeking
21 assistance to the discover whether or not it pertains to the
22 stipulation that --

23 JUDGE SMITH: Yes, that is one matter. But the
24 very reason I gave them was the ^{Court} Board had some comments in
25 there about what apparently is the NRC's position on the

1 litigability of preoperational testing. That's why I brought
2 it, and I apparently did not emphasize that adequately.

3 MS. WHICHER: I'm sorry. I have not seen that
4 decision. And apparently there was some miscommunication. I
5 was not given a copy of that.

6 All I can say is that I will review it as soon as I
7 receive a copy of it.

8 And if our position changes on the preoperational
9 testing issue, I will inform the Board.

10 On February 10th, 1984, Mr. Miller provided a
11 McGuire notification to the Appeal Board of all enforcement
12 actions taken since the close of the record, I believe, in
13 April, the quasi-close of the quality assurance record. It
14 admitted, in that February 10th submission, that it had been
15 dilatory in submitting facts concerning civil penalties. We
16 believe the fine history of Commonwealth Edison is relevant
17 that is named in the initial decision at 131 and pages
18 following, and especially paragraph D-29.

19 Should that information -- should the initial
20 decision be made current, it should reflect a total of
21 \$600,000 in fines in 1983, placing it well above the
22 regional average, indeed above the national average, more
23 than any other utility, and so far reflects a fine of
24 \$140,000 in 1984. This fine was assessed on May 8th and
25 has yet to be the subject of a McGuire notification to this

1 Board by Commonwealth Edison.

2 And item number 4, it is more in the nature of
3 supplementing the record than litigating new facts.

4 As to number 5 --

5 MR. MILLER: May I just be heard briefly on the
6 issue before the Board?

7 My Board notification of February 10th did, in
8 fact, recite the subsequent civil penalty history of
9 Commonwealth Edison Company as a company. Following the close
10 of the April hearings, it is worth stating for the record,
11 however, that there have been no civil penalties assessed
12 with respect to the Byron station, nor have there been any
13 assessments of civil penalties in connection with the
14 construction at Commonwealth Edison of a nuclear power plant,
15 other than a \$100,000 civil penalty at the Braidwood station,
16 which was discussed by the Board or discussed in evidence
17 before the Board, although at the time the penalty had not
18 yet been paid.

19 I believe that without a really quite extensive
20 examination of each of these civil penalties for Commonwealth
21 Edison Company, as well as some sort of comparative analysis
22 with other utilities, region- or nationwide, as perhaps
23 suggested by Ms. Whicher, the Board's conclusions, which
24 were found in paragraph D-30, are not going to be altered
25 by the fact of the additional civil penalties.

1 There has been no indication from the Staff that its
2 view of Commonwealth Edison's commitment to safety and its
3 corporate attitude has changed as a result of these additional
4 civil penalties.

5 And the statements of Mr. Forney that the Board
6 cites to in paragraph D-30 I believe were made unimpaired.
7 I think that it simply will add nothing to the record with
8 respect to quality assurance at Byron station by going into
9 the civil penalties involved in Commonwealth Edison's
10 operating plants.

11 MS. WHICHER: We don't intend to litigate the
12 details of each civil penalty. We think the record ought to
13 be supplemented to reflect the facts as they are current, as
14 this proceeding will be relitigated on remand. And that
15 includes an additional \$400,000 in 1983 and so far \$130,000
16 in 1984.

17 The Board's treatment of those fines in its
18 initial decision -- I cannot predict what effect that will
19 have, but we feel this is information that ought to be
20 before the Board. And apparently Mr. Miller does, too,
21 because he submitted it.

22 JUDGE SMITH: Now, wait a minute.

23 When parties comply with the so-called McQuire
24 rule, they do not necessarily concede that the information
25 they provide is information which is appropriately a subject

1 for litigation. That inference cannot be drawn.

2 MS. WHICHER: I am merely saying it's relevant to
3 the Board's determination of reasonable assurance. We would
4 like the record supplemented to reflect the current status
5 of Edison's fine history.

6 JUDGE SMITH: That might be done quite easily and
7 quickly, maybe perhaps even by stipulation.

8 That being the case, however, what will we do with
9 that information?

10 MS. WHICHER: I think that information ought to be
11 factored into this Board's analysis of whether, under the
12 totality of the circumstances, based on the evidence it has
13 heard thus far and what it will be hearing in the remand
14 hearing, reasonable assurance exists that the Byron plant
15 can be safely operated.

16 MR. RAWSON: Judge Smith, just a comment or two.

17 When we started this litigation, we had a very
18 broad contention. The Applicant and Staff introduced
19 testimony relating to a whole range of issues concerning the
20 Applicant's overall performance.

21 The evidence, then, moved very quickly into an
22 analysis on the specific safety of this plant, as
23 constructed.

24 The Board, in its initial decision, moved very
25 quickly past the generalized inferences to the specifics.

1 It seems to me that we really ought to be focusing on the
2 specifics, which are, after all, more clearly relevant and
3 important to the determination of the safety or not of the
4 plant. It seems to me that we are well past litigating the
5 generalized questions about enforcement history.

6 For example, it's just not nearly as probative or
7 efficient a use of the Board's time.

8 MS. WHICHER: We are concerned that this Board
9 view all the evidence, including the evidence to be received
10 in this remanded hearing, and the totality of the
11 circumstances, and whether, based on all the evidence it
12 has heard and will hear about Byron, it can find reasonable
13 assurance not based solely on the evidence that it will be
14 hearing in this remanded proceeding.

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1 For that reason we believe this fine record ought
2 to be brought current.

3 JUDGE SMITH: Proceed.

4 MS. WHICHER: As to the fifth item on my list, a
5 series of five I&E reports submitted by Mr. Rawson. Three
6 of these submissions, reports 83-61, 84-02 and 84-05 concern
7 allegations against Hatfield Electric. And in addition,
8 84-05 concerns information on the 82-05 reinspection program,
9 because the 82-05 reinspection program was and has been
10 relied on by Region III to dispose of many of Hatfield's
11 allegations. Allegations against Hatfield, particularly
12 those concerning weld quality.

13 We believe we have a right to litigate them, and
14 that they are every bit as relevant as, for example, more
15 evidence concerning the Hunter tabling issue. We believe
16 that we have the right to examine the Staff's investigation,
17 otherwise this Board is allowing the Staff to determine
18 what is true and what is not true. And as a judicial
19 function, that is not a function for the Staff.

20 Once these allegations are put in issue, which
21 they were by Mr. Hughes' testimony and by the Region's
22 testimony that the 82-05-19 program was being relied on
23 to resolve open allegations.

24 As to the third of the reports in Mr. Rawson's
25 list, 83-58, this concerns preoperational test violation,

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1 which at this time we do not intend to litigate. However,
2 I reserve to change our position based on the decision which
3 I have not yet seen that the Board referred to earlier this
4 morning.

5 The fifth report in that series concerns Reliable
6 Sheet Metal and the 100 percent reinspection of it. We
7 believe Reliable is an appropriate subject of relitigation
8 in these reopened proceedings for the reasons I've already
9 stated, and for the reasons I stated yesterday.

10 That completes my arguments on number 5, and I'll
11 be glad to respond to any arguments by the Staff or the
12 Applicant.

13 MR. MILLER: I'm at a little bit of a handicap
14 since I gave up my inspection reports.

15 MS. WHICHER: I'll give them back to you. Oh,
16 wait. This is the number 5 series.

17 MR. MILLER: Insofar as these inspection reports
18 deal with the reinspection program, I think they could be
19 comprised within the scope of the testimony by the Staff or
20 the Applicant in any event. And to the extent that the
21 allegations that are referred to have been closed on the
22 basis of the reinspection program, I don't know that we
23 would have any objection to litigating that issue.

24 What concerns me is the suggestion that by
25 opening up the issue on the basis of these inspection reports

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1 the Intervenors believe that they are thereby entitled to
2 critique, if you will, the entire Staff investigation and
3 report. It seems to me that if there are facts known to the
4 Intervenors which deal with the allegations of Hatfield
5 and Hunter, they present them by way of direct examination
6 or cross-examination and let the Board decide whether the
7 Staff's determination that an allegation was unsubstantiated
8 or substantiated, or of safety significance is true.

9 But to go off on a tangent and simply second guess
10 the manner in which the Staff conducts these investigations
11 is not going to be productive, and it's going to be a big
12 time waster. What we're all interested in here are the facts
13 relating to the reinspection program itself, and what the
14 reinspection programs tells all of us about the allegations
15 that were made.

16 Within those limits, I don't have any objection
17 if the Board wishes to hear evidence on those allegations
18 to litigate. But I do have objection to having some sort
19 of wide ranging inquiry into the way in which the Staff
20 itself conducted these investigations.

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21 MR. RAWSON: Judge Smith, my comments briefly
22 are similar to those of Mr. Miller. I don't see a basis
23 for us going into a wholesale inquiry into the Staff's
24 inspection process. I find that Ms. Whicher's reference
25 to these reports is still too general to do me much good in

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1 being responsive, and I think the Board as well. If there's
2 a specific allegation and specific information in those
3 inspection reports which Ms. Whicher thinks is material to
4 the matter before the Board at this time, then we ought to
5 talk about it. But we ought to talk about it specifically,
6 rather than the inspection report as such.

7 JUDGE SMITH: Well, Ms. Whicher, to the extent
8 that she is not specific as to her arguments, that's going
9 to be one of the risks she takes when the Board gets back
10 and studies the transcript and studies the documents.
11 Considering our admonition before, I don't think you want
12 any more advice, however, from us, so you be as specific as
13 you wish.

14 MS. WHICHER: Reports 83-61, 84-02 and 84-05
15 all concern allegations against Hatfield, the status of
16 those allegations. And as to the last of those reports
17 concerning the reinspection program, my understanding is
18 that neither the Applicant nor the Staff object to the
19 litigation of that report with respect to the reinspection
20 program.

21 It seems to me the problem is to what extent are
22 Intervenors allowed to inquire into the Staff's disposition
23 of allegations. That to me seems to be what we're really
24 talking about here.

25 JUDGE SMITH: Well, make your arguments. To what

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1 extent to do you think you should be allowed to inquire.
2 I mean, you have the rules of practice, you have the case
3 law, make your arguments.

4 MS. WHICHER: I believe the Intervenors ought to
5 be allowed to inquire as to the disposition of every
6 allegation against Hatfield Electric Company.

7 JUDGE SMITH: In what manner? Prehearing --

8 MS. WHICHER: Cross-examination. Unless I have
9 a witness, which I don't have at the moment who has
10 information otherwise.

11 JUDGE SMITH: You see, Ms. Whicher, going back
12 to the problem that I asserted that you wish to push with
13 more or less equal vigor a large array of issues down the
14 road, you make it virtually impossible for the Board to
15 come in and say, well, look I think this one has a lot of
16 merit. Why don't you do this, why don't you do that. We're
17 not going to help you. You're on your own.

18 Unless we see an issue which, on our own we will
19 pick up and put in there because of our own judgment, then
20 you're going to have to be your own litigator.

21 MS. WHICHER: Your Honor --

22 JUDGE SMITH: You just tell us what you want and
23 we'll rule on it.

24 MS. WHICHER: I would like to litigate -- be
25 allowed to cross-examine on the disposition and the

3pb6
1 propriety of the disposition of allegations against Hatfield
2 Electric Company.

3 JUDGE SMITH: I think then that you're making
4 your request prematurely. I cannot tell you at this moment,
5 until there's a witness on the witness stand whether you
6 can cross-examine or not.

7 MS. WHICHER: All right, then we'll just have
8 to wait until --

9 JUDGE SMITH: I guess. I mean, your motion right
10 now is you want to cross-examine. I don't know. Ask the
11 question, wait till there's an objection.

12 MR. RAWSON: Judge Smith, for planning purposes,
13 however my comments were really directed to the question
14 of whether we were going to be establishing as an issue to
15 be taken up in the direct testimony of the parties the
16 disposition of the allegations. And my arguments have been
17 that I think we ought not to do that.

18 Yesterday we discussed the example of the affidavit
19 the Staff filed of Mr. Connaughton. At this point in time
20 it would not be the Staff's intention to put on wholesale
21 testimony on the disposition of all those allegations unless
22 the Board and the parties identify that as an issue.

23 MS. WHICHER: It doesn't have to. I can
24 cross-examine Mr. Connaughton and obtain all the information
25 I need on that. And to the extent he has additional evidence

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1 that he thinks the Board ought to hear, that can be done
2 on redirect.

3 MR. RAWSON: To the extent that cross-examination
4 is within the scope of the issues, I would agree on that.
5 But it is not clear to me that some of those are going to
6 be within the scope of the issues that were formulated here
7 for the relitigation. And that's my only concern. I don't
8 want us to get caught in a situation where Ms. Whicher
9 tries to bring up a particular inspection report during the
10 examination of a witness who is here to talk about the
11 reinspection program, and then is surprised when the Staff
12 objects that that particular inquiry is beyond the scope of
13 the issues.

14 JUDGE SMITH: Could we have an example? This
15 is very difficult for the Board to give guidance to the
16 parties in such a general discussion.

17 MR. RAWSON: That's my problem as well. And
18 that's the reason that in our May 23rd letter we asked for
19 specificity.

20 MR. MILLER: I might just say that the very first
21 inspection report that is attached to Mr. Rawson's March
22 7th letter -- report 83-61 -- the one allegation that is
23 referred to there is an investigation of an allegation made
24 regarding Hatfield Electric. There is nothing in the Staff's
25 writeup however, which indicates that the investigation of

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1 this allegation was in any way tied to the reinspection
2 program itself.

3 The allegation relates to the qualifications of
4 a welder. And the disposition of the allegation involved a
5 check of that welder's certification package and a determination
6 made that he was properly qualified for the welding that he
7 was performing.

8 I may have spoken too soon when I said we have
9 no objection to litigating allegations against Hatfield. This
10 one, for example, seems to me to be simply outside the scope
11 of reinspection program. And we are now into an issue that
12 I don't believe we have had any evidence on prior to this
13 time, which is the qualifications of craftspeople to perform
14 their functions.

15 MS. WHICHER: That appears to me to be an objection
16 that Mr. Miller may make on cross-examination if he wishes.
17 I was under the impression we were here today to decide the
18 scope. And it doesn't appear to me that this conversation
19 is directed toward that end, but rather to review each of
20 these inspection reports. And I think that's a matter for
21 the attorneys to do in preparing their litigation strategy.

22 Our view is that the scope of the remanded
23 proceedings ought to include any new evidence that has come
24 out since the record was closed in August. And to the
25 extent that the Board requires a more detailed presentation

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1 about what that evidence is that is exactly what I am
2 attempting to do this morning.

3 But to the extent Mr. Miller wants to pick every
4 reinspection report that I mention and object to it, and
5 I think that objection is premature. And he ought to wait
6 and see if I use it on cross-examination.

7 MR. MILLER: Well, excuse me. It seems to me that
8 Ms. Whicher's last comments just, if you will, add further
9 credence to the comments that you made from the bench
10 yesterday, that what we're saying is, I want to maintain
11 absolute flexibility on every issue. And perhaps at
12 cross-examination you'll find out, Board and the other
13 parties, whether or not I intend to pursue something.

14 I do not wish, Judge Smith, to put my client
15 at risk in this very important proceeding by having somebody
16 play games with what the scope of this reopened hearing is.
17 We want to address the issues that the Board orders us to
18 address. But to simply say, well, you make a decision as
19 to whether this allegation should be addressed in your
20 direct testimony and then let's see what happens on my
21 cross-examination is simply not in keeping with what I
22 understood the process to be, in terms of issue definition.

23 MS. WHICHER: Your Honor, there's no requirement
24 that Edison submit direct testimony on each allegation. I
25 believe the disposition of allegations is an appropriate

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1 topic for litigation. I have selected a list of inspection
2 reports dealing with the allegations. I am sorry I only
3 had one evening to do it. And that list may very well be
4 narrowed on cross-examination.

5 Now, to the extent Mr. Miller wants to inquire as
6 to the what I'm going to cross-examine about, I think that
7 is entirely inappropriate, and I think that this discussion
8 ought to center around whether disposition of allegations
9 against Hatfield Electric is an appropriate topic for the
10 remanded proceeding. That's the real issue here.

11 MR. RAWSON: I would suggest that we did discuss
12 that yesterday and the Board reiterated its ruling of last
13 summer that we would deal with these disposed of allegations
14 on a case by case basis. That information has been available
15 for some time now. We're here to talk about whether that
16 information ought to be the subject of litigation.

17 I want to avoid a situation in which we prepare
18 testimony based on what we all understand to be the scope
19 of the issues, and then cross-examination comes out on
20 issues relating to specific findings or allegations. We
21 may not have the proper witnesses, not having understood
22 that that was to be a subject of the litigation.

23 MS. WHICHER: Fine. I will submit to Mr. Rawson
24 a list of the inspection reports and the allegations which
25 we would like to cross-examine on so he can have the witnesses

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1 available. Perhaps that would solve the problem.

2 MR. RAWSON: The point is, we need to know what
3 the scope is. We told Ms. Whicher in our May 23rd letter we
4 considered that her obligation to do that for today's
5 conference.

6 MS. WHICHER: Well, you're not the judge. I'm
7 sorry.

8 JUDGE SMITH: Yesterday we had a discussion as
9 I recall where we put a probable cutoff point on the
10 relevance of allegations at the craftsman level. I hesitate
11 to make that a binding rule that would apply in every instance
12 because I cannot envision every circumstance. But I thought
13 that we had agreed that the qualifications of the inspectors
14 were somewhat beyond -- the general qualifications of the
15 inspectors, except for the appeal board's language of the
16 inspections following September '82, was the outside of
17 the scope. And the qualifications of the particular
18 craftsman -- excuse me, what did I just say?

19 The qualifications of the investigators was the
20 boundary of the scope. And that the qualifications of the
21 craftsman would probably be beyond the scope. And that is
22 diminished relevance as a question. It's not a better of
23 no relevance, but the need to put a reasonable boundary
24 around the inquiry. That to me was my -- that is my memory
25 of our discussion yesterday.

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I have the cover letter of that March 7th
transmittal with me. I do not have the 83-61 document.

1 I really hesitate -- what you're asking for is
2 advanced evidentiary rulings without any evidence.

3 MS. WHICHER: I was under the impression, from what
4 you said yesterday, that you wanted more specificity as to
5 why I thought these ought to be litigated. That's exactly
6 what I'm trying to go through, without making you look at the
7 reports. We apparently only have one copy of the report in
8 the room. If I can just get my views on the record, I think
9 that's really all I can do here today.

10 JUDGE SMITH: All right, I'm confused.

11 MS. WHICHER: What can I do to help you clarify?

12 JUDGE SMITH: Just give me your views on the
13 record. It will do you little good if the Board doesn't under-
14 stand your views.

15 MS. WHICHER: Well, my view is that the disposition
16 of allegations against Hatfield Electric Company, in
17 particular --

18 JUDGE SMITH: All allegations?

19 MS. WHICHER: All allegations -- are appropriate
20 subjects for this reopen proceeding. I am not suggesting
21 that either Edison or the Staff need present direct evidence
22 on that. To the extent you want to view this list as a
23 preview of my cross examination, then you may view it as such.
24 But I consider the disposition of all allegations, at this
25 point, to be within the scope of the proceeding, just as I

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1 consider all new evidence developed since the close of the
2 record to be within the scope.

3 JUDGE SMITH: See, when you start talking like
4 that, not only are you no help, you're just totally confusing
5 to me. I just simply don't know what you meant by that last
6 clause. It is unbounded.

7 MS. WHICHER: Okay, let me take an example from
8 the list. Number 6 is next on the list, Mr. Rawson's
9 March 28th Board Notification, Report 84-09, substantiates
10 allegations set forth in 84-02.

11 JUDGE SMITH: Wait a minute. May I catch up with
12 you?

13 MS. WHICHER: Yes.

14 JUDGE SMITH: All right.

15 MS. WHICHER: It contains some rather egregious
16 examples of cable pulling by Hatfield, historically starting
17 in 1981. One might think they had learned their lesson,
18 but they continued until at least December 1983. Therefore,
19 in spite of all their troubles Hatfield continues this long
20 and bad history. This also relates to the reinspection report,
21 because apparently the inspectors are not doing their job,
22 even after the reinspection and recertification program was
23 complete.

24 Therefore I consider this report, while it goes
25 back historically farther than I would choose to pursue it,

1 shows that Hatfield has not cleaned up its act and its long
2 and bad history continues, even to the date of this report.
3 That is what I mean by new evidence that has developed
4 since the close of the hearings in August. I think that is
5 a good example.

6 JUDGE SMITH: So you're asking now, is that one
7 of the items that the Board -- with its broad authority --
8 has to receive evidence on?

9 MS. WHICHER: Yes, it's relevant to the issue of
10 whether or not reasonable assurance exists that Hatfield's
11 work is reliable.

12 JUDGE SMITH: See, that's helpful. Now you pick
13 a particular incident and you say well, you know, you argue
14 there is some contextual background. That's helpful. So are
15 you asking us to rule on a report by report and incident
16 by incident basis, whether it should be included?

17 MS. WHICHER: This particular report, I believe
18 that the Staff is under an obligation to present direct
19 evidence on in Edison as well. Whether or not they do that is
20 up to them, of course, but I certainly intend to cross
21 examine on this report. I think this is a very important
22 report and it contains new evidence that has developed since
23 the close of the record concerning Hatfield Electric.

24 I think it's the perfect example of the type of
25 evidence that belongs here.

1 JUDGE SMITH: Is cable pulling one of the
2 unrecratable circumstances? I suspect that it is and my
3 suspicion is reinforced by Mr. Connaughton's expression.

4 MR. RAWSON: The assemblage, over here at the
5 Staff's table, indicates that it is non-recratable.

6 JUDGE SMITH: I think that probably would be
7 included in our broader request yesterday. I would think
8 so.

9 MR. RAWSON: I would note also, for the Board and
10 the parties, that the Staff has a further inspection report
11 evaluating the follow up actions, as a result of this report,
12 which will be out shortly.

13 MS. WHICHER: Maybe at the end of our session today,
14 we can get a listing of the reports we can be expecting, that
15 might relate to this proceeding from the Staff. I think that
16 would be most helpful to us.

17 The seventh item on my list --

18 MR. MILLER: Excuse me, Judge Smith, we kind of
19 left paragraph 5 in limbo. It seems to me that a reasonable
20 definition of what allegations are within the scope of this
21 proceeding are allegations the disposition of which rested
22 in a whole or in part on the reinspection program.

23 JUDGE SMITH: That is true.

24 MR. MILLER: And I guess -- I don't know whether
25 the Board intends to rule later on whether that can be the

1 scope or whether, as Ms. Whicher expressed it, simply
2 all allegations relating to Hatfield Electric.

3 JUDGE SMITH: Well you see, that's the problem.
4 I would agree that that set of allegations that you just
5 described is within the scope. What I would not agree
6 with are all others are necessarily outside the scope. But
7 I think there has to be some particular reason why they would
8 be within the scope. Certainly, we cannot ascribe to her view
9 that all Hatfield allegations are within the scope. She has
10 not, at least, convinced this Board member that all Hatfield
11 allegations are within the scope of the reopened proceeding.

12 MS. WHICHER: May I continue on my list? Number
13 7 is the SALP report, which is a compilation or synthesis
14 of unfortunately 1982 violations of performance at Byron.
15 My understanding is, from Mr. Rawson, that a SALP report on
16 1983 is due shortly. I have two points to make about this.

17 First of all, the objection during the August
18 portion of the hearings to my introduction of the SALP report
19 as evidence was solely on the basis that it was a preliminary
20 report. It is not final. Therefore, I see no valid objection
21 to it.

22 Secondly, we believe it relates to the quality
23 of Byron as a whole against which the reinspection effort and
24 the reinspection program results must be judged.

25 Finally, Mr. Rawson suggested to me, the other day,

1 that a new SALP report will be out shortly. We would agree
2 to litigate that one, instead of the 1982 SALP report, with
3 the understanding that the 1983 report will cover the
4 reinspection program and will be more current. We are
5 interested in the most current evidence available, about
6 the quality of construction at Byron.

7 MR. MILLER: My recollection, of my objection to the
8 introduction of the SALP report, in our August hearing, was
9 two-fold. First, it was preliminary. Secondly, and of
10 equal importance, was that it was simply another recitation
11 of Staff observations of items of noncompliance on the
12 quality assurance history of Byron, that had already been
13 litigated. That is, it added nothing to the existing record
14 put before the Board.

15 That objection is as valid today as it was then.
16 Once again, we're going back to 1982 events, most of which --
17 insofar as they relate to certainly Hatfield, and probably
18 to Hunter as well, have already been the subject of detailed
19 evidentiary presentations to the Board and indeed findings,
20 some of them adverse to Applicant on those very subjects.

21 The SALP report, as a document, I think has very
22 limited relevance to the issue in this hearing. To the
23 extent that the SALP report that is going to be forthcoming
24 addresses the reinspection program, that may or may not have
25 some insights into the Staff's approach and to the inspection

1 program that do not already exist in inspection reports on
2 that program. But -- once again, the Board is free to take
3 almost any of these issues and require evidence on them. But
4 this one just seems to me, well not laid to any relevant
5 evidence with respect to reasonable assurance that the Byron
6 facility, insofar as it dealt with the reinspection program.

7 MS. WHICHER: Perhaps Mr. Rawson could repeat
8 the statement that he made to me the other day, about the
9 imminence of the next SALP report.

10 MR. RAWSON: I have no recollection of using either
11 the words "imminence" or "shortly" in connection with that.
12 What I told here was the SALP report was in preparation for
13 1983 and the Staff would be issuing it. At this point, it is
14 still in preparation. We will making a Board Notification of
15 it at the time it's ready. I don't think we could give a
16 firm date, right now, in terms of when that particular
17 report would be out.

18 So it seems to me it would be a Board Notification
19 and would be dealt with as new information when it does
20 become available. Other than that, I would ascribe to Mr.
21 Miller's comments, which I think are in line with our May 23
22 letter.

23 As to the other SALP report, there was nothing in
24 the one which was recently issued which added materially to
25 information which was already in the record. We are making

1 every effort to expedite the preparation of that report. It
2 is not something which we are willing to withhold or avoid
3 having the subject of testimony. We will get it out as part
4 of our effort to make sure that all relevant information is
5 before the Board.

6 MS. WHICHER: With Mr. Rawson's assurance, I
7 will withdraw Number 7 and make my case for the 1983 SALP
8 report when it comes out, because I expect it will encompass
9 the reinspection program. And to that extent, will be
10 extremely relevant to this Board. It will be something
11 of confidence that the Board will want to hear.

12 JUDGE SMITH: Certainly, if it adds independent
13 relevance to the reinspection program, I think that will have
14 to be presented. You recall, however, our initial decision.
15 We found that the SALP reports, as such, were not especially
16 valuable in resolving issues in this case.

17 MS. WHICHER: Well, Your Honor, I personally found
18 the SALP reports valuable in that they give an overview
19 which a simple run-through of items of noncompliance does not
20 always provide. And they provide an overview and a synthesis
21 of the Staff's view that thusfar has not been contained in
22 their direct testimony.

23 JUDGE SMITH: But it's hard to take that overview
24 and put it into traditionally acceptable findings. That's
25 the difficulty.

1 MS. WHICHER: To the extent Staff identifies
2 trends in the SALP report that are not identified in individual
3 items of noncompliance, is there issued, I would think it
4 would be extremely helpful to the Board, as it is to me, in
5 analyzing the trends of quality construction in the plant.

6 JUDGE SMITH: We'll have to take up the particular
7 part of the report that you allude to, as compared to the
8 simple ratings which you, I believe, urged us to find in our --

9 MS. WHICHER: No, Your Honor, my focus last summer
10 was not on the ratings of the SALP report, as much as it was
11 on the conclusions of the SALP report, as to Commonwealth
12 Edison's myopic view with respect to fixing identified items
13 of noncompliance, but not looking to see if similar items
14 of noncompliance existed elsewhere. And it was the portion
15 of the preliminary SALP report that was read into the record
16 because of the objections to the admission of the entire
17 document.

18 Number 8, again, is merely my expression that new
19 evidence is new evidence. I don't know how to say it any
20 differently, and I don't see that it bears repeating. I have
21 prepared a list, and Ms. Chavez has aided me in preparing a
22 list of inspection reports relating to allegations. I don't
23 think that would be of much value to the Board. There are
24 approximately 20 reports. This merely reiterates Intervenor's
25 view that any new evidence bearing on the quality of Byron,

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1 since the close of the record, is a legitimate topic in this
2 reopened proceeding. And that has been discussed at length.
3 And I see no reason to go over that argument again. And I
4 would just as soon move on, if it's all right with the Board.

5 JUDGE SMITH: That's fine with me.

6 MR. RAWSON: Judge Smith, may I make one comment?
7 I didn't remind myself to make the comment earlier, when
8 Ms. Whicher started, but she's just repeated the position of
9 the Intervenors that the Board has jurisdiction to consider
10 anything that's relevant to the reasonable assurance question.
11 I didn't want, by my silence, to have the Board and parties
12 think that the Staff agrees that that is a proper statement
13 of the law of this case.

14 The construction quality assurance contention is
15 what has been remanded to this Board. The Board's jurisdiction
16 is over properly contested issues and that deals with
17 quality construction assurance, not the whole range of issues
18 which the Staff must consider, which go beyond this.

19 MS. WHICHER: I would refer the Board to the famous
20 Footnote 72, given the Licensing Board and Mr. Miller's words
21 carte blanche to include any other question related to the
22 reinspection program or otherwise, that it deems relevant
23 to the issue, whether or not deficiencies -- reasonable
24 assurance exists that the Byron facility has been safely
25 constructed.

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1 I think that is a pretty broad statement by the
2 Appeal Board, giving this Board jurisdiction to hear whatever
3 it feels it must hear in order to find whether reasonable
4 assurance exists.

5 MR. RAWSON: We take a very strong position and
6 urge the Board to find that Footnote 72 does not give the
7 Board carte blanche with respect to the entire question of
8 reasonable assurance of the plant. It is the context of
9 the quality assurance contention and decision.

10 The issue back before the Board now is quality
11 assurance.

12 MS. WHICHER: We're not attempting to relitigate
13 steam generators or anything of that nature. We're dealing
14 only with quality assurance and I think the issue is going to
15 be fully focused by the next topic, and I can see it being
16 led into right now. So let's just go right to it. And that
17 is the integrated design inspection program underway at
18 Byron.

19 MR. MILLER: There has been no specification by the
20 Intervenors as to what portions of this mountain of inspection
21 reports they are referring to in Paragraph 8, that relate
22 to the scope of the reopened hearing. I'd just like
23 that clear on the record.

24 MS. WHICHER: Judge Smith, if I might summarize,
25 first the quality assurance program of Sargent & Lundy is

1 clearly and explicitly within the scope of Contention 1A.

2 JUDGE SMITH: Would you repeat that?

3 MS. WHICHER: The quality assurance program of
4 Edison's architect engineer, Sargent & Lundy, is clearly
5 within the scope of Contention 1A and is explicitly within
6 the scope of Contention 1A. I'd like to give you a very
7 brief background about the integrated design inspection, which
8 is known as IEI.

9 In the summer of 1983, a special inspection of
10 Sargent & Lundy was done by Region IV. I believe it was
11 done under the auspices of the vendor inspection program,
12 although I am not certain. Because Intervenors are not on the
13 list to receive vendor inspection reports from Region IV --
14 we only receive I&E reports from Region III, I understand
15 the system has since changed, but we did not receive
16 reports that come out of NRR in Washington.

17 We were unaware of this program. The purpose
18 of the program was to evaluate the control of design process
19 and the quality of design activities.

20 There were five general problems identified during
21 the integrated design inspection program. I can list those
22 for the Board. The availability of valid calculations, the
23 meeting of licensing commitments in postulated breaks and
24 cracks and certain areas, the documentation of design
25 criteria in the area of instrument control. Deficiencies

1 in the balance of piping, plant design work done by Westinghouse
2 and specifically, and most importantly, in the electrical
3 power area, a systematic weakness in justifying lack of
4 separation of safety and non-safety related cables.

5 As a part of satisfying the NRC's concerns, I
6 have found out -- through Region III -- that Edison has
7 hired Bechtel Corporation to do an independent audit of
8 Sargent & Lundy. We believe that especially the electrical
9 power area of the integrated design inspection program ought
10 to be litigated in this reopened proceeding. The performance
11 of Sargent & Lundy is clearly included within the contention
12 and we urge the Board to consider that serious problems exist
13 with design QA and we would particularly focus our
14 presentation on the electrical area as found in the
15 integrated design inspection program.

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1 MR. MILLER: Judge Smith, if I could respond
2 briefly. It is true the words architect engineers appear
3 in Contention 1A, but it is put in the focus of the past
4 history of the noncompliance and there was never any evidence
5 adduced by way of direct or cross-examination, which dealt
6 with Sargent & Lundy's quality assurance and quality control
7 except insofar as Mr. Shewsky may have made some very general
8 statements about the Commonwealth Edison quality assurance
9 program.

10 To my knowlede, I don't think the words Sargent
11 & Lundy appear in the transcript of the initial QA hearing.

12 JUDGE SMITH: Well, no, there were allegations
13 that --

14 MR. MILLER: Oh, that's right, that Sargent &
15 Lundy was a poor excuse for an engineering firm. I recall
16 that allegation. The alleged missing beam.

17 JUDGE SMITH: Yes, and that there was a practice
18 that Sargent & Lundy would modify their design to accommodate
19 any errors.

20 MR. MILLER: Right. So I stand corrected.

21 JUDGE SMITH: And this I believe was investigated
22 thoroughly by Mr. Hayes.

23 MR. MILLER: Right. And there was extensive
24 testimony on it. But I think that the Board correctly
25 characterized the scope of the hearing before us in its

5pb2

1 finding D-2 where it said evidence was received for both
2 construction and quality assurance. None of the parties
3 could address the issue of design quality assurance, which
4 is, I believe an entirely different and new issue.

5 I think what we have here almost is the converse
6 of what was heard in the Diablo Canyon situation where design
7 quality assurance was an admitted issue, and at a very late
8 stage in that proceeding, the governor of California attempted
9 to introduce a construction quality assurance issue and
10 attempted to link the two. And that was rejected by the
11 appeal board.

12 I think we have the same sort of a bootstrap
13 attempt here in this proceeding. And now I am talking about
14 the general issue of construction quality assurance, without
15 focusing on the scope of this reopened hearing, as it has
16 been unfolding, as we have discussed the various issues that
17 the company and Intervenors have put forward for consideration
18 by the Board.

19 It is becoming clear to me that the Board's
20 primary focus, as I believe it should be, is on the
21 reinspection program and its results. And there's simply
22 no showing how the integrated design inspection by Region IV
23 of the company responsible bears on that reinspection program.

24 MR. RAWSON: A couple of additional thoughts,
25 Judge Smith. I agree with Mr. Miller, the contention does

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1 mention architect engineers, but we have a long history on
2 this contention. The contention is not something that gets
3 etched in stone. It is shaped by the litigation of it, it's
4 shaped by the issues that have been presented.

5 The original Board notification with respect to
6 IDI, which went to the Board and all parties was on October
7 18th, 1983, at the time the Board still had the matter in
8 litigation. I would agree with Mr. Miller that design
9 quality assurance is a different animal than construction
10 quality assurance.

bu 3.

11 If the Intervenors had an interest in design
12 quality assurance, it was incumbent upon them to seek to
13 reopen the record at that point. Certainly now to seek a
14 late filing contention to meet the requirements -- I would
15 note in our Mary 23rd letter, we cited the Board to the
16 Callaway decision of the appeal board, ALAB 750.

17 In that case, the intervenors there sought to
18 raise a design quality assurance issue, directly related to
19 another integrated design inspection after the close of the
20 record on quality construction.

21 JUDGE SMITH: What letter to the Board are you
22 referring to?

23 MR. RAWSON: 83-157, dated October 17th, 1983.

24 JUDGE SMITH: But you just recently made a
25 reference to another one.

5pb4

1 MR. RAWSON: My May 23rd letter to the Board
2 setting out the Staff's position on the issues that it
3 had discussed to the parties. And that letter discussing
4 this issue, number 9, we cited the Board to the Callaway
5 decision. And in that case, as I said, the intervenors
6 sought to raise design QA issues after the close of the
7 record on construction QA issue.

8 The appeal board found those intervenors had not
9 met the tripartite test for reopening the record, that
10 design QA was different than construction QA. And in the
11 absence of a specific nexus which the intervenors were
12 unable to show between design quality assurance information
13 and construction quality assurance issues which had been
14 litigated that the matter ought not to be taken up.

15 So I would stand on those comments, and agree
16 with Mr. Miller that design QA is not within the scope of
17 this proceeding.

18 MS. WHICHER: It is irrelevant whether Sargent &
19 Lundy was or was not litigated in the original QA/QC
20 proceedings. What is relevant is that (a) it is contained
21 within the contention, and (b) what has been uncovered since
22 the close of the record.

23 We believe this Board should not ignore the
24 substantial problems raised in the integrated design
25 inspection, especially when they concern the electrical area.

5pb5

1 Mr. Miller and Mr. Rawson are correct when they say that the
2 primary focus of this remanded hearing should be on the
3 reinspection program. But we do not think that the appeal
4 board meant that the Board should ignore serious problems
5 that have cropped up in the meantime.

6 Mr. Rawson, further made the point that he saw
7 no nexus between the IDI and quality assurance of construction.
8 However, in an IDI meeting which I attended under the
9 auspices of Region III, Mr. Spessard from Region III
10 specifically stated that if Region III were expected to give
11 testimony before this Board as to the quality of the Byron
12 plant, and whether reasonable assurance existed, the IDI
13 inspection programs and the results of Bechtel's analysis
14 would be factored into that testimony.

15 And I believe that statement alone provides a
16 reasonable nexus to allow this to be litigated. Because if
17 Mr. Spessard or any other member of Region III is going to
18 rely to any extent on this program in giving testimony about
19 the reasonable assurance or lack of reasonable assurance
20 of Byron's safety, then I'm entitled to inquire into it.

21 MR. RAWSON: I would suggest that we are back
22 into my earlier point then about what is back before the
23 Board in terms of reasonable assurance, within the scope of
24 the quality assurance contention and other matters which
25 are properly within the Staff's purview.

5pb6

1 Now as far as those comments, Mr. Spessard --
2 I was not at the meeting in question. Mr. Lewis was however --
3 I'm sorry. I amend that. It is our understanding from
4 Mr. Spessard that that is not what he stated and that in
5 any event, an off-the-cuff remark by a regional official
6 without prior consultation with counsel is certainly not
7 something which would bind the Staff in this proceeding.

8 MS. WHICHER: My position stands, Your Honor, that
9 is the Staff relies to any extent on the IDI and results of
10 the Bechtel analysis in its assessment before this Board
11 of the reasonable assurance of Byron's safety, then I am
12 entitled to inquire into that and to litigate that issue.
13 That is my issue.

14 MR. MILLER: Excuse me. That's a very different
15 position, and one that I have no quarrel with, because all
16 we're talking about there is the scope of presumably the
17 cross-examination and any direct examination that may follow
18 from that. But that is very different from beginning now
19 to litigate the whole issue of the design quality assurance,
20 which I understood was the Intervenor's original position.

21 MS. WHICHER: Our position is two-fold. First,
22 to the extent the region relies on the IDI, we have a right
23 to inquire into it. Secondly, we believe the IDI is
24 absolutely relevant to the quality of the Byron plant.

25 Now I have waived my first argument, as Mr. Miller

5pb7

1 has suggested that I have.

2 JUDGE SMITH: Our rules and the rules of this
3 court provide for cameras with available light. We will
4 make an exception, but I think you are pushing it pretty
5 far. It is becoming an annoyance. Would you take a position,
6 make your shots, use your spotlight. But make the shots
7 that you need, or you can use available light.

8 If you can use available light, I'd prefer it.

9 MR. RAWSON: Judge Smith, one additional comment,
10 because again, I don't want the parties to be misled. In
11 the absence of a ruling that IDI is a proper subject of
12 litigation in this proceeding, which I don't believe we
13 have at this point, the Staff will not intend to come in
14 and present testimony on the subject of the IDI inspection.

15 I understand Ms. Whicher's position, that if
16 she has something specific in that report that she thinks
17 is relevant to what the Staff is testifying about, she
18 may cross-examine on that. But I don't want anybody to
19 believe that we're going to come in here and make a showing
20 on the IDI. We don't believe it's within the scope of the
21 contention at this point.

22 JUDGE SMITH: That's my understanding that each
23 party will be making its own judgments, unless the Board
24 indicates that a particular issue should be addressed.

25 MR. RAWSON: I just don't want anyone surprised.

5pb8

1 MS. WHICHER: Moving on to number 10. Let me just
2 read it into the record. I think that would be the easiest.
3 "The overstressing of numerous steel beams, and the reasons
4 overstressing occurred, and whether and what corrective
5 action has been taken."

6 I have discussed this particular item with Mr.
7 Miller, whose position appears to be that it is involved
8 in the situation with respect to the structural adequacy of
9 the structural steel beams at Byron and at Braidwood. And
10 that as hanger locations change, the loads placed on these
11 structural elements also change. And that there is still
12 hangers being installed in Byron I.

13 Some stiffeners have also been installed. Sargent
14 & Lundy and Commonwealth Edison are well aware of the problem,
15 and design changes since the fall of 1982 have been used
16 to document these changes. And there are literally hundreds
17 of changes.

18 Let me tell the Board by way of background that
19 this item of information is drawn from an allegation in a
20 complaint filed by a part owner of the Marble Hill Plant.
21 The Marble Hill plant is a design twin of Byron, designed by
22 Sargent & Lundy. In my conversations with the attorney
23 representing the utility that is suing the Public Service
24 Company of Indiana was the main owner of Marble Hill. This
25 is the part owner that is suing Wabash Valley -- their

5pb9
1 position is that Sargent & Lundy has miscalculated the
2 structural strength of the steel at Bryon and Braidwood and
3 Marble Hill. And it is still a design problem that is not
4 under control.

5 I realize this is new information. It's information
6 that's being developed. Let me put this item in the context
7 of putting the parties on notice that I will be developing
8 information along this regard with the intent of filing a
9 motion to reopen the record on this allegation. Thank you.

10 As to number 11, number 11 concerns why the
11 100 percent reinspections were needed at Johnson Controls,
12 Powers-Azco-Pope, Reliable Sheet Metal, whether they suffer
13 from this same apparent flaws present in the alleged 100
14 percent performed by Pittsburgh Testing Laboratories.

15 First of all, my understanding is that Johnson
16 Controls, PAP, and Reliable were subject to 100 percent
17 reinspections, which stemmed out of the 82-05-19 program.
18 I remind that Board that these two contractors and the
19 reasons for 100 percent reinspections were never litigated
20 because the August proceeding was limited solely to Hatfield.
21 Therefore, Intervenors have never had the opportunity to
22 inquire as to why 100 percent, as opposed to a sampling was
23 required of these two contractors.

24 I also understand that Johnson Controls, Powers-
25 Azco-Pope, Reliable Sheet Metal and all other contractors

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1 were subject to over-inspection by Pittsburgh Testing
2 Laboratories, not just during the 82-05-19 reinspection
3 program, but during the entire course of construction. I
4 submit to the Board, on the basis of the results of the
5 82-05-19 program that PTL has not been one of the stellar
6 performers of that reinspection program.

7 Secondly, Pittsburgh Testing Laboratories did
8 some sort of inspection at Systems Control. Just what about,
9 apparently Commonwealth Edison isn't sure. And I base that
10 comment on Mr. Miller's May 25th letter. Apparently some
11 inspections were performed, some were to be performed but
12 simply were not.

13 And again, reminding the Board that PTL did
14 over-inspections all through the reinspection report, and
15 that is contained in Section 4, page 4 of the reinspection
16 report. Thus, there are three key facts that we believe
17 are important for the Board to understand why Pittsburgh
18 Testing Laboratories, Johnson Controls, PAP and Reliable,
19 as well as the other contractors ought to be litigated in
20 this remanded proceeding.

21 First of all, Pittsburgh Testing Laboratories
22 did over-inspections for the 82-05-19 program. It had poor
23 performance in the 82-05-19 program, and did apparently
24 malperformed its duties with respect to Systems Control
25 Corporation. This leads us to three conclusions.

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1 First, Pittsburgh Testing Laboratories ought
2 to be a subject of the remanded proceedings. Second,
3 Pittsburgh Testing Laboratories over-inspections should be
4 discounted from the results of the reinspection program.
5 And thirdly, that all contractors subject to over-inspection
6 by PTL during the reinspection program ought to be the
7 subject of litigation.

8 JUDGE SMITH: We'd like to have more explanation
9 of your views on PTL. Just what type of litigation do you
10 anticipate? Just what would you expect -- how would you
11 expect it to go? What type of presentation would you,
12 yourself make? And what would you expect that your adversaries
13 would make a reasonable response to your recommendation?

14 MS. WHICHER: First of all, let me tell the Board
15 that we have not, at this time, determined whether or what
16 type of expert witness evidence we will be submitting. It
17 depends in large degree on finances.

18 It is our position that PTL is one of the poor
19 performers in the 82-05-19 reinspection program. PTL did
20 over-inspections, not just during the 82-05-19 reinspection
21 program, but in fact throughout the course of construction
22 at Byron.

23 PTL also did inspections of some sort -- exactly
24 what sort no one seems to know at this point -- of Systems
25 Control Corporation. We believe those three facts ought to

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lead this Board to conclude that PTL should be the subject of litigation in this remanded proceeding.

1 The history of its performance, whether its
2 performance has been adequate to provide reasonable assurance,
3 I do not know at this point whether we will be able to put on
4 a direct witness, but I can assure Commonwealth Edison and
5 the Staff that this will be a point of cross-examination.
6 And we would like a ruling from this Board that PTL will be a
7 subject of the remanded proceeding, as are Hatfield and
8 Hunter.

9 MR. MILLER: Judge Smith, I confess to being
10 totally confuse^d by both the statement of the issues that
11 intervenors wish to litigate in their May 18th, 1984 letter
12 to the Board and Ms. Whicher's oral explanation this morning.

13 First of all, the basic premise from which she
14 proceeds is simply wrong. She asserts that PTL was one of
15 the poorer performers in the 82-05-19 reinspection effort.
16 That is simply not what the report says.

17 JUDGE SMITH: You mean the final report?

18 MR. MILLER: The final reinspection program report
19 concludes that PTL inspectors are qualified on the basis
20 that reinspections of their work met the 90 percent,
21 95 percent criteria.

22 So, I'm not at all certain, once that premise is
23 shown to be faulty, where the rest of the argument goes.

24 The Board previously has indicated its interest
25 in specifically Hatfield and Hunter's results arising out of

1 the reinspection program. And while -- again, at the risk of
2 repeating myself -- should the Board wish to hear the results
3 of that program with respect to any other contract, we will
4 present it. But it is not immediately apparent to me why,
5 at this point in the proceedings, Johnson Controls and
6 Powers-Azco-Pope, as they are referred to in paragraph 11 of
7 the letter, should now be brought in as an additional issue
8 in this proceeding.

9 I think the Board properly characterized the scope
10 of the proceeding as to Powers-Azco-Pope and Johnson Controls
11 in its initial decision, when you said that you really heard
12 very little evidence about them. And that is the fact.

13 JUDGE SMITH: PTL did not do the inspecting for
14 those two contractors. They did their own.

15 MS. WILCHER: They did over-inspections, Your
16 Honor.

17 MR. MILLER: But that's the point, Your Honor. The
18 reinspection program for each contractor was conducted by a
19 properly certified inspector employed by that contractor.

20 There was one over-inspection by PTL. It was
21 perhaps referred to as a unit concept inspection. And that
22 did take place and it -- since Hatfield and Hunter were
23 among the contractors to which that unit concept inspection
24 was applied, the Applicant intends to address that aspect
25 of PTL's work in the reinspection program. But that is a

1 far different issue from the question of whether, in the
2 period prior to Septebmer 1982, PTL had qualified inspectors
3 at the Byron site performing their inspection activities.

4 As I said yesterday -- perhaps my letter of May 25th
5 is not as clear as it could be --- information is still being
6 developed with respect to Systems Control, but there is
7 nothing known to me or to the company at this point which
8 indicates that PTL did not do what was asked of it. The
9 question is, rather, whether what was asked of them was
10 consistent with representations that were made to the NRC in
11 January of 1981. But I do not believe there is any
12 suggestion that PTL's conduct of the inspections that it
13 actually performed at Systems Control has been deficient.

14 MS. WHICHER: Judge Smith, Pittsburgh Testing
15 Laboratories was one of the poor performers in the
16 reinspection program. I don't know if you have that report
17 before you.

18 JUDGE SMITH: Which program? The reinspection
19 program? They were one of the contractors.

20 MS. WHICHER: That's correct -- an independent
21 testing laboratory.

22 JUDGE SMITH: Yes. They were one of the
23 contractors that was identified by Region III as having
24 problems with their inspector certification. They were one
25 of the contractors included in the reinspection program.

1 MS. WHICHER: That's right.

2 JUDGE SMITH: There was no particular mention of
3 them in our initial decision with respect to the
4 reinspection program. But there was a passing reference
5 whether over-inspections and reinspections would continue
6 with the contractors.

7 And what you're suggesting now is their original
8 initial decision should have addressed the fact that PTL was
9 one of the contractors in the reinspection program and
10 evaluated the significance of that.

11 MS. WHICHER: What I'm suggesting is that the
12 results of the reinspection program show that PTL was one of
13 the poorer performers.

14 JUDGE SMITH: Where do you get this "poorer
15 performers"? Mr. Miller has objected to that.

16 MS. WHICHER: Poorer, more poor than others.

17 JUDGE SMITH: Mr. Miller has objected to that, and
18 I don't understand the context in which you're using that.

19 MS. WHICHER: I'm using that particularly with
20 reference to Table 5-1, the number of inspectors meeting
21 acceptance criteria.

22 JUDGE SMITH: So, this is in the final report?

23 MS. WHICHER: Exactly.

24 JUDGE SMITH: All right. Which, incidentally, I
25 don't have. Dr. Callihan has it.

1 MS. WHICHER: Table 5-1, under the heading
2 "Inspectors Performing Subjective Inspections": With the
3 exception of Powers-Azco-Pope, his performance appears
4 abysmal."

5 Pittsburgh Testing Laboratories is the worst,
6 92 percent of the inspectors, under the way this chart is
7 set out, are purported to have passed subjective inspections.
8 Whereas, with respect to other contractors, 100 percent
9 passed.

10 That is the basis for my statement that it is one
11 of the poorer performers of the reinspection program.

12 MR. MILLER: Judge Smith, I think that perhaps
13 this could be put in context if the Board would turn to
14 Exhibits 5-1, which are in subchapter 5, and 5-2, which
15 indicate that for Pittsburgh Testing Laboratory, on
16 objective inspections, nine of nine inspectors were
17 qualified; and that for subjective inspections, ten of
18 eleven.

19 MS. WHICHER: Well, Your Honor, I think, in this
20 case, the percentages -- I'm not sure what the relationship
21 is of the percentages to the real numbers, but it appears
22 to me that -- at least using Mr. Miller's own citations --
23 PTL had one inspector that did not pass the threshold. It
24 has two inspectors whose qualifications were indeterminate.
25 There were only 14 inspectors inspected. His work was

1 inspected.

2 I think that PTL's performance during the --
3 with respect to the reinspection reports -- reinspection
4 program -- coupled with its performance with Systems Control
5 Corporation and the fact it has been doing over-inspections
6 at the plant, not just during the course of construction but
7 during the entire reinspection program, combined to present
8 a convincing case that Pittsburgh Testing Laboratories ought
9 to be one of the contractors that the Board should inquire
10 into.

11 JUDGE SMITH: Okay.

12 Mr. Rawson.

13 MR. RAWSON: I guess I don't have a terrible amount
14 to add to what Mr. Miller said with respect to the
15 reinspection program. The point is that the overall results
16 were considered to demonstrate that the program had been
17 effective with respect to Pittsburgh Testing Laboratories.

18 JUDGE SMITH: Yes. But if we go the course we are
19 headed, we will never learn that.

20 MR. RAWSON: I understand that, Judge Smith.

21 We took the position in our May 23rd letter that
22 absent some specific information to warrant expansion of
23 the scope of this proceeding, Pittsburgh Testing Laboratory
24 -- that we ought not to inquire into Powers-Azco-Pope -- in
25 fact, PTL wasn't one of those originally mentioned by

1 Ms. Whicher, and I haven't heard anything this morning that
2 causes me to change that opinion.

3 JUDGE SMITH: Well, I think Pittsburgh Testing is
4 perhaps a special case.

5 Argument can be made that it was not given the
6 attention that it should have been given in the initial
7 decision. We did not really discuss it much at all with
8 respect to the reinspection program. And indeed, it was
9 outside the scope of the reopened hearing, which we
10 recognize, and with Hunter for that matter.

11 I would put Pittsburgh Testing as a candidate for
12 further Board consideration. I'm not saying that we are
13 ruling that that would be an issue in the proceeding. I'm
14 saying that more than some of the candidate issues advanced
15 by the Intervenor, this is one that the Board will give
16 special discussion to.

17 And for planning purposes, I want to give you that
18 advance notice.

19 MR. MILLER: Just for the Board's further
20 information, at page 5-8 of the Reinspection Program Report,
21 there is a further discussion of Pittsburgh Testing
22 Laboratory and its results.

23 MS. WHICHER: This is evidence, Your Honor.

24 JUDGE SMITH: We want to make our judgment not
25 based upon whether this is good or bad.

1 MR. MILLER: You have the representation by
2 Intervenors' counsel that they were poorer than anybody else.

3 JUDGE SMITH: Yes, I know. But we can read it,
4 too.

5 Now, I think that the significance of an order
6 which would put PTL in the remanded reopened hearing is --
7 I don't know actually what it is.

8 You could just say, "Well, here's the reinspection
9 program, and that's it." And then you could cross-examine
10 on it, and we would make findings.

11 The question that we have more concern on is: Does
12 it require any special discovery or anything special?

13 MS. WHICHER: Well, Your Honor, I intend to do
14 discovery on PTL. And to the extent that Edison or the
15 Staff decides it needs some type of special presentation, I
16 think that ought to be left up to them.

17 I don't think it's this Board's duty to decide.

18 JUDGE SMITH: You always have this basic problem.
19 We cannot complain about the presentation of the Applicant
20 and the Staff on any issue. We just say, "Bring it in," not
21 very well. Although the Applicant complains that we have
22 done that very thing. But, nevertheless, we try to avoid
23 a situation -- if we say we want to hear evidence on PTL and
24 they say, "Okay, there it is, it's in the Reinspection
25 Program," how can we complain?

1 MS. WHICHER: Your Honor, my position would be --
2 and I will tell you -- that if -- I can go two ways on that.
3 I can choose to rest on the evidence that they put in.

4 JUDGE SMITH: Right.

5 MS. WHICHER: Or I can cross-examine on that
6 evidence.

7 Thirdly, I could put on direct evidence if I have
8 some.

9 JUDGE SMITH: However, the point I was going to,
10 the amount of evidence and the nature of the evidence that
11 they would be required to put in with respect to PTL would
12 depend, to a large part, on the advance notice that they
13 have as to the particular concerns.

14 MS. WHICHER: Well, I think that they will have
15 advance notice of our concerns through our discovery.

16 MR. MILLER: It's not the Intervenors' concerns
17 that I'm necessarily going to be responsive to unless the
18 Board tells me that I should be.

19 JUDGE SMITH: This may present -- I'm really
20 reluctant to go this route, but this may present a special
21 case which would require special Board monitoring. But
22 the tendency of the parties to become quarrelsome in this
23 phase of the hearing does not create a very inviting
24 experience this summer, but I think we may have to monitor
25 all aspects of the prehearing procedures very closely and

1 be available possibly on a daily basis to resolved discovery
2 disputes.

3 MS. WHICHER: That's fine.

4 I would like to make a statement for the record
5 that during the March and April segments of the hearings, as
6 well as the August segments of the hearing, Commonwealth
7 Edison and its attorneys were extremely cooperative in
8 obtaining for me information that I requested from them.

9 Since this Board's decision, they have taken
10 180 degree turn. And I regret that.

11 I also regret the fact that the professional
12 courtesy shown to me by them in the past has also disappeared.

13 I hope that we can go back to the original
14 litigative posture that we had during March and April, where
15 they were more than helpful to me in providing me with
16 documents that I requested on an informal basis.

17 I don't like to go to the Board on discovery
18 disputes. I believe it's a waste of the litigants' time and
19 the Board's time. And I hope that is not necessary.

20 MR. MILLER: I really have to object most
21 strenuously to that characterization. I don't want to take
22 the Board's time to discuss how attorneys are getting along
23 with one another.

24 Suffice it to say that when the Appeal Board's
25 order came down, I wrote Ms. Whicher and extend her every

1 opportunity to have informal discovery on certainly the
2 issues identified in the Appeal Board's order.

3 Subsequently, she served a request for documents
4 and interrogatories. And we have agreed to turn over -- and,
5 in fact, the documents are available -- well in advance of
6 the time required, for her to look at on issues that we
7 agreed, again, are within the scope of the reopened hearings.

8 But I simply do not open up the company's files
9 for Ms. Whicher, who not only represents these litigants
10 before this Board, but is also engaged in litigation with
11 Commonwealth Edison Company at the Illinois Commerce
12 Commission, to simply go into our files and whatever asked
13 for, she gets. That's not the way the process works, and
14 that's not what is contemplated by the rules or professional
15 courtesy or anything else.

16 MR. GALLO: I suggest a recess at this time.

17 MS. WHICHER: Your Honor, I think that my
18 presentation that I had planned for the Board this morning
19 will last about another three minutes. And then we can
20 take a break.

21 JUDGE SMITH: All right -- unless you have a need
22 to take a break to discuss this particular point.

23 MR. MILLER: No, sir.

24 JUDGE SMITH: All right, then, let's let the
25 presentation finish.

1 MS. WHICHER: Lastly, I believe some discussion
2 is warranted of the document that I served yesterday of the
3 potential 50.55(e) report concerning the splicing of
4 electrical cables. It appears to me to be a potentially
5 severe problem.

6 I notice that the Applicant and the Staff have
7 been noticeably silent as to the details of the problems, as
8 well as to why the Board and the Intervenors were not
9 informed.

10 Commonwealth Edison, in particular, has been
11 silent, except as to deny any responsibility to explain.

12 I would ask this Board for an order to
13 Commonwealth Edison to explain on the record the details of
14 this problem, what it concerns, so that Intervenors may stay
15 on top of this problem in case it develops into an item that
16 we believe should be litigated in the remanded proceeding.
17 This will help us in preparing our case on a more expedited
18 basis, rather than to wait for the normal course of events
19 to unfold.

20 Given Edison's history of lack of being forthcoming
21 in this particular issue, I think such an order is called
22 for at this time.

23 MR. MILLER: Judge Smith, of course, we will abide
24 by any Board order.

25 I have just observed, as I did in chambers

1 yesterday, that the document to which Ms. Whicher refers is
2 a notification of potential 50.55(e) event. And the company
3 is involved now in analyzing the situation to determine
4 whether or not it is, in fact, a reportable event.

5 My understanding is that because of the amount of
6 time it would take to fully analyze it, that, in accordance
7 with guidelines that NRC Staff has established, it will be
8 reported as a 50.55(e) event.

9 At that point in time, the appropriate notification
10 will be made. And if the Intervenors believe that this is an
11 issue that ought to be litigated before this Board, why,
12 then, they really ought to make the appropriate showing with
13 respect to new information and how it relates to this Board's
14 decision. And we will respond appropriately and may agree
15 with them.

16 MR. RAWSON: Judge Smith, I would agree with
17 Mr. Miller's comments that this is a potential 50.55(e)
18 matter. It is not the Staff's matter to bring potential
19 matters of this sort to the Board's attention. It happens,
20 in certain situations, that the matter is cleared up.

21 In fact, the letter was brought to Ms. Whicher's
22 attention, as are all Region III inspection matters, in due
23 course, by way of Mr. Spessard's May 25th, 1984 letter.

24 MS. WHICHER: I am still missing any explanation
25 as to the details of what is behind this problem and what

1 contractor is involved.

2 If this is Hatfield Electric, I think this is
3 something you ought to begin to take discovery on right away.

4 JUDGE SMITH: Is there any reason why you cannot
5 identify the contractor?

6 MR. MILLER: It is Hatfield Electric.

7 But once again, by identifying the contractor
8 involved as Hatfield, that does not automatically make it an
9 issue in this proceeding.

10 MS. WHICHER: Well, it makes it more nearly an
11 issue, in my view.

12 Lastly, I would like to, at this time --

13 JUDGE SMITH: We're ready for our break. Go
14 ahead; finish.

15 MS. WHICHER: I would like to move this Board for
16 a production of all documents given to the Board during the
17 in camera, ex parte proceeding. I am not sure from the
18 transcripts that are released whether the Board received
19 documents from the Staff.

20 There is one document bound into the second day of
21 the proceeding that is a summation by Mr. Hayes.

22 JUDGE SMITH: Let's put the in camera proceedings
23 as a separate agenda item following the break.

24 I don't recall any documents, but let's talk
25 about that following the break.

(Recess.)

1 JUDGE SMITH: All right, we're ready to proceed.

2 With respect to the ex parte, in camera proceeding
3 last summer, I don't believe there are any documents. I
4 think that the transcript certainly would have reflected if
5 we had received any documents, and we certainly didn't get
6 any documents secretly or surreptitiously. As you know, the
7 transcript of the main proceeding and the transcript of the
8 in camera proceeding set out the rules that all discussion
9 between the participants would be on the record. The only
10 exception to that was when the parties would consult among
11 themselves, but not the Board.

12 MR. RAWSON: Judge Smith, I may be able to help
13 shed a little light on the matter.

14 MS. WHICHER: There is one exhibit or document that
15 is bound into the transcript.

16 JUDGE SMITH: Yes, I know that.

17 MS. WHICHER: My question and motion goes to if
18 there are others, that they be released as well.

19 MR. RAWSON: There were a number of pages prepared
20 by the Staff prior to that in camera, ex parte session, which
21 were given to the Board and bound into the transcript of
22 those proceedings. At the time that the Staff removed for the
23 release of the materials, after the reports issued, the ones
24 that were discussed on August 10th, involving allegations
25 inspected by the Staff were in fact released pursuant to the

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1 order of the appeal board. And those appear in the August
2 10th copy. And I believe I distributed those sometime shortly
3 after April 27th of this year.

4 With respect to the separate transcript of August
5 10th, which was a transcript of the discussion with members
6 of the Office of Investigations. it is my understanding -- from
7 talking with Mr. Hayes -- that there were also such pages
8 summarizing the allegation and potential safety significance
9 of the allegation concerning the eight matters which had
10 originally come to the Staff and were referred to the Office
11 of Investigations.

12 It's my recollection those were also bound into
13 the transcripts. The report on those has not been issued yet
14 by OI, so those materials have not yet been released pursuant
15 to motion or otherwise. After the OI report issues, it would
16 be the Staff's intention to seek the release of most of that
17 material. We have not sought the release of names of
18 allegors on other material. I don't expect we would, at this
19 time, either.

20 But the great bulk of that material will be
21 released after the report issues.

22 MS. WHICHER: I would move the Board to release
23 the entire OI portion of the transcript, at this time, under
24 protective order. We have a protective order that is perfectly
25 satisfactory to all the parties. We haven't had any problem

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1 with it and I don't see why that part of the transcript can't
2 be released at this time. That would give us, as I understand,
3 the entire transcript.

4 MR. RAWSON: Number one, I don't see why that's
5 necessary at this point, given the fact the OI report is
6 close to being in the hands of the parties next week. In
7 addition, I think the office of investigations has to have
8 a say in release of any such materials, and the Staff is not
9 in a position to represent them at this time.

10 JUDGE SMITH: Yes, that would be a breach of
11 the understanding on which OI presented the information. And
12 without their acquiescence, it wouldn't be appropriate, and
13 it probably is not going to be necessary.

14 MS. WHICHER: I was not aware you had an agreement
15 with OI different from anything --

16 JUDGE SMITH: Well, if you recall the circumstances
17 at the time, there was a Commission order, or interim
18 policy statement that says that OI may come to us and present
19 ex parte, in camera, and it was under that policy that it
20 would be ex parte that they made their presentation. And
21 it was understood to be that policy. So that is the ground
22 rules of that particular session.

23 We may never have to address it, because it will be
24 released in due course anyway. However, it raises another
25 aspect of it, and that is several components of the Commission

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1 including the panel of the Atomic Safety and Licensing
2 Board, the Office of General Counsel, OI, OELD, Office of
3 Executive Legal Director, and others, have forwarded to the
4 Commission a draft of a new policy statement with a recommenda-
5 tion that the Commission adopt it, which would not automatically
6 have an ex parte presentation.

7 And for this case, for the balance of this case,
8 the rule will be that we don't wish to receive, without
9 prior notification, ex parte communications. If there is
10 a piece of information that has to be presented to the Board
11 ex parte, a preliminary document should be filed, saying that
12 such information exists and asserting as much information as
13 can be made public.

14 The reason why it should be ex parte, because we
15 would have to have some convincing reason not to proceed
16 under a protective order. This Board was never particularly
17 happy with an ex parte presentation which brings us to
18 another point, and that is it was stated in our telephone
19 conference call, you were invited to seek whatever relief
20 you felt you need. If possible, to redress the harm that you
21 feel was caused to you and the Intervenors by that procedure.

22 MR. MILLER: Yes, Judge Smith, we feel that some
23 thought certainly having access to the ex parte transcript is
24 a step in the right direction and I, too, wish that it could
25 have been accomplished last August so that the issue would not

1 arise. Beyond that, however, I think that it falls in the
2 category of a non-recreatable event. There is really no way
3 of knowing how the dynamics of the interplay between the Board
4 and the Staff personnel, who were present, occurred. A record
5 is certainly helpful, but it's no substitute for having been
6 there. And from having had the opportunity to participate
7 to the extent we were allowed to, or indeed to observe it.

8 But be that as it may, we continue to think about
9 it. But at this point, I'm not sure what else could be done.

10 JUDGE SMITH: I just want to make it clear that
11 if you perceive an injury, we will entertain a request for
12 remedies.

13 MS. WHICHER: Intervenors' position is that we will
14 wait until we receive the entire transcript before we --
15 I don't know whether it is remedial, whether we will seek any
16 remedial relief, but we will await release of the entire
17 transcript, so as not to have to do anything piecemeal.

18 JUDGE SMITH: Anything further?

19 MR. MILLER: Judge Smith, at the end of last night's
20 session, I advised everyone to review my May 25th letter on
21 Systems Control. The Applicant intends, obviously, to make a
22 full evidentiary presentation on that subject. But if there
23 are additional questions or issues that have suggested them-
24 selves to the Board or the parties, we'd be happy to discuss
25 them now.

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1 JUDGE SMITH: I read the letter before we came
2 yesterday. I read it again this morning. I don't know quite
3 what to make of it. It's a complicated set of events. I
4 have no comment about it.

5 My conversation with Dr. Callihan -- we both
6 agreed that we read the letter and we still don't understand
7 the full significance of it. I guess it may be just a
8 question of studying it.

9 MR. MILLER: Well, I would like to just say that
10 within the limits of my capabilities to express what took
11 place, I attempted to do so fully. But I agree with you
12 that it is a complicated set of facts involving, as it does,
13 both events at the Braidwood Station and at Byron. And my
14 efforts may be augmented by presenting testimony so that the
15 Board will have a much fuller explanation of the sequence of
16 events and what occurred.

17 JUDGE CALLIHAN: Is it possible, Mr. Miller, to say
18 what the purpose of the letter is?

19 MR. MILLER: Yes, sir. I satisfied myself that
20 the statements that appeared in documents that are in evidence
21 before this Board need correction.

22 JUDGE CALLIHAN: Simply that?

23 MR. MILLER: Yes, really to provide some background
24 as to what the status of Systems Control Corporation's equip-
25 ment was, in terms of inspections and analyses of that

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1 equipment by organizations other than Systems Control.

2 JUDGE CALLIHAN: Well, that in itself is helpful
3 but for me, perhaps a time will come when it is important
4 for us to look at some clarifications. But for the moment
5 it was merely to say -- the purpose was merely to say yes,
6 there were some errors in the record. Then that helps a lot,
7 at this moment. Thank you.

8 MR. RAWSON: Judge Smith, and Judge Callihan,
9 the Staff had made an earlier Board Notification in April
10 of this year, and the Staff has continued to inspect the
11 matter. We have an inspection report in the works, which we
12 expect to have in the hands of the Board and the parties
13 within the next two weeks.

14 JUDGE SMITH: Now, are we ready for scheduling?
15 The Board proposes that we begin the evidentiary hearing on
16 January 9 -- excuse me, July 9. We propose that we begin
17 the evidentiary hearing on July 9.

18 MR. RAWSON: Judge Smith, we discussed briefly
19 with you, and discussed previously with Counsel, the transition
20 in Staff counsel that's ongoing at this point. And we were
21 obviously putting our resources to minimize an impact on the
22 hearings. However, because of the date for my leaving the
23 office, and the problems that Mr. Lewis will have in returning
24 to Bethesda to his work station there, it would be of
25 tremendous, immeasurable value to the Staff if you could push

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1 that schedule back by one single week. Mr. Lewis will
2 be in the process of moving his home and himself and his
3 family back to Bethesda during that time period and will
4 be reporting for duty in Bethesda on July 9th. So if we
5 could have one single week, as a courtesy to the Staff,
6 it would be of great value to us.

7 MS. WHICHER: Judge Smith, I have a conflict.
8 The middle of that week, on Wednesday, July 11th, a pre-trial
9 conference that has been set for a number of months, that
10 has been set over innumerable times because of proceedings
11 in this case. And I am certain will not be moved. So that
12 that particular day that week, I would have a conflict.

13 I have a personal concern about the ability of
14 Intervenors, given the fact we have limited resources and
15 limited counsel, to be ready by either the week suggested
16 by the Board or by the Staff. As you know, I'm the only
17 attorney working on this case.

18 While my clients are able to provide help and
19 assistance to me, in analyzing documents, I am the person
20 in charge of the legal strategy. This Board has expressed
21 dissatisfaction in the past with my legal strategy, to the
22 extent it wants a more clear and focused presentation, which
23 I believe were the words you used yesterday, Your Honor. The
24 more time, the better.

25 MR. MILLER: Judge Smith, July 9th is a date that's

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1 agreeable to us. While I understand that dependancy of
2 completion of instruction and pre-operational testing is not
3 a consideration which weighs on this Board's full consideration
4 of all the evidence before it, nonetheless it seems to me
5 that it is an appropriate consideration to be taken into
6 account in scheduling matters without prejudging results or
7 anything else.

8 The document that I handed out yesterday indicated
9 that Commonwealth Edison currently projects that by September
10 15th the plant will have completed its pre-operational
11 testing, insofar as it can do so prior to the fuel load data.
12 And will, at that point in time, be ready to load fuel.

13 If we begin on July 9th and assuming approximately
14 four weeks of hearings, which may be overly long, that puts
15 us to the end of the first week in August. Presumably, there
16 will be -- we will ask for an accelerated schedule on
17 submission of proposed findings of fact and conclusions of
18 law. But even so, it's really bumping up against the
19 September 15th date.

20 I am sympathetic to the Staff's problems in making
21 this transition and under other circumstances would have no
22 objection to accomodating their request. But on behalf of
23 Commonwealth Edison Company, if you wanted to start the
24 hearings by a day, from the 9th to the 10th, so Mr. Lewis
25 can accomplish whatever administrative tasks there are, I

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1 don't object to that. Otherwise, it seems to me that those
2 things really have to be handled without affecting the
3 hearing process.

4 Ms. Whicher did mention her July 11th pretrial
5 conference to me earlier, and I was agreeable, as she led
6 me to believe it was late in the afternoon on the 11th, and
7 I had no objection to an early recess on that day. But I
8 really think that this prehearing conference has been quite
9 useful in getting at least the preliminary indications from
10 this Board, as to what kind of evidence it is looking for.

11 Ms. Whicher has been given a very direct admonition
12 about the way her presentation should be focused. She was
13 able, within two days of the Appeal Board's order, to file
14 discovery and I believe that the fact that she is the only
15 attorney on this case is simply no excuse. Indeed, the
16 Commission has said other commitments by attorneys are not
17 reasons for interfering with the orderly hearing of issues
18 before Licensing Boards.

19 MS. WHICHER: Judge Smith, let me respond to
20 Mr. Miller's argument. About the fuel load data, I think
21 it is a completely irrelevant consideration in the circumstances
22 of this case. This is the first plant ever to have a license
23 denied. Edison has been less than forthcoming, in the past,
24 about its fuel load date and this Board has issued an order
25 stating that it would not consider itself bound by the

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1 Applicant's fuel load date, with respect to its decisions.
2 I refer you to a motion I filed for discovery on the fuel
3 load date last fall.

4 So I think to the extent Mr. Miller is relying on
5 the September 15th fuel load date as an excuse to start the
6 earlier hearings, then first is necessary and second is
7 prudent, I think is completely irrelevant and beside the point
8 and should be disregarded by this Board.

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1 JUDGE SMITH: The fuel load date is not irrelevant
2 to the scheduling of the hearings. The assurance that the
3 Board made to you was that we will decide issues based upon
4 the time needed to decide issues and to hear issues. But
5 you cannot overlook the fact that the licensee has a legitimate
6 interest in having, consistent with a fair hearing an
7 expeditious hearing. They have a legitimate interest in
8 that, which we have a right and obligation to look at.

9 Do you question that?

10 MS. WHICHER: I do not question the Applicant's
11 right to an expeditious hearing. My point is that that
12 hearing ought not to be backed up against Edison's September
13 15th fuel load date. We have an equal right an expeditious
14 and fair and well-reasoned presentation. And the more time
15 you give us the better chance that that is what you will
16 get from us.

17 The hearing is expeditious regardless of when
18 it's scheduled.

19 JUDGE SMITH: In the strongest possible language
20 I urged you to really look at your issues, and I pointed out
21 what I perceived to be nonproductive shotgun approach in
22 your proposed findings in the main hearing. And you rejected
23 100 percent my advice. You brought your clients in to
24 reaffirm your position.

25 You've not given me any basis for believe that

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1 extended time will result in a more focused and sharp hearing.
2 You specifically reserve the right and announced the intention
3 to include whatever issue you think you wish to put in.
4 You've not given us any help at all.

5 MS. WHICHER: Whatever issue I think warrants
6 that supports attention.

7 JUDGE SMITH: All right. But your point is that
8 you're asking for more time. More time, for whatever purpose
9 I don't know.

10 MS. WHICHER: To prepare for this hearing, Your
11 Honor.

12 JUDGE SMITH: But you suggested there would be
13 an incidental benefit. And that is there would be more
14 sharply focused attention to the issues. But you rejected
15 that advice, save your clients specifically and individually,
16 then I misunderstood Ms. Johnson.

17 Nevertheless, let's proceed. Assuming -- what is
18 your answer, Mr. Lewis, to Mr. Miller's suggestion that you
19 move in a day? Can you move in a day instead of a week?

20 MR. LEWIS: I'll speak to Mayflower Moving
21 Company about that. We will abide by the Board's decision
22 as to scheduling. There are personal considerations, but
23 we recognize that the Board may have some scheduling
24 considerations as well.

25 JUDGE SMITH: Well, the difficulty is, having

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1 moved twice under government roles, I have a bias, which
2 I think I have to announce on the record. That it's just
3 not easy to do.

4 However, at the same time, we have informed other
5 counsel that the unavailability of a single counsel may not
6 control. I don't know what to say. I see that the Staff
7 is suffering the good fortune of individual members of the
8 Staff, and bad fortune of the Staff of having lost experienced
9 people in this case.

10 MR. LEWIS: We are making provisions to have other
11 counsel as well assigned to the case. As you know, both
12 counsel presently assigned to the case will be unavailable.
13 So it is not just simply my situation, but we're also making
14 provisions for additional counsel, new counsel, to be brought
15 into the case.

16 But nevertheless, whatever the date is, you
17 designate, we will comply with.

18 MS. WHICHER: Your Honor, I would urge this Board
19 to abide by the Staff's wishes then. Set this matter for
20 hearing no sooner than the week of the 16th.

21 JUDGE SMITH: We need the testimony. And the
22 two-week, or the 15-day regulatory period is the absolute
23 minimum. This was a problem and caused us difficulties in
24 the main hearing. It is one of the reasons why the Board's
25 participation was less than Mr. Miller wanted it to be.

8pb4
1 We have to have enough time to read it and
2 understand thoroughly this testimony. So we need absolutely
3 two weeks in our hands. It has to be two weeks in our hands,
4 and more if possible. And in that respect, I would ask that
5 two weeks before the hearing, you don't plop down all of it,
6 which suggests that some of it necessarily had to have been
7 prepared, but being held up until it's all ready.

8 If you're concerned about litigative tactics, we
9 can provide for testimony being given to the Board only and
10 not to the parties. But we need as much time as possible
11 to get on top of this testimony. Two weeks seems like a
12 comfortable amount of time, but the way it turns out, the
13 days in the weeks before a hearing begins, there's a
14 snowstorm of papers that come in that demand your attention.
15 That's one reason why we insisted that Ms. Whicher prepare
16 her arguments today, rather than motions coming up, because
17 motions interfere with trial preparation.

18 So with that observation, Mr. Miller, can you
19 really be ready for a hearing on July 9th, giving us the
20 amount of time we need for the advanced testimony?

21 MR. MILLER: Well, I can, but I really think that
22 perhaps -- I'm interested in giving the Board additional
23 time as well. So the 16th is satisfactory.

24 JUDGE SMITH: We were too relaxed on testimony
25 before. We always were optimistic we would receive it and

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1 somehow get on top of it on the airplane or at night or
2 things like that. But as it turned out, other events
3 intervened and that's not a realistic approach. We want the
4 testimony.

5 So with that in mind --

6 MR. MILLER: Well, there's one special case that
7 I'd like to bring before the Board and the parties when
8 talking about testimony preparation.

9 We have retained Torrey Pines Technology to make
10 an evaluation of Systems Control equipment. Their report
11 or testimony, that is the written product of their investigation
12 will not be available until July 9th. It seems to me that
13 while there may be some relationship between Systems Control
14 and the reinspection program, it is really of a minor nature.
15 At least, insofar as the issues that have been identified
16 so far.

17 And since Torrey Pines has almost just begun its
18 work, it's impossible for me to make any representation to
19 the Board as to the length or complexity of their testimony.
20 I would like to hold to the date for the start of the
21 hearings.

22 We will attempt, as best we can, to get all the
23 material including Torrey Pines report to the Board and the
24 parties on the 2nd. It may be however, that we will have
25 to ask for relief of as much as a week.

8pb6

1 JUDGE SMITH: Certainly, we are not going to
2 read all of the testimony on the 15th day before the hearing.
3 We're not going to read it all on the day we receive it, so
4 relief is possible. But it's just a question of how much you
5 push up toward the hearing and how much we can absorb.

6 MR. MILLER: Yes, sir.

7 JUDGE SMITH: So I realize you'll have to do what
8 you have to do. And then any way you can beat that July
9 2nd date -- the week of July 2nd is a difficult week for a
10 lot of people, too. I don't know what commitments that
11 Board members might have. But any testimony you can get in
12 before July 2nd, if you want to present testimony -- although
13 I don't recommend you do this, but if you want to present
14 written testimony to the Board but not to the parties until
15 two weeks, you can do that. But I recommend that you just
16 get it out as fast as you can.

17 MR. MILLER: That's what we do. I'd rather not
18 disclose just to the Board and to the parties.

19 MS. WHICHER: I would object to that type of
20 proceeding because it gives me less time to prepare simply.

21 JUDGE SMITH: It's not going to happen. All
22 right, Staff, for that you have the same problem in preparation
23 of your testimony, and I would guess that the -- well, we've
24 already agreed that the 16th is the starting point. And I
25 assume that testimony is not a problem there.

8pb7

1 MR. RAWSON: No, sir. We'll put the resources
2 on it and get the job done.

3 JUDGE SMITH: Anything further?

4 MS. WHICHER: Yes, Your Honor. I would like to
5 remind the Board that during the first two phases of quality
6 assurance litigation, by the nature of NRC litigation, the
7 Staff panel has testified last. And on both of those
8 occasions the Staff panel began testifying on a Thursday
9 and ended their testimony on a Friday. And both times my
10 cross-examination was restricted by time constraints.

11 I was severely backed up against the time constraints
12 because of scheduling. I would like to put the Board and
13 the parties on notice that I do not intend to let that happen
14 again. I think that the Staff ought to make arrangements
15 to make itself available for as much time as will be needed
16 for cross-examination, whether it means coming back on a
17 Monday that it had not planned for.

18 If the Board will recall, this happened twice
19 in a row. At the Board's suggestion, I severely restricted
20 my cross-examination of the Staff. And given what is at
21 stake at this hearing, I cannot allow that to happen a third
22 time.

23 MR. MILLER: Excuse me, I guess I'm a little bit
24 puzzled after all. The Board ultimately found in its initial
25 decision that the Intervenors prevailed. To suggest that

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1 somehow their cross-examination was somehow unfairly restricted
2 because of schedule restraints, to my knowledge, it never
3 took place. And in any event, there was clearly no
4 prejudice.

5 I don't know what sort of issue she is raising.

6 MS. WHICHER: I am putting everyone on notice
7 that I will protest the backing up of the Staff's testimony
8 toward the end of the week to the extent that it causes me
9 to restrict my examination as it has in the past. I just
10 want that on the record.

11 JUDGE SMITH: Ms. Whicher, the Board is not
12 accustomed to having the parties before it using that tenor
13 of language. You put the Board on notice, you make motions,
14 and you make them with courtesy.

15 MS. WHICHER: All right then. I would move the
16 Board to allow sufficient time to schedule this hearing so
17 that my cross-examination of the Staff is not restricted by
18 time constraints. And I'm sorry if my tone was interpreted
19 as being disrespectful. I apologize.

20 JUDGE SMITH: It was very forceful.

21 MS. WHICHER: This happened to me twice.

22 JUDGE SMITH: In at least one instance, and I
23 believe both instances, you were given additional time and
24 you declined it.

25 When you make statements like that, Ms. Whicher,

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1 please make them completely. That way, perhaps some of the
2 tension that we have in the hearings will be reduced.

3 MR. RAWSON: It seems to me, sir, that we may be
4 anticipating trouble that won't even arise. It seems to me
5 the appropriate time for all the parties to address this
6 issue is as it arises. Hopefully it can be avoided totally.

7 JUDGE SMITH: Okay. Anything further? We will
8 continue the Express Mail service. The protective orders
9 issued by the appeal board are, of course, continued in force
10 and they are adopted by this Board. Any final business?

11 MR. MILLER: Will there be a written order as
12 a resort of today's --

13 JUDGE SMITH: Yes, there will have to be a written
14 order. Maybe two of them. Maybe we will go to PTL immediately.
15 I think you ought to plan on that. I don't know what planning
16 there might be to do, and then we will rule on the others.

17 With respect to telephone conference calls --
18 Mr. Campbell could we have Ms. Whicher's attention? The
19 last one was very difficult. The reporter made -- the
20 transcript suffered as a result. We had too many people. I
21 don't think it works to have too many people.

22 So, I don't believe that everybody has to be in
23 on the telephone conference call. I'd like to have your
24 recommendations on it. I think it is good to have Mr. Gallo,
25 it's helpful to have him on it because he's in Washington and

8pb10

1 he can comply with -- he can meet requirements quite quickly.
2 You had all of your Intervenors.

3 MS. WHICHER: They all requested to be involved
4 in the call, Your Honor.

5 JUDGE SMITH: Well, something has to give. Do
6 you all have to be on it?

7 MS. WHICHER: Your Honor, I did that at the request
8 of my clients.

9 JUDGE SMITH: Yes, I understand. I'm not being
10 critical, Ms. Whicher. We've had other telephone conference
11 calls with a lot of people on it and apparently it was all
12 right. And it didn't delay, I don't know but --

13 MR. MILLER: I think part of problem was that
14 there was some construction going on right outside the
15 reporter's window.

16 MS. WHICHER: That's right, Your Honor. And
17 perhaps we can arrange to have the people who desire to
18 participate in Rockford all be at the same number.

19 JUDGE SMITH: All right, that's fine. We'll set
20 up telephone conference calls on this matter. We will make
21 some effort to give enough notice so that as many people as
22 you wish to participate can participate. But we won't delay
23 very long on that basis.

24 I mean, if we decide in the morning that one is
25 necessary in the afternoon, we'll go ahead in the afternoon

8pb11

1 if we can get adequate representation of each party. I'm
2 just pointing out the problem and the record suffers, and it
3 becomes -- not only does the record suffer, but it becomes
4 a stressful experience too.

5 MS. WHICHER: I understand that, Your Honor. I
6 should tell the Board there will be instances in the next
7 few weeks when I will be out of the office for portions of
8 a day or an entire day on another case. And so, to the
9 extent that they can be scheduled a day or two in advance,
10 that would be of great help to me.

11 JUDGE SMITH: Okay. And I just remembered one
12 other thing. I'd like to have a largely different approach
13 in the preparation of testimony. I'd like to have it to be
14 uniform too. And let's understand that only parties have
15 exhibits. Witnesses don't have exhibits. Witnesses have
16 attachments or something else, but they should be attachments.

end 8.

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1 We will encourage binding in matters which might
2 otherwise be a short exhibit. We will encourage binding in,
3 particularly if it illustrates testimony and is germane.
4 Where testimony has a lot of attachments, there should be
5 a way to find which one you're looking for rather than just
6 looking through a page at a time, until you happen to come
7 to the beginning of them.

8 Therefore, when there are many attachments, there
9 should be a numbering system, that a person can tell whether
10 they're at the beginning, or the end, or approaching the
11 beginning of the attachment, like Attachment A, B, 1, 2, 3,
12 or maybe just seriatum all the way through. But they should
13 be numbered so we can find them.

14 It's not only during the hearing, but it saves
15 a lot of time during the preparation of the initial decision.

16 MR. MILLER: Would it be helpful to have tabs
17 on the attachments, so that they are readily --

18 JUDGE SMITH: That would be helpful, but all is
19 lost in the distribution system of transcripts. Actually, I
20 think it's quite simple, so that you have five attachments
21 of approximately ten pages apiece. Either number them A 1
22 through 10, B 1 through 10, or 1 through 50. You know,
23 in that way, there is some means of finding it.

24 Okay, I guess that's about it.

25 MR. MILLER: Judge, since we're talking about

1 testimony format, it varied from issue to issue, perhaps even
2 from witness to witness. There was a question as to whether
3 the testimony was narrative or as question and answer form.
4 Does the Board have any preference now?

5 JUDGE SMITH: Well, I have a preference for
6 question and answer, but not when it is awkward, not when
7 it does not really fit.

8 MR. MILLER: Okay. If it is amenable to question
9 and answer, there is a slight preference for that? All right.

10 JUDGE SMITH: Anything further?

11 So we do not have the use of -- I don't believe
12 we have the use of this courtroom and we have to use the
13 smaller courtroom. And then we may have a problem on
14 Wednesdays, when the Grand Jury may be meeting using that room.
15 So we may have to look over at the courthouse.

16 One final thing, although the general day of the
17 hearing was cleared with Dr. Cole, I have not talked to him
18 about this particular date and I haven't talked to him in the
19 last week or so about it, but I am very confident that that
20 date is open for him.

21 Anything further?

22 MR. LEWIS: Would you be speaking in terms of
23 starting on a Monday of that week?

24 JUDGE SMITH: Monday at 2 o'clock, and we will
25 follow the same routine as before.

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If there is nothing further, we will adjourn until further order.

(Whereupon at 12:05 p.m., the hearing was adjourned pursuant to further notice.)

CERTIFICATE OF PROCEEDINGS

This is to certify that the attached proceedings before the
NRC COMMISSION

In the matter of: COMMONWEALTH EDISON COMPANY
(Byron Nuclear Power Station)

Date of Proceeding: Thursday, May 31, 1984

Place of Proceeding: Rockford, Illinois

were held as herein appears, and that this is the original
transcript for the file of the Commission.

Ann Riley

Official Reporter - Typed

Ann Riley

Official Reporter - Signature

John Trowbridge

Official Reporter - Typed

John Trowbridge

Official Reporter - Signature

LEAGUE OF WOMEN
VOTERS OF ROCKFORD

ROCKFORD, ILLINOIS
May 31, 1984

Page #1
Copies

Ivan W. Smith, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission

Re: Commonwealth Edison Company
(Byron Nuclear Station, Units land 2)
Docket Numbers 50-454 and 50-455

Dear Ivan W. Smith:

At the prehearing conference held in Rockford, Illinois on May 30, 1984, you asked the Rockford League of Women Voters about its support for actions taken by our Attorney, Jane Whicher, in these operating license proceedings. The following statements are made in answer to your question.

The League of Women Voters of Rockford strongly supports the excellent representation on quality assurance issues that our Attorney, Jane Whicher, provided for us during the 1983 hearings on the operating license for the Byron facility.

Using the limited resources available to the Intervenors, Jane Whicher was able to substantiate and bring to the attention of the Atomic Safety and Licensing Board serious quality assurance deficiencies that would not have been litigated otherwise. The Rockford League thinks that the January 13, 1984 decision denying the operating license for the Byron Nuclear Power Station on the basis of these quality assurance deficiencies is proof of the excellence of the work that Jane Whicher did for us.

At all times the Rockford League's Attorney, Jane Whicher has worked closely with the Rockford League and other intervenors to attain the goal of all parties to these licensing proceedings, that there be "reasonable assurance that the Byron facility has been properly constructed" before an operating license is granted.

Neither the Rockford League or our Attorney wish to burden the Court with prolonged and/or unnecessary proceedings. The Rockford League has confidence that Jane Whicher is representing and will continue to represent us in a responsible manner in any future proceedings related to the granting of an operating license for the Byron facility.

Betty Johnson

Betty Johnson, Chair of the
Byron Nuclear Power Plant Intervention Com.

Elizanne Lewis

Elizanne Lewis, President
League of Women Voters of Rockford, Illinois