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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

'84 NOV 26 P1:07

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

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

Docket Nos. 50-454 OC
50-455 OC

NRC STAFF'S BRIEF IN OPPOSITION TO
INTERVENORS' SUPPLEMENTAL BRIEF ON APPEAL

Stephen H. Lewis
Deputy Assistant Chief
Hearing Counsel

November 23, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

OFFICE OF SECRETARY
INSPECTING & SERVICE
BRANCH

In the Matter of)
COMMONWEALTH EDISON COMPANY) Docket Nos. 50-454
(Byron Station, Units 1 and 2)) 50-455

NRC STAFF'S BRIEF IN OPPOSITION TO
INTERVENORS' SUPPLEMENTAL BRIEF ON APPEAL

I. INTRODUCTION

On November 6, 1984, the Intervenors in this proceeding ^{1/} appealed ^{2/} the Atomic Safety and Licensing Board's Supplemental Initial Decision (SID). ^{3/} In the SID, the Licensing Board found that the Applicant had prevailed on League Contention 1A regarding quality assurance. ^{4/} Since the Licensing Board had earlier ruled in Applicant's

^{1/} Rockford League of Women Voters and Dekalb Area Alliance for Responsible Energy/Sinnissippi Alliance for the Environment (DAARE/SAFE), acting as joint intervenors.

^{2/} Intervenors' Supplemental Brief on Appeal.

^{3/} Supplemental Initial Decision (Operating License), LBP-84-41, 20 NRC ____, slip opinion, (October 16, 1984).

^{4/} Contention 1A states:

Intervenor contends that Edison does not have the ability or the willingness to comply with 10 C.F.R. Part 50, Appendix B, to maintain a quality assurance and quality control program, and to observe on a continuing and adequate basis the applicable quality control and quality

(FOOTNOTE CONTINUED ON NEXT PAGE)

favor on all other contentions litigated in the proceeding, ^{5/} it authorized the Director of the Office of Nuclear Reactor Regulation (NRR) to issue full-power licenses for Byron, Units 1 and 2. This authorization was subject to the Director making all of the findings required under 10 C.F.R. § 50.57(a) and was further subject to the provisions of 10 C.F.R. § 2.764(f) limiting operation to five percent of full power pending the Commission's review on its own motion of the Initial Decision, as modified and supplemented by the SID. SID at 160. The Intervenors argue on appeal that the SID should be reversed. For the reasons stated in this responsive brief, the Staff believes that the arguments in Intervenors' brief should be rejected and that the SID should be affirmed.

II. STATEMENT OF THE CASE

The SID was issued following evidentiary sessions undertaken in accordance with ALAB-770, ^{6/} which remanded certain specified issues to

(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

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

^{5/} Initial Decision, LBP-84-2, 19 NRC 36 (1984).

^{6/} 19 NRC 1163 (1984).

the Licensing Board. In ALAB-770 the Appeal Board remanded the proceeding to the Licensing Board for receipt of further evidence on the quality assurance issue. ^{7/} 19 NRC at 1168. The Appeal Board provided guidance on the issue to be considered on remand. The Appeal Board noted that the "record is devoid of anything establishing the actual existence of uncorrected construction deficiencies of potential safety significance." Id. The Appeal Board, however, in rejecting the Applicant's arguments that its quality assurance program and those of its electrical contractor, Hatfield Electric Company, and its piping contractor, Hunter Corporation, met the Commission's licensing standards, also noted that "one of the principal deficiencies with regard to both Hatfield and Hunter related to the absence of adequate certification procedures for quality assurance personnel." 19 NRC at 1175. It was this deficiency, and its ramifications for the adequacy of inspections, that the Appeal Board held had to be considered further. In the Appeal Board's words:

Given that absence [of adequate certification procedures], a legitimate question arose respecting whether the quality assurance inspectors examining safety-related structures, systems and components were, in actuality, competent to perform their assigned function. And, so long as that doubt lingered, there also remained an uncertainty as to whether construction defects of potential safety significance had gone undetected.

Although the Appeal Board considered this to constitute a significant doubt, such that operating licenses for the Byron units could not be

^{7/} The Appeal Board also directed the Licensing Board to take further evidence regarding the adequacy of equipment supplied to the Byron Station by Systems Control Corporation (SCC). 19 NRC at 1179-80. Intervenors have not, however, appealed the Licensing Board's findings as to SCC, and that aspect of the SID is not addressed in this brief.

authorized on the basis of the record before the Licensing Board (Id.), it held that the Licensing Board had improperly denied the application. 19 NRC at 1169. Rather, the Licensing Board should have informed the parties of its concerns on the quality assurance issues, retained jurisdiction, and provided for further proceedings upon the completion of the Byron Reinspection Program (BRP). ^{8/} Id.

In view of the issuance of the report on the results of the BRP in February 1984, the Appeal Board held that the Licensing Board should undertake in the remanded session

. . . a full exploration of the significance of the program [BRP] in terms of whether there is currently reasonable assurance that the Byron facility has been properly constructed. Stated otherwise, the focus of the inquiry should be upon whether, as formulated and executed, the reinspection program has now provided the requisite degree of confidence that the Hatfield and Hunter quality assurance inspectors were competent and, thus, can be presumed to have uncovered any construction defects of possible safety consequence.

19 NRC 1178, footnotes omitted.

In accordance with this articulation of the remanded issue (see SID. ¶ 16), the Licensing Board conducted further evidentiary sessions and issued the SID. The Licensing Board made the following principal findings in the SID:

- 1) the selection method for inspectors to be included in the Byron Reinspection Program (BRP) resulted in a sufficient and representative number of inspectors to draw inferences regarding the qualifications of Hatfield, Hunter, and Pitts-

^{8/} The BRP was undertaken in response to a 1982 item of noncompliance issued by NRC Region III for deficiencies identified in the certification records of quality assurance/quality control (QA/QC) inspectors for certain contractors at Byron, including Hatfield and Hunter, which suggested that some of their inspectors were not adequately qualified or trained to perform safety-related inspection functions. 19 NRC at 1171.

burgh Testing Laboratory (PTL) ^{9/} inspectors not reinspected (¶ 34);

2) none of the human factors concerns raised by Intervenor's witness Kochhar has a material effect on the validity of the BRP (¶ 103);

3) the BRP has provided reasonable assurance as to the capability of Hunter, Hatfield, and PTL inspectors whose work was not reinspected (¶ 129);

4) the Applicant has provided reasonable assurance that Hunter, Hatfield and PTL inspectors were qualified ((¶ 140);

5) none of the Hunter or Hatfield discrepancies identified in the BRP had design significance and, accordingly, they had no safety significance (¶¶ 162, 182);

6) there is no evidence in the record to support the need for an independent (by some entity other than Sargent & Lundy (S&L), the Architect Engineer) review of discrepancy evaluations based upon any alleged lack of objectivity or impartiality on the part of S&L (¶ 196);

7) the record demonstrates that the quality of the work of Hatfield and Hunter is adequate (¶ 232); and

8) the quality of equipment supplied by Systems Control Corporation is acceptable, subject to the completion of the review of inspections on cable tray hangers, which the Board delegated to the Staff (¶¶ 255-256). ^{10/}

Intervenors have organized their argument into four points, but in actuality there are two principal points raised. The first is that the Board improperly relied on the results of the BRP to conclude that the work of Hatfield and Hunter at Byron is adequate for the purposes of the facility's design. Intervenor's Brief, at 7. The second is that the

^{9/} The question of whether the BRP provided reasonable assurance that the inspection work of PTL did not present safety problems was added as a hearing issue by the Licensing Board in its Memorandum and Order Following Prehearing Conference, dated June 8, 1984, at 12-13.

^{10/} Intervenor's do not contest the Board's findings with respect to Systems Control Corporation on appeal.

Board made findings regarding the design of the Byron facility, but rejected testimony offered by witnesses for the Intervenor on relevant design issues. Intervenor's Brief, at 26-28. The Staff's analysis of the Intervenor's Brief is divided into two principal parts to address these issues.

III. ARGUMENT

A. The Licensing Board Properly Focused Upon Whether the BRP Demonstrated That Hatfield, Hunter and PTL Inspectors Were Competent and Did Not Err By Also Considering the BRP Results As They Relate To Work Quality

Intervenor's first argument on appeal is that the Licensing Board erred by failing to focus on whether discrepancies between the original inspections and the reinspections indicated matters of "possible safety consequence." Intervenor's Brief at 6. Intervenor interprets ALAB-770 as directing the Licensing Board to focus the remanded hearing on this issue. Intervenor has incorrectly interpreted ALAB-770. The language of ALAB-770 on which Intervenor relies has been quoted in Section II, above, at 4. Briefly, the Appeal Board stated that the focus of the hearing should be upon whether the BRP has now provided the requisite degree of confidence in the competence of Hatfield and Hunter quality control inspectors, such that the inspectors can be presumed to have uncovered any construction defects of "possible safety consequence." 19 NRC at 1178. Thus, the Appeal Board did not remand on the issue of work quality itself, but rather on the issue of whether the results of the BRP permitted a presumption (or inference) that significant construction deficiencies had been identified.

A review of the inspection finding which led to the BRP is of assistance in understanding the reasons why the Appeal Board's description of the remanded issue was appropriate. The Appeal Board discussed this inspection finding in ALAB-770 (19 NRC at 1171-72) and it is also addressed in the SID (¶ 21). The inspection finding was part of the Region III Construction Assessment Team (CAT) inspection conducted at Byron in the Spring of 1982. CAT inspections were concentrated team inspections undertaken to determine whether there were serious quality assurance deficiencies at nuclear power plants under construction which had not previously been recognized. Testimony of James G. Keppler, ff. Tr. 10,135. While the CAT inspection at Byron did not disclose significant problems with the construction of the plant, it did identify a number of quality assurance violations. Id. The most significant of these findings (Inspection Finding 82-05-19) related to deficiencies in site contractors' evaluations of initial inspector capabilities, the documentation of initial certification and the criteria used to establish inspector qualification. SID, ¶ 21. The inspectors in question were those whom the Applicant had committed to certify in accordance with Regulatory Guide 1.58, which invokes and supplements ANSI N-45.2.6-1978. SID, ¶ 22.

The BRP was formulated to address the question raised by 82-05-19, i.e., whether quality control inspectors who may not have been properly certified had overlooked significant construction deficiencies. Keppler,

ff. Tr. 10,135. ^{11/} The BRP was not oriented toward demonstrating the adequacy of construction work at Byron, since neither the CAT inspection nor the overall Region III inspection program at Byron had raised significant questions regarding the quality of work. Id.; Testimony of NRC Staff On Remanded Issues With Respect to the Reinspection Program, ff. Tr. 9510 at 4 (Little).

The Appeal Board's formulation of the quality control inspector certification issue is consistent with the specific deficiencies identified by Region III. Intervenors have selected from the Appeal Board's language the phrase "possible safety consequence" in order to argue that

The Board below failed to heed this Appeal Board's direction to focus on whether defects overlooked by inspectors were of "possible safety consequence."

Intervenors' Brief at 6. The Staff believes that Intervenors have taken this phrase out of context and that the Appeal Board clearly stated that the remand hearing should focus on whether the BRP provided the requisite degree of confidence in the competence of Hatfield and Hunter quality control inspectors.

In support of their interpretation, Intervenors cite to Section 182(a) of the Atomic Energy Act of 1954, as amended, (42 U.S.C. 2232(a)) and to 10 C.F.R. § 50.57(a)(3). Intervenors rely on the language of Section 182(a) that requires an applicant for a license for a utilization facility (such as Byron) to provide the Commission such information as

^{11/} This was how the Staff formulated the purpose of the BRP. The Staff agreed, however, that this was equivalent to determining the competence of the QC inspectors. Little, Tr. 9582-83; Keppler, Tr. 10,136-37.

may be necessary to enable it to find that operation of the facility "will provide adequate protection to the health and safety of the public," and the language of 10 C.F.R. § 50.57(a)(3) which requires that before issuing an operating license for a production or utilization facility the Commission must find that

There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public. . .

Intervenors' Brief at 6.

Intervenors have failed, however, to address Commission regulations and cases which designate what issues are properly before a licensing board in an operating license proceeding and what issues and findings lie within the responsibility of the Director of NRR. Under the Commission's regulations, a licensing board presiding over an operating license proceeding

. . . shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding and on matters which have been determined to be the issues in the proceeding by the Commission or the presiding officer. . . .

10 C.F.R. § 2.760a. In the Byron proceeding, the League put forward a quality assurance contention (1A), which was extensively litigated and initially resulted in a decision of the Licensing Board denying the application. LBP-84-2, 19 NRC at 280. Upon review of the Initial Decision, the Appeal Board, acting pursuant to authority granted to it by the Commission under 10 C.F.R. § 2.785, determined that the remaining aspect of Contention 1A (as it related to resolution of Inspection Finding 82-05-19) was the determination of whether the BRP had provided the

requisite degree of confidence in the competence of the Hatfield and Hunter quality control inspectors.

Under § 2.760a a licensing board may consider matters not put into controversy by the parties only upon a determination that "a serious safety, environmental, or common defense and security matter exists." That authority has not, however, been invoked by the Licensing Board with respect to the work quality issue which Intervenors seek to litigate.

The issue before the Licensing Board on remand was not, therefore, nearly as broad as characterized by Intervenors, i.e., "whether reasonable assurance exists that the Byron facility has been properly constructed." Intervenors' Brief at 11. This finding entails matters beyond those placed in controversy in the proceeding and therefore falls within the responsibility of the NRC staff. 12/

The Intervenors take issue with the finding of the Licensing Board that the results of the BRP 13/ can be extrapolated to the conclusion that all Hatfield and Hunter work at Byron is adequate for purposes of the plant's design. SID ¶ 200. Specifically, the Intervenors argue that the Board erred in its: (i) failure to adopt the positions taken in

12/ 10 C.F.R. § 2.760a; Portland General Electric Co. (Trojan Nuclear Plant), ALAB-181, 7 AEC 207, at 209 n.7 (1974); Consolidated Edison Co. of New York, Inc. (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, at 190 (1976); Union Electric Co. (Callaway Plant, Unit 1), ALAB-750, 18 NRC 1205, at 1216-17 (1983).

13/ The BRP includes the evaluation of the design significance of discrepancies undertaken by Sargent & Lundy Engineers (S&L), the architect-engineer for the Byron plant.

the testimony of Dr. Eugene P. Ericksen, a statistician appearing on behalf of the Intervenor, ff. Tr. 11,045; (ii) its exclusion of portions of Dr. Ericksen's testimony and of all of the proposed testimony of Dr. William H. Bleuel; ^{14/} and (iii) its determination not to receive testimony from an Authorized Nuclear Inspector (ANI) who had been assigned to Byron. Intervenor's Brief at 7-23.

Intervenor argues that the testimony of Dr. Ericksen demonstrates that the Board could not extrapolate from the findings of S&L that none of the discrepancies identified in the BRP had design significance to a finding that the overall work of Hunter and Hatfield at Byron was acceptable. Intervenor's Brief at 8. Intervenor base this argument on their assertion that "disproportionate numbers of reinspections focused on documentation inspections that had no direct safety consequences." Id. Dr. Ericksen had no expertise with respect to nuclear plants (see generally Tr. 10,966-11,007), but he relied on testimony of Richard B. Tuetken, a witness for the Applicant, with respect to levels of safety significance for the various Hatfield inspection attributes and Hunter inspection elements. Tr. 10,981. Mr. Tuetken's safety levels were provided in deposition testimony and were subsequently adopted by him in hearing testimony. Tr. 8541-45. Applicant's witness Louis O. Del George expressed general agreement with Mr. Tuetken's testimony, but noted that the safety levels represented an informal ranking of the relative importance of inspection activities and that all of the systems and components subject to these inspections are "safety-related." Tr. 8545.

^{14/} Dr. Bleuel's rejected testimony appears in the transcript following Tr. 10,764.

In support of their assertion, Intervenors cite to 1) their Exhibit R-1, admitted at Tr. 11,033, which lists the level of safety significance assigned by Mr. Tuetken to Hatfield inspection procedures and PTL and Hunter attribute classifications and 2) Amended Attachment B to Dr. Ericksen's testimony (ff. Tr. 11,045), which contains a list provided by the Applicant in response to interrogatories propounded by Intervenors. Intervenors Brief, at 8. In those interrogatory responses the Applicant provided the following information on each Hatfield inspection attribute and Hunter inspection element: 1) total inspections performed, 2) total reinspections performed, 3) number of inspectors inspecting attribute (element) and 4) inspectors reinspected. Intervenors did not present on the record any analysis of these numbers to support the claim made in their brief that a disproportionate number of reinspections focused on documentation (as opposed, apparently, to hardware) inspections that had no direct safety consequences.

Intervenors have not rebutted the findings of the Board which supported its conclusion as to the adequacy of Hatfield and Hunter work. Principal among these findings were the following:

- . the inspectors selected for reinspection were sufficient in number to draw an inference as to inspectors not reinspected and the inspectors spanned the range of inspection activities for the period from commencement of construction until the time when all contractors subject to the BRP were recertifying their QC inspectors (SID, ¶¶ 30, 33);
- . all safety-related work attributes that were recreatable, accessible, and identifiable to a sampled inspector were included in the BRP (SID, ¶ 48); and
- . attributes not reinspected are similar in many respects to those captured for reinspection and the qualification and certification programs for inspectors to perform

inspections of attributes that turned out to be inaccessible or nonrecreatable were the same as those for attributes verified by the BRP (SID, ¶ 131).

The testimony of Dr. Ericksen does not cast doubt upon the soundness of these Board findings.

Intervenors also argue that the BRP results should have been reoriented according to Mr. Tuetken's levels of safety significance. Intervenors' Brief at 9, 10. This argument is, however, premised upon the Intervenors' misperception of the issue on remand, i.e., their belief that the Appeal Board directed the Licensing Board to focus its inquiry into the BRP on the "possible safety significance" of any defects overlooked by inspectors.

In Part II of their brief, Intervenors assert that the Licensing Board committed error by excluding evidence on what the Intervenors term the ultimate issue in the proceeding. The ultimate issue is stated as whether reasonable assurance exists that the Byron facility has been properly constructed. Intervenors' Brief at 11. As discussed above, Intervenors incorrectly and overbroadly characterize the remanded issue. Proceeding from this mischaracterization, the Intervenors incorrectly argue that the Licensing Board erred in excluding the testimony of Dr. Bleuel and of an Authorized Nuclear Inspector and in excluding portions of the testimony of Dr. Ericksen.

1. Dr. Bleuel. At the hearing session on July 24, 1984, Intervenors advised the Licensing Board that an additional prospective expert witness, Dr. William Bleuel, had offered to testify on their behalf. Tr. 8532-35. Dr. Bleuel had not been identified by the date previously established by the Licensing Board for the Intervenors to inform the

Board and parties of their proposed witnesses. Memorandum Following Telephone Conference of June 26, 1984 (dated June 27, 1984), at 2. On August 13, 1984, the date established for Intervenors' filing of their testimony, Intervenors filed a "Motion for Leave to File Testimony of Dr. William H. Bleuel", accompanied by the proposed "Direct Testimony of Dr. William H. Bleuel On Contention 1 (The Reinspection Program)." ff. Tr. 10,765.

The Licensing Board applied the standards for admission of late-filed contentions in ruling upon whether to accept Dr. Bleuel's testimony. Tr. 10,743. ^{15/} Appellate review of licensing board application of the five factors under § 2.714(a) is governed by the "abuse of discretion" standard. South Carolina Electric and Gas Co.

^{15/} Those standards, which are set forth in 10 C.F.R. § 2.714(a), require consideration of the following factors in determining whether to grant nontimely petitions to intervene in Commission licensing proceedings:

- (i) good cause, if any, for failure to file on time;
- (ii) the availability of other means whereby the petitioner's interest will be protected;
- (iii) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;
- (iv) the extent to which the petitioner's interest will be represented by existing parties; and
- (v) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Contrary to Intervenors' assertion (Intervenors' Brief at 18-19), these standards are applicable to contentions filed after the time specified in § 2.714(b) by already-admitted parties. Pacific Gas

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(Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, at 885 (1981). Application of that standard does not, however, foreclose "close scrutiny of the factual and legal ingredients of the analysis underlying the board's ultimate conclusions." Id.

The Staff believes that the standards applied by the Licensing Board in ruling upon whether to admit Dr. Bleuel's testimony were proper. While one aspect of Dr. Bleuel's proposed testimony dealt with a subject raised by Intervenor's witness Dr. Kochhar (i.e., whether inspectors' performance would be weakest in their first ninety days on the job), ^{16/} Dr. Bleuel's proposed testimony in large part raised a new contention. The new contention was that the BRP was deficient because it did not include a Failure Modes and Effects Analysis (FMEA). Bleuel rejected testimony, ff. Tr. 10,765, at 3, 4-11.

The Licensing Board ruled on whether to accept Dr. Bleuel's testimony after receiving the comments of the Applicant and Staff in opposition to its admission. ^{17/} The reasoning for the Board's exclusion of Dr. Bleuel's proposed testimony is fully set forth at Tr. 10,740-60.

With respect to good cause, the Board took the position that Intervenor's had a greater burden to establish good cause for the late filing

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& Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, at 364-65 (1981) and CLI-82-39, 16 NRC 1712, at 1714-15 (1982).

^{16/} See Testimony of Dr. Dev S. Kochhar, ff. Tr. 10,538, at 7-10.

^{17/} Memorandum of Commonwealth Edison Company in Opposition to Intervenor's Motion for Leave to File Testimony of Dr. William H. Bleuel (August 16, 1984); Staff comments at Tr. 10,366-68.

of proposed expert testimony (Dr. Bleuel was presented as an expert witness) rather than testimony of a fact witness bringing newly-discovered information before the Board. Tr. 10,744. ^{18/} The Board concluded that the Intervenor's had not carried their burden on this criterion, stating:

But he is not bringing, or you are not seeking, to bring to us novel ideas, unknown by people in this business before. Simply what you did is you were late in getting your expert.

Id. The Staff believes that this determination reflected a proper weighing of "concepts of how a hearing should be run fairly and what the burdens of the parties are and what the rules of the case are." Id.; 10 C.F.R. § 2.718.

The Board concluded that there was no other satisfactory means for the protection of the Intervenor's interest in having Dr. Bleuel's views considered on the work quality issue (criterion ii) and that, since there were no other intervenors in the proceeding, no other party would bring these views before the Board if Dr. Bleuel's testimony were not admitted (criterion iv). Tr. 10,746-47. ^{19/} These criteria, therefore, weighed in Intervenor's favor.

^{18/} The circumstances surrounding the Board's ruling on Dr. Bleuel are distinguishable, therefore, from its earlier decision to receive the testimony of Mr. John Hughes, a fact witness for the Intervenor's. Intervenor's Brief at 13-14, 15-16.

^{19/} Aside from Dr. Bleuel's testimony regarding the need for an FMEA, he also asserted (1) that criteria for determining whether discrepancies were within design parameters had not been defined at the outset of the BRP or, alternatively, the Applicant had not retained an independent firm to do an after-the-fact reliability assessment and (2) that the use of the first ninety days of inspectors' work in the BRP was not justified. Bleuel rejected testimony, ff. Tr. 10,765. It was not strictly correct that these views could be brought before the Board only by Dr. Bleuel. As noted above, Dr. Kochhar addressed the issue of the use in the BRP of an

The Board concluded that admission of Dr. Bleuel's testimony, insofar as he asserted that a FMEA was necessary to a conclusion on the quality of Hatfield and Hunter work, would broaden and extend the proceeding (criterion v). Tr. 10,745. In light of the Board's view that Dr. Bleuel would not be able to contribute to the development of a sound record (discussed below), the Board weighed this criterion against Intervenors.

The key factor in the Board's analysis of whether Dr. Bleuel's testimony should be admitted was whether it appeared his testimony could reasonably be expected to contribute to the development of a sound record (criterion iii). Tr. 10,747-60. The fundamental basis for the Board's exclusion of his testimony was its belief that Dr. Bleuel simply did not have the necessary information on which to base an opinion that a FMEA needed to be conducted for Byron. Tr. 10,748-49. He was not an expert with respect to nuclear plants and was not familiar with the application for operating licenses for the Byron plant or the record of this proceeding, which the Board viewed as essential to an informed judgment as to the need for a FMEA. Tr. 10,748-52. Similarly, the Board found that Dr. Bleuel did not have the necessary foundation knowledge to offer an

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inspector's first ninety days of inspection. Testimony of Dr. Dev. S. Kochhar, ff. Tr. 10,538, at 7-10. Mr. Stokes addressed the issue of lack of independence on the part of S&L (Direct Testimony of Charles C. Stokes on Byron Reinspection Program, ff. Tr. 10,770, at 7-8) and sought to address issues related to the lack of predefined acceptance criteria for the evaluation of discrepancies although most of his testimony on this point was

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informed judgment on whether S&L had used pre-established acceptance criteria in their evaluation of discrepancies, in that he was unfamiliar with S&L's engineering criteria and evaluation methods. Tr. 10,757-59. As to his proposed testimony on the validity of using the first ninety days of an inspector's work as the initial reinspection period, the Board found that it did not appear that Dr. Bleuel could make a contribution to the record because his testimony took no account of the difference between a sample to test the adequacy of initial qualifications and training and a sample to test fall-off in inspector concentration and interest in their work. Tr. 10,759-60.

The Staff submits that the Licensing Board carefully weighed the five factors for admission of a late-filed contention and properly concluded that Dr. Bleuel's proposed testimony did not satisfy those standards. Additionally, contrary to Intervenors' assertion (Intervenors' Brief at 19-20), the Board did not commit error by declining to accept Dr. Bleuel's testimony as rebuttal. The Board carefully weighed whether Dr. Bleuel's testimony on lack of pre-established criteria should be admitted as rebuttal, but concluded that his lack of knowledge of S&L's engineering criteria and evaluation methods (discussed above) precluded his making a meaningful contribution to the record. Tr. 10,757-59. Intervenors argue that the Board's exclusion of Dr. Bleuel's testimony was particularly unfair in light of

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excluded. *Id.*, at 6-7, 8-22. In any event, the Board did not find that the testimony of Dr. Kochhar and Mr. Stokes rendered Dr. Bleuel's proposed testimony unnecessary.

its acceptance of the testimony of Mr. John Hansel, ^{20/} an expert witness for the Applicant on the organization, approach and adequacy of the BRP, whom Intervenors characterize as having credentials similar to Dr. Bleuel's. Intervenors' Brief at 19-20. Intervenors are incorrect in equating Dr. Bleuel's and Mr. Hansel's credentials to offer expert testimony in this proceeding. As to experience with nuclear plants, Dr. Bleuel's statement of his background indicates no prior experience in this area, whereas Mr. Hansel's background statement indicates that he was a consultant to the Kemeny Commission and that he was selected by the NRC to serve on an independent panel to provide an overview of a study conducted by the NRC to evaluate its approach to quality assurance and to make recommendations for improvements. ^{21/} More to the point, however, is that Mr. Hansel had conducted an independent survey and evaluation of the BRP, which provided the basis for his testimony. Hansel testimony, ff. Tr. 8901, at 3. He thus had the kind of factual knowledge of the subject addressed in his testimony which the Board found Dr. Bleuel to lack.

The Licensing Board's exclusion of Dr. Bleuel's testimony was proper.

Intervenors also assert in Section IV of their brief, relying on an attached portion of Dr. Bleuel's proffered testimony, that

the often highly judgmental criteria and methods used by Sargent & Lundy should not be considered a reliable basis for evaluating the safety significance of discrepancies, since they were neither clearly defined at the outset nor applied by independent reviewers.

^{20/} Testimony of Mr. John Hansel, ff. Tr. 8901.

^{21/} Compare, Bleuel proposed testimony, ff. Tr. 10,765, at 1-3, with Hansel testimony, ff. Tr. 8901, at 2-3.

Although Dr. Bleuel's testimony was not admitted, Intervenor's arguments that the Sargent & Lundy criteria used in evaluating discrepancies were overly "judgmental" and that Sargent & Lundy was not objective or impartial were considered by the Board in connection with Mr. Stokes' testimony. SID, ¶¶ 183-196. The Board found

that the Sargent & Lundy evaluations were performed in accordance with proper engineering standards and that the assumptions used in performing these evaluations were sufficiently conservative Accordingly, the Board finds no evidence in this record to support the need for an independent review based upon any alleged lack of objectivity and impartiality on the part of Sargent & Lundy.

Nothing in Intervenor's brief demonstrates that this conclusion was incorrect.

2. Dr. Ericksen. Intervenor's assert that the Licensing Board committed prejudicial error by excluding certain portions of the testimony of Dr. Ericksen. Intervenor's Brief at 20-22. The ruling as to which Intervenor's complain was made upon an oral motion to strike made by the Applicant following its voir dire of Dr. Ericksen. Tr. 10,992. The Applicant moved to strike those portions of Dr. Ericksen's testimony that offered opinions as to the reliabilities and confidence levels that should be applied to elements of the BRP depending upon their importance to safety. Tr. 10,992-93.

The Licensing Board granted this motion in its entirety on the basis that

Dr. Ericksen does not have sufficient factual understanding of the history and purposes of the Reinspection Program to express an opinion as to how it should have been designed. Nor does he have the expertise to make the judgments that he has about the initial design of the Reinspection Program.

Tr. 11,026. The Board's ruling was a proper one in light of the information developed during the voir dire of Dr. Ericksen.

As previously noted, Dr. Ericksen does not have any nuclear expertise, but was relying on Mr. Tuetken's classifications in offering his testimony on reliabilities and confidence levels. Tr. 10,981. Dr. Ericksen had no personal knowledge as to what importance to safety applied to the various inspection attributes or elements in the BRP. Id. Nevertheless, Dr. Ericksen proposed to testify as to:

- ° the Applicant's failure to distinguish between inspection elements on the basis of their relative importance to safety or on the basis of the degree of difficulty of inspection. (Q&A 9, first paragraph); and
- ° the reliabilities and confidence levels that should be applied to reinspection results according to four levels of importance to safety that might be included in a "reasonable reinspection program" (Q&A 10 and Q&A 20, first paragraph).

Ericksen testimony, ff. Tr. 11,045.

Mr. Tuetken's assignment of levels of safety significance to Hunter and Hatfield inspection elements or attributes is a crucial part of the Intervenor's argument that Dr. Ericksen's testimony should have been admitted. Without it, his proposed reliabilities and confidence levels have no engineering foundation. ^{22/} Mr. Tuetken's testimony clearly represents the exercise of his engineering judgment to place inspection

^{22/} Applicant's rebuttal statistical witness testified that the BRP is a judgment sample (a form of non-probability sample) and that inferences from it must be supported by the judgments of individuals with appropriate substantive knowledge. Rebuttal Testimony of Martin R. Frankel, ff. Tr. 11,120, at 7-8. In order to determine whether a particular sample is capable of supporting statistical

attributes and elements into some relative ranking of importance of the inspection activity to assuring that the plant has been properly constructed. It was not, however, a direct ranking of the safety significance of particular structures, systems of components and was not related to any classification system defined in NRC regulations. Tr. 8545, 10,981-83, 10,991-92. For these reasons, Mr. Tuetken's levels of safety do not provide sufficient foundation for Dr. Ericksen's proposed testimony as to appropriate reliabilities and confidence levels.

Apart from Mr. Tuetken's testimony, Dr. Ericksen did not have any basis for the reliabilities and confidence levels he suggests are appropriate. Ericksen testimony, ff. Tr. 11,045, at 5-7. He was not familiar with NRC regulations and did not derive his suggested reliabilities and confidence levels from any specific regulatory requirement. Tr. 10,989-92.

The record demonstrates that Dr. Ericksen lacked sufficient knowledge to offer an expert opinion with respect to those portions of his testimony which were excluded.

3. Authorized Nuclear Inspector Intervenors also assert that the Licensing Board committed error by excluding the testimony of an Authorized Nuclear Inspector (ANI), Mr. Sargent Podworny, who had worked at Byron. Intervenors' Brief at 22-23. ANI's have inspection responsibilities related to the determination by insurers that the work of

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inferences, the sampling statistician must work together with subject matter experts in determining whether certain assumptions required for sample inferences are satisfied. Id., at 8-9.

ASME Certificate Holders complies with the ASME Code. ^{23/} Mr. Podworny was employed by the Authorized Inspection Agency at Byron, the Hartford Steam Boiler Inspection & Insurance Company, and was assigned to inspect the work of the Hunter Corporation. ^{24/} In March 1984, Mr. Podworny brought to the attention of the NRC allegations of intimidation and other improprieties by his Hartford supervisors. ^{25/} Those allegations were referred to the National Board of Boiler and Pressure Vessel Inspectors, which has jurisdiction over ANI's, for the conduct of an audit of ASME activities at the Byron Station. ^{26/}

On July 23, 1984, the first day of the remanded hearing, Intervenors filed a motion for the inclusion in the hearing of the matters raised by Mr. Podworny. "Motion to Include Intervenors' Proposed Issue, No. 1, With Respect to One Allegor, Within Scope of Hearing," ff. Tr. 8445. The Licensing Board deferred ruling upon the motion until such time as Intervenors had informed the Board and parties of the identity of the allegor and the specific matters to which he would testify. Tr. 8454-55. On July 30, 1984, Intervenors filed a Memorandum in support of their

^{23/} Tr. 9921, 9945-46; Board Notification Letter dated October 3, 1984, from Michael I. Miller to the Licensing Board, with enclosures; Memorandum, dated October 5, 1984 from Thomas M. Novak to the Licensing and Appeal Board, Subject: Follow-Up on Allegations at Byron (Board Notification 84-165), with enclosures.

^{24/} Memorandum, dated April 19, 1984, from Thomas M. Nova to the Appeal Board and Licensing Board, Subject: Allegations at Byron (Board Notification 84-070), with enclosure; Board Notifications, dated October 3 and 5, 1984, supra n. 23.

^{25/} Board Notification 84-070, supra. n. 24.

^{26/} Id.

motion. The Licensing Board and parties were also provided with copies of the National Board's first report on its audit at Byron, dated July 16, 1984, (Tr. 9687-88) and the Applicant's response, dated July 31, 1984, which was superseded by a response dated August 1, 1984, to the National Board's audit report. Tr. 9927. These were the documents before the Licensing Board in ruling on Intervenors' motion.

Intervenors argue that Mr. Podworny's allegations, if true, raised "serious questions about the accuracy and honesty of the QA/QC records of the contractor involved [Hunter], as well as about the safety of that contractor's work." Intervenors' motion, ff. Tr. 8445, at 2. While acknowledging that Mr. Podworny was not a reinspector in the BRP, Intervenors attached significance to the fact that his inspections covered 14 of the Hunter attributes reinspected in the BRP and 6 of the attributes not reinspected in the BRP. Id.

The allegations brought forward by Mr. Podworny do not support the interpretation put on them by Intervenors. They related principally to alleged practices by Hartford in the performance of the insurance company's responsibilities in determining compliance with the ASME Code. See Board Notification 84-070. The function of the ANI is independent of the QA program of the Applicant and its contractors. Tr. 9945. Whether there are deficiencies in the practices of the ANI's or of the Authorized Inspection Agency is a separate question from whether the Applicants and its contractors were properly discharging their QA responsibilities. Tr. 9945-46. Thus, contrary to Intervenors' claim, Mr. Podworny's allegations did not raise questions regarding Hunter's QA performance.

Intervenors also asserted that the findings of the National Board in its first audit report had a relationship to the issues before the Board regarding the BRP. Tr. 9922-23. In that report, the National Board stated

It is the opinion of the National Board audit team that to date, with the exception of findings 3.2 and 3.3, there appears to be no findings (sic) which will impact on the hardware.

July 16, 1984 National Board report, at 8.

Finding 3.2 was to the effect that a Hunter Site Implementation Procedure which allowed it to rely on the Applicant's review and acceptance of subcontractor NDE personnel certifications was at variance with the requirements of the ASME Code. Intervenors candidly admitted that they had not had time to fully understand this finding, but offered the opinion that it seemed to be similar to deficiencies in the Applicant's and its contractors' certifications of QC inspectors to ANSI 145.2.6. Tr. 9922-23. The similarity is not apparent to the Staff. The finding appears to be limited to the question of which entity (the Applicant or Hunter) should approve the certifications of subcontractor NDE personnel. Tr. 9934. Unlike the Staff's Inspection Finding 82-05-19, the National Board finding did not raise any questions about the qualifications of inspectors. Id. The finding does not, therefore, appear to have any relationship to the issues that were before the

Licensing Board and does not appear to have a high degree of safety significance. ^{27/}

Intervenors asserted that National Board finding 3.3 was also similar to matters litigated in the remand proceeding. Tr. 9922. That finding was to the effect that an interface agreement between Hunter and PTL providing for binding arbitration by the Applicant of any disagreements between Hunter and PTL as to application of the Code or its associated standards or as to the interpretation of any NDE results, was inconsistent with the applicable Code requirements. The finding related to radiographic examinations, whereas testimony in the remand proceeding related to visual weld inspections. Tr. 9928-29. In response to this finding, the arbitration provision was eliminated and all examinations on which arbitration had been invoked (22 occasions) were reviewed and found acceptable by the Hunter Level III QC inspector. Tr. 9929-30. Thus, any potential hardware concern raised by this finding has been removed.

Intervenors believe that this finding raises a matter that is relevant to the remand proceeding because of its similarity to a finding by CECO QA that PTL had changed the deficient status of welds covered in the BRP which had previously been approved by a third party inspector,

^{27/} The Hunter procedure in question has been revised to eliminate the provision that Hunter may rely on the Applicant's review of the certifications. All NDE personnel certifications have been reviewed and accepted by the Hunter Corporation's Level III QC inspector. The National Board found this corrective action to resolve the finding. See August 1, 1984 letter from V. I. Schlosser (Applicant) to D. J. McDonald (National Board), at 5, and August 17, 1984 letter from the National Board Audit Team to Cordell Reed (Applicant), at 4 (which are enclosures to Board Notification 84-165) and Mr. Schlosser's letter dated October 10, 1984 to Mr. McDonald (which is an enclosure to Board Notification 84-176, dated November 7, 1984).

without allowing the third party inspector to concur or disagree with the changes. SID, § 112. Although these findings bear some similarities, they differ in the important respect that PTL's actions in the BRP were contrary to an "interpretation" (i.e., instruction from the Applicant's project construction department), whereas the actions identified by the National Board were consistent with an existing contractual agreement. Additionally, as noted above, the NDE activities which were the subject of the finding were unrelated to the visual weld inspections subject to reinspection in the BRP. The Staff submits that National Board finding 3.3 did not raise a matter which was related to issues in the remand proceeding.

Based upon the documentary information available to it and the arguments of the parties, the Licensing Board denied Intervenors' motion. Tr. 10,149. The Board found that the allegations "had, at best, a tenuous relationship to the identified issues for the remanded hearing." Id. The Board also concluded that the allegations did not present a significant safety issue which might affect the outcome of the proceeding and, therefore, did not provide a basis for admission of a new issue into the proceeding. Id. ^{28/} The Staff believes that the Board's ruling was based upon a correct assessment of the issues raised by Mr. Podworny and that no error was committed by the denial of the motion. ^{29/}

^{28/} The Board viewed the motion as arguably a motion to reopen the record to admit a new issue.

^{29/} The National Board completed its investigation of the allegations brought forward by Mr. Podworny and concluded that "the allegations

B. The Licensing Board Relied Upon Testimony As To Facility Design Only With Respect to Evaluation Of Discrepancies Identified In The BRP And Did Not Deny Intervenors The Opportunity To Rebut This Testimony

Intervenors assert that they were denied due process by the Licensing Board's reliance on testimony of the Applicant with respect to plant design and design margins, while at the same time ruling that plant design was not an issue in the proceeding and excluding certain testimony on design matters offered by Intervenors. Intervenors' Brief, at 23. Intervenors perceive a contradiction in the Board's actions, yet the Board has fully and satisfactorily explained the basis for its rulings in the footnote from ¶ 189 of the SID quoted by Intervenors at pages 25-26 of their brief.

The Licensing Board received evidence related to design criteria for the Byron plant only insofar as that evidence related to Sargent & Lundy evaluation of discrepancies in the work of Hatfield and Hunter identified in the BRP (e.g., SID ¶¶ 155, 161, 168, 172) or to the adequacy of equipment supplied by SCC (SID ¶ 246).

The Intervenors offered the testimony of Charles C. Stokes with respect to Sargent & Lundy's evaluations of discrepancies identified in the BRP. ff. Tr. 10,770. Mr. Stokes' testimony, however, also raised matters which the Board concluded were attacks on the Byron Station de-

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in most instances were correct, however, it appears they were programmatic and additional audits by the audit team revealed supporting documentation that assured there was not apparent effect on the hardware." The National Board further found that "procedures were revised and corrective action has been proposed and is being imple-

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sign criteria. See generally, Tr. 10,686-739. Intervenors acknowledge that some of the defects alleged by Mr. Stokes "may fall outside of the scope of the BRP," but assert generally that others have an impact on the analyses performed in the BRP. Intervenors' Brief, at 26. Aside from this general assertion, however, Intervenors provide specific argument only with respect to Stokes Question and Answers Nos. 19 and 29-33. Accordingly, the Staff's response is necessarily limited to those Questions and Answers.

In Answer 19, Mr. Stokes asserts that a section of the Structural Project Design Criteria Byron and Braidwood Nuclear Power Station Units 1 and 2 relating to mechanical component supports specifies certain design effects that are to be ignored in performing calculations. Mr. Stokes asserts that these stresses, although small, are non-conservative and states: "If these stresses were added to the calculations, I believe, some of them [component supports] would fail." Mr. Stokes does not specify any particular calculation done by Sargent & Lundy which he believes to be in error and has, therefore, failed to establish any connection between the design criterion discussed in Answer 19 and the evaluations of discrepancies identified in the BRP. ^{30/} The Licensing Board concluded that the Question and Answer were an attack on the Byron design criteria and were outside of the scope of the remand

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mented to assure Code compliance." See August 31, 1984 letter from National Board to John Streeter (NRC) (Enclosure 4 to Board Notification 84-165).

^{30/} See Staff's discussion of Stokes testimony at Tr. 10,642-43.

proceeding because Mr. Stokes had failed to show that the design criterion in question provided the basis against which any discrepancies identified in the BRP were evaluated. Tr. 10,715-10,718, 10,761, and see generally Tr. 10,668, 10,687. The Board also noted that it had independently looked at the design criterion referenced by Mr. Stokes and determined that, contrary to his assertion, torsional effects were not ignored. Tr. 10,761.

The Licensing Board's exclusion of Stokes Question and Answer 19 reflected a correct interpretation of the limited issues remanded in ALAB-770 and was not, therefore, error.

Intervenors assert that Questions and Answers 29-33 of Mr. Stokes' testimony, which relate to Sargent & Lundy evaluation of discrepancies initially inspected by PTL, should not have been excluded by the Licensing Board. Intervenors' Brief, at 27. Intervenors base this argument on their interpretation of the Board's "Memorandum and Order Following Prehearing Conference" (June 8, 1984). The Licensing Board there granted Intervenors' motion to have PTL included in the remand proceeding. Memorandum and Order, at 12. The Board stated:

We expect a general showing of the scope of Pittsburgh's work and a discussion of whether the reinspection program has provided reasonable assurances that Pittsburgh's work presents no safety problems.

Id., at 12-13. The Board added the following admonition:

Intervenors, however, have indicated that they intend to discover vigorously on Pittsburgh's activities, and we authorize a broad discovery effort. However, we remind Intervenors of the Board admonition during the prehearing conference -- that the nature of the evidence Applicant would be required to present on Pittsburgh Testing will depend largely on the advance notice it has received about particular concerns. E.g., Tr. 8251.

Id., at 13. The Licensing Board Chairman subsequently clarified the intended scope of the consideration in the hearing of PTL's inspection activities in the following words:

We did not in so many words say that we will bring Pittsburgh Testing Laboratory into the reopened hearing limited to their inspection activities at Systems Control and Hatfield I am of the opinion that the Applicant was quite correct in interpreting what could have been a better, clearer order on our part, that they did have to particularly address Pittsburgh involvement with Systems Control and Hatfield

Tr. 10,670. At Tr. 10,727, the Board further stated:

The Applicant has correctly proved the scope of the hearing with respect to PTL to be the three companies, Systems Control, Hatfield and Hunter.

Intervenors argue that it was unfair for the Board to exclude Questions and Answers 29-33, ^{31/} since they were based on the Intervenors' interpretation of the June 8, 1984 Memorandum and Order. The Licensing Board's clarified statement of the scope of consideration of PTL inspection activities is, however, consistent with the scope of the issues remanded in ALAB-770. The Intervenors' interpretation goes beyond that scope. Intervenors seek to bring Questions and Answers 29-33 within the scope of the hearing on the basis that PTL did the initial inspections of this Blount work. Intervenors' Brief, at 28. The Sargent & Lundy evaluations were, however, directed at determining whether any of the BRP discrepancies were design-significant, while the remand hearing with respect to that issue -in contrast- was limited to the work of Hatfield,

^{31/} The calculations and assumptions discussed in Questions and Answers 29-33 related to work performed by Blount Brothers, a Byron contractor included in the BRP but not in the scope of the remand. Tr. 10,662-63.

Hunter and SCC and did not cover the work of Blount Brothers. SID, ¶¶ 232, 256.

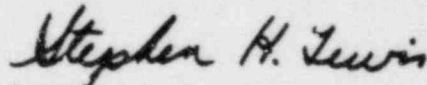
The question that the Licensing Board raised in its Memorandum and Order of June 8, 1984, as clarified during the hearing, was whether the performance of PTL's inspection activities (remembering that PTL was not a construction contractor at Byron), as determined in the BRP, raised any safety issue. That question was fully addressed in testimony in the proceeding, with the conclusion that PTL inspectors had, as a group, competently performed their inspection responsibilities. SID, ¶¶ 126-128.

The Staff submits that the Licensing Board's exclusion of Questions and Answers 19 and 29-35 was a correct ruling.

IV. CONCLUSION

For the reasons set forth in this brief, the Appeal Board should reject the arguments in Intervenors' brief and should affirm the Licensing Board's Initial Decision, as modified and supplemented by its Supplemental Initial Decision.

Respectfully submitted,



Stephen H. Lewis
Deputy Assistant Chief
Hearing Counsel

Dated at Bethesda, Maryland
this 23rd day of November, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
COMMONWEALTH EDISON COMPANY) Docket Nos. 50-454
(Byron Station, Units 1 and 2)) 50-455

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN OPPOSITION TO INTERVENORS' SUPPLEMENTAL BRIEF ON APPEAL" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk by use of express mail service, or as indicated by a triple asterisk by hand-delivery, this 23rd day of November, 1984:

Alan S. Rosenthal, Chairman***
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Howard A. Wilber***
Atomic Safety and Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Reginald L. Gotchy***
Administrative Judge
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Ivan W. Smith, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. A. Dixon Callihan
Administrative Judge
102 Oak Lane
Oak Ridge, TN 37830

Dr. Richard F. Cole*
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Michael Miller, Esq.**
Isham, Lincoln & Beale
Three First National Plaza
Chicago, IL 60602

Mrs. Phillip B. Johnson
1907 Stratford Lane
Rockford, IL 61107

Ms. Diane Chavez
528 Gregory Street
Rockford, IL 61108

Dr. Bruce von Zellen
c/o DAARE
P. O. Box 261
DeKalb, IL 60015

John Streeter, Region III
U.S. Nuclear Regulatory Commission
Office of Inspection & Enforcement
799 Roosevelt Road
Glen Ellyn, IL 60137

Timothy Wright, Esq.**
Douglass Cassel, Esq.
109 N. Dearborn Street
Chicago, IL 60602

Ms. Pat Morrison
5568 Thunderidge Drive
Rockford, IL 61107

Joseph Gallo, Esq.
Isham, Lincoln & Beale
Suite 840
1120 Connecticut Avenue, NW
Washington, DC 20036

Atomic Safety and Licensing Board
Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Appeal
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing & Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Steven P. Zimmerman
Pedderson, Menzimer, Conde,
Stoner & Killoren
120 W. State St. - Suite 400
Rockford, Illinois 61101

Stephen H. Lewis

Stephen H. Lewis
Deputy Assistant Chief
Hearing Counsel