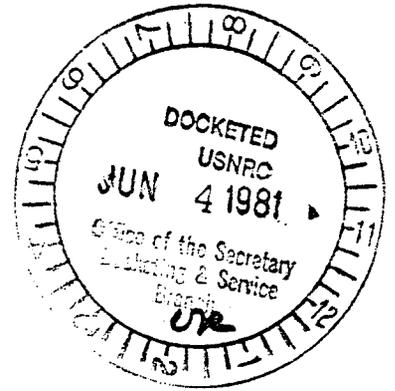


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
James L. Kelley, Chairman
Elizabeth B. Johnson
Cadet H. Hand

SERVED JUN 4 1981



In the Matter of
SOUTHERN CALIFORNIA EDISON COMPANY, ET AL.
(San Onofre Nuclear Generating Station,
Units 2 and 3)

Docket Nos. ~~50-361-01~~
50-362-01

June 3, 1981

MEMORANDUM AND ORDER
(Ruling on NRC Staff's Objection to Prehearing Conference Order)

The NRC Staff has filed an objection to that portion of our Prehearing Conference Order of May 8, 1981, authorizing participation in this case by supervised legal interns on behalf of the Intervenor Friends of the Earth (FOE). The interns, second and third year law students at the University of San Diego Legal Clinic, would present FOE's direct case and cross-examine opposing witnesses, under the direct and continuous supervision of FOE's counsel, the supervising attorney of the Environmental Law Clinic and an experienced trial lawyer.

The Staff reasserts its argument that 10 CFR 2.713, by its "explicit provisions... provides the only ways in which a person may appear in a representative capacity in Commission proceedings." Under that rule, as recently amended, representation is explicitly authorized (1) on a pro se basis, (2) by an attorney, and (3) in the case of an "unincorporated association" such as FOE, by a member or officer. We are told that because

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these legal interns are neither attorneys, nor officers nor members of FOE, the Board's general authority to "conduct a fair and impartial hearing" (10 CFR 2.718) does not extend to authorizing their participation in this case.

We adhere to our prior ruling for the reasons advanced in our May 8 Order (which we will not repeat), and for the following additional reasons.

To begin with, we reject the Staff's unduly literal approach to this question. Section 2.713 does not, by its terms, bar legal interns; nor does it say, in so many words, that only those categories of persons referenced may appear. Accordingly, we look next to the history of the rule.

The "legislative history" of section 2.713 apparently does not shed any direct light on this question. The rule was amended last year to "clarify who may appear before NRC in a representative capacity." 45 Fed. Reg. 69877. Those amendments explicitly authorized appearances by officers and members of groups like FOE, to reflect "actual practice and the intent of the rule." Id. This history does indicate that at least until November 1980, section 2.713 was not literally and exclusively applied, as the Staff now urges us to do. On the contrary, officers and members of intervenor groups, presumably without any legal training, were allowed to appear and represent.^{1/} And in at least one case, representation by legal interns under the supervision of an attorney was authorized by a Licensing Board.^{2/} The Staff points to no case, and we know of none, where legal interns were barred.

^{1/} See, e.g. Offshore Power Systems (Floating Nuclear Power Plants), 2 NRC 813 (1975); Duke Power Co. (Catawba, Units 1 and 2), 6 AEC 666, 677-80 (1973).

^{2/} Pacific Gas and Electric Co. (Diablo Canyon, Units 1 and 2), Order of Nov. 24, 1976.

Thus we do not find an unequivocal answer to this question of interpretation in either the language or the history of the rule.^{3/} This means that the legislative authority simply did not think of the question. That is not an uncommon problem for an adjudicatory tribunal, whether concerned with a statute or an administrative rule. Learned Hand stated the controlling principle --

"As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final."^{4/}

Applying this principle, we believe that the Commission would have answered the present question by reference to three important considerations in the hearing process -- that the process "move along at an expeditious pace,"^{5/} that it be "consistent with the demands of fairness,"^{6/} and that it produce a complete and intelligible record.

The salient facts in this case are that FOE confronts a relatively lengthy and technical hearing on seismic issues with (if the Staff's view prevails) only one lawyer to present its case and cross-examine. The complexity of the case is roughly indicated by the number of expert witnesses each party proposes to call, because each witness tends to focus on a separate area of expertise. The Applicants propose to call twelve experts. The NRC Staff proposes to call nine experts. FOE proposes to call nine or ten experts.

^{3/} See Duke Power Company (Cherokee, Units 1, 2 and 3), ALAB-440, 6 NRC 642, 643 at n.3 (1977) in which a consolidated appeal by an individual petitioner on behalf of herself and one other individual petitioner was permitted notwithstanding "... the seeming requirement of 10 CFR 2.713(a) that an individual not appearing on his or her own behalf must be represented by a lawyer." [Emphasis added.]

^{4/} Guiseppi v. Walling, 144 F.2d, 608 (C.A. 2), aff'd sub nom. Genesco, Inc. v. Walling, 324 U.S. 244 (1945). See generally Murphy, "Old Maxims Never Die: The Plain-Meaning Rule and Statutory Interpretation in the Modern Federal Courts," 75 Colum. L.Rev. 1299 (1975).

^{5/} Statement of Policy on Conduct of Licensing Proceedings, p.3.

^{6/} Id.

Since the applicants and NRC Staff are in general agreement on most seismic issues, this means that FOE's single lawyer will have to prepare for and cross-examine as many as twenty-one expert witnesses. By contrast, FOE's nine or ten witnesses will be at least potentially subject to cross-examination by a battery of as many as ten Applicant and Staff lawyers.^{7/}

Taking the considerations listed above in reverse order, we think that rejection of legal interns here could impair our ability to develop a complete and intelligible record. Without intending any criticism of FOE's single counsel, we think it would unduly strain the abilities of any one lawyer to try to handle all direct presentations and cross-examination in this technical case. Effective cross-examination requires substantial time to prepare and has to be done, at least in part, as the hearing progresses.^{8/} If cross-examination responsibility can be divided by subject matter among several attorneys (or interns), it can be knowledgeable and concise. If one attorney is overloaded, he is likely to be poorly prepared (at least some of the time), rambling and, ultimately, unproductive.

The second consideration is the "demands of fairness." We think it would be unfair to perpetuate the greatly disproportionate resources of the opposing parties, when a helpful equalizing device like supervised legal interns is at hand.

^{7/} We do not know whether all or even most of these attorneys will be participating in cross-examination. These are merely the numbers of attorneys who have entered an appearance -- six for the Applicants and four for the Staff. However, these numbers are a fair indication of the greatly disparate resources available to the different parties.

^{8/} In addition, FOE's Counsel will have to find some time during the seismic hearing to work on emergency planning testimony. The emergency planning hearing will begin shortly after the close of the seismic hearing.

How the third consideration -- prevention of undue delay -- applies to this intern question is less clear. One can argue that several well-prepared interns will move through cross-examination more efficiently than an over-extended and less well-prepared single lawyer. Conversely, one can argue that the inexperience of the interns will result in unnecessarily lengthy and repetitive questioning. The results, of course, would vary from case to case, depending largely on the quality of the interns and their supervision.

In any event, we believe that direct supervision by FOE's Counsel should help to prevent delay here. In addition, as stated in our Revised Prehearing Order of May 28, we are requiring advance submission of cross-examination plans. If necessary, we may also require the interns to submit the actual questions they propose to ask; this would give the Board tighter control over their conduct of cross-examination. And we would be prepared to terminate the intern participation should it become counter-productive.

In the light of these considerations, and even assuming that the prospect of delay weighs negatively in the balance, we conclude that the Commission would have authorized supervised intern participation by law students had it thought of the question when it last amended section 2.713. We so read the rule.^{9/}

One final factor also figures in the result we reach -- that any "member" of an intervenor organization like Friends of the Earth can appear and represent the organization in NRC proceedings. This shows that the Commission is aware of the conflict between highly-skilled (and expensive) advocacy and ease of access to our proceedings by poorly-financed intervenor groups. Here the balance has been struck decisively in favor of ease of access, for there is

^{9/} Given our interpretation of the rule, we do not reach the Staff's argument that the waiver procedures of 10 CFR 2.758 should have been followed.

no correlation between mere membership in an intervenor group and skill as an advocate. These things being so, it seems to us anomalous to suggest that the Commission would have wished to bar supervised legal interns as advocates, and at the same time to allow in their place unsupervised, unskilled members of intervenors groups. Perhaps equally anomalous, were we to adopt the Staff's theory and bar these law student interns from the case, they could surmount the bar simply by becoming members of Friends of the Earth. We decline to engage in such an empty exercise.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD


James L. Kelley, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 3d day of June, 1981