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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
CONSUMERS POWER COMPANY
(Midland Plant, Units 1 and 2)

}
} Docket Nos. 50-329
} 50-330
}

NRC STAFF RESPONSE TO LICENSEE'S MOTION
TO STRIKE PORTIONS OF THE TESTIMONY OF DR. RICHARD J. TIMM

Introduction

On February 7, 1977, Intervenors other than Dow Chemical Company (Intervenors) filed the written testimony of Dr. Richard J. Timm. Several dates have been scheduled for Dr. Timm's appearance and cross-examination in this proceeding. Due to a variety of circumstances, Dr. Timm has yet to appear. The Atomic Safety and Licensing Board (Board) by its Order of April 12, 1977 has re-set May 9, 1977 as the date for Dr. Timm's appearance. Consumers Power Company (Licensee) has moved^{1/} the Licensing Board to strike portions of Dr. Timm's testimony prior to his appearance. The Staff supports a part of Licensee's motion and suggests the remainder of the motion be held in abeyance pending resumption of the evidentiary hearing.

^{1/} "Motion and Supporting Memorandum of Consumer's Power Company to Strike Portions of the Testimony of Dr. Richard J. Timm" filed on April 13, 1977

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Discussion

Licensee's motion addresses two categories of the Timm testimony which it perceives to be defective. The first category consists of those portions of the testimony which deal with legal, rather than factual, questions.^{2/} The second category consists of those portions of the testimony which the Licensee believes fall outside the area of Dr. Timm's competence as an expert witness.^{3/}

With regard to the first category, the Staff supports the Licensee's motion. Dr. Timm has been offered by Intervenors as an expert witness and an expert may testify only to those facts and opinions within his area of expertise.^{4/} And while it may be argued that a particular fact or factual opinion may be beyond the expert's area, it is clear that a legal opinion is always beyond the expert's area. Legal conclusions and opinion are appropriate subjects of a motion to strike. The record in this proceeding would be best served by limiting testimony to facts and factual opinions of experts qualified in their particular areas.^{5/}

^{2/} Page 4 of Licensee's motion

^{3/} Ibid.

^{4/} Federal Rules of Evidence, Rule 702, Testimony by Experts.

^{5/} It should be noted that the record in this proceeding is already unduly burdened by the characterizations and statements of Intervenor's Counsel. See Staff's "Motion for Censure of Myron M. Cherry" dated March 25, 1977.

The Staff has examined each of the portions of Dr. Timm's testimony identified by the Licensee as consisting of legal conclusions and supports the Licensee's motion that these portions be stricken.

Dr. Timm's response at pages 12 to 14^{6/} of his testimony is clearly incompetent as it consists of Dr. Timm's personal understanding of the legal issues in this proceeding and the legal positions of the parties. The incompetence of this portion of Dr. Timm's testimony is highlighted on page 14 where he opines that:

...the conclusion is inescapable that construction must halt in order to permit a fair and objective analysis of all of the important issues and information.

This is a clear legal conclusion to be reached only after legal argument based on the factual record in this proceeding and upon application of the standards of Coalition for Safe Nuclear Power, et al. v. U.S.A.E.C., et al. 463 F.2d 954 (D.C. Cir., 1972).

Dr. Timm was offered as an expert and his role is limited to providing facts and expert opinion based on facts from which it may be argued that a suspension is in order. But, it is not for Dr. Timm to make such arguments.

^{6/} All page references to Dr. Timm's testimony refer to the underlined portions of his testimony as presented in Attachment A to Licensee's motion.

On pages 18-19, Dr. Timm carries forward his misplaced role as advocate. He feels the need to identify the factors and considerations which should guide the Commission in reaching a decision in this proceeding. Again this portion of his testimony is clear legal argument and should be stricken.

On pages 27-28, Dr. Timm reaches conclusions as to what record evidence is required to support a finding which he considers relevant. Dr. Timm in essence tells us what the legal issue is, in his view, and then goes on to elaborate on why the record evidence is not adequate to support a finding in Licensee's favor on that issue. This is pure legal argument and should be stricken.

The Licensee argues in paragraph 6 on page 8 of its motion that certain other portions of Dr. Timm's testimony should be stricken as consisting of legal conclusions. The Licensee identifies a footnote on page 34 as one such portion. While Dr. Timm does reach an improper conclusion regarding relevancy, the bulk of the footnote deals with expert analysis and opinion and would appear as proper subjects for voir dire and cross-examination. The Staff would oppose striking this portion of Dr. Timm's testimony. Dr. Timm's conclusion on page 42 that the one day in 10 year criteria should be subjected to a cost-benefit analysis at the remand hearing is a legal conclusion which should be stricken. Finally, contrary to the Licensee's position, we think that the bulk of Dr. Timm's testimony

on pages 81 and 82 relating to nuclear fuel costs is again purportedly expert analysis and opinion and proper subjects of voir dire and cross-examination. However, the last sentence on page 82 of Dr. Timm's testimony, as identified by the Licensee, does deal with a legal conclusion as to Dr. Timm's views on the consideration of fuel cycle costs in this proceeding and should be stricken.

The second category of testimony which the Licensee seeks to be stricken consists of those portions of Dr. Timm's testimony which, in the Licensee's view, are beyond the expertise of Dr. Timm. While the Staff agrees that, based on the professional qualifications presented by Dr. Timm in his testimony, Dr. Timm is testifying beyond his expertise in many areas, this can only be established by voir dire on the record. Dr. Timm has reached a great number of ^{con-}clusions in his testimony. While in many instances, Dr. Timm's expertise in these area does not appear on the face of his testimony, voir dire may indeed establish his competence to testify in these areas. In the Staff's view, testimony of Dr. Timm identified by the Licensee in paragraphs C, E, F and H of its brief as being beyond the expertise of Dr. Timm, may be proper testimony. Only voir dire can establish whether this testimony should be stricken.

Conclusion

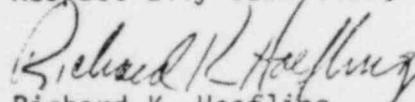
The Staff supports that portion of the Licensee's motion which seeks to strike portions of the testimony of Dr. Timm as consisting of legal arguments and conclusions which Dr. Timm is not qualified to make.

Specifically, the Staff supports striking the following portions of the Timm testimony as identified by the Licensee in its Attachment A:

1. Pages 12 to 14, 18 to 19 and 27 to 28.
2. Dr. Timm's conclusion on page 42 relating to the scope of the cost-benefit analysis for his proceeding.
3. Dr. Timm's conclusion on page 32 as to consideration of fuel cycle costs in this proceeding.

With regard to the remainder of the Licensee's motion dealing with testimony which may be beyond Dr. Timm's expertise, the Staff would oppose Licensee's motion. The Licensee's motion is more properly made upon development of a record or voir dire as to the extent of Dr. Timm's qualifications. At that time the Board and all parties will be in a better position to reach an informed judgment.

Respectfully submitted,


Richard K. Hoefling
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 26th day of April, 1977

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LICENSEE'S MOTION TO STRIKE PORTIONS OF THE TESTIMONY OF DR. RICHARD J. TIMM" dated April 26, 1977 in the above-captioned proceeding, have been served on the following by deposit in the United States mail, first class or air mail, this 26th day of April, 1977:

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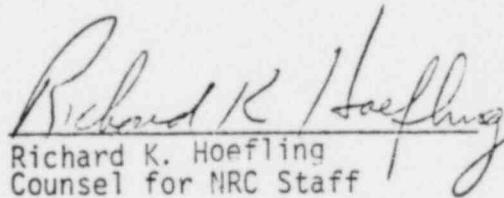
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