

07/30/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA

(UCLA Research Reactor)

)
) Docket No. 50-142
) (Proposed Renewal of Facility
) License)

NRC STAFF RESPONSE TO INTERVENOR'S
MOTION REQUESTING PERMISSION FOR
EXAMINATION BY EXPERT



INTRODUCTION

By motion dated June 3, 1981, the Intervenor, Committee to Bridge the Gap (CBG) requested permission from this Board for Mr. Daniel Hirsch to conduct examination or cross-examination of expert witnesses pursuant to 10 CFR § 2.733. In support of this request, an affidavit signed by Mr. Hirsch, describing his areas of expertise, was attached to the motion. By Board Order of June 16, 1981 Mr. Hirsch was directed to clarify his formal education and teaching courses.

By letter dated June 30, 1981, Mr. Hirsch submitted a clarification of his education and a description of the course he teaches through the Council on Educational Development (Special Undergraduate Enrichment Courses) at UCLA.^{1/} The title of the course is "Energy Alternatives and Public Policy". Mr. Hirsch also explains that his degree in Special Studies at Harvard Uni-

^{1/} Mr. Hirsch states at p.1 that Staff counsel had previously stated by phone that Staff had "no objection". Mr. Pollock states on p.2 of the June 3, 1981 motion that Staff indicated by phone to Mr. Pollock that "they" indicated no objection from Staff. Both statements are false.

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versity was obtained through an interdisciplinary program in which "each student is responsible for putting together an interdisciplinary academic committee to tutor, advise, and evaluate his work, including his thesis."^{2/} Mr. Hirsch states that the committee he selected (for tutoring, advice and evaluating his work) was composed of a geologist, an economist, and a member of the school of education.^{3/} Mr. Hirsch states further that the substance of his education was "how various disciplines are utilized in public policy decisions" ... "focusing on public policy questions".^{4/} Additionally, Mr. Hirsch states that

In sum, my formal education has focused on the public policy side of academic disciplines, not science or engineering; however, my experience since formal education ended has been heavily immersed in acquiring the technical competence necessary for work in my area of public policy.^{5/}

Mr. Hirsch indicates that to address the public policy questions of energy, including nuclear power, "required a deep immersion in the scientific and technical aspects of the policy questions I address".^{6/}

II. QUALIFICATION AS AN EXPERT

The pertinent words in 10 CFR § 2.733 state that:

A party may request the presiding officer to permit a qualified individual who has scientific or technical

^{2/} Response to Board Order of June 16, 1981, Requesting Additional Information from Daniel Hirsch, p.2.

^{3/} Id.

^{4/} Id.

^{5/} Id., p.3.

^{6/} Id., pp. 2-3.

training or experience to participate on behalf of that party in the examination and cross-examination of expert witnesses. The presiding officer may permit such individual to participate ... upon a finding: (a) that the individual is qualified by scientific or technical training or experience (Emphasis added)

The rule goes on to state that once qualified, the examination or cross-examination conducted by an expert shall be limited to areas within the expertise of the individual.

Analogously, Federal Rule of Evidence 702 defines an expert witness as one qualified by knowledge, skill, experience, training or education.

The Appeal Board has previously made clear that the party sponsoring the expert has the burden of demonstrating the expertise^{7/} and a licensing board recently applied this standard in determining the qualifications of an intervenor's proposed expert.^{8/}

The qualifications of an expert witness are established either through consideration of his academic training or of his relevant experience, or through some combination of these factors^{9/} and the academic field of study must be shown relevant to the technical subject at hand.^{10/} Practical experience must be shown in terms of particular activity performed and the subject

^{7/} Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) ALAB-417, 5 NRC 1398, 1405 (1977) citing 2 Wigmore, Evidence, § 560 at pp. 640-41 (3d Ed. 1940).

^{8/} Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) LBP-78-36, 8 NRC 567 (1978).

^{9/} Id., p. 570.

^{10/} Id., 571.

addressed rather than just undefined participation.^{11/} Mere familiarity or general knowledge of reactor systems and operations is not enough to qualify one as an expert.^{12/} In short, a well-informed layman is not an expert.^{13/}

III. NO EXPERT QUALIFICATIONS HAVE BEEN SHOWN BY INTERVENOR

The June 3, 1981 Affidavit of Mr. Hirsch states that he is a magna cum laude graduate of Harvard University in "special studies" which he clarifies as education in public policy decisionmaking. However, the affidavit is unclear as to whether the "special studies" program results in a degree, whether Mr. Hirsch was awarded a degree and in what year the degree, if any, was awarded. More importantly, the affidavit provides no information as to the nexus between any of the admitted contentions and any academic course work or other training which would provide a foundation for a claim by Mr. Hirsch that he is qualified by training to have expertise regarding an issue in litigation. As noted above, Mr. Hirsch candidly admits that his formal education has focused on the public policy side of academic disciplines, not science or engineering. Accordingly, the Intervenor has provided no basis to support a finding by the Board that Mr. Hirsch is quali-

^{11/} Id., p. 573.

^{12/} Id., p. 573.

^{13/} Id., p. 573. Cf. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B) ALAB-463, 7 NRC 341, 361 (1978); Illinois Power Co. (Clinton Power Station, Units 1 and 2) LBP-75-59, 2 NRC 579 588 (1975). Staff is aware that the cases cited here all deal with qualification of expert witness, rather than expert interrogators, but Staff believes that the requirement for qualification is the same in both cases, i.e., as an expert in a particular scientific or technical area which is the subject of a particular contention.

fied by training in any technical or scientific discipline relating to any admitted contention to support his participation in cross-examining any expert witness.

The activities described in the affidavit and the clarification as evidence of expertise gained by experience, namely, as part time lecturer on "Energy Alternatives and Public Policy" through the Council on Educational Development program of the UCLA Academic Senate; as a researcher and advisor to the Intervenor, Committee to Bridge the Gap (CBG); testifying on "nuclear matters" before a Congressional subcommittee and the U.S. Radiation Policy Council; as a member of the Los Angeles Federation of Scientists; and preparation of the contentions and other pleadings filed in this proceeding by the Intervenor CBG do not indicate any working experience as a scientist or engineer or technician which could qualify Mr. Hirsch as an expert in any matter related to this proceeding.

This proceeding is not considering the relicensing of a nuclear power plant, but rather, a university research and training reactor which does not generate any electricity. Thus, in this proceeding, not even the generation of energy is addressed, so that Mr. Hirsch's involvement with public policy on energy issues could not be even remotely relevant here.

The expertise necessary pursuant to 10 CFR § 2.733 to cross-examine the Staff and University nuclear engineers, physicists, and other experts would require a showing of some formal education or working experience in engineering or physics or other area directly related to the subject matter of a contention. The twenty contentions admitted to this proceeding are concerned with basic and specific scientific and engineering principles concerning such matters as reactivity, reactor and other structural designs and construction; properties

and characteristics of radionuclides and uranium; radiation dose calculations; Argonaut reactor operating characteristics, and financial and management issues. None of the contentions is or could be related to public policy on energy sources. The indication made by Mr. Hirsch, that he has informed himself to some undefined extent on the scientific and technical aspects of the policy questions he addresses, shows that he may be an "informed layman", but no expert in scientific and technical matters.

None of the activities described qualify Mr. Hirsch as an expert. Neither lecturing (part time) on the very broad subject of "energy issues" nor being active in an organization interested in nuclear power issues shows anything more than a great interest in energy issues and certainly no expertise of any sort relevant to this proceeding.

In addition to his failure to qualify as an expert, Mr. Hirsch has also failed to provide any support for the two additional findings required by 10 CFR § 2.733. 10 CFR § 2.733(b) requires that the individual show that he has read any written testimony he intends to examine or cross-examine and any documents to be used in the course of the examination. 10 CFR § 2.733(c) requires that the individual show that he has prepared himself to conduct a meaningful and expeditious examination. It is, of course, impossible to make a showing or a finding on 10 CFR § 2.733(b) and (c) at this time since no testimony has been filed in this proceeding, and the promise to read and to prepare given in the Intervenor's motion is not sufficient to support a finding in advance.

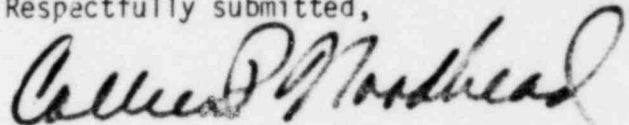
Lastly, Mr. Pollock's declaration of June 30, 1981 stating that he lacks scientific knowledge and must have Mr. Hirsch cross-examine, is not persuasive on the matter. The Commission's practice of requiring the prefiling of written

direct testimony (10 CFR § 2.743(b)) affords Mr. Pollock the opportunity of having the assistance of Mr. Hirsch and any other person he has available to him review the direct testimony of the other parties and aid him in preparation for cross-examination of the witness sponsoring the testimony. Further, he is free to have the assistance of these or any other persons at the hearing. Under the circumstances, there is no merit to the implication in his declaration that unless Mr. Hirsch is able to participate in cross-examination of witnesses of the other parties, Intervenor would be precluded from doing so.

IV. CONCLUSION

For the reasons stated herein, the Intervenor has not shown that Mr. Hirsch is qualified by scientific or technical training or experience to be an expert interrogator nor that the other factors in 10 CFR § 2.733 can be found in favor of the Intervenor. Accordingly, the Board must deny the Intervenor's motion requesting that Mr. Hirsch be allowed to conduct examination or cross-examination of expert witnesses pursuant to 10 CFR § 2.733.

Respectfully submitted,



Colleen P. Woodhead
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 30th day of July, 1981

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO INTERVENOR'S MOTION REQUESTING PERMISSION FOR EXAMINATION BY EXPERT" 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, this 30th day of July, 1981:

Elizabeth S. Bowers, Esq., Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Emmeth A. Luebke*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dr. Oscar H. Paris*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mr. Daniel Hirsch
Committee to Bridge the Gap
1637 Butler Avenue, #203
Los Angeles, CA 90025

William H. Cormier, Esq.
Office of Administrative Vice
Chancellor
University of California at
Los Angeles
405 Hilgard Avenue
Los Angeles, CA 90024

Mr. John Bay
1633 Franklin Street
Santa Monica, CA 90404

Christine Helwick, Esq.
Glenn R. Woods, Esq.
Office of General Counsel
2200 University Avenue
590 University Hall
Berkeley, CA 94720

Roger Holt, Esq.
Office of City Attorney
200 North Main Street
City Hall East, Room 1700
Los Angeles, CA 90012


Mark Pollock, Esq.
1724 No. La Brea Avenue
Hollywood, CA 90046

Mr. Daniel Hirsch
c/o Quaker Center
P.O. Box 686
Ben Lomond, CA 95005

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

Atomic Safety and Licensing Appeal
Panel (5)*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section (7)*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

A handwritten signature in cursive script, reading "Colleen P. Woodhead". The signature is written in dark ink and is positioned above a horizontal line.

Colleen P. Woodhead
Counsel for NRC Staff