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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

October 30, 1978

Samuel J. Chilk
Secretary of the Commission

Dear Mr. Chilk:

As requested in your letters of October 20, 1978, the staff's comments on the generic question of cross-examination of ACRS consultants in NRC licensing proceedings are enclosed.

Sincerely,

Stuart A Treby

Stuart A. Treby
Assistant Chief Hearing Counsel
for NRC Staff

Enclosure: As stated

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STAFF COMMENTS ON THE GENERIC MATTER OF CROSS-EXAMINATION OF ACRS CONSULTANTS IN NRC LICENSING PROCEEDINGS

As requested in the Secretary to the Commission's letter of October 20, 1978, the staff submits the following comments on the generic matter of the cross-examination of ACRS consultants in NRC licensing proceedings.*/

I. Background

At the outset we wish to make clear that the generic question posed raises implicitly a much broader generic question: whether the Commission should continue to generally preclude NRC employees, consultants to the Commission, employees of consultants to the Commission and members of advisory boards from being compelled by subpoena to testify in NRC licensing hearings. While we are not aware of any significant impetus (from any direction) for modification of that policy, we note that the status quo here should not be allowed to be necessarily dispositive of the specific question as to ACRS consultants.

1. As to the details of current policy, the Commission has long taken the position in its regulations and in its adjudicatory decisions that the ACRS is a collegial body whose individual members cannot

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*/ As directed in the Secretary's letters, the staff's comments are in terms of policy issues related to the generic matter and do not involve or discuss the specifics of any on-going licensing proceeding.

In addition, the generic matter is only concerned with whether or not ACRS consultants should be protected from being compelled by subpoena from testifying in a NRC licensing proceeding. Nothing now precludes the voluntary appearance by an individual as a potential witness in such a proceeding.

be compelled to testify except under exceptional circumstances. This position has been upheld judicially. Briefly, the court held that the ACRS's unique role as an independent part of the administrative process is "sufficiently analogous to that of an administrative decision maker to bring into play the rule that the 'mental processes' of such a 'collaborative instrumentalit/y/ of justice' are not ordinarily subject to probing". This rule, the court said, is "particularly apropos in light of ACRS's collegial composition such that no individual may speak for the group as a whole." Aeschliman v. Nuclear Regulatory Commission, 547 F.2d 622, 631-632 (D,C, Cir.) (1976). (See Attachment "A" for additional background.)

2. Beyond this, NRC employees, consultants to the Commission, and employees of consultants to the Commission, as well as members of advisory boards, cannot be compelled by other parties to testify in an NRC hearing under the provisions of the Commission's regulations (10 CFR §§2.4(p) and 2.720). A presiding board, however, may, upon a showing of exceptional circumstances require the testimony of these persons. The reason for the protection of NRC employees and NRC consultants is essentially to avoid undue interruption of staff work by allowing a party to select staff witnesses and place demands on the time of senior staff officials who may be compelled to appear and testify.

3. Exceptional circumstances would probably be found to exist if it could be shown that an individual had direct personal knowledge

of a material fact not known to the NRC witnesses selected by the staff to participate in the hearing. To date, however, there has been no occasion to invoke the "exceptional circumstances" provision. In this regard, it should be noted that the NRC staff does participate as a party in NRC hearings and present testimony through one or more witnesses. The staff has an obligation, without being compelled, to produce witnesses (over whom they exercise control and can produce) shown to have direct personal knowledge of a material fact in the hearing. The ACRS, on the other hand, does not participate as a party in NRC hearings and present testimony. Its letter report to the Commission is only admitted as part of the record for the limited purpose of showing compliance with statutory requirements. (Section 182 b. of the Atomic Energy Act directs the ACRS to review certain applications and to submit a report thereon.) Although the ACRS's position as reflected in its report is significant in the licensing process, the report itself is not considered as having been admitted into evidence for the truth of any of the statements therein.

4. It is important to note that it is not clear that the regulations as written (10 CFR §§2.4(p) and 2.720) also apply to consultants to the ACRS. This precise question has never been dealt with explicitly by the Commission.

II. Discussion

1. The staff believes that several courses of action are unrealistic and can be readily dismissed. These include either extending

absolute protection to consultants to the ACRS or extending no protection at all. Extending absolute protection to them would give them greater protection than is now extended to individual ACRS members or to NRC personnel. On the other hand, a policy which goes to the other extreme and gives them no protection would be difficult to square with legitimate policy considerations underlying the protection which the regulations now extend to NRC personnel (which, as stated, is defined to include NRC consultants and their employees, as well as NRC employees). In other words, there is no apparent reason why reasonable alternatives should include giving consultants to the ACRS any more favored treatment than is now extended to the ACRS members themselves or any less favored treatment than the regulations now provide to NRC employees and NRC consultants and their employees (unless, of course, the Commission wishes to reexamine and modify that general approach). In addition, no alternative should provide for compelling the testimony of an ACRS consultant for the purpose of probing the ACRS's collegial deliberative process.

2. Consistent with the foregoing, the narrow generic question which emerges is whether the established policy for the protection of ACRS members themselves should also apply to consultants to the ACRS.

3. The ACRS itself would answer this question in the affirmative. See letter, dated December 12, 1977, from M. Bender to Howard K.

Shapar attached to the Secretary to the Commission's letter of October 20, 1978 asking for our comments on the generic question. Several grounds are advanced by the ACRS in support of its position. According to the ACRS, the comments and recommendations of ACRS consultants are an integral part of the ACRS decision-making process. Even if a presiding board only intended to question an ACRS consultant in the individual's area of expertise, according to the ACRS, it would, in all probability, involve a discussion of factors which are a part of the ACRS's decisionmaking process. In this regard, the ACRS also asserts that their consultants render advice based on facts and information which are already in the record of the licensing proceeding; and that they do not have direct personal knowledge of a material fact not known to other witnesses made available by the staff.

The ACRS also states that compelling ACRS consultants to testify in NRC hearings would further limit the amount of time and effort they could devote to ACRS activities. Consultants, as well as members of the ACRS, we are told have only a limited amount of time to devote to Committee business.

4. The grounds advanced by the ACRS for the protection of its members are essentially the same as those which have been advanced for the protection of the members themselves. ACRS consultants, however, are individual experts and are not, as are the members, a collegial body. Nevertheless, as the staff understands the

ACRS's position, the consultants are so involved with the members' collegial decisionmaking process that it would be difficult to focus only on any individual consultant's role as an expert without getting involved in the Committee's collegial process. Although the ACRS's position regarding the collegial role of its consultants may be correct in terms of the practical operation of the Committee and its Subcommittees - and we have no information to the contrary - the reasons supporting that general proposition, at least, are not self-evident. It is not completely clear from the ACRS position why all ACRS consultants should be deemed to be "an integral part of the ACRS decisionmaking process."

The ACRS position does not explain how the ACRS would generally handle a situation in which one of its consultants has an expert opinion contrary to a conclusion expressed by the Committee in its letter report to the Commission. Such a situation would not necessarily be known unless disclosed by the consultant or by the ACRS report. The mere fact that, as stated in the ACRS position, the consultants do not have "direct personal knowledge of a material fact not known to other witnesses made available by the Commission Staff," should not necessarily be a controlling factor. Of possibly greater significance, in our view, depending on the circumstances, is the opinion of the expert consultant, particularly where that opinion may be in an area where the necessary expertise is limited, or where there are substantial differences in the expert opinions which are otherwise available. The ACRS's position does not address these matters.

5. The staff understands that the Commission intends to meet with the ACRS on this generic question. Subject to any impression which the Commission may derive from this meeting which differs from our understanding (set forth in the preceding paragraph) of ACRS's position, the staff believes that some reasonable, but not absolute, protection should be provided to ACRS consultants. The main advantages of this course of action are: (1) the integrity of the ACRS's deliberative process would be maintained; and (2) the time consultants have to devote to ACRS work would not be diminished. A disadvantage is that such protection could be perceived as making the regulatory process a less open one.

6. A balance has to be struck between protecting the integrity of the ACRS's deliberative process on the one hand, and, on the other, not establishing a barrier for access to witnesses which might be necessary to the presentation of a party's case. The staff believes that such a balance is now more or less reasonably struck in the Commission's regulations which protect ACRS members, NRC employees, consultants to the NRC and their employees from being compelled to testify except upon a showing of exceptional circumstances. A reasonable application the exceptional circumstances provision should provide a safety valve so that anyone generally protected under the regulations could be compelled by a presiding board to

testify upon a showing, for example, that an individual has direct personal knowledge of a material fact that is not known to the witnesses made available to testify in the proceeding.

7. If the Commission finds the provisions in these regulations to be generally acceptable, they should be clarified to extend the same protection to ACRS consultants. If, on the other hand, the Commission does not agree with the protection which the present regulations provide for ACRS members, NRC employees, consultants to the NRC and their employees, then the broader generic question should be reconsidered and any new approach applied to the matter of ACRS consultants. In short, we do not discern a convincing rationale for a disparity in treatment between ACRS consultants on the one hand and, on the other hand, NRC employees, consultants to the Commission, employees of consultants to the Commission and members of advisory boards.

ATTACHMENT "A"

BACKGROUND INFORMATION

I. The ACRS

Under section 29 of the Atomic Energy Act of 1954, as amended, there is established an Advisory Committee on Reactor Safeguards to review safety studies and facility license applications referred to it by the Commission, and to advise the Commission with regard to the hazards of proposed or existing reactor facilities, and the adequacy of proposed reactor safety standards. Section 182 b. of the Atomic Energy Act of 1954 provides that the ACRS shall review each application for a construction permit or an operating license for a power or test reactor or other facility for which a hearing is mandatory under section 189 a. of the Act, and may review applications for construction permits or operating licenses for other facilities or for amendments to construction permits or licenses. The section further provides that the ACRS shall submit a report on each application it reviews, which shall be made a part of the "record of the application" and available to the public except to the extent that security classification prevents disclosure. The Act does not explicitly provide that the ACRS report shall be made part of the "record for decision" as that term is used in the Administrative Procedure Act (APA).

The ACRS report is, in essence, a public statement from a group of experts - outside the hearing process - that a proposed reactor can or cannot be constructed with reasonable assurance of safety. Evidentiary weight is not given to an ACRS report in a contested licensing proceeding and the agency's final decision in such a

proceeding in no way rests on that report. The report is only admitted into evidence to show compliance with Section 182b. of the Atomic Energy Act.

II. Judicial Decisions

1. Excerpt from Aeschliman v. Nuclear Regulatory Commission, 547 F.2d. 622, 630-632 (C.A.D.C. 1976):

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A.

Saginaw also contends that the Commission erred by refusing to permit inquiry into the safety conclusions of the Advisory Committee on Reactor Safeguards [ACRS]. ACRS is a group of outside experts charged by statute to "make reports . . . with regard to the hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards." 42 U.S.C. § 2039 (1970). *See Siegel v. AEC*, 130 U.S.App.D.C. 307, 400 F.2d 778, 780 (1968). Pursuant to 42 U.S.C. § 2232(b), each application for a construction permit or operating license for a commercial nuclear power generating facility must be reviewed by ACRS and a report "made . . . available to the public except to the extent that security classification prevents disclosure." *Id.*

The ACRS report in this case was a 5 page, single-spaced typewritten letter. In language accessible to the determined layman, the ACRS report discusses roughly half a dozen design problems raised by the Midland reactors, and recommends modifications to alleviate them.[17] Following discussion of these specific problems, the ACRS report concludes:

> *Other problems* related to large water reactors have been identified by the Regulatory Staff and the ACRS and cited in previous ACRS reports. The Committee believes that resolution of these items should apply equally to the Midland Plant Units 1 & 2.
>
> The Committee believes that the above items can be resolved during construction and that, if due consideration is given to these items, the nuclear units proposed for the Midland Plant can be constructed with reasonable assurance that they can be operated without undue risk to the health and safety of the public.

IV J.A. 97-98 [emphasis added].

Pointing out that it could not determine what "[o]ther problems" the ACRS had in mind, or what "resolution" of them it had suggested, Saginaw requested the Licensing Board to permit discovery into these matters. Saginaw's discovery requests took the form of 337 interrogatories, various document demands, subpoenas, and requests for depositions directed to ACRS members. These requests were all denied, for essentially two reasons. First, it was stated that "the ACRS letter is only admitted as part of the record to show compliance with the statutory requirements. . . ." RAI-74-5-331 at 340. Second, the Commission had indicated in another case that it would be inappropriate to probe the reasoning of individual ACRS members. *Id.*, 340 & n. 62.

We agree with Saginaw that further explication of the ACRS report was necessary, but agree with the Commission that dis-

17. IV J.A. 92-98. Changes suggested by ACRS are almost always voluntarily adopted by the applicant. While ACRS *approval* (as opposed to scrutiny) is not required by law before a license issues, "in practice it is very unlikely that an applicant would persist in going before [the Licensing Board] over their objection." *Union of Concerned Scientists v. AEC*, 163 U.S. App.D.C. 64, 499 F.2d 1069, 1073 n. 5 (1974).

An example of the nature of the ACRS report is the following:

> The Committee has commented in previous reports on the development of systems to control the buildup of hydrogen in the containment which might follow in the unlikely event of a major accident. The applicant proposes to make use of a technique of purging through filters after a suitable time delay subsequent to the accident. However, the Committee recommends that the primary protection in this regard should utilize a hydrogen control method which keeps the hydrogen concentration within safe limits by means other than purging. The capability for purging should also be provided. The hydrogen control system and provisions for containment atmosphere mixing and sampling should have redundancy and instrumentation suitable for an engineered safety feature. The Committee wishes to be kept informed of the resolution of this matter.

IV J.A. 97.

A supplemental ACRS report was also prepared several months later addressing several additional problems. IV J.A. 99-100.

covery from individual ACRS members was not the proper way to obtain it.

B.

The role Congress intended for ACRS clearly emerges from its legislative history. In 1957, ACRS was added to the Atomic Energy Act of 1954 by Pub.L. 85-256, 71 Stat. 579. Prior to that time, the Commission had established its own "Committee on Reactor Safeguards." *See* S.Rep. No. 296, 85th Cong., 1st Sess., 1957 U.S.Code Cong. & Admin.News, pp. 1803, 1813 [hereafter USCCAN]. However, in 1956, the Commission issued the construction permit litigated in *Power Reactor Development Co. v. Int'l Union of Elect. Workers*, 367 U.S. 396, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961), despite an adverse committee report which had not been made public. *See Union of Concerned Scientists v. AEC*, 163 U.S.App.D.C. 64, 499 F.2d 1069, 1073 n. 5, 1075 n. 13 (1974). Aroused by this incident, Congress gave ACRS an independent statutory existence and required that its reports be made public. *Id.*

The Commission opposed making a public ACRS report a "formal statutory requirement." USCCAN at 1816. However, noting the "great prestige" and credibility which the Reactor Safeguards Committee enjoyed in the eyes of the public, the Joint Committee on Atomic Energy stated:

> The report of the [ACRS] committee is to be made public *so that all concerned may be apprised of the safety or possible hazards of the facility*. It is the belief of the Joint Committee that when the public is adequately and accurately informed that it will be in a better position to accept the construction of any reactors.

USCCAN 1825, 1826 [emphasis added]. The statute established ACRS "as part of the administrative procedures in chapter 16 of the act" to provide the "same type of scrutiny and prestige" as the Reactor Safeguards Committee had in the past. USCCAN at 1825. As part of its mandate, ACRS also was to "advise the Commission with respect to the hazards involved at any facility" and to "insure that any features of new reactors would be as safe as possible." *Id.*

[6] The ACRS report in this case must be evaluated in light of the congressional purposes. While the reference to "other problems" identified in previous ACRS reports may have been adequate to give the Commission the benefit of ACRS members' technical expertise, it fell short of performing the other equally important task which Congress gave ACRS: informing the *public* of the hazards. At a minimum, the ACRS report should have provided a short explanation, understandable to a layman, of the additional matters of concern to the committee, and a cross-reference to the previous reports in which those problems, and the measures proposed to solve them, were developed in more detail. Otherwise, a concerned citizen would be unable to determine, as Congress intended, what other difficulties might be lurking in the proposed reactor design. Since the ACRS report on its face did not comply with the requirements of the statute, we believe the Licensing Board should have returned it *sua sponte* to ACRS for further elaboration of the cryptic reference to "other problems." [18]

[7] Turning to the propriety of discovery directed to individual ACRS members and ACRS documents, we conclude it was not error to deny these requests. ACRS' unique role as an independent "part of the administrative procedures in chapter 16 of the act," *supra*, is sufficiently analogous to that of an administrative decisionmaker to bring into play the rule that the "mental processes" of such a "collaborative instrumentalit[y] of justice" are not ordinarily subject to probing. *United States v. Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941). This rule is particularly apropos in light of ACRS's collegial compo-

18. This is not to say that an ACRS report must contain detailed factual findings of the kind necessary to aid judicial review. Under Commission rules, when ACRS conclusions are controverted, a factual record is compiled anew before the Licensing Board. *See* 10 C.F.R., pt. 2, App. A, V(f)(1) (1976).

sition such that no individual may speak for the group as a whole. Where an ACRS report on its face omits material information, the appropriate course is not discovery but to return it for supplementation. *Cf. Dunlop v. Bachowski*, 421 U.S. 560, 574-75 & n. 11, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975). We merely hold here that neither the Atomic Energy Act nor general principles of administrative law required the Commission to grant Saginaw's discovery requests.[19]

On remand, the ACRS report should be returned to the ACRS for clarification of the ambiguities noted above.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that copies of a letter dated October 30, 1978 from Mr. Stuart Treby, Assistant Chief Hearing Counsel for the NRC Staff, to Mr. Samuel Chilk, Secretary of the Commission, transmitting "Staff Comments on the Generic Matters of Cross-Examination of ACRS Consultants in NRC Licensing Proceedings" and the enclosure 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 October, 1978. The following persons comprise the standard service list in the Matter of Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units Nos. 1 and 2), Docket Nos. 50-275 O.L. and 50-323 O.L. and Puget Sound Power and Light Co., et al. (Skagit Nuclear Power Project, Units 1 and 2), Docket Nos. STN 50-522 and STN 50-523.

Elizabeth S. Bowers, Esq., Chairman*
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Mr. Glenn O. Bright*
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. William E. Martin
Senior Ecologist
Battelle Memorial Institute
Columbus, Ohio 43201

Philip A. Crane, Jr., Esq.
Pacific Gas and Electric Company
77 Beale Street, Room 3127
San Francisco, California 94106

Mrs. Elizabeth Apfelberg
1415 Cozadero
San Luis Obispo, California 93401

Mrs. Raye Fleming
1920 Mattie Road,
Shell Beach, California 93449

Mr. Frederick Eissler
Scenic Shoreline Preservation Conference, Inc.
4623 More Mesa Drive
Santa Barbara, California 93105

Mrs. Sandra A. Silver
1792 Conejo Avenue
San Luis Obispo, California 93401

Mr. Gordon Silver
1792 Conejo Avenue
San Luis Obispo, California 93401

Richard B. Hubbard
MHB Technical Associates
366 California Avenue
Palo Alto, California 94306

Paul C. Valentine, Esq.
321 Lytton Avenue
Palo Alto, California 94302

Yale I. Jones, Esq.
100 Van Ness Avenue
19th Floor
San Francisco, California 94102

John R. Phillips, Esq.
Simon Klevansky, Esq.
Margaret Blodgett, Esq.
Center for Law in the
Public Interest
10203 Santa Monica Drive
Los Angeles, California 90067

David F. Fleischaker, Esq.
1025 15th Street, N. W.
5th Floor
Washington, D. C. 20005

Arthur C. Gehr, Esq.
Snell & Wilmer
3100 Valley Center
Phoenix, Arizona 85073

Janice E. Kerr, Esq.
Lawrence Q. Garcia, Esq.
350 McAllister Street
San Francisco, California 94102

Mr. James O. Schuyler
Nuclear Projects Engineer
Pacific Gas & Electric Company
77 Beale Street
San Francisco, California 94106

John Marrs
Managing Editor
San Luis Obispo County
Telegram-Tribune
1321 Johnson Avenue
P. O. Box 112
San Luis Obispo, California 93406

Bruce Norton, Esq.
3216 North 3rd Street
Suite 202
Phoenix, Arizona 85012

Samuel W. Jensch, Esq., Chairman*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dr. Frank F. Hooper, Member
Atomic Safety and Licensing Board
School of Natural Resources
University of Michigan
Ann Arbor, Michigan 48109

Mr. Gustave A. Linenberger, Member*
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Robert Lowenstein, Esq.
Lowenstein, Newman, Reis
& Axelrad
Suite 1214
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. Lloyd K. Marbet
c/o Forelaws on Board
19142 S. Bakers Ferry Road
Boring, Oregon 97009

Robert C. Schofield, Director
Skagit County Planning Department
120 W. Kincaid Street
Mount Vernon, Washington 98273

Roger M. Leed, Esq.
1411 Fourth Avenue
Seattle, Washington 98101

Mr. Nicholas D. Lewis
Chairman
Washington State Energy Facility
Site Evaluation Council
820 East Fifth Avenue
Olympia, Washington 98504

F. Theodore Thomsen, Esq.
Perkins, Coie, Stone, Olsen
& Williams
1900 Washington Building
Seattle, Washington 98101

Richard D. Bach, Esq.
Rives, Bonyhadi & Drummond
1400 Public Service Building
920 S.W. 6th Avenue
Portland, Oregon 97204

Richard M. Sandvik, Esq.
State of Oregon
Department of Justice
500 Pacific Building
520 S.W. Yamhill
Portland, Oregon 97204

Canadian Consulate General
Robert Graham
Vice-Consul
412 Plaza 600
6th & Stewart Street
Seattle, Washington 98101

Donald W. Godard, Supervisor
Siting and Regulation
Department of Energy
Room 111, Labor and Industries
Building
Salem, Oregon 97310

Russell W. Busch, Esq.
Attorney for Upper Skagit Indian
Tribe and Sauk-Suiattle Indian
Tribe
Evergreen Legal Services
5308 Ballard Avenue, N.W.
Seattle, Washington 98107

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

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

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Stuart A. Treby
Stuart A. Treby
Assistant Chief Hearing Counsel
for the NRC Staff