UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Robert M. Lazo, Chairman
Dr. Richard F. Cole
Dr. A. Dixon Callihan



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| In the Matter of<br><br>ARIZONA PUBLIC SERVICE COMPANY, ET AL.<br><br>(Palo Verde Nuclear Generating Station, Units 1, 2 and 3 Operating License Proceeding) | Docket Nos. STN-50-528-OL<br>STN-50-529-OL<br>STN-50-530-OL<br><br>ASLBP Docket No. 80-447-01-OL<br><br>August 19, 1982 |

MEMORANDUM AND ORDER
(Confirming the Admission Into Evidence of
Joint Applicants' Exhibit DD)

## I. INTRODUCTION

On June 25, 1982, the Licensing Board received into evidence Joint Applicants' Exhibit DD, an independent review of the Applicants' Water Reclamation Studies (the Nalco Report). Tr. 2690. Intervenor Patricia Lee Hourihan objected to the admission of this report on the grounds that it was not properly authenticated and that it was not produced during discovery. Tr. 2579-84, 2684-5. The document was admitted into evidence over the objection of the Intervenor. Tr. 2690.

On July 16, 1982, Intervenor filed a motion requesting the Board to reconsider its admission into evidence of Joint Applicants' Exhibit DD. In this motion, she asks the Board to either strike Exhibit DD from the record or, in the alternative, to reopen the hearing to allow for cross-examination of the author of the Nalco Report. In addition to the objections set forth above, she objects to the admission of Exhibit DD on the ground that it is inadmissible as hearsay evidence.

The Licensing Board finds that the Intervenor's motion does not set forth sufficient grounds to render Exhibit DD inadmissible as evidence in this proceeding. The motion is, therefore, denied.

## II. DISCUSSION

### A. Intervenor's Hearsay Objection is Untimely

In her motion, Intervenor objects to the admission of Exhibit DD on the ground that it is hearsay evidence.[1/] During the hearing, Intervenor based her objection to the admission of the exhibit on the grounds that it was not properly authenticated and that it had not been provided during discovery. Tr. 2579-84, 2684-5. At no time during the hearing did she raise the hearsay exception in conjunction with Exhibit DD.

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1/ Intervenor's Motion at 2.

Joint Applicants and Staff rely on a footnote in Florida Power and Light Company (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-335, 3 NRC 830, 842 n.26 (1976). This note suggests that the failure to object to the admission of evidence at the time it is offered bars the taking of exception to its admission at a later time. Id. Reliance on the Appeal Board's ruling is misplaced here, as Intervenor in this case did object to the admission of this evidence at the time of its admission. Tr. 2684.

While Intervenor did make a timely objection, she did not do so on the ground that the exhibit was hearsay. It is well settled that:

> It is not enough merely to make an objection. The rule requires the objecting party to state "the grounds therefor."... An objection that states the grounds on which the objection is based is sufficient. An objection that fails to state the specific grounds therefor is not. An objection on one ground will not enable the objecting party to rely on appeal on other grounds that were not stated in the objection. C. Wright and A. Miller, Federal Pratice and Procedure § 2473 (1971) (citations omitted).

The Commission's procedural rules do not strictly parallel the Federal Rules of Civil Procedure. However, as will be discussed, infra, in conjunction with the hearsay exception, administrative agencies adhere to a more liberal standard for the admission of evidence than do federal courts. Intervenor will not be permitted to have evidence excluded on a ground not raised during the hearing.

B. Hearsay Evidence is Admissible in this Proceeding

Even if we were to consider the applicability of the hearsay exception to this situation, we would rule in favor of admitting Exhibit DD into

evidence. Section 556(d) of the Administrative Procedure Act provides in pertinent part that "any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."[2/] Section 2.743(c) of the Commission's regulations requires that evidence be relevant, material, reliable and not unduly repetitious in order to be admitted into a licensing proceeding.[3/] As the Intervenor must recognize, the Supreme Court has said that hearsay is generally admissible in administrative proceedings. Richardson v. Perales, 402 U.S. 389, 407-410 (1971). This position has been adopted in NRC licensing proceedings. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 411-12. (1976)

As the Staff points out in its brief, [4/] the policy behind the exclusion of certain types of hearsay evidence under the Federal Rules of Evidence is that lay jurors will not have a sufficient basis on which to judge the reliability of the evidence. An administrative judge has the special expertise necessary to determine the probativity and value of hearsay evidence. As the Chariman has indicated, the fact that evidence is hearsay goes to its weight, not to its admissibility. Tr. 2252. The Licensing Board has admitted the Nalco Report into evidence. It will decide its value or lack thereof based on the record.

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2/ Administrative Procedure Act §7, 5 U.S.C. § 556(d) (1977)

3/ 10 CFR § 2.743(c)

4/ Staff's Brief at 7

Invervenor cites the Appeal Board's decision in Illinois Power Company[5/] to stand for the the position that hearsay will not be admitted if its substance is challenged by other parties or is in some way inconsistent with other disclosures in the record. This is a patent misstatement of the Appeal Board's ruling. The opinion specifically stated that the Appeal Board did not reach the question of to what extent an expert witness in an administrative proceeding may rely on hearsay. Id. Evidence received in a proceeding, whether hearsay or not, is often contradictory. It is this Board's job to evaluate the contradictory evidence in coming to its decision.

C. Exhibit DD Was Properly Authenticated.

Intervenor has raised the objection that the Nalco Report was not properly authenticated. Tr. 2684. She argues in her motion that Mr. Bingham did not properly authenticate the document because "he could not testify to the research methods, data base, or process of analysis in the report."[6/]

Under the Federal Rules of Evidence, the requirement of authentication is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Rule 901

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5/ Illinois Power Company (Clinton Power Station, Units 1 and 2), ALAB-340, 4 NRC 27, 31 (1976)

6/ Intervenor's Motion at 3.

specifically provides that the testimony of a witness with knowledge that a matter is what it is claimed to be will satisfy the authentication requirement. Fed. R. Evid. 901 (b)(1). Thus, it was not necessary for Mr. Bingham to testify to any specifics of the report in order for him to authenticate it. He merely had to demonstrate that he had knowledge that the document was in fact the Nalco Report. Mr. Bingham has testified that Bechtel contracted with the Nalco Chemical Company to independently review the testing methodology and results, and that he was providing their report as Exhibit DD. Bingham, ff. Tr. 2585 at 14-15. This testimony is sufficient to authenticate the document.

D. Intervenor Was Not Harmed By Failing To Receive Exhibit DD During Discovery.

Intervenor asserts that Joint Applicants' failure to produce Exhibit DD during discovery unfairly prejudiced her in the preparation of her case.[7/] We do not need to decide the question of whether the document should have been produced pursuant to Intervenor's discovery request. Counsel for the Intervenor admits that she has had the exhibit in her possession since June 15th. Tr. 2584. She further admits that she was not unprepared to question Mr. Bingham about the document. Id. She did in fact cross-examine Mr. Bingham on the stand. Tr. 2593 et. seq. Had she

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7/ Intervenor's Motion at 9

required further assistance from her expert, she could have called him as a surrebuttal witness. She chose not to do so. Therefore, Intervenor has not been unfairly prejudiced in any significant way by having received Exhibit DD on June 15th rather than during discovery. The remedies she has requested are, therefore, inappropriate.

## III. CONCLUSION

In consideration of the foregoing, it is this 19th day of August, 1982,

ORDERED

that Intervenor's Motion for Reconsideration of Board's Admission Into Evidence of Joint Applicants' Exhibit DD is denied.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

Robert M. Lazo

Robert M. Lazo, Chairman
ADMINISTRATIVE JUDGE