

10/29/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
UNITED STATES DEPARTMENT OF ENERGY)	Docket Nos. 50-537
PROJECT MANAGEMENT CORPORATION)	
TENNESSEE VALLEY AUTHORITY)	
)	
(Clinch River Breeder Reactor)	
Plant))	

STAFF RESPONSE TO INTERVENORS' MOTION FOR
QUALIFICATION OF AN EXPERT INTERROGATOR

INTRODUCTION

On October 20, 1982 Intervenors filed "Intervenors, Natural Resources Defense Council, Inc. and The Sierra Club Motion for Qualification of An Expert Interrogator Under 10 C.F.R. § 2.733." That motion requested that Dr. Cochran be qualified as an expert interrogator under 10 C.F.R. § 2.733 in order to conduct cross-examination of Staff and Applicant witnesses at the upcoming Clinch River Breeder Reactor hearings. For the reasons set forth below, the Staff opposes that motion.

DISCUSSION

The Expert Interrogator Rule

The regulations state at 10 C.F.R. § 2.733^{1/} that the presiding

1/ 10 C.F.R. § 2.733 states:

Footnote continued on page 2

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officer may allow a qualified individual to conduct cross-examination upon finding that: 1) the individual is qualified by scientific or technical training or experience to contribute to development of the record, 2) that the individual has read the testimony on which he/she intends to conduct cross-examination and 3) the examiner will prepare himself to conduct a meaningful and expeditious examination.

Footnote continued from page 1:

§ 2.733 Examination by Experts.

A party may request the presiding officer to permit a qualified individual who has scientific or technical 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 on behalf of the party in the examination and cross-examination of expert witnesses. The presiding officer may permit such individual to participate on behalf of the party in the examination and cross-examination of expert witnesses, where it would serve the purpose of furthering the conduct of the proceeding, upon finding: (a) That the individual is qualified by scientific or technical training or experience to contribute to the development of an adequate decisional record in the proceeding by the conduct of such examination or cross-examination, (b) that the individual has read any written testimony on which he intends to examine or cross-examine and any documents to be used or referred to in the course of the examination or cross-examination, and (c) that the individual has prepared himself to conduct a meaningful and expeditious examination or cross-examination. Examination or cross-examination conducted pursuant to this section shall be limited to areas within the expertise of the individual conducting the examination or cross-examination. The party on behalf of whom such examination or cross-examination is conducted by his attorney shall be responsible for the conduct of examination or cross-examination by such individuals.

Appendix A to 10 C.F.R. Part 2, Section (V)(c)(8)^{2/} states that the use of non-attorneys to conduct cross-examination is a privilege, not a right, and is to be granted only when to do so would further the conduct of the hearing. This section of Appendix A, as well as 10 C.F.R. § 2.733, both note that cross-examination is to be limited only to those areas within the expertise of the lay person cross examiner. Intervenors have moved that Dr. Cochran, their Senior Staff Scientist and not an attorney, be allowed to serve as a cross-examiner on behalf of Intervenors on all of the Contentions to be litigated in the forthcoming hearing sessions. Motion at 1, 2. Intervenors acknowledge that they also intend to present Dr. Cochran as an expert witness on many of these contentions and cite to other Commission proceedings where an expert has acted as both an expert witness and cross-examiner. Motion at 4, 5. The Staff agrees with Intervenors that in certain other proceedings, Boards have allowed a qualified witness to also serve as an expert examiner.

2/ Appendix A to 10 C.F.R. Part 2, Section (V)(c)(8) states:

(8) Use of scientifically or technically trained persons who are not attorneys may conduct direct or cross-examination on behalf of a party is provided for in § 2.733. This procedure is a privilege, not a right and may be granted to further the conduct of the hearing. Before permitting such a person to conduct examination of witnesses, the board must determine (i) that he has technical or scientific qualifications, (ii) that he has read the written testimony and any documents which are to be the subject of his examination, and (iii) that he has prepared himself to conduct a meaningful and expeditious examination. Permission to conduct examination will be limited to the areas in which the interrogator is shown to be qualified. The party on whose behalf the interrogator conducts the examination and his attorney are responsible for the interrogator's conduct of examination or cross-examination.

However, as is discussed below, the facts in this case do not support the findings that must be made pursuant to 10 C.F.R. § 2.733 and Appendix A to 10 C.F.R. Part 2 prior to allowing Dr. Cochran to act as an expert examiner.

Dr. Cochran Has Not Established That He Is Qualified By Scientific Or Technical Training For All Contentions

The contentions admitted to this proceeding cover, 1) the Fuel Cycle for CRBR, 2) Safeguards for CRBR, 3) Core Disruptive Accidents, 4) Site Selection, 5) Decommissioning, 6) Health Effects, and 7) Alternative Designs to CRBR. The Affidavit submitted by Dr. Cochran, as well as his statement of professional qualifications, at most may establish expertise in electrical engineering, physics and health physics areas. Thus, it is not evident that Dr. Cochran, other than having read some relevant documents, has any expertise in the areas involving the fuel cycle, safeguards, site selection, alternative designs, genetic effects, or decommissioning.

While Dr. Cochran notes memberships on several committees involving breeder reactors and general reactor topics, as well as some publications addressing reactors and health affects, that does not establish that Dr. Cochran is an expert in all subject areas relating to reactor licensing. Thus, even if Dr. Cochran could establish that he has read the pre-filed testimony of Staff and Applicant witnesses and intends to prepare himself to conduct cross-examination, he would not be qualified, based on NRDC's present submittal, to conduct cross-examination on all contentions.

Dr. Cochran May Not Conduct A Meaningful And Expeditious
Cross-Examination

The Staff does not believe that Dr. Cochran is likely to conduct a meaningful and expeditious cross-examination. This belief is based on Dr. Cochran's actions in several contexts where he has continued to bring up subjects which this Board has ruled are not within the scope of this proceeding. For example, in spite of this Board's specific ruling in its May 27, 1982 Protective Order that questions going to environmental effects beyond the United States borders were beyond the scope of NEPA, Dr. Cochran continues to raise questions related to environmental effects outside the United States.^{3/}

Also, in spite of this Board's ruling that the availability of fuel was not a question within the scope of the present proceeding^{4/}, Dr. Cochran continues to make statements arguing the availability of the fuel issue.^{5/} Dr. Cochran has also spent time during depositions inquiring into areas wholly irrelevant to the present proceeding. For example, during the deposition of the Staff witnesses on the fuel cycle and safeguards contentions, Dr. Cochran asked a number of questions directed at all DOE facilities or at specific facilities which have not been proposed for use in the CRBR fuel cycle.^{6/} The answers to such questions are not relevant to determinations of environmental effects at facilities to be

^{3/} Cochran Affidavit in Support of Intervenors' October 19, 1982 Response to Summary Disposition Motion at 2 para. 7.

^{4/} Order Following Conference With Parties, April 14, 1982, p. 7, Contention 17.

^{5/} Affidavit of Thomas B. Cochran in support of Intervenors' October 19, 1982 response to summary disposition motion at 5, para. a).

^{6/} October 12, 1982 Deposition of Messrs. Dube, Hockert, Gaskin, Jones, and Hurt; p. 56 line 20, through p. 60; p. 65 through p. 68; p. 143 line 1 - line 8; p. 73 line 8, through p. 78 and p. 147 line 4 - 16.

used for the CRBR fuel cycle.

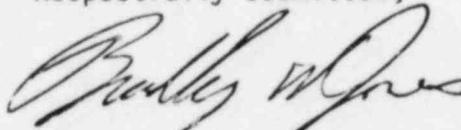
Dr. Cochran, in deposing Staff witnesses in recent depositions, resorted at times to repetitious cross-examination which unnecessarily prolonged the deposition and, on at least one occasion, constituted harrassment of the deponent.^{7/}

While the Staff recognizes that the Board can control problems such as those raised above through rulings from the bench, the necessity of frequent objections, arguments on objections, and rulings thereon would detract from the expeditious development of a clear record. NRDC is represented by competent counsel who are trained to understand the legal standards of evidence, including relevancy. Use of these counsel for cross-examination will help eliminate the need for frequent rulings by the Board with respect to the conduct of cross-examination.

CONCLUSION

For the reasons discussed above, NRDC has failed to establish that the Board should exercise its discretion to designate Dr. Cochran as an expert interrogator. The Licensing Board should deny NRDC's motion to designate Dr. Cochran and expert interrogator for Contentions 1, 2, 3, 4, 5(b), 6, 7(a), 7(b), 8 and 11.

Respectfully submitted,



Bradley W. Jones
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 29th of October, 1982

^{7/} See generally, Deposition of Edward Branegan, October 13, 1982, pp. 8-18, 22-28.