



purposes of rehabilitation" by the Staff and Applicants (Intervenors' Motion, pp. 2, 3).<sup>1/</sup>

The Staff filed a response to this motion on October 29, not opposing the motion but asserting that special procedural steps need not be taken simply because the Staff's review results in a position not inconsistent with the Applicants' evidence. The Applicants' response filed October 29 stated that the motion mischaracterized the prior record, but did not object to the motion because it would make no difference in the hearings, and reserved the right to conduct such cross-examination as it deemed necessary.

The Board has previously directed that the order of presentation of witnesses and evidence should be first the Applicants, followed by the Staff, and then the Intervenors. If the Staff takes a significantly different position on issues from the Applicants, the Board would review and might reconsider this order of presentation.<sup>2/</sup> This procedure was adopted in order to have all of the evidence on one side of the issues presented first, so

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<sup>1/</sup> It is noted that none of the Intervenors' various motions was first discussed with opposing counsel before Board action was sought. The Comanche Peak procedure requiring the parties to confer directly with each other "before resorting to motions involving the Board" was not intended to be limited to discovery disputes in the instant case (14 NRC at 156). This rule of prior consultation shall apply to all disputes which could be susceptible to resolution or narrowing by counsel (See Order entered September 27, 1982, p. 9; Order Denying Motion to Compel Discovery, entered June 30, 1982).

<sup>2/</sup> Tr. 866-69; Order Following Conference With Parties entered August 5, 1982, p. 7.

that the parties taking opposite positions could present all of their contradicting or rebuttal witnesses at one time, instead of piecemeal. However, this underlying reason is not necessarily applicable to the order of cross-examination. The Board has already indicated that it would not allow parties to cross-examine their own witnesses, in effect, by leading other parties' nonhostile witnesses. The rights of all parties can be protected in this respect by prompt objections and rulings as the interrogation of witnesses is conducted. It is not necessary to alter the order of cross-examination to accomplish that result. If the testimony of a nonhostile witness conflicts in some respects with the trial theory of another attorney or experts, then limited cross-examination would be permitted in those areas of difference. Rulings will not be made in advance or in a vacuum, but will await the event. The Intervenor's motion concerning the order of cross-examination will be denied.

## II.

The Intervenor's filed a motion October 20 seeking the qualification of Dr. Thomas B. Cochran as an expert interrogator under 10 CFR §2.733, to conduct cross-examination on Contentions 1,

2, 3, 4, 5(b), 6, 7(a), 7(b), 8 and 11.<sup>3/</sup> The affidavits of Thomas B. Cochran and Ellyn R. Weiss were attached in support of the motion.

The Applicants' response filed October 29 opposed the motion on the grounds that the Intervenors had not demonstrated Dr. Cochran's qualifications to serve as an expert interrogator, and that it had not been shown that granting the motion would further the conduct of the proceedings. The Staff also opposed the motion, asserting that it was not shown that Dr. Cochran had expertise in many areas

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3/ Section 2.733 provides in pertinent part as follows:

"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, 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 is conducted and his attorney shall be responsible for the conduct of examination or cross-examination by such individuals."

covered by the contentions, citing the requirements of Appendix A to 10 CFR Part 2, § (V)(c)(8).<sup>4/</sup>

At the first phase of evidentiary hearings held August 23-27, 1982, Dr. Cochran and Intervenors' counsel were required by the Board to elect whether Dr. Cochran would testify as one of the principal witnesses, or would conduct cross-examination of the expert witnesses to be tendered by the Applicants and the Staff. The reason for this ruling was that Dr. Cochran had been very pervasively involved in presenting and arguing the Intervenors' case in opposition to the application over many years. As his current affidavit shows, Dr. Cochran has participated actively in all phases of this proceeding since 1975, including the preparation of numerous contentions, NRDC's comments on the 1977 FES and the draft

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<sup>4/</sup> Appendix A, Section (V)(c)(8) states:

"(8) Use of scientifically or technically trained persons who are not attorneys to 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."

supplement, testifying before the ACRS on several occasions, attending many meetings held by the Staff and Applicants, participating actively in extensive discovery proceedings from 1975 to 1977 and March, 1982 to the present involving interrogatory questions and responses, requests for admissions and responses, several depositions, analyzing numerous documents, testimony and exhibits, and engaging in arguments before the Board at prehearing conferences.

In short, Dr. Cochran has been massively involved in most phases of this proceeding. He has also testified at length as an expert witness, and proposes to do so in the future. As a result of all these activities, the Board has been and will be fully informed of Dr. Cochran's many views as to the subject matter of these evidentiary hearings. Under the circumstances of this case, the Board believes it would be going too far to allow Dr. Cochran to testify pervasively on all these matters, and further to allow him to cross-examine all of the other experts with whom he disagrees. By analogy, a lawyer who intends to testify as a witness is generally required to withdraw as counsel if his testimony is required.

We recognize that in some cases the use of an expert interrogator has been helpful to the Board, but this is not such a case. The use of nonlawyers to conduct cross-examination is a

privilege, not a right, and will not be permitted unless it would further the conduct of the hearing. The Staff has pointed out that while Dr. Cochran may have shown expertise in electrical engineering, physics and health physics, expertise is not established in areas involving the fuel cycle, safeguards, site selection, alternative designs, genetic effects, or decommissioning.<sup>5/</sup> The Applicants have also challenged the extent and bases of alleged expertise.<sup>6/</sup> Both parties also raise questions concerning prior conduct by Dr. Cochran when acting as a cross-examiner in depositions or arguing matters before the Board. However, we need not get into an extensive and possibly pejorative discussion of Dr. Cochran's qualifications as a cross-examiner. It is sufficient to find that his past and projected participation in this case as an expert witness and consultant is sufficient, and that it would be an act of supererogation to extend it to cross-examination of opposing experts. The motion will be denied.

### III.

The Intervenors have also filed a request to schedule the testimony of Dr. Carl Johnson regarding Contentions 6 and 11 at the

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<sup>5/</sup> Staff Response, p. 4.

<sup>6/</sup> Applicants' Response, pp. 3-5.

December 13-17 portion of the LWA-1 hearings. His written testimony will be prefiled on November 1. There are no objections, and good cause has been shown. The Board will endeavor to accommodate witnesses who have scheduling problems whenever it can reasonably do so, and the request will be granted.

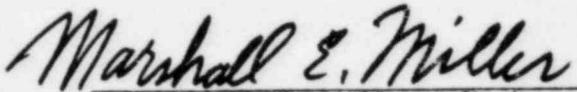
The Staff in its filing has indicated that the parties have conferred and have reached agreement on an informal schedule for the consideration of issues during the November and December sessions. Such arrangements are mutually helpful to the parties in handling scheduling problems of their witnesses and are encouraged. The Board was asked if it had any problems with the informal schedule outlined by the Staff on behalf of all parties. The Board sees no problems in this regard, but notes that it is not bound by this schedule in regard to its own interrogation of witnesses, and cautions that there shall be no hiatus in the taking of testimony because of any lack of available witnesses.

Finally, the Intervenors included in their filings an affidavit of Thomas B. Cochran dated October 20, 1982 which purports to correct alleged errors in his testimony at Tr. 2777, 2779, 2785 and 2789. Substantive testimony cannot be altered or changed in this fashion, and the affidavit will not be received into evidence or made a part of the record in this proceeding.

The rulings described above are hereby adopted and shall apply to those pending motions or requests.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
Marshall E. Miller, Chairman  
ADMINISTRATIVE JUDGE

November 1, 1982