UNITED STATES OF AMERICA '84 JUN 12 P12:16

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Glenn O. Bright
Dr. James H. Carpenter
James L. Kelley, Chairman

In the Matter of	
CAROLINA POWER AND LIGHT CO. et al. (Shearon Harris Nuclear Power Plant, Units 1 and 2)	Dockets 50-400 OL 50-401 OL
	11 June 1984

JOINT INTERVENORS' RESPONSE TO APPLICANTS' MOTIONS RE: PROPOSED TESTIMONY OF DR. CARL J. JOHNSON

On 5 June 1984 Applicants filed a "Motion for a Determination the Joint Intervenors' Proposed Testimony of Dr. Carl J. Johnson is Inadmissible" and a "Motion for Expedited Ruling" thereon, arguing in essence that Dr. Johnson's testimony should be ruled inadmissible in advance of the hearing on Joint Contentions II(c) and II(e). For the reasons set out below, Joint Intervenors respectfully request that said motions be denied forthwith.

The relevant section of the Rules of Practice is 10 C.F.R. 2.743(c), which provides that:

> Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

Applicants focus their attack on the first criterion in this section, to wit, that evidence must be relevant to be admissible. "Relevant" is not defined in the Rules of Practice.

An applicable definition of "relevant evidence" is however provided by Rule 401 of the Federal Rules of Evidence:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (Emphasis added)

This definition is broad indeed, particularly in light of the emphasized language: not "a tendency" or "some tendency," but "any tendency." The Advisory Committee's Note elaborates, and suggests that any doubts should be resolved in favor of admitting the evidence whose relevance is disputed:

> The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute....A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of ...helpful evidence, or at least the raising of endless questions over its admission. (Emphasis added)

Furthermore, it is clear that the Board is not bound to the strict rules of evidence as they would apply in formal judicial proceedings. 10 C.F.R. Part 2, App. A, V.(d)(7). Even assuming for the sake of argument that it were, and assuming further that the Board should/but does not exclude Dr. Johnson's testimony under those rules, it is extremely doubtful that prejudicial error can be predicated upon such a ruling, since the Board and not a jury is the finder of fact. It is a well-established rule of appellate review that nothing else appearing the judge sitting as trier is presumed to have disregarded incompetent evidence in reaching its decision, except to the extent that it can be shown by appellant that such evidence was in fact relied upon. Therefore, unless the Board eventually relies on incompetent portions of Dr. Johnson's testimony, its admission is harmless and no substantial right will be affected.

See Federal Rule of Evidence 103. With the foregoing principles of law in mind, it is clear that Dr. Johnson's testimony should be ruled inadmissible if and only if it is entirely and absolutely irrelevant to the issues at hand. Joint Intervenors respectfully submit that Applicants have failed to make such a showing.

The issues involved in the proceeding currently are whether the Staff should expand the time during which the radionuclides released during normal operation should be considered for health effects, specifically limitation to annual doses and effects and incremental impacts. In addition, the absorption in/adsorption to of radionuclides on coal fly ash is at issue. Order of 27 January 1984. Dr. Johnson has proffered testimony relevant to these issues in at least the following respects: Dr. Johnson's testimony regarding the alpha recoil phenomenon relates directly to the size of particles and their adsorption/absorption to coal fly ash, as well as providing ba[illegible] information on Joint Intervenor's general positio[illegible]y radionuclides have been omitted from the St[illegible]ideration. See Advisory Committee Note to Federal Rul[illegible]idence 401. Johnson's testimony relative to alpha recoil also is relevant to the effectiveness of the Shearon Harris filtration system, and clearly shows that the projections made for that system are inaccurate. To the extent that Joint Intervenors did not bring this argument forward in their response to Applicants summary disposition motions, Joint Intervenors respectfully submit (1) that they did not have this information in hand and that time, and (2) that the potential health effects of even minute releases of these radionuclides are such that the Board should reconsider its prior ruling on the matter. In this respect, Johnson's testimony relative to the experiments with dogs and microcurie amounts of plutonium is relevant to the extent of the threat to exposed individuals.

Dr. Johnson has also testified regarding the absence of the majority of the actinide group from the releases considered. Applicants argue that this is irrelevant because of the Board's apparent conclusion that Np-239 will be the only significant actinide alpha-emitter released. Motion at 9. Even assuming this to be uncontrovertedly established, Johnson's testimony regarding the significantly higher impacts on specific organs is relevant to Joint Intervenor's contention that the Staff has underestimated the incremental impact. In addition, Joint Intervenors note that other emitters, e.g. Pu-241 (beta), are indicated by Johnson's testimony as not being considered in the Staff's analysis. In this respect it is clearly relevant. Therefore Joint Intervenors respectfully request that the Board rule that Dr. Johnson's testimony is relevant and admissible and deny Applicants' motion.

Applicants helpfully point out that an expedited ruling on their motion will possibly save Joint Intervenors the trouble and expense of bringing D. Johnson to Raleigh. However, this suggestion, while well-meant, is inappropriate, since Joint Intervenors intend to have D. Johnson at hearing to assist them with cross examination in any event.

Therefore, Joint Intervenors respectfully request that Applicants' motion be denied.

Respectfully submitted,

Daniel F. Read
For Joint Intervenors

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BRANCH

CERTIFICATE OF SERVICE

I hereby certify that copies of Joint Intervenors' Response Re: Johnson & Change of Address (Read) were served this 11 day of June, 1984, by deposit in the U.S. Mail, first-class postage prepaid, upon all parties whose names appear below, except those whose names are marked with an asterisk, for whom service was accomplished by hand delivery per oral agreement with Applicants, & 2 (two) asterisks, by hand delivery

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