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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARD

'92 MAY 11 AIO:G5

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

SERVED MAY 11 1992

In the Matter of

ALABAMA POWER COMPANY

(Joseph M. Farley Nuclear
Plant, Units 1 and 2)

Docket No. 50-348-CivP
50-364-CivP

ASLBP No. 91-626-02-CivP

May 8, 1992

MEMORANDUM AND ORDER
(Ruling on NRC Staff
Motion In Limine)

In an April 16, 1992 motion in limine, the NRC staff requests that we exclude portions of Alabama Power Company's (APCo) prefiled surrebuttal testimony. Specifically, staff asserts that certain of the testimony should be excised as 1) irrelevant, because it concerns the safety significance of an actual failure of certain of the equipment at the Farley Nuclear Plant found by the staff to be in violation of the Commission's environmental qualification rule, 10 C.F.R. § 50.49, or 2) unreliable, in that it consists of hearsay statements by unidentified persons. APCo opposes the staff's motion on both counts.

For the reasons stated herein, we reserve ruling on the relevance of the testimony on operational safety

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significance and deny the staff's motion as it relates to the hearsay evidence.

I. Testimony on Safety Significance

The staff's objections to the admission of certain portions of the APCo surrebuttal testimony harks back to an objection staff already lodged to parts of APCo's direct testimony. See NRC Staff's Motion In Limine to Exclude Irrelevant Testimony Submitted by [APCO] (Feb. 4, 1992). Then, as now, the staff asserts that because each piece of equipment required to be environmentally qualified in accordance with section 50.49 is inherently safety significant, arguments concerning equipment operability or the associated systems effect of the failure of a particular piece of equipment are not germane to our evaluation of the purported APCo violations. Regarding the APCo prefiled surrebuttal testimony, staff contends that on pages 228-29 of volume II of the testimony, in James Sundergill's answer to question 152 regarding the silicone oil levels of GEMS level transmitters, he makes reference to a portion of his direct testimony in which he explained the purported safety significance of low oil levels. The staff maintains that, as with the referenced direct testimony, this incorporation by reference likewise should be stricken.

As the staff recognizes in its motion, at the start of the evidentiary hearing in this proceeding in February 1992, we declared that we would reserve ruling on the staff's "safety significance" objections until the time of our initial decision. As we then advised the parties, and continue to believe, we will be in the best position at that point to determine the merits of the "safety significance" issue and, hence, the relevance of the contested testimony. See Tr. 7-9. Accordingly, our ruling upon this portion of the staff's motion is reserved until our initial decision.

II. Hearsay Testimony

Pointing again to Volume II of the APCo surrebuttal testimony, the staff also objects to the answers of David Jones and Jesse Love in response to questions 61 (p. 90), 63 (p. 95-96), and 65 (p. 97) on the ground that these answers seek to rely on unreliable hearsay testimony. In each instance, the answers describe the conversation these witnesses had with utility or Bechtel electricians concerning their knowledge of the procedures used in preparing the Chico A/Raychem seals for qualification testing or use at the Farley facility.

In assessing the admissibility of this evidence, both parties acknowledge the long-established rule that hearsay is generally admissible in NRC adjudicatory proceedings.

is generally admissible in NRC adjudicatory proceedings. See, e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987) (citing cases). Nonetheless, referencing the Appeal Board's statement in Tennessee Valley Authority (Hartsville Nuclear Power Plant Units 1A, 2A, 1B, and 2B), ALAB-367, 5 NRC 92, 121 & n.165 (1977), that "[e]xpert testimony in hearsay form from someone unknown is most unreliable," the staff asserts that "[t]o the extent these statements to the APCo witnesses by unknown experts are being proffered by the APCo witnesses as substantive evidence of how the seals were installed, the evidence is unreliable and, therefore, inadmissible for that purpose in this proceeding." NRC Staff's Motion In Limine to Exclude Testimony Submitted by [APCo] (Apr. 16, 1992) at 4.

APCo, on the other hand, argues that the staff's objection to the testimony goes to its weight, not its admissibility. Observing that the staff has itself utilized similar hearsay evidence in the course of its rebuttal testimony, APCo asserts that the staff will have an opportunity to cross-examine Mr. Love and Mr. Jones regarding the reliability of the hearsay evidence. Thereafter, APCo contends, it is up to the Board to assess the significance, if any, to be assigned to the hearsay evidence.

The Hartsville case relied upon by staff is inapposite here. In Hartsville, the hearsay testimony at issue was an unidentified "expert's" statement of opinion regarding the substantive matter at issue. Because the individual making the statement was not identified, the Board had no way of assessing whether his opinion was in fact that of an "expert" so as to be accorded any validity. As such, the testimony was inherently unreliable. By contrast, the hearsay statements at issue here are not expressions of "expert" opinion. They are, instead, factual statements by individuals, albeit currently unidentified,¹ describing their knowledge of the actions taken in preparing the seals for testing or use. They do not require that the Board assess the expertise of these witnesses; rather, as with hearsay testimony generally, we need consider only the degree to which their statements can be considered truthful and accurate.²

¹ Witness identification of the source of a hearsay statement undoubtedly is a relevant factor in assessing the weight to be given to that statement.

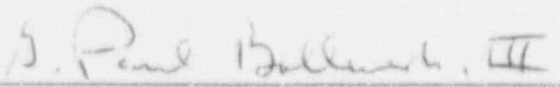
² Another factor distinguishing this case from Hartsville is the fact that in Hartsville the individual repeating the hearsay statement apparently had no expertise in the subject at issue. See ALAB-367, 5 NRC at 121. As a result, cross-examination was likely to provide little, if any, additional clues to the expertise of the hearsay witness or the substantive reliability of his statements. In this instance, however, the hearsay statements were made to and are being reiterated by individuals who have some substantive knowledge of the subject matter at issue and the

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The hearsay statements set forth in the answers to surrebuttal questions 61, 63, and 65 thus fall within the general category of hearsay statements that are admissible. Accordingly, as to those statements, the staff's motion in limine is denied.

It is so ORDERED.³

FOR THE ATOMIC SAFETY
AND LICENSING BOARD


G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

May 8, 1992

²(...continued)
familiarity of the hearsay witness with that subject matter. Cross-examination of those APCo witnesses could provide a useful tool in exploring the reliability of the hearsay statements they recount.

³ Copies of this memorandum and order were sent to the parties by rapifax this date.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (RULING ON STAFF MOT..) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
11 day of May 1992

Kris Carter
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