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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
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Before the Atomic Safety and Licensing Board

In the Matter of)
)
THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY, ET AL.)
)
(Perry Nuclear Power Plant,)
Units 1 and 2))

Docket Nos. 50-440 OL
50-441 OL

APPLICANTS' ANSWER TO OCRE "MOTION TO
COMPEL THE APPEARANCE OF DR. MARSHALL BERMAN"

Pursuant to the Licensing Board's order given during the prehearing telephone conference of March 22, 1985 (Tr. 2134), Applicants file their written answer to Intervenor Ohio Citizens for Responsible Energy's ("OCRE's") motion to compel the appearance of Dr. Marshall Berman as a witness for the NRC Staff on Issue No. 8, concerning hydrogen control. Motion to Compel the Appearance of Dr. Marshall Berman, dated March 18, 1985 ("Motion").

Dr. Berman is supervisor of the Reactor Safety Studies Division of Sandia National Laboratories, which is engaged in ongoing research on hydrogen control for the NRC. Sandia also provided technical assistance to the Staff in its review of the Grand Gulf hydrogen igniter system. The results of the Sandia review are contained in NUREG/CR-2530, SAND 82-0218, "Review of the Grand Gulf Hydrogen Igniter System" (March 1983). Dr.

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Berman is not listed as an author of the report, but apparently was connected with the project in a supervisory capacity. See NUREG/CR-2530 at 6 (acknowledging Dr. Berman's "leadership to the project"). The design of the Perry hydrogen igniter system is based on the Grand Gulf igniter system design.

The Commission's regulations at 10 C.F.R. § 2.720(h)(2)(i) state:

In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations, for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the presiding officer, by subpoena or otherwise: Provided, That the presiding officer may upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations require the attendance and testimony of named NRC personnel.

(Emphasis added).^{1/} Thus, the NRC Staff normally has discretion to choose its own witnesses; and NRC Staff personnel normally cannot be compelled to testify in licensing proceedings. Only upon a showing of "exceptional circumstances" can a licensing board require the attendance and testimony of NRC

^{1/} For the purposes of 10 C.F.R. § 2.720, persons acting as consultants to the NRC, including contractors such as Sandia, are considered NRC personnel. 10 C.F.R. § 2.4(p)(2).

personnel. As the Appeal Board recently stated, "[S]omething more than a mere disagreement among staff members was necessary before we would compel testimony by staff witnesses not otherwise scheduled to testify." Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802 (March 26, 1985), slip. op. at 21.

As OCRE points out, the regulations state that such circumstances may exist where "a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations. . ." (emphasis added). However, OCRE fails entirely to make this required showing with respect to Dr. Berman.

First, OCRE fails to show that Dr. Berman has knowledge of facts not known to the witnesses which the Staff intends to use on Issue No. 8. OCRE argues that "[s]ince the Staff does not conduct its own research on these matters, it is likely that the Staff witnesses do not have all the facts in Dr. Berman's possession." Motion at 3. To the contrary, as counsel for the Staff pointed out during the March 22 conference call, the Staff members who oversee Sandia's work for the NRC establish the research, review the reports, and are intimately familiar with the details of the research. Tr. 2131-32. Further, Staff counsel stated that Staff witness Notafrancesco is thoroughly familiar with NUREG/CR-2530 and could speak to any matters discussed in that report. Tr. 2125. Since the Staff has not put

its testimony on the record, or had a chance to be questioned by the parties or the Licensing Board, there is no reason to believe that Dr. Berman is aware of a material fact which the Staff's witnesses are not. As stated by the Appeal Board in ALAB-802, supra, slip op. at 20-21, the party seeking to compel a Staff witness to testify must at least "suggest the existence of either a particular material fact that might have been uniquely in the possession of the inspector or some other exceptional circumstance requiring his appearance as a witness" (emphasis added).

ALAB-802 affirmed the Licensing Board's ruling during the evidentiary hearing on the quality assurance issue in this proceeding concerning the necessity to call to the stand a Region III inspector whom the Staff had not planned to call as a witness. After considerable cross-examination and discussion, the Licensing Board determined that there was no information which that inspector could bring to bear on the situation that was not already being presented by the panel of witnesses the Staff had chosen. See Memorandum and Order (Procedural Objections and Staff Witness Question), August 30, 1983, slip op. at 17. At this stage, it would be, at the very least, premature for the Licensing Board to order Dr. Berman to appear without an inquiry comparable to the inquiry conducted for the quality assurance hearing.

Neither does OCRE show that Dr. Berman has knowledge of information material to Issue No. 8. OCRE in its Motion describes at some length the ongoing experimental and analytical research being done by Sandia on a wide range of technical concerns related to hydrogen control. Motion at 4-9. However, OCRE makes no attempt to show how this research relates specifically to issues which, under the Commission's new hydrogen control rule, may be litigated as part of Applicants' preliminary hydrogen analysis. See Applicants' Response to Ohio Citizens for Responsible Energy Motion to Reword Issue #8, dated February 6, 1985, at 6-7.

Nor does OCRE demonstrate that Sandia's review of the Grand Gulf igniter system is material to this proceeding. The analysis for Grand Gulf was not done in the context of the current rule. Applicants' preliminary analysis under the rule is only required to show that the Perry hydrogen control system is adequate during the interim period between operation above five percent power and completion of Applicants' final analysis. 10 C.F.R. § 50.44(c)(3)(vii)(B). In contrast, as stated by the Staff in its SER supplement on hydrogen control for Grand Gulf:

The SNL [Sandia] review did not evaluate the HIS [hydrogen igniter system] from the perspective of interim versus final evaluation. Therefore, this evaluation can be construed as a final evaluation based on present, albeit incomplete, knowledge.

Motion, Exhibit 1 at 22-3 (emphasis added).

Finally, it is not clear that Dr. Berman himself has direct personal knowledge of material facts. Dr. Berman supervises the entire Reactor Safety Studies Division of Sandia, which is engaged in a number of research projects in addition to those relating to hydrogen control. See Motion, Exhibit 2. Moreover, as stated supra, Dr. Berman's involvement with the Sandia review of the Grand Gulf hydrogen control system was apparently in a supervisory role of some kind. Supervisory knowledge is not necessarily direct personal knowledge, and OCRE has not shown that Dr. Berman does in fact possess direct personal knowledge of the Perry hydrogen control system.^{2/}

OCRE cites Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit No. 1), ALAB-715, 17 N.R.C. 102, 105 (1983), in which the Appeal Board ruled that a Staff witness may be compelled to appear where there is "a genuine scientific disagreement on a central decisional issue" OCRE claims that there is such a genuine scientific disagreement in this case based on the Staff's disagreement with Sandia's conclusion in NUREG/CR-2530 that the Grand Gulf hydrogen igniter system is only "marginally adequate." See Motion, Exhibit 1 at 22-2 to 22-3.

^{2/} Even if the Licensing Board were to decide that a Sandia witness were necessary - and Applicants do not believe that OCRE has shown this to be the case - Dr. Berman would not be the appropriate individual since he was not a member of the team that reviewed the Grand Gulf system.

There is no genuine scientific disagreement as to the Perry hydrogen igniter system. Counsel for the Staff during the March 22 conference call provided the following information which was obtained from Dr. Berman during a telephone conference call earlier that day:

1. The original conclusion of Sandia in its review of the Grand Gulf igniter system was that it was marginally adequate. Although the margin of safety was thought to be narrow, the system was determined to be adequate.

2. Subsequent to the issuance of NUREG/CR-2530, further work has demonstrated a much wider margin of safety than previously thought. Dr. Berman's opinion now is that the margin of safety is sufficient.

3. Based on information provided to him by the Staff during the conference call, Dr. Berman's evaluation of the Perry hydrogen control system is the same as the Staff's. There is no difference of opinion on the adequacy of that system.

Tr. 2117-19.^{3/} Thus, it is clear that no "genuine scientific disagreement" exists between Dr. Berman and the witnesses which the Staff will call at the evidentiary hearing on Issue No. 8.^{4/}

^{3/} The Licensing Board requested that the Staff submit an affidavit from Dr. Berman by March 27, 1985 confirming the information he provided during the telephone conference with the Staff. Tr. 2134.

^{4/} This is an entirely different situation than the McGuire case, cited by OCRE (Motion at 4), in which the licensing board requested that Dr. Berman testify as a Staff witness. In McGuire, there was a genuine scientific disagreement between Dr. Berman and the other Staff witnesses concerning placement

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In summary, OCRE has not shown that Dr. Berman has direct personal knowledge of a material fact not known to the Staff witnesses, or that there is a genuine scientific disagreement on a central decisional issue between those witnesses and Dr. Berman. OCRE is asking the Licensing Board to substitute its judgment for the Staff's on who is an appropriate Staff witness. Since OCRE has failed to show the "exceptional circumstances" required by the Commission's regulations, such a substitution of judgment is inappropriate. Cf. South Carolina Electric and Gas Company, ALAB-663, 14 N.R.C. 1140, 1156-57 (1981) (licensing board may not call outside consultants as board witnesses unless it "simply cannot otherwise reach an informed decision").

(Continued)

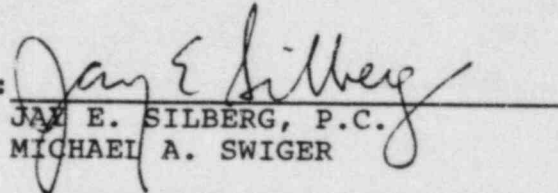
of hydrogen igniters in the ice condenser. Dr. Berman was also a direct participant in the Sandia review of the McGuire igniter system. See Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 N.R.C. 453, 470-72 (1982); Duke Power Company (William B. McGuire Nuclear Station, Units 1 and 2), LBP-81-13, 13 N.R.C. 652, 670-71 (1981). Perry is not an ice condenser plant; Dr. Berman was not a direct participant in Sandia's review of the Grand Gulf igniter system; and, in any event, Dr. Berman has stated that he does not disagree with the Staff's evaluation of the Perry igniter system.

For all of the above reasons, OCRE's Motion should be denied.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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DATED: March 27, 1985

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Applicants' Answer to OCRE 'Motion to Compel the Appearance of Dr. Berman'" were served by deposit in the United States Mail, First Class, postage prepaid, this 27th day of March, 1985, to all those on the attached Service List, except for those parties identified by a single asterisk, who were served by hand-delivery.


MICHAEL A. SWIGER

Dated: March 27, 1985

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