

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

OFFICE OF SECRETARY
DOCKET

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

Docket No. 50-440 OL
50-441 OL

NRC STAFF OPPOSITION TO OCRE MOTION FOR
DIRECTED CERTIFICATION (BOARD WITNESS ISSUE)

George E. Johnson
Counsel for NRC Staff

April 5, 1985

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ENVIRONMENTAL
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I. INTRODUCTION

On March 16, 1985, Intervenor Ohio Citizens for Responsible Energy ("OCRE") served a Motion for Directed Certification ("Motion") seeking interlocutory review and reversal of the Licensing Board Order denying OCRE's February 11, 1985 Motion for Appointment of Board Witness on Issue 16 (relating to the reliability of emergency diesel generators at Perry Nuclear Power Plant (PNPP)). Because of the instant motion's lack of merit, the Staff opposes the motion and urges its summary dismissal. ^{1/} In the event the Appeal Board were to direct certification, the Appeal Board should affirm the ruling of the Licensing Board.

^{1/} By Order of April 2, 1985, the Appeal Board considered and denied OCRE's request for a "continuance" of the hearings on Issue 16 pending disposition of this interlocutory appeal.

II. BACKGROUND

In its March 26, 1985 Memorandum and Order (Motion for Appointment of Board Witnesses), the Licensing Board explained the basis for its summary order of March 13, 1985 denying the OCRE motion for appointment of George Dennis Eley (and associates that may be required) as consultants and witnesses on OCRE Issue 16. Briefly, the Board found no justification for exercise of its authority to appoint Board witnesses, and no due process requirement that such witnesses be appointed at the request of an intervenor where the intervenor claims financial inability to call such witnesses itself. March 26, 1985 Memorandum and Order, at 2. While the Board noted its responsibility to assure an adequate record for decision, and its authority to call witnesses for this purpose, it observed that NRC case law requires that this authority must be exercised with discretion and must be based on genuine need. Id., at 3. ^{2/} On the other hand, it noted the statutory prohibition against calling party witnesses at government expense. Id. The Board also stated that Intervenor may defeat Applicant's affirmative case by cross-examination of Applicant and Staff witnesses, without calling any of its own witnesses (apparently addressing OCRE's due process argument). Finally, the Board found that OCRE had ignored the technical expertise represented among

^{2/} The Board also noted that the Appeal Board has ruled that prior to calling its own witnesses, a Licensing Board must provide parties with an opportunity to clarify or supplement their testimony. Id., citing, South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1151 (1981); ALAB-710, 17 NRC 25, 27-28 (1983). Appointment of an expert witness by the Board prior to hearing would obviously run afoul of that requirement, the Board stated.

the judges of the Atomic Safety and Licensing Board panels. Id., at 3-4. For these reasons, the Board concluded that it would be "a serious abuse of Board discretion" to appoint the requested witnesses prior to development of a decisional record in this case. Id., 2, 4.

In its motion, OCRE argues that it is irreparably harmed by the failure to appoint Mr. Eley as a Board witness because such appointment is necessary to allow OCRE to effectively present a case. Motion, at 3-5. Second, OCRE argues that the unwillingness of the Licensing Board to hear an intervenor-proffered witness shows "an unwillingness of the Board to perform its job" which "constitutes a pervasive and unusual alteration of the basic structure of the proceeding." Id. at 5-6. Finally, OCRE argues that without Mr. Eley's testimony, the public interest will suffer from an incomplete record. Id. at 6.

III. DISCUSSION

A. Directed Certification

1. Commission Standards for Directed Certification and Interlocutory Review of Licensing Board Rulings

As recently as December 3, 1984, the Appeal Board in Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579 (1984), had occasion to reiterate the test for determining whether to exercise the Appeal Board's discretionary authority to direct certification. The Appeal Board considers whether the subject Licensing Board ruling:

either (1) threatens the party adversely affected by it with immediate and serious irreparable impact, or (2) affects the

basic structure of the proceeding in a pervasive or unusual manner... ^{3/}

The Appeal Board has often noted that "the fact that legal error may have occurred does not itself justify interlocutory appellate review in the teeth of the long-standing articulated Commission policy generally disfavoring such review." Seabrook, supra, ALAB-734, 18 NRC 11, 15, (1983), citing Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit No. 1), ALAB-635, 13 NRC 309, 310-11 (1981).

2. A Ruling Declining to Appoint a Board Witness Prior to Development of a Record is a Routine Procedural Ruling For Which Interlocutory Review is Unwarranted

a. OCRE Has Not Demonstrated that the Board Ruling Threatens Immediate and Serious Irreparable Impact Which Cannot be Alleviated by Later Appeal

OCRE argues that denial of due process constitutes irreparable injury, citing several federal cases. However, OCRE has suffered neither unfairness in process nor harm to itself approaching that of the cases upon which it relies. See, e.g., Heublein, Inc. v. FTC, 539 F. Supp. 123, 128 (D.Conn. 1982) (favorable market opportunities available in absence of FTC action irretrievably lost, resulting in irreparable harm); Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cr. 1972) (closed reinstatement hearing on claim of illegal firing denied due

^{3/} TMI Restart, supra, ALAB-791, 20 NRC at 1582, citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 171 (1983), quoting Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1192 (1977). See also, Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1110 (1982).

process); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1972) (due process denied where person who participated in SEC investigation participated in decision). Nor is this a case where OCRE is being denied notice of, or opportunity to confront and rebut, evidence which the decision-maker is to consider in its decision. See, Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292 (1937); Zotos International v. Kennedy, 460 F.Supp. 268 (D.D.C. 1978). See also NRC Staff Response In Opposition to OCRE Motion for Appointment of Board Witness on Issue 16, March 4, at 7-8. Even assuming, for the sake of argument, that OCRE is correct--that appointment of a Board witness were required--no impact or harm other than the adverse ruling itself is asserted. OCRE does not address the possibility that following presentation of the Applicant's and Staff's cases, the Board may decide that a Board witness should be called. OCRE also does not address what impact of an irreparable nature would flow to it, if, on appeal from a decision rendered without the benefit of the OCRE-proffered witnesses, the Appeal Board were to decide the Licensing Board was wrong. As the Appeal Board has stated:

in the absence (as here) of a potential of truly exceptional delay or expense, the risk that a licensing board's interlocutory ruling may eventually be found to have been erroneous, and that because of the error further proceedings may have to be held, is one which must be assumed by that board and the parties to the proceeding.

Duke Power Company et al. (Catawba Nuclear Station, Units 1 and 2), ALAB-768, 19 NRC 988, 992 (1984), citing, Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-116, 6 AEC 258, 259 (1973). In this case, OCRE may not even have to wait until the end of the case to obtain the

relief it seeks. In any event, an adverse evidentiary ruling (such as the instant one) "may turn out to have little, if any, effect on a licensing board's ultimate substantive decision. Perhaps more important, even an erroneous prejudicial ruling of this type can be corrected on appeal at the end of the proceeding." TMI-Restart, supra, ALAB-791, 20 NRC at 1583.

In sum, the impact on OCRE is limited and the cost or delay entailed in waiting until the end of the case to obtain review is not the type of impact which warrants interlocutory review.

b. The Subject Procedural Ruling Does Not Affect the Basic Structure of the Proceeding in a Pervasive or Unusual Manner

In the TMI-Restart decision cited above, the Licensing Board denied a request to introduce into evidence the testimony of two former NRC Commissioners on the so-called "Dieckamp mailgram" issue. In rejecting Intervenor Three Mile Island Alert's interlocutory appeal, the Appeal Board stated that "determinations regarding what evidence should be admitted rarely, if ever, have a pervasive or unusual effect on the structure of a proceeding so as to warrant our interlocutory review." ALAB-791, 20 NRC at 1583. The ruling which is the subject of this interlocutory appeal merely found, as noted above, that there was inadequate "reason for appointment of a board witness prior to development of a decisional record in this proceeding. The necessity for that action must await future developments." Memorandum and Order, March 26, 1985, at 4. There is little which distinguishes this ruling from other discretionary rulings dealing with the regulation of the hearing. Moreover, the ruling

has a provisional character and may be revisited by the Licensing Board. The ruling clearly does not affect the basic structure of the proceeding in a pervasive or unusual manner. ^{4/}

In sum, the standards for directed certification are not met in this instance. OCRE's motion for directed certification and interlocutory review should be denied.

B. On The Merits The Licensing Board's Ruling Was Clearly Correct

The Licensing Board determinations that (1) OCRE had failed to demonstrate a genuine need for the testimony of Mr. Eley or any of his associates, (2) the Board lacked authority to authorize payment of the sort of consultant fees requested, and (3) OCRE had failed to substantiate its claim that due process required appointment of Mr. Eley as a Board witness, were clearly correct.

As noted in the Staff's March 4, 1985 opposition, the Appeal Board has stated that a Board may call "witnesses of its own where it finds a genuine need for their testimony" and authorize "payment of the usual witness fees and expenses when it does so." Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 607-8 (1977), citing 42 U.S.C. § 2201 and 10 C.F.R. § 2.718(b). Whether calling of such a witness is an exercise of sound discretion will turn on the facts of each

^{4/} OCRE also argues that the standard for referral--that the public interest will suffer or there will be unusual delay or expense (see 10 C.F.R. § 2.730(f))--is satisfied. Motion, at 3, 6. However, OCRE's argument appears to be that the public interest is the interest in a complete record. Since the adequacy of the record is a matter ordinarily reviewed at the end of the case, OCRE fails to show that public interest considerations warrant interlocutory review.

case. See, Summer, supra, ALAB-663, 14 NRC at 1155, n.29. As the Licensing Board noted in its decision, the determination whether there is such genuine need cannot be made soundly until the record on Issue 16 has been developed.

Second, the payment of "appropriate costs" sought by OCRE, is, as the Licensing Board observed, proscribed by statute. Memorandum and Order, March 26, 1985, at 2. Such proscription clearly distinguishes the case at hand from United States Marshalls Service v. Means, 724 F.2d 642 (8th Cir. 1983), affirmed on rehearing, 741 F.2d 1053 (1984). Thus the complete relief OCRE seeks is unavailable.

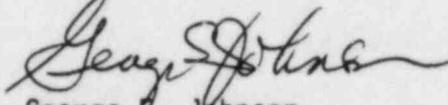
Third, the Licensing Board correctly noted that the cases relied upon by OCRE do not establish a due process right to payment of witness costs in NRC proceedings. Moreover, the Board correctly stated that under Commission case law, intervenors may defeat an applicant's affirmative case through cross-examination, without calling any witnesses of its own. Memorandum and Order, March 26, 1985, at 2-3. Thus, OCRE did not make a persuasive showing that failing to appoint its proffered witness(es) would deny OCRE adequate opportunity to establish its position.

In sum, the ruling denying OCRE's motion for appointment of a Board witness and payment of appropriate costs was clearly in accordance with applicable statutes, NRC regulations and NRC case law. If interlocutory review of the Licensing Board's ruling is undertaken, the ruling should be affirmed.

IV. CONCLUSION

There is no basis for interlocutory review of the denial of OCRE's motion for appointment of a Board witness, and OCRE's Motion for Directed Certification should be summarily denied. If interlocutory review nevertheless is undertaken, the Licensing Board's ruling is correct on the merits and should be affirmed.

Respectfully submitted,



George E. Johnson
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 5th day of April, 1985

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO OCRE MOTION FOR DIRECTED CERTIFICATION (BOARD WITNESS ISSUE)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 5th day of April, 1985:

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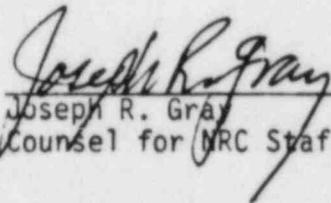
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