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March 4, 1985

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

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 RESPONSE IN OPPOSITION TO  
OCRE MOTION FOR APPOINTMENT OF BOARD  
WITNESS ON ISSUE 16

I. INTRODUCTION

Intervenor Ohio Citizens for Responsible Energy ("OCRE") on February 11, 1985 served a Motion for the Appointment of Board Witness ("Motion"). OCRE argues that appointment of Mr. George Dennis Eley of Ocean Fleets Services as Board consultant and witness is required both in order to allow the Licensing Board to "fulfill its mandate to decide [the] issues based on a full and complete record and to provide OCRE with due process." Motion at 1. In addition, OCRE would have the Board "pay the appropriate costs" of such witness. Motion at 5, 10. The subject Motion raises several issues: (1) whether appointment of a Board witness at this time is authorized and appropriate under NRC practice; (2) whether the Board is empowered to authorize the expenditure of public funds to pay for the requested services; and (3) whether OCRE has a due process claim to have a witness called at its request where it lacks the financial resources to pay expert witness consultancy fees. As discussed

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below, the Staff is of the view that OCRE's request is premature and therefore should not be granted. However, should the Board decide to address these issues now, the Staff argues below that each of the three above issues should be answered in the negative, and OCRE's motion be denied.

## II. DISCUSSION

### A. The Licensing Board Lacks the Requisite Basis for Determining Whether There is a Genuine Need for Mr. Eley's Testimony

The Appeal Board has addressed whether a licensing board, at the request of any intervenor unable to pay expert witness fees and expenses, may subpoena the would-be intervenor witness as a Board witness.

Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603, 607-8 (1977). There the Appeal Board stated that notwithstanding a then-applicable Commission decision precluding financial assistance to intervenors, <sup>1/</sup> the Board was authorized to call "witnesses of its own where it finds a genuine need for their testimony" and to authorize "Commission payment of the usual witness fees and expenses when it does so." Id., citing 42 U.S.C. § 2201; 10 C.F.R. § 2.718(b). As noted in South Carolina Electric & Gas Company, et al. (Virgil C. Summer Station, Unit 1), ALAB-663, 14 NRC 1140, 1155, n. 29, the question in such circumstances is not the authority of the Board to call as its own, a witness proffered by intervenors, but whether it finds a "genuine need

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<sup>1/</sup> Such financial assistance to intervenors is now precluded by statute. See Section 502, Energy and Water Development Appropriation Act, 1985, P.L. 98-360, 98 Stat. 420, and identical provisions in prior appropriations acts beginning FY 1981.

for their testimony," and whether calling of the witness is an exercise of "sound discretion." (Emphasis and quotes in original.) <sup>2/</sup>

Intervenor here has not shown such "genuine need." First, Contention 16, on which OCRE would have Mr. Eley testify, is subject to Applicants' Motion for Summary Disposition of Issue 16, served February 5, 1985. Thus, the possibility exists that the Licensing Board will find that no genuine issue of material fact exists, and grant summary disposition. In such case, it is obvious that there would be no need whatsoever for appointment of Mr. Eley as a board witness.

In addition, it is by no means obvious that, were the contention to survive the summary disposition motion, Mr. Eley's testimony would be required in the interest of full development of the record. The Board can hardly make that judgment in the absence of at least the prefiled testimony and positions of Applicants and Staff. Upon examination of such prefiled testimony, or at hearing, the Board may in its sound discretion determine there to be unanswered questions or gaps in the evidence which cannot be fully addressed by Applicant or Staff so that appointment of a Board witness may be genuinely needed. The Board may then determine whether Mr. Eley has the appropriate background and

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<sup>2/</sup> As discussed further, below, these cases do not authorize the expenditure of funds beyond that authorized by law for payment of witness fees and expenses. They do not address or authorize payment of consultancy fees or costs which Intervenor has enumerated in its Motion, at 5.

experience to assist the Board in its determination of relevant facts. <sup>3/</sup>  
The Board may, upon examination of Mr. Eley's qualifications, determine that another Board witness of its own choosing may be preferable. However, at this pre-trial stage, there has been no showing of a genuine need for appointment of a board witness as required by Midland and Summer. <sup>4/</sup>

B. Funding of Intervenors is Barred by Act of Congress

In support of its request that the Board not only call Mr. Eley as its own witness, but "pay the appropriate costs," OCRE relies upon the Midland case, as well as United States Marshalls Service v. Means, 724 F.2d 642 (8th Cir. 1983), aff'd on rehearing, 741 F.2d 1053 (1984). The Midland case, ALAB-382, however, stands only for the proposition that, notwithstanding prohibitions against providing financial assistance to

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- <sup>3/</sup> Other approaches to obtaining the assistance of experts are authorized in 10 C.F.R. §§ 2.722 (use of technical expertise on the Atomic Safety and Licensing Board Panel) and 2.733 (use of experts by parties to examine and cross-examine witnesses).
- <sup>4/</sup> The other cases cited by OCRE as supporting its position on development of the record involved instances in which the reviewing court determined that the administrative record below was incomplete, and did not contain relevant information. See Michigan Consolidated Gas Co. v. FPC, 283 F.2d 204, 226 (D.C. Cir. 1960) (alternatives to abandonment of gas service not considered by FPC due to lateness of proposed settlement); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 612 (2d Cir. 1965) (alternatives to proposed siting of Storm King plant were required by law to be considered and ignoring alternatives made record insufficient to support decision); Isbrandtsen Co. v. United States, 96 F.Supp. 883 (S.D.N.Y. 1951) (Federal Maritime Board ignored its own ruling that dual rate structure in question was discriminatory). No such showing has been made here, nor can such showing be made in advance of the proffering of evidence.

intervenors, the Board may, where a genuine need exists, call an intervenor-proposed witness as its own and pay "the usual witness fees and expenses," citing 42 U.S.C. § 2201(c) and 10 C.F.R. § 2.718(b).

42 U.S.C. § 2201(c), however, provides only that:

"Witnesses subpoenaed under this subsection shall be paid the same fees and rulings as are paid witnesses in the district courts of the United States."

It does not authorize the payment of consultant fees, such as those requested on behalf of Mr. Eley, here.

Although OCRE believes it draws support for its position from United States Marshalls Service v. Means, even in that case, where the Court of Appeals found that advancement of costs for witnesses was "absolutely essential" to a fair trial and in the interests of justice, the court found express legal authority for payment of such funds.<sup>5/</sup> In Means, such authority was found in the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and, with respect to advancement of costs by the United States as a party, 28 U.S.C. § 1920, and § 2412. While legal authorities and court decisions construing the Federal Rules of Civil Procedure are sometimes relied upon in NRC cases, particularly

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<sup>5/</sup> Even in the Means case, the Court of Appeals emphasized that the authority to advance fees and expenses of lay and expert witnesses was a discretionary power to be exercised only under compelling circumstances. United States Marshalls Service v. Means, supra, 741 F.2d 1059. As noted in the previous section, there has been no showing here that action by this Board is required at this time in order to assure a "fair and thorough hearing process." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 453 (1981).

where the Rules of Practice are patterned after the Federal Rules, <sup>6/</sup> the Federal Rules of Evidence have not been adopted in NRC cases or in the Commission rules. Neither 28 U.S.C. § 1920, which applies to the Federal Courts, nor 28 U.S.C. § 2412, which applies only to civil actions brought by or against the United States, are applicable to administrative proceedings such as this one. <sup>7/</sup> OCRE does not cite and we are not aware of any authority for the award by the NRC of costs, or the advancement of witness fees in anticipation of such award -- elements of Federal Court rules which have not been adopted in NRC rules and regulations.

Moreover, there is very broad language in Section 502 of the Energy and Water Development Appropriation Act, 1985, P.L. 98-360, 98 Stat. 420, which states:

None of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act.

See, Comptroller General Legal opinion No. B-200585, dated December 3, 1980, interpreting the same language in the Energy and Water Development Appropriation Act for FY 1981 (P.L. 96-367) to prohibit the NRC from paying for "litigation expenses that would inevitably have been paid by the non applicant party." 46 Fed. Reg. 13681 (February 24, 1981). See

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<sup>6/</sup> See, Pennsylvania Power and Light Co. et al. (Susquehanna Steam Electric Station, Units 1 and 2), ALAB-613, 12 NRC 317, 322 (1980); Boston Edison Company, et al. (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 581 (1975).

<sup>7/</sup> Although authority similar to 28 U.S.C. § 2412 was found in 5 U.S.C. § 504 until its repeal (see P.L. 96-481, 94 Stat. 2327, effective Oct. 1, 1984), subsection (b)(1)(C) thereof expressly excluded cases such as this one "...for the purpose of granting or renewing a license..."

also, Metropolitan Edison Company, et al. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1273 (1984). Thus, even if the Licensing Board were to determine there was a "genuine need" for the Intervenor-proposed witness' testimony at hearing, the foregoing prohibition would appear to preclude paying the consultancy fees of OCRE's proposed board witness. Since there is no authority to pay witness fees beyond those authorized by 42 U.S.C. § 2201, payment of the proposed expenses would constitute "litigation expenses that would inevitably have been paid by the non applicant party."

In sum, even were the Licensing Board, at an appropriate time, to decide there was a "genuine need" for Mr. Eley's testimony, the authority to call him "should be exercised with circumspection" and in accordance with the binding prohibitions enacted by Congress. Midland, ALAB-382, supra, 5 NRC at 608.

C. Due Process Does Not Require NRC Sponsorship of Witnesses Which an Intervenor Cannot Afford

OCRE claims that due process requires the Board to appoint Mr. Eley as consultant and Board witness on Issue 16. However, the authorities upon which OCRE relies do not support that proposition. Armstrong v. Manzo, 380 U.S. 545 (1965), involved lack of notice of pendency of adoption proceedings, whereas Goldberg v. Kelly, 397 U.S. 254 (1970), involved termination of Federal financial assistance without prior notice and hearing. Union Bag-Camp Paper Corporation v. FTC, 233 F.Supp. 660, 666 (S.D.N.Y. 1964), involved access to documentary evidence. None of these cases discuss the appointment of witnesses for which a party cannot afford to pay fees.

OCRE also fails to cite any precedent which supports the proposition that due process requires appointment of Board witnesses so that an intervenor may prove its case. Commission case law is clear that an intervenor is not required, in order to carry whatever burden it has in these proceedings, to present its own witnesses. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 356 (1978). An intervenor may establish its case entirely through cross-examination. Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 389 (1974). Cf. Washington Public Power Supply System (WPPSS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1182-83 (concurring views of Judge Edles). In addition, as noted above, the Licensing Board is authorized to issue subpoenas, either for attendance of a party witness, or a Board witness. 10 C.F.R. § 2.718(b); 10 C.F.R. § 2.720(d). OCRE does not explain why the foregoing rules of procedure and agency practice are not fully adequate for it to present and prove its case. Since OCRE has not provided any authority establishing due process rights to the relief requested, or shown that the access to witnesses provided by the Commission's Rules of Practice is insufficient, its due process argument should be rejected.

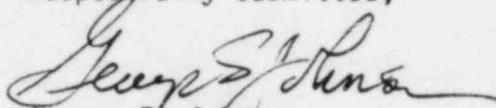
### III. CONCLUSION

OCRE's request for relief is premature, and, at this point, the requested relief would be contrary to statutory prohibitions against intervenor funding. If Issue 16 is set down for hearing and the proffered evidence warrants, the Licensing Board may then determine whether



there is a "genuine need" for separate expert testimony. No such need has been established at this time and OCRE's motion should be denied.

Respectfully submitted,



George E. Johnson  
Counsel for WRC Staff

Dated at Bethesda, Maryland  
this 4th day of March, 1985

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE IN OPPOSITION TO OCRE MOTION FOR APPOINTMENT OF BOARD WITNESS ON ISSUE 16" 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 4th day of March, 1985:

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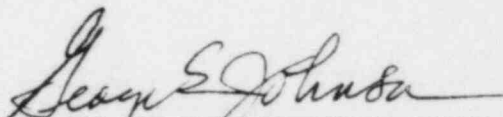
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