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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
NUCLEAR REGULATORY COMMISSION

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 OHIO CITIZENS
FOR RESPONSIBLE ENERGY'S MOTION
FOR THE APPOINTMENT OF BOARD WITNESS

By motion of February 11, 1985, Ohio Citizens for Responsible Energy ("OCRE") requested that the Licensing Board appoint Mr. George Dennis Eley as the Board's "consultant and witness" on Issue No. 16. OCRE's request is prompted by OCRE's inability to pay Mr. Eley's fees and expenses, Motion at 2, 4-5. OCRE argues that it is therefore necessary for the Licensing Board to call Mr. Eley to provide OCRE with due process and to develop a complete record in this proceeding. Id. at 2-3. The unprecedented relief sought by OCRE is without bases in either Nuclear Regulatory Commission ("NRC") or judicial precedent. No licensing board has, to our knowledge, ever paid the fees of a witness proposed by an intervenor. For the reasons discussed below, Applicants oppose OCRE's motion and request that it be denied.

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I. Agency Precedent Concerning the Calling of Board Expert Witnesses Precludes the Appointment of Mr. Eley As a Board Witness in this Proceeding

A. The Summer Decisions - Criteria for Calling Board Witnesses.

The standard for an atomic safety and licensing board to call its own witness is set forth "in unqualified terms" in two decisions involving South Carolina Electric and Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1151 (1981) and ALAB-710, 17 NRC 25 (1983). In Summer, both the applicant and the NRC staff presented a panel of expert witnesses at a hearing on seismic issues.^{1/} ALAB-663, 14 NRC at 1143. During the hearing, the licensing board on its own motion decided to call its own independent, expert consultants to clarify the principal issues involved. Id. at 1144. This decision was prompted by its dissatisfaction with the NRC staff's review of these issues. Id.

The NRC staff petitioned the Appeal Board to prohibit the licensing board from calling its own witnesses without first affording the parties an opportunity to respond to the licensing board's concerns. Id. at 1145. Although the Appeal Board denied the staff's petition for directed certification, "notwithstanding its merit," i. at 1158, it went to great length in its opinion to provide "guidance as to the proper

^{1/} The intervenor participated only by cross-examination of applicant and staff witnesses.

circumstances in which to seek outside testimony." Id. The standard enunciated for a licensing board to call its own expert witness is a strict one:

[A]lthough "a licensing board may well have the latitude to call upon independent consultants itself for the purpose of supplementing what it deems to be an unsatisfactory record," the exercise of that power should be confined to those instances where it is beyond question that a board could not "otherwise reach an informed decision on the issue involved."

Id. at 1163 (emphasis added) (quoting an August 27, 1981 Appeal Board Memorandum, appended to decision).

The Appeal Board also required that certain steps must be taken before a licensing board can call its own witness. It stated that "the boards may take this extraordinary action only after ... giving the parties to the proceeding every fair opportunity to clarify or supplement their previous testimony." ALAB-710, 17 NRC at 25, 27-28 (1983) (emphasis added). The licensing board's concerns must be specific:

[T]he boards' use of such consultants should be based on more than intuition and vague doubts about the reliability of the staff's presentation: the boards must articulate good reason to suspect the validity and completeness of the staff's work. That is what [is] meant in requiring a demonstration "beyond question that a board simply cannot otherwise reach an informed decision on the issue involved."

ALAB-663, 14 NRC at 1156-1157 (quoting Appeal Board August 27, 1981 Memorandum at 1163). It is only where "the staff is unable or unwilling to clarify its testimony on a significant

safety issue and the other evidence of record is similarly unresponsive to a licensing board's articulated concerns, [that] the board is free under our standard to seek outside testimony in an effort to resolve the matter." Id. at 1157.

Thus, the Appeal Board has provided that licensing boards must first work with the witnesses presented by the parties to achieve a fully-developed record, prior to taking the "extraordinary action" of calling their own witnesses. See also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984) (Appeal Board rejected intervenor's argument that the licensing board should have appointed an independent expert to assist it and cited Summer, ALAB-663, for establishing that a board's "calling upon independent experts ... is warranted in only the most extraordinary circumstances.").

OCRE has failed to meet the standards established by the Summer decisions. First, it has not shown that the Board is unable to obtain whatever information the Board (not OCRE) needs to resolve the issue without calling OCRE's witness. Second, OCRE has not shown that the staff's (or Applicants') witnesses would be unwilling or unable to respond to the Board's concerns.^{2/} Third, OCRE has not shown that the

^{2/} As OCRE itself notes, the NRC staff has expended "substantial resources" in studying the TDI diesel generators. Motion at 1. This has included utilization of Pacific Northwest Laboratory as a consultant to perform a technical evaluation of the

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Licensing Board could not reach an informed decision without calling Mr. Eley.

B. Other NRC Decisions.

The Appeal Board in Summer cited instances where licensing boards have called their own expert witnesses. See Summer, ALAB-663, 14 NRC at 1153-1155. None of the decisions cited (some of which are also cited in OCRE's motion), provide precedent for OCRE's argument that the Board should call Mr. Eley as its witness. Neither have any other decisions been found, nor has OCRE cited any decision where an atomic safety and licensing board has called an expert witness because of an intervenor's financial inability to sponsor him.

In Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-382, 5 NRC 603 (1977), the Appeal Board denied the intervenors' motion seeking directed certification of the licensing board's order denying their request for Commission funds to pay, inter alia, the fees and expenses of an expert witness. The intervenors offered some of the same arguments proffered by OCRE in the case at hand; they stressed the importance of their contribution to the proceeding and asserted that they would not

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Owners Group Program and its analyses. The NRC staff is, therefore, certainly in a position to provide the Licensing Board with supplemental information on any concern the Board should raise. Applicants are similarly in a position to clarify or supplement information provided to the Board should this be deemed necessary.

be able to participate any longer without this financial assistance. Id. at 605.

The Appeal Board concluded that it had no authority to grant the relief requested, citing the NRC's express policy against financing parties in NRC adjudicatory proceedings. Id. at 606 (discussing Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, 4 NRC 494 (1976)). The intervenors' attempt to differentiate their case was, likewise, to no avail:

Accepting arguendo everything the ... intervenors assert about the usefulness of their participation, ... [i]t amounts to no more than that the determination whether or not to finance intervenor groups should be made anew in each individual case. A proposal for a case-by-case review ... has already been considered by the Commission and ... expressly rejected.

5 NRC at 607 (footnote omitted).

Recognizing that the licensing board might decide to call the expert as its own witness, the Appeal Board observed that:

[n]othing we have said ... precludes a Board from calling witnesses of its own where it finds a genuine need for their testimony

Needless to add, the Board's authority in this respect should be exercised with circumspection where the witness it desires to hear would have been sponsored by one of the parties but for financial considerations. In these circumstances, there necessarily can be no bright line between rendering indirect financial support to an intervenor - which we take to be proscribed by Commission policy - and arranging to hear evidence which a Board deems relevant and important for its resolution of a significant contested issue.

Id. at 607-608 (emphasis added) (footnotes omitted). See also Summer, ALAB-663, 14 NRC at 1155 n. 29 (explaining the result in Midland).

Contrary to OCRE's assertion, Midland does not establish as "the law of [the NRC] that, when an intervenor would call an expert witness but for financial lack, the Board should call the witness as its own and pay the appropriate costs." Motion at 10. Rather, Midland reiterates the NRC's policy against funding intervenors. See Metropolitan Edison Co., (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1247 (1984) (Licensing Board was precluded by law from appointing an independent expert to assist intervenor with its case); Rochester Gas & Electric Corp., (R.E. Ginna Nuclear Plant, Unit 1), LBP-83-73, 18 NRC 1231, 1239 (1983) ("The Commission lacks the legal authority to provide financial assistance to intervenors.") Clearly, if the Board were to grant OCRE's motion, it would be "rendering indirect financial support to an intervenor" by appointing OCRE's expert as its own and paying his fees and expenses. No "genuine need" for Mr. Eley's testimony has been established in this proceeding. OCRE's inability to finance its participation does not constitute a "genuine need" -- if it did, the exception would swallow the rule since that circumstance would be present in every case. Neither have the criteria of Summer been satisfied, as discussed supra.

By asserting that the calling of Board witnesses "has been freely employed", OCRE mischaracterizes the decisions which it

cites. Motion at 11. In Southern California Edison (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-3, 15 NRC 61 (1982), Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-667, 15 NRC 421 (1981), and Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-604, 12 NRC 149 (1980), the expert witnesses involved were two seismological consultants to the NRC's Advisory Committee on Reactor Safeguards. Exceptional circumstances justified their testimony at the hearings. Because the two were "unwilling to accept compensation from or to become witnesses for intervenors", and "[a]s [ACRS consultants] ... [were] special government employees ... barred from appearing on behalf of Joint Intervenors or any other party to [the] proceeding other than the NRC," they appeared as Board witnesses. Diablo Canyon, supra, at 150. See also Seabrook, supra, at 425 n. 8. (The witness "was called as a Board witness because of his then status as a consultant to the Advisory Committee on Reactor Safeguards. Given that status, he preferred not to appear as a witness for a party to the proceeding.")^{3/}

^{3/} It is possible that OCRE is relying on the Appeal Board's citation of Seabrook and Diablo Canyon, Summer, ALAB-663, 14 NRC at 1154-1155, when it states that "the Appeal Board expressly distinguished between such sua sponte action and calling a witness which intervenors wanted to have heard." Motion at 11. OCRE mischaracterizes the Summer decisions to the extent it implies that the Appeal Board expressly confined the decisions to cases where the witness was not proposed by an intervenor.

OCRE, of course, does not assert that Mr. Eley is an ACRS consultant. To our knowledge, he is not. Money is the only factor precluding his participation as a witness in this proceeding. If OCRE would pay his fees, Mr. Eley would readily appear on OCRE's behalf. The circumstances which necessitated the calling of Board witnesses in the aforementioned proceedings are entirely absent in the case at hand.

In a case not cited by OCRE, the licensing board in Carolina Power & Light Co. (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-7, 19 NRC 432 (1984), indicated its intention to call an expert witness in the unique context of summary disposition on radiation health effects.^{4/} The Harris licensing board interpreted the Commission's decision in Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-31, 12 NRC 264 (1980) as "differentiating health effects contentions from other contentions in the summary disposition context." 19 NRC at 437. The licensing board interpreted Black Fox to require an opponent of summary disposition of a radiation health effects contention to provide new and substantial evidence challenging the cancer risk estimates of the National Academy of Sciences Committee on the Biological Effects of Ionizing Radiation. Id. Mindful of the Summer directives,

^{4/} The board also suggested that, in the alternative, the NRC staff call the witness. Id. at 443. There is no indication that the intervenor requested the board to call the expert witness.

however, the Board first gave the NRC staff the opportunity to supplement its filings on the issue. Id. at 443. Ultimately, the individual identified by the licensing board became unavailable and did not appear as a board witness. See Carolina Power & Light Co. (Shearon Harris Nuclear Plant, Units 1 and 2), LBP-84-15, 19 NRC 832 (1984). The unique requirements of Black Fox make the Shearon Harris decisions inapposite. In addition, the witness in Shearon Harris was being called by the board sua sponte, not at an intervenor's request.

II. Due Process Does Not Require Appointment of Mr. Eley As a Board Witness

OCRE's due process argument is, essentially, that it lacks the financial ability to present a comprehensive case on Issue No. 16 and that denial of such financial assistance (via the Board appointing OCRE's witness as its own) deprives it of due process.^{5/} OCRE has pointed to no legal authority supporting its position.

The case law cited by OCRE does not support its claim that due process requires the NRC to pay for OCRE's witness. In U.S. Marshals Service v. Means, 741 F.2d 1053 (8th Cir. 1984), the U.S. Government sought the ejectment of a group of American Indians from national forest lands. The defendants were

^{5/} OCRE has not asserted, and cannot assert, that any statutory authority supports its request that the Board appoint Mr. Eley as its witness because of OCRE's financial inability to do so.

indigent and lacked funds to pay the fees and expenses of witnesses who would present "indispensable defense testimony". Id. at 1059. The court found direct statutory support for a district court's discretionary authority to call the defendants' witnesses as its own, and, in doing so, to order the United States, as a party, to pay the associated expenses. The court "strongly emphasize[d] that this discretionary power [was] to be exercised only under compelling circumstances." Id. The compelling circumstances in Means were that the Government had paid the fees and expenses of the defendants' witnesses on four occasions before the trial and then, mid-trial, refused to pay for these witnesses, seeking "victory by default". Id.

In Means, the witnesses were deemed to be "absolutely essential" for a fair trial where a group of indigent defendants faced resettlement and disruption of their community. OCRE, by its own choice, is involved in an administrative proceeding as an intervenor. Its request for appointment of a Board witness favorable to its position is prompted only by "OCRE's desire to present the best case possible on Issue No. 16." Motion at 5 (emphasis added). It is apparent that the extenuating circumstances prompting the result in Means do not exist in this regulatory proceeding.

The other case cited by OCRE, Motion at 7, Union Bag - Camp Paper Corp. v. FTC, 233 F. Supp. 660 (S.D.N.Y. 1964), did not involve a party's right to an expert witness. Rather, in

Union Bag, the plaintiff was denied access to certain FTC reports which it alleged were necessary for its defense in an FTC proceeding. Citing the broad rights of discovery, defense, rebuttal and cross-examination, already available to the plaintiff in FTC proceedings and the heavy burden of proof imposed upon the Government, the court concluded that the use of the reports by the Government, while denied to the plaintiff, did not constitute a denial of due process. Id. at 666. The court noted:

Plaintiff's defense in these proceedings may be costly, time consuming and difficult. But the crucial factor is that there has been no denial of evidence or access to it.

...
...

...The fact that such reports were issued to counsel for defendants, does not, a fortiori, entitle plaintiff to identical relief.

Similarly, in the instant case, the fact that Applicants and the NRC staff may present expert witnesses, should this contention go to hearing, does not a fortiori require that OCRE be provided with an expert witness. Like the plaintiff in Union-Bag, OCRE has had, and continues to have, a variety of avenues open to it to develop its case on this contention. This Board's refusal to appoint Mr. Eley as a witness would, therefore, not be a denial of due process.

Neither Armstrong v. Manzo, 380 U.S. 545 (1965), nor Goldberg v. Kelly, 397 U.S. 254 (1970), both cited by OCRE,

addressed the necessity for an agency to provide a witness at an administrative hearing in order to satisfy the requisites of procedural due process. Motion at 7. Armstrong concerned an unlawful failure to give notice to an interested party (a child's natural father) in an adoption proceeding. Goldberg addressed the unique procedural requirements which must accompany termination of an individual's welfare benefits.^{6/}

The NRC expounded upon the procedural safeguards which exist in licensing proceedings when it determined that it would not provide financial assistance to intervenors. See Nuclear Regulatory Commission (Financial Assistance to Participants in Commission Proceedings), CLI-76-23, 4 NRC 494, 502-506 (1976). Significantly, the same factors relied upon in Summer to curtail the use of Board witnesses were relied upon by the NRC in reaching its decision not to fund intervenors. In both cases, the expertise of the NRC staff and the technical experts on the boards were cited as greatly contributing to the proper resolution of safety-related issues. The Commission explicitly recognized that some intervenors might not have the financial resources to hire independent experts and would thus be restricted to cross-examination to make their affirmative cases. Id. at 505.

^{6/} Neither would the Board's failure to appoint Mr. Eley as its witness constitute a denial of "meaningful public participation" as addressed in Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (1984) (vacating NRC rule that would have denied public's statutory right to a hearing on a material issue in licensing proceedings). Motion at 7.

The technical expertise of this Board, as well as the NRC staff, will likewise bear upon a proper resolution of Issue No. 16. Weighed against the serious impropriety of calling an intervenor's witness as a board witness and the considerable financial burden this would impose (see Motion at 4-5), failure to appoint Mr. Eley as a Board witness is neither unfair nor violative of due process.

III. The NRC's Statutory Duty to Protect Public Health and Safety Does Not Require Appointment of Mr. Eley as Board Witness

OCRE argues that it is entitled to have the Board appoint OCRE's witness as its own because of NRC's obligation to have a complete record before it in the context of the NRC's mandate to protect public health and safety. Motion at 8-10. It cites Rules 614 and 706 of the Federal Rules of Evidence as having embodied this concept by their allowance of court-sponsored witnesses, where necessary.^{7/} Id. at 9. Additionally, it references a series of cases which stress the development of a complete record in administrative proceedings. Id. at 8-10.

The NRC has already determined that funding of intervenors is not necessary to ensure that the Commission fulfill its mandate to protect public health and safety. While "[not] questioning the social value of public participation in agency

^{7/} Fed. R. Evid. 614 permits a court, on its own motion or at the suggestion of a party, to call witnesses. Fed. R. Evid. 706 permits a court, on its own motion or on the motion of a party, to appoint expert witnesses.

decisionmaking nor, ... underrat[ing] the contributions that intervenors [make] ... [the NRC was] unable to make the finding ... that without funding [it] 'cannot make the required [licensing] determination' and that the participation of funded groups is 'essential to dispose of the matter.'" Nuclear Regulatory Commission, supra, at 502 (quoting Comptroller General Decision, B-92288 (1976) at 4).

While it is true that this Board has an affirmative duty to develop a complete record in this proceeding, that obligation does not require that the Board call as its own a witness identified by an intervenor. As the Appeal Board noted in Summer, "We certainly do not suggest that a licensing board should ignore deficiencies ... or play no role in the development of a complete record. The protection of the public health and safety is a paramount concern." Summer, ALAB-663, 14 NRC at 1156 (emphasis in original). Only when other means of developing the evidentiary record fail and it is "'beyond question that [the] board simply cannot otherwise reach an informed decision on the issue'" may it resort to its own outside experts. Id. at 1156-1157.

The cases cited by OCRE require no more than the development of a complete evidentiary record sufficient to support an informed decision by the Board; none involve an agency calling its own witness. See, e.g., Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965) (setting aside agency decision to grant a hydroelectric power license because

agency ignored relevant information, failed to consider possible alternatives to the project, and record was insufficient to support its decision); Michigan Consolidated Gas Co. v. FPC, 283 F.2d 204 (D.C. Cir. 1960), cert. den. sub nom. Panhandle Eastern Pipeline Co. v. Michigan Consolidated Gas Co., 364 U.S. 913 (1960) (setting aside FPC orders regarding abandonment of gas service to an area, in part, because the FPC did not take the initiative to consider an alternative proposal that was clearly in the public interest); Isbrandtsen Co., Inc. v. United States, 96 F. Supp. 883 (S.D.N.Y. 1951) (holding that a Federal Maritime Board's ultimate decision was not supported by its specific findings of fact). There is no requirement that an administrative record contain information from expert witnesses representing all parties to a proceeding. The only requirement is that reasonable alternatives and all relevant information on the record be considered in the decision-making process, and that the record reflect this fact. The Summer decisions dictate the manner in which such a record is to be developed in licensing proceedings and the manner in which a licensing board's articulated concerns relating to public health and safety are to be addressed. As discussed supra, there is no basis, under Summer, for appointing a board witness under the circumstances presented by OCRE.

IV. Conclusion

The Appeal Board has directed that "independent consultants should not be called upon to supplement an adjudicatory record except in 'that most extraordinary situation in which it is demonstrated beyond question that a board simply cannot otherwise reach an informed decision on the issue involved.'" Summer, ALAB-663, 14 NRC at 1146. Licensing boards may "take this extraordinary action only after (i) giving the parties to the proceeding every fair opportunity to clarify or supplement their previous testimony, and (ii) showing why it cannot reach an informed decision without independent witnesses." Summer, ALAB-710, 17 NRC at 27-28 (footnote omitted). These requisites have not been met in the case at hand. Indeed, no licensing board has ever called an expert witness in the circumstances presented here. Furthermore, appointment of Mr. Eley as a Board witness would constitute impermissible indirect financial assistance. Applicants, therefore, respectfully request that the Board deny OCRE's Motion to appoint Mr. Eley as a Board witness in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing
APPLICANTS' ANSWER TO OHIO CITIZENS FOR RESPONSIBLE ENERGY'S
MOTION FOR THE APPOINTMENT OF BOARD WITNESS was served by
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attached Service List.


Rose Ann Sullivan
Rose Ann Sullivan

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