

are not entitled under the rules of practice. See 10 CFR § 2.754. The record in any event speaks for itself and, we submit, fully bears out the validity of Applicants' filing. Two matters, however, do call for refutation here and now. First, the previous position of Edward A. Thomas plainly was not admitted in evidence for all purposes, and, second, there is nothing untoward in Applicants' points going to the credibility of Mr. Thomas. These were timely and properly made in reply to intervenors' proposed findings. Needless to say, they do not provide an occasion for supererogatory responses.

1. As to the Evidentiary Limitations
on the Previous Thomas Position.

The previous position of Mr. Thomas on beach shelter contentions (filed June 4, 1987 and again in September 1987) was not admitted in evidence, as intervenors claim, without limitation and for all purposes. That claim is unfounded.

Intervenors cite but unaccountably discount this Board's ruling on the matter.

"MR. DIGNAN: Well, Your Honor, if you're taking it for the truth of the matters contained, the witness must testify he believes it.

"JUDGE SMITH: Well, that's right. You cover that on cross-examination. In the meantime it's accepted for the fact that on June the 3rd this was his

judgment as to what the testimony should have been.

"MR. FLYNN: I've been --

"MR. DIGNAN: I don't have any problem with it for that purpose, Your Honor, that's my point.

JUDGE SMITH: All right. So we're fine."

Tr. 13551-52 (emphasis added).

The Thomas position was never again offered for any purpose other than the limited historical purpose enunciated by the Board. Interestingly, Mass AG, when invited to pursue the matter, expressly declined the invitation.

"BY MR. OLESKEY:

"Q Mr. Thomas, I take it from your testimony just before the break that the document you sent down to Washington last June 4th would be marked Mass. AG Exhibit 50, that was in your judgment an accurate summary of where you thought your agency was on the beach population issue at that time; is that right?

"Q And if you were asked today to do this again in the circumstances which existed last June would you send down the same text you sent down then?

"JUDGE SMITH: Whoa, I have trouble with that one. Necessarily he would, you know -- would he send down today --

"MR. OLESKEY: This is tautology.

"JUDGE SMITH: Yes.

"MR. OLESKEY: Well, I'm just trying to deal with what I understood that your last comments were that, as a ruling, which is that this is some kind of historical document only and doesn't represent Thomas's views.

"JUDGE SMITH: Well, then ask the question, based upon what you know today would you still advocate this as --

"MR. OLESKEY: Well, that gets into a level of complexity that deals with everything that's happened between June 2, '87 and today. To get this in the record as his view of where the agency was or should be last June, I think the only operative question was, was it your best judgment, was it accurate, did you send it down to be relied on, which is all I said.

"JUDGE SMITH: Yes.

"MR. DIGNAN: And he so testified and it's in for that purpose, as I understand it, to show his view.

"MR. OLESKEY: All right. That's what I wasn't clear about.

"JUDGE SMITH: Yes, it's in for that purpose. My concern with your last question is it necessarily then, if everything were the same then up till the time you sent it.

"MR. OLESKEY: I was proceeding from a misapprehension about what your concern was, Judge Smith, so I don't need that question."

Tr. 13553, 13554-55.

Intervenors' other argument that the Thomas position was admitted for general purposes is equally wanting.

Intervenors have the temerity to assert:

"In addition, the form of FEMA position was admitted as Attachment 7 to the Goble testimony, at Post Tr. 10932."

Intervenors' Motion at 4 n.3.

The Board specifically inquired, with respect to the Goble attachments:

"JUDGE SMITH: . . . Do I understand this entire presentation correctly, that attachment one through ten are not being offered as prime exhibits, they're being offered as the basis for the written testimony as to which this [Goble] panel is being cross-examined.

"MR. OLESKEY: Correct.

"JUDGE SMITH: My understanding is correct.

"MR. TURK: And may I seek one clarification of it. In other words, these are historical documents which they read, which they considered and which went into their own thinking.

"JUDGE SMITH: That's my understanding."

Tr. 10964. Given this backdrop, it is too late in the day even to suggest that the document was accepted for all purposes.

2. As to Mr. Thomas's Credibility

In their proposed findings on intervenors' shelter contentions, Applicants refrained from any comment upon the credibility of Edward A. Thomas. Similarly, they had refrained from extensive cross-examination of Mr. Thomas on June 15, 1988. Intervenors, however, elected to put Mr. Thomas's credibility at issue using it to underpin their proposed findings notwithstanding their knowing of the record

support for a negative finding on this score.¹ Applicants' reply, accordingly, was very much in order. While the credibility of Mr. Thomas was a matter that Applicants had considered to have become a non-issue, intervenors were of a different mind. They can hardly cry foul for having forced Applicants to join the issue. Needless to say, their provocation of a reply to their proposed findings does not provide an occasion to depart from the rule of practice which does not allow for yet another go around.

Mr. Thomas on his own behalf has also sought leave to file a response to Applicants' reply to intervenors. Mr. Thomas seeks leave to file a response on the ground that he perceives a need to communicate with the Board on the matter of his credibility. This belief, we observe, he has perceived for some time. The rules of practice, however, do not provide for a non-party witness to contribute proposals for the Board's findings of fact. See 10 CFR § 2.734.² To be sure, Mr. Thomas has a personal interest in the matter of his credibility. However, credibility is not established as

¹ See, e.g., record citations listed in Applicants' Motion for Order (And/Or Subpoenas) Requiring Attendance and Testimony of Particular Named NRC Employees, filed on January 6, 1988, *passim*.

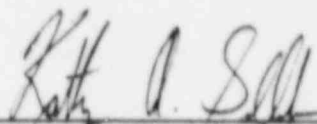
² Mr. Thomas cites 10 CFR § 2.730(c) as authority for his personal response. That section, however, governs responses to motions and not filings on proposed findings. Furthermore, that section also limits the right of response to parties.

an after the fact matter. Nothing is presented here that warrants a departure from the rule.

CONCLUSION

The motions of intervenors and Edward A. Thomas for leave to file responses to Applicants' reply to intervenors' proposed findings on shelter contentions should be denied.

Respectfully submitted,



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'88 SEP 28 P5:36

CERTIFICATE OF SERVICE

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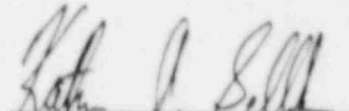
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