

DOCKETED
USNRC

UNITED STATES OF AMERICA

'82 JUL 16 P4:01

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING SERVICE
BRANCH

In the Matter of)

ARIZONA PUBLIC SERVICE)
COMPANY, et al.)

(Palo Verde Nuclear)
Generating Station,)
Units 1, 2 and 3))

Docket Nos. STN 50-528
STN 50-529
STN 50-530

INTERVENOR'S MOTION FOR RECONSIDERATION
OF BOARD'S ADMISSION INTO EVIDENCE
OF JOINT APPLICANTS' EXHIBIT DD

Pursuant to 10 C.F.R. §2.730 Intervenor Patricia Lee Hourihan moves this Licensing Board to reconsider its admission into evidence of Joint Applicants' Exhibit DD, purportedly an independent review by NALCO of the Applicants' water reclamation studies.

Intervenor has been prejudiced because the witness sponsoring the document could not properly authenticate it and Intervenor could not cross-examine the witness on the substance of the document. Intervenor's inability to cross-examine on the substance of the document is crucial since the previous testimony of Applicants' witness and Intervenor's expert were in direct contradiction to the facts and conclusions stated in Exhibit DD.

Intervenor also objects to the admission of the document because it was not produced in response to Intervenor's discovery requests, and so Intervenor was prejudiced in preparing for the hearing on the water quality issue.

Intervenor requests, therefore, that the Board strike the exhibit from evidence or, the the alternative, that this licensing hearing be reopened and that the author of Exhibit DD be made available for adequate cross-examination by Intervenor.

I. EXHIBIT DD SHOULD BE EXCLUDED AS HERESAY
EVIDENCE NOT PROPERLY AUTHENTICATED
BY APPLICANTS.

Intervenor was barred from cross-examination on the substance of Exhibit DD since Mr. Bingham, the witness through whom the document was introduced, was not knowledgeable about the substance of the document and had previously testified in direct contradiction to the facts in the document. In addition, Mr. Bingham did not properly authenticate the document which was dated June, 1974, but did not appear in this proceeding until June 15, 1982. At no time did applicants produce the author of the document for cross-examination or authentication.

The most important reason for exclusion of heresay from administrative and judicial proceedings is that an adversary is unable to cross-examine the absent declarant whose out-of-court statement is being offered. 24 McCormick On Evidence (1981), §245 at 583. Cross-examination, called by Wigmore the "greatest legal engine ever invented for the discovery of the truth,"

5 Wigmore, Evidence, §1367 (3d ed. 1941), allows a party to challenge the facts and assumptions underlying an expert opinion. However, if the expert offering the opinion is not present to testify, often what is offered into evidence is no more than the bare conclusions.

The problem with hearsay evidence was clearly illustrated in Mr. Bingham's testimony about Exhibit DD. He was unable to testify about the substance of the document other than to refer to specific portions of the document. For example, his prefiled rebuttal testimony stated that "tube flow velocity" was a "key parameter" that Applicants considered in designing and conducting tests with the circulating water test facility. Bingham Rebuttal Testimony at 7. And Exhibit DD clearly states that corrosion tests were done at different flow rates. However, Mr. Bingham could not find in the Water Reclamation Studies any results that showed the specific effects of flow rates on corrosion if all other variables were kept constant. Tr. at 2615-2617. Nor could he identify precisely the test results that NALCO evaluated in Exhibit DD. Tr. at 2614-2615.

In fact, Mr. Bingham, in response to his own counsel's questions, had previously testified that the flow was held constant during corrosion testing. Tr. at 1302.

Moreover, Mr. Bingham could not properly authenticate the document. He could not testify to the research methods, data base, or process of analysis in the report. He did no

more than state that he had received Exhibit DD around June, 1974, and that he had forgotten it in his files until June, 1982. Tr. at 2670-2673. The author of the document was not produced to testify that NALCO did the independent review. In addition, the document itself does not appear to have been maintained in regular Bechtel files since it did not have large black numbers on the side, as do all other Bechtel documents.¹

Furthermore, prior to June 15, 1982, Exhibit DD had never been referred to or mentioned in any submission to the NRC, or in any response to Intervenor's discovery requests. (See part II of this Motion below) Mr. Bingham said he did not remember the document until the time he filed his prefiled rebuttal testimony. As his previous testimony directly contradicted the document in that he testified that flow rates had been kept constant during all corrosion testing, Mr. Bingham clearly had no knowledge of the document until after May 28, 1982. Therefore, he demonstrated he was not a competent witness to authenticate the document or to testify as a witness available for cross-examination on its substance.

Although hearsay documents are sometimes admitted into evidence in administrative hearings, they generally will not

¹Mr. Bingham testified that the document did not have large black numbers because Bechtel had two file systems, and that the numbers were taken off by the microfiche system in the Los Angeles office. Tr. at 2674.

Applicants turned over many original Bechtel documents to Intervenor and all had large black numbers on the side. Contrary to Mr. Bingham's statement in his testimony these originals came from nearby Bechtel offices in Arizona and not from San Francisco. Tr. at 2674.

be admitted if their substance is challenged by other parties or they are in some way inconsistent with other disclosures in the record. See Illinois Power Company (Clinton Power Station, Units 1 and 2), ALAB-340, 4 NRC 27, 31 (1976).

Here Intervenor's expert witness on water quality, Mr. Paul Robinson, challenged the basic conclusion of the NALCO Report i.e., that the water reclamation studies provided enough data to formulate a reliable recirculating cooling water treatment program using effluent as cooling water. Moreover, Applicants' chief witness on water quality himself contradicted facts presented in the NALCO Report in his direct testimony. Thus, Intervenor should be afforded an adequate opportunity to cross-examine the author(s) of the NALCO Report to determine its validity in light of contradictory evidence from both Applicants and Intervenor's witnesses.

II. APPLICANTS SHOULD BE BARRED FROM INTRODUCING INTO EVIDENCE A DOCUMENT NOT PREVIOUSLY PRODUCED IN DISCOVERY BUT DIRECTLY RESPONSIVE TO INTERVENOR'S DISCOVERY REQUESTS.

Applicants' failure to produce Exhibit DD during discovery prejudices Intervenor in that not until the rebuttal testimony was Applicants' position clear on the key issue of water quality. Exhibit DD is a document obviously and directly responsive to Intervenor's repeated and numerous discovery requests, yet it did not appear in these proceedings until June 15, 1982. Intervenor's prejudice is compounded by Applicants' failure to make available for cross-examination any witness with knowledge of the substance of the document.

On May 26, 1981, Intervenor filed a set of 341 interrogatories, at least 40 of which specifically requested information on Applicants' on-site treatment facility.² Exhibit DD purports to be an independent review of Applicants' testing methodology, bench scale tests and pilot plant facilities, and as such it is not only relevant but perhaps the most concise single document evaluating Applicants' pilot project.

Intervenor also made unmistakable, specific requests for all documents Applicants prepared for the licensing proceeding, or that they intended to rely on in the proceeding, and all documents they had used to prepare the F.S.A.R. and E.R.-O.L.³ Again, Applicants at no time mentioned, referred to, or identified in any way Exhibit DD.

Intervenor's present counsel entered an appearance in this case on April 22, 1982. After a two-hour deposition of Mr. Van Brunt, Intervenor's counsel requested all documents relating to the quality of water to be used at Palo Verde. Within three days Intervenor's counsel received at least 500 documents including the two-volume Water Reclamation Studies, now admitted as Joint Applicants' Exhibit BB. In the three-week period between the first and second weeks of hearings,

²The interrogatories requesting information on the site water reclamation facility are listed in Attachment A.

³See Intervenor's Interrogatory Nos. 336, 337, and 341.

Intervenor's counsel made repeated requests of Mr. Bischoff for documents on water quality, in six to eight telephone conversations. She requested, inter alia, descriptions of tests, test results, and test evaluations. The type of documents which were produced from Bechtel files over the 1973 to 1975 period indicate Applicants understood Intervenor's request for information. Again, they offer no credible explanation of why NALCO's independent review, dated June 26, 1974, was not maintained together with all other similar evaluations, or why another NALCO Report was produced but Exhibit DD was not.

On May 15, 1982, Intervenor notified all parties that Mr. Robinson, as an expert witness, would testify that it was his opinion that applicants had not demonstrated in the water reclamation studies that they could treat and then use effluent for condenser cooling up to 15 cycles of concentration on a consistent basis in the circulating water system at Palo Verde. Exhibit DD surely would have been an important aid in Mr. Robinson's preparation of his direct testimony. Because Intervenor did not have access to Exhibit DD prior to Mr. Robinson's testimony, Mr. Robinson was unable to draw on information contained in the document or address and refute the conclusions NALCO drew.

Applicants have not explained why this document was not previously turned over in discovery other than to argue

that Intervenor did not make a specific request for this specific document. Tr. at 2688. Obviously no party can be expected to make a request for a specific document if he or she has no reason to know the document exists. Applicants have most, if not all, the information relevant to this licensing proceeding within their control, and have a continuing duty to provide it to the other parties in the proceeding. Apart from their responsibilities under the discovery rules, Applicants have an overriding duty to disclose fully all relevant information to the NRC since only through such disclosure can the Commission carry out its duty under the Atomic Energy Act to protect the public health and safety. Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480, 488-489 (1976), aff'd, Virginia Electric and Power Co. v. NRC, 571 F. 2d 289 (1978). The system of regulating the nuclear industry depends to a great degree on the willingness of applicants and licensees to provide thorough and accurate information. Applicants' failure to produce Exhibit DD in discovery must be seen at best as a failure to make even a minimal effort to answer Intervenor's discovery requests truthfully and completely.

Discovery is liberally granted in administrative proceedings in order "to enable the parties to ascertain the facts in complex litigation, refine the issues, and prepare adequately for a more expeditious hearing or trial." Pacific Gas and

Electric Company (Stanislaus Nuclear Project, Unit 1) LBP-78-20, 7 NRC 1038, 1040 (1978), cited with app'd in Texas Utilities Generating Comapny (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-25, 14 NRC 241,243 (1981).

There can be no doubt that withholding Exhibit DD from Intervenor prejudiced her in preparing for the hearing on the water quality issue and prejudiced Mr. Robinson in preparing his testimony. Moreover, Intervenor's prejudice was compounded by Applicants' refusal to provide a witness whom Intervenor could cross-examine on the substance of Exhibit DD.

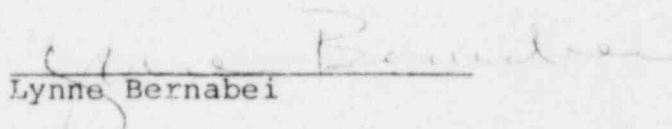
III. THIS BOARD SHOULD STRIKE EXHIBIT DD OR, IN THE ALTERNATIVE REOPEN THE HEARING TO GIVE INTERVENOR AN OPPORTUNITY TO CROSS-EXAMINE THE AUTHOR OF THE DOCUMENT ON ITS SUBSTANCE.

The Commission's discovery rules closely parallel the Federal Rules of Civil Procedure. Therefore, it seems appropriate to refer to Rule 37, Fed.R.Civ.P., in considering appropriate sanctions when a party, such as Applicants in this case, fail to provide critical discovery. Rule 37(d), Fed.R.Civ.P., provides as one sanction that a delinquent party may be prohibited from introducing evidence that has been withheld from other parties during discovery. See generally, Barker v. Bledsoe, 85 F.R.D. 545 (D.Okla. 1979); Surg-O-Flex of America, Inc. v. Berger Brunswick Col., 75 F.R.D. 654 (D. Conn. 1977); Davis v. Marathon Oil Co., 528 F.2d 395 (6th Cir.), cert. denied, 429 U.S. 823 (1976).

Exclusion of Exhibit DD seems an appropriate remedy in this case since only by prohibiting Applicants' use of the document can this Board ensure that Intervenor has not been unfairly prejudiced by the eleventh-hour admission of a document not previously produced. As argued above, the prejudice to Intervenor is compounded by Mr. Bingham's inability to testify either on the substance of the document or about the underlying test results NALCO evaluated to reach its conclusions.

However, if this Board does not wish to stike Exhibit DD, it must, to preserve Intervenor's due process rights, reopen the hearing to allow Intervenor an opportunity to cross-examine the author of the document on NALCO's conclusions and the assumptions underlying the evaluation.

Respectfully submitted,


Lynne Bernabei

HARMON & WEISS
1725 I Street, N.W., Suite 506
Washington, D.C. 20006
(202) 833-9070

DATED: July 16, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
ARIZONA PUBLIC SERVICE)	
COMPANY, et al.)	Docket Nos. STN 50-528
)	50-529
(Palo Verde Nuclear)	50-530
Generating Station,)	
Units 1, 2, and 3))	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of Intervenor's Motion For Reconsideration of Board's Admission Into Evidence of Joint Applicants' Exhibit DD was mailed first class, postage prepaid, or delivered by other means as specified below, this 16th day of July, 1982, to:

** Docketing and Service Section
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Chairman, Maricopa County
Board of Supervisors
111 South Third Avenue
Phoenix, Arizona 85004

** Dr. Richard F. Cole
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

** Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

* Charles A. Bischoff
3100 Valley Bank Center
Phoenix, Arizona 85073

Rand L. Greenfield
Assistant Attorney General
P.O. Box Drawer 1508
Santa Fe, New Mexico 87504-1508

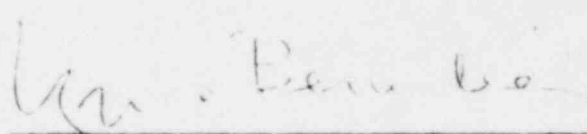
** Robert M. Lazo, Esq.
Chairman, Atomic Safety
and Licensing Board
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

** Dr. Dixon Callihan
Union Carbide Corporation
P.O. Box Y
Oak Ridge, Tennessee 37831

** Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

** Lee Scott Dewey, Esq.
Office of the Executive
Legal Director
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

* Express Mail
** Delivered by NRC Mails


Lynne Bernabei

ATTACHMENT A

²The interrogatories requesting information on the on site water reclamation facility include the following:

Nos. 124-126: Describe the basic design for the on-site treatment facility, and identify all relevant supporting documents and each person with knowledge about the facility.

Nos. 127-129: Describe all treatment processes at the on-site treatment facility, and identify all supporting documents and persons with knowledge about these treatment processes.

Nos. 135-137: Describe the organization, including the functional organization of the on-site treatment facility, and identify all supporting documents and persons with knowledge about this organization.

No. 139: Identify each job category, description and qualifications, and NRC technical specifications and/or guidelines regarding water quality with respect to the on-site treatment facility.

Nos. 181-183: Identify the testing, monitoring and analytical methods and procedures used to determine the quality of treated effluent, supporting documents and persons with knowledge about testing and monitoring.

Nos. 184-186: Identify the content of iodine and salts in the sewage effluent before and after the treatment process at the on-site treatment facility, supporting documents and persons with knowledge about the filter system.

Nos. 190-192: Identify the amount of salts and iodine remaining in the on-site treatment facility after filtering, supporting documents, and persons with knowledge about the amount of remaining salts and iodine.

Nos. 193-195: Identify the system to be used to treat sewage effluent at the on-site treatment facility, supporting documents, and persons with knowledge about the system.

Nos. 199-201: Identify the method which will be used to mitigate any problem with the on-site treatment plant not providing the quality of required effluent, supporting documents, and persons with information about this method.

Nos. 218-219: Identify all waste and by-products from the treatment process expected at the on-site treatment facility and supporting documents.