

demonstrated the inconsistency between a literal interpretation of the rule, which Applicants endorse (see, e.g., Reply at 27, 49), and years of Commission practice and precedent concerning the role of the Staff. Indeed, OCRE finds the observation of Judge Learned Hand to be most applicable here: "[t]here is no surer way to misread any document than to read it literally ..." [Guiseppi v. Walling, 144 F2d 608, 624 (2d Cir. 1944) (L. Hand, J., concurring)].

The Board and the parties have acknowledged on several occasions that the Commission's new hydrogen control rule is not a model of clarity. When the language of a regulation is unclear, it is appropriate to examine its legislative history to determine the intent of its framers. Such an approach is especially appropriate here as this is a case of first impression on this issue. OCRE would thus urge the Licensing Board to direct the parties to file briefs on the legislative history of the hydrogen control rule, as was done for a troublesome part of the ATWS rule. See LBP-84-40, 20 NRC 1181 (1984).

Applicants cite Louisiana Power and Light (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076 (1983) in support of their assertion that operating instructions and procedures for the igniter system need not be subjected to Board scrutiny or approval. Applicants' Reply at 10-11. Waterford dealt specifically with implementing instructions for emergency planning; such instructions are not the plans, but rather

supplement the plans themselves "with all the details that will be necessary in the event of an actual emergency." These instructions were characterized as:

probably never finalized because they're always undergoing changes. Telephone numbers are added; fire trucks are added and deleted. Radios are added and deleted. This is a resource list. This is a how-to and what-to-do-list. This is a list of mapping requirements, hotline procedures, notification, message flow, diagrams, et cetera. 17 NRC at 1107.

Clearly the Waterford decision has no relevance whatsoever to the question of whether operating procedures for the hydrogen control system, including instructions for dealing with a station-blackout degraded core accident and for ensuring that there is not a release of substantial quantities of radioactivity to the environment due to containment venting, need Board scrutiny and approval. The emergency planning instructions addressed in Waterford were peripheral to the central question of the adequacy of the plan. The instructions at issue here are crucial to the determination of whether the PNPP hydrogen control system will in fact prevent loss of containment integrity and fission product release into the environment. This question is of course the essence of Issue #8, as admitted and rewarded by the Board.

Applicants, who voiced incessant objections to OCRE's cross-examination at the hearing, now complain that OCRE did not conduct enough cross-examination. See Applicants' Reply at 13, 15, 18, 23-24, 26, 32, 37, 38, 40, 45. Applicants believe that documentary evidence (even Applicants' own exhibits, if used to

their disadvantage (Reply at 13, concerning margins for penetration P205)) should carry no weight unless subjected to cross-examination. Not surprisingly, Applicants cite no authority or precedent supporting this theory.

Applicants would apparently bar a party on the Licensing Board from drawing conclusions by applying known engineering principles to and making mathematical calculations from facts in the record if a witness had not performed this exercise, contrary to Vermont Yankee Nuclear Power Co. (Vermont Yankee Nuclear Power Station), ALAB-229, 8 AEC 425, 437, reversed on other grounds, CLI-74-40, 8 AEC 809 (1974).

The fact is that OCRE (and the Board) can draw conclusions from documents in evidence regardless of whether there was cross-examination on the subject. OCRE did not have to conduct cross-examination on every matter in every exhibit; indeed, such an approach would lead to an unwieldy record and would obviate the purpose and advantage of utilizing documentary evidence.

The essence of Applicants' argument is that OCRE, instead of Applicants, bears the burden of proof in this proceeding. This of course is contrary to 10 CFR 2.732. Thus, it is inappropriate to ask why OCRE did not conduct cross-examination on a document. Rather, it should be asked why Applicants did not conduct cross-examination or put on rebuttal witnesses if they wished to discredit a document. Applicants did not even object to the admission into evidence of OCRE Ex. 21, upon which they now devote over 9 pages of attack in their Reply. See Tr. 3691 (Glasspiegel). Having failed to object to its admission at the hearing, Applicants now have no right to complain about OCRE Ex. 21.

Applicants' misplaced burden of proof is also illustrated by their statement that the Board should not require Applicants to provide an experimental basis [or any other credible basis, apparently] for their witnesses' expert judgements. Reply at 45. However, Applicants would require the most exacting basis for the expert judgements of the Sandia National Laboratories (Reply at 40), which the Board has recognized as an authoritative, reputable source of scientific information on hydrogen combustion. See Tr. 3687.

Similarly, Applicants present a complex argument, based solely on conjecture and inference, attempting to show that OCRE Ex. 18 does not detract from the credibility of their witness, Mr. Alley. Reply at 18-20. The simplest explanation consistent with the evidence, 10 CFR 2.732, and Mr. Alley's behavior at the hearing is that Mr. Alley was lying.

Applicants castigate OCRE for supposedly not requesting copies of calculations mentioned by their witnesses at the hearing. See Reply at 17, 29, 48. Their assertions are without merit.

In the case of the G/C calculations discussed at p. 17 of Applicants' reply, OCRE did ask Applicants' witness if he had a copy of the calculations. Tr. 3315. Mr. Alley said that he did not have the calculations with him. Id. Obviously there was no point in asking Applicants for a copy of calculations they did not have available. Cross-examination on an unseen document is an exercise in futility, as there is no way to tell if the witness is lying.

Similarly, the uncertainty expressed by the witnesses concerning the document discussed at p. 29 of Applicants' Reply indicated to OCRE that the document was unavailable, else they would have referred to it. See Tr. 3660, 3664.

Even if these documents were available, examining them for the first time during the hearing hardly constitutes an efficient process. The purpose of discovery is to avoid surprises like this. OCRE in its 13th Set of Interrogatories to Applicants, filed July 30, 1984, made numerous requests for categories of documents, which included the documents in question. For example, OCRE requested that Applicants identify and produce all documents upon which Applicants intended to rely prepared by or for Mississippi Power & Light (Interrogatory 13-7), HCOG (13-8), the IDCOR Program (13-9), General Electric (13-10), the BWR Owners Group (13-11), the NRC (13-12), EPRI (13-13), COMBEX (13-91), Offshore Power Systems (13-94), and other categories of documents such as probabilistic risk assessments (13-6). OCRE also requested all evaluations performed by or for Applicants considering the effects of hydrogen combustion loads on the inaccessible, rejectable weld defects discussed in the Aptech report. See OCRE Interrogatory 13-101. Ironically, Applicants objected to these interrogatories as untimely, yet now assert that OCRE should have conducted discovery at the hearing. It is Applicants, not OCRE, who should be castigated for failing to meet their discovery obligations.

Applicants cite Eagle-Picher Industries v. U.S.E.P.A., 759

F2d 905 (1985) to support their claim that CLASIX 3 should be relied upon, despite its flaws. Reply at 37, note 17. In Eagle-Picher, the petitioners challenged the legality of the EPA's Hazardous Ranking System, a methodology developed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, more commonly known as "Superfund." The Hazardous Ranking System is used to determine which sites are to be listed on a National Priority List of hazardous waste sites. The petitioners argued, inter alia, that the EPA's Hazardous Ranking System was arbitrary, capricious, and an abuse of discretion.

Such a claim is made pursuant to the Administrative Procedure Act, 5 USC 706. The Supreme Court has ruled that the standard of judicial review is quite narrow, and that the court is not empowered to substitute its judgement for that of the agency. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 US 402, 416 (1971). The Court in Eagle-Picher held that an agency may utilize a predictive model so long as it explains the assumptions and methodology it used in preparing the model, citing Small Refiner Lead Phase-Down Task Force v. EPA, 705 F2d 506 (DC Cir., 1983):

we must defer to agency's decision on how to balance the cost and complexity of a more elaborate model against the oversimplified model. We can reverse only if the model is so oversimplified that the agency's conclusions from it are unreasonable. 759 F2d at 922.

It is clear that Eagle-Picher concerns judicial review (where the agency's decision is accorded deference) of an agency standard promulgated pursuant to a unique Act of Congress. It

has no relevance whatsoever to NRC licensing proceedings where applicants bear the burden of proof. Even if it were relevant, the controlling issue is not the degree of simplification of a model, but rather whether it gives reasonable results. As demonstrated in OCRE's Proposed Findings and Conclusions, CLASIX 3 does not yield reasonable results.

Just as Applicants have distorted the law, they have distorted the record of this proceeding. For example, they claim that the evidence in the record demonstrates "that ionizing radiation is not sufficient to increase flame speeds beyond those estimated by Applicants for the conditions analyzed at PNPP." Reply at 43. The citations to the record provided show only that ionizing radiation is insufficient to directly initiate a detonation but that ionizing radiation will increase flame speeds.

Applicants also claim that OCRE's arguments concerning a more severe DWB scenario, assuming earlier core reflood, is postulated on a "worst case" design basis accident. Reply at 47. Examination of the record on the matter in question will reveal that the scenario OCRE discussed assumed core reflood at 5500 seconds into the accident, by which time substantial amounts of hydrogen had been generated. Tr. 3533-42. A design basis accident does not involve substantial generation of hydrogen.

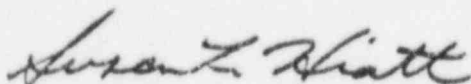
Applicants claim that OCRE did not object to Applicants' cross-examination on the Berman affidavit during the hearing. Reply at 34-35. The truth is that OCRE, anticipating

Applicants' use of the Berman affidavit, objected at the start of the line of questioning. Tr. 3724. Since the objection was overruled, there was little point in renewing it at every subsequent question.

Applicants state that "OCRE appears not to challenge any aspects of Applicants' 1/4 scale test program for diffusion flames other than the 75% metal-water reaction issue." Reply at 52, note 28. As discussed in OCRE's findings, since the 1/4 scale tests are an ongoing experimental program, it (except for Applicants' blatant violation of the Commission's rule) is more appropriately addressed at the final analysis. OCRE would clarify, however, that not challenging the tests at this point should not be construed as a waiver to any future challenge when the matter is ripe for litigation.

The above examples, by no means exhaustive, clearly demonstrate that Applicants' Reply is based on misrepresentation of law and fact and on a distorted and deceitful interpretation of the record. The Licensing Board's own evaluation of the record on this issue will likewise find that Applicants' Reply is worthless and must be rejected.

Respectfully submitted,



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This is to certify that copies of the foregoing were served by deposit in the U.S. Mail, first class, postage prepaid, this 11th day of July, 1985 to those on the service list below.

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