

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

Before Administrative Judges:

Ronald M. Spritzer, Chairman  
Dr. Gary S. Arnold  
Dr. William W. Sager

In the Matter of

CALVERT CLIFFS 3 NUCLEAR PROJECT,  
LLC, and UNISTAR NUCLEAR OPERATING  
SERVICES, LLC

(Combined License Application for Calvert Cliffs  
Unit 3)

Docket No. 52-016-COL

ASLBP No. 09-874-02-COL-BD01

January 17, 2012

ORDER

(Granting in Part and Denying in Part NRC Staff's Motion in Limine)

On December 9, 2011, the NRC Staff filed a Motion in Limine to exclude portions of Joint Intervenors' direct and rebuttal testimony and several of their proposed exhibits, and to strike portions of their rebuttal statement of position.<sup>1</sup> Joint Intervenors filed a Response stating that they "agree to exclude and/or strike several passages in testimony and rebuttal position statement identified by the NRC as outside the scope of the hearing."<sup>2</sup> In all other respects, Joint Intervenors oppose the Motion in Limine.<sup>3</sup>

The Board grants the Motion in Limine insofar as it pertains to the specific passages which Joint Intervenors and the NRC Staff agree should be excluded or stricken. The passages

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<sup>1</sup> NRC Staff Motion in Limine to Exclude Portions of the Joint Intervenors' Direct and Rebuttal Testimony, Exhibits, and Portions of the Joint Intervenors' Rebuttal Statement of Position (Dec. 9, 2011) at 1 [hereafter Motion in Limine].

<sup>2</sup> Joint Intervenors' Opposition to NRC Staff Motion in Limine (Dec. 19, 2011) at 1 [hereafter Opposition].

<sup>3</sup> Id.

are therefore stricken from the documents in question. As to the matters in dispute, the Board grants the Motion in Limine in part and denies it in part, as explained below.

I. Direct and Rebuttal Testimony of Scott Sklar

The NRC Staff requests that the Board exclude passages of the direct and rebuttal testimony of Scott Sklar, Joint Intervenors' designated witness for the evidentiary hearing. The NRC Staff alleges that the challenged passages are outside the scope of the proceeding and/or outside the scope of the admitted contention.<sup>4</sup>

Evidence is admissible if it is relevant, material, reliable, and not repetitious.<sup>5</sup>

The concepts of materiality and relevance are closely linked. Evidence is material if it concerns a fact that is of consequence to the outcome of the proceeding. Evidence is relevant if it has "any tendency" to make the existence of any material fact more or less likely.<sup>6</sup> Thus, evidence need not be conclusive in order to be relevant. It is sufficient that it has some tendency, even a slight one, to make a fact of consequence more or less likely.

In arguing that portions of Mr. Sklar's testimony are outside the scope of the proceeding and/or outside the scope of the admitted contention, the NRC Staff in substance argues that the challenged testimony concerns issues that are immaterial to this adjudication. Under section 2.711(e), "[i]mmaterial or irrelevant parts of an admissible document will be segregated and excluded as far as is practicable." Thus, a party may appropriately request that portions of exhibits—in this instance, portions of Mr. Sklar's pre-filed direct and rebuttal testimony—be

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<sup>4</sup> See Motion in Limine at 5–8.

<sup>5</sup> 10 C.F.R. §§ 2.337(a), 2.711(e).

<sup>6</sup> See Fed. R. Evid. 401. While the Federal Rules of Evidence are not directly applicable to NRC proceedings, NRC adjudicatory boards often look to those rules for guidance. S. Cal. Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-717, 17 NRC 346, 365 n.32 (1983). See generally Duke Power Co. (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-669, 15 NRC 453, 475 (1982).

excluded if practicable. The NRC Staff is also correct in noting that “a board’s decision should only rely on information that is included in the record.”<sup>7</sup>

We do not agree, however, that we must make the determination concerning the materiality of the challenged portions of Mr. Sklar’s testimony now, before the evidentiary hearing has begun. As the Appeal Board explained, normally a determination on materiality will precede the admission of an exhibit into evidence where its materiality is questioned, but this is not an ironclad requirement in administrative proceedings in which no jury is involved. The determinations of materiality, the Appeal Board stated, could be safely left to a later date without prejudicing the interests of any new party.<sup>8</sup> Here the issue of materiality has been raised by a motion in limine, which is ordinarily used to prevent a jury from becoming aware of potentially prejudicial evidence that may ultimately be ruled inadmissible. By filing a motion in limine, the party opposing admission of the evidence may obtain a ruling in advance of trial, or at least outside of the presence of the jury. In administrative proceedings such as this, where no jury is involved, no such threat of prejudice is present, and there is accordingly no compelling need for a ruling on the materiality of challenged testimony before the hearing has begun.

We therefore will defer our ruling on the disputed portions of Mr. Sklar’s testimony. Although the NRC Staff makes a number of arguments concerning the materiality of the challenged testimony, those arguments are vigorously disputed by Joint Intervenors. We believe we will be better able to resolve the disputes when we can consider the full evidentiary record. We will therefore not exclude any portion of Mr. Sklar’s testimony at this time.

## II. Joint Intervenors’ Exhibits

The NRC Staff objects to Exhibit JNT000024, an article from the website Wikipedia discussing the concept of baseload power. The NRC Staff argues that “[t]he authors of this

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<sup>7</sup> Motion in Limine at 3 (citing Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-580, 11 NRC 227, 230 (1980)).

<sup>8</sup> Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 & 2), ALAB-520, 9 NRC 48, 50 n.2 (1979).

article and their credentials are unknown, and therefore this exhibit is . . . unreliable and inadmissible.”<sup>9</sup>

The article is an out-of-court statement to be offered into evidence to prove the truth of the matter asserted, and it is therefore hearsay.<sup>10</sup> Although subject to exclusion in federal court, hearsay evidence is generally admissible in administrative proceedings.<sup>11</sup> But, to be admitted into evidence, the hearsay evidence must be reliable. For example, a statement by an unknown expert to a non-expert witness which such witness proffers as substantive evidence is unreliable and, therefore, inadmissible.<sup>12</sup> In addition to being reliable, hearsay evidence must be relevant, material and not unduly repetitious to be admissible under 10 C.F.R. § 2.337(a).

We find that Exhibit JNT000024 fails the reliability test for the reason identified by the NRC Staff: we do not know who wrote the article or what expertise, if any, the authors have in the subject matter of baseload power. We have no basis upon which to find that the article is a reliable source of information, and therefore we will not admit it without additional information concerning its authors.

We are not persuaded by the NRC Staff’s remaining objections. The NRC Staff acknowledges that JNT000010 and JNT000011 could be relevant, but notes that they are not specifically cited in Joint Intervenors’ expert testimony or in any other document. Joint Intervenors respond that the two exhibits are relevant to an understanding of the Maryland Renewable Portfolio Standard, which Joint Intervenors maintain mandates greater use of wind

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<sup>9</sup> Motion in Limine at 10–11.

<sup>10</sup> See Fed. R. Evid. 801(c).

<sup>11</sup> S. Cal. Edison Co., ALAB-717, 17 NRC at 366; Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-355, 4 NRC 397, 411–12 (1976); Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-802, 21 NRC 490, 501 n.67 (1985); Philadelphia Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-863, 25 NRC 273, 279 (1987).

<sup>12</sup> See Tenn. Valley Auth. (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-367, 5 NRC 92, 121 (1977).

and solar power than the level referred to in the Staff's Final Environmental Impact Statement (FEIS). Like Joint Intervenors, we see nothing in 10 C.F.R. § 2.337(a) requiring that exhibits must be cited in expert testimony or some other document in order to be to be admissible. In addition, Joint Intervenors have explained the relevance and materiality of the two exhibits. We therefore will not preclude their admission into evidence.

NRC Staff also objects to Exhibits JNT000021 through JNT000025. We have already excluded JNT000024 based on lack of reliability. As to the other exhibits, the NRC Staff's only objection is that they are cited only in Joint Intervenors' rebuttal statement of position, and not in their expert testimony. As we have just explained, section 2.337(a) does not require that exhibits be cited in expert testimony, or in any other type of document, in order to be admitted. An exhibit may be admitted if it is material, relevant, reliable, and not repetitious. Joint Intervenors have provided arguments to justify the admission of these exhibits, and we are not able to conclude at this time that the documents must be excluded.

We therefore sustain the NRC Staff's objection to Exhibit JNT000024 on the ground that its reliability has not been demonstrated, but we do not sustain the NRC Staff's other objections to Joint Intervenors' exhibits.

III. Motion to Strike Portions of Joint Intervenors' Rebuttal Statement of Position

NRC Staff requests that we strike statements in Joint Intervenors' rebuttal statement of position on the ground that they are outside the scope of the proceeding and/or outside the scope of the admitted contention.<sup>13</sup> We need not decide these disputed issues because the rebuttal statement of position is just that: a statement of position, not evidence. The admissibility standards in section 2.337(a) apply only to "evidence." Statements of position, like proposed findings of fact and conclusions of law, simply present the arguments of the parties as to what they think the evidence means and how the law should be applied to the evidence. We need not rule on the admissibility of statements of position because they will not be admitted as

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<sup>13</sup> Motion in Limine at 5–9.

evidence, but will only be considered by the Board in its merits ruling to the extent they are based on admitted evidence.

We therefore grant in part and deny in part the NRC Staff's Motion in Limine in accordance with this ruling.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

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Ronald M. Spritzer, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Gary S. Arnold  
ADMINISTRATIVE JUDGE

*/RA/*

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William W. Sager  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
January 17, 2012

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
)  
CALVERT CLIFFS 3 NUCLEAR PROJECT, LLC. )  
AND UNISTAR NUCLEAR OPERATING )  
SERVICES, LLC ) Docket No. 52-016-COL  
)  
(Calvert Cliffs 3 Nuclear Project, LLC) )  
(Combined License) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Licensing Board **ORDER (Granting in Part and Denying in Part NRC Staff's Motion in Limine)** have been served upon the following persons by Electronic Information Exchange.

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Docket No. 52-016-COL

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[Original signed by Christine M. Pierpoint]  
Office of the Secretary of the Commission

Dated at Rockville, Maryland  
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