

May 28, 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DTE ELECTRIC COMPANY)	Docket No. 52-033-COL
)	
(Fermi Nuclear Power Plant, Unit 3))	

NRC STAFF ANSWER TO INTERVENORS' REQUEST FOR
CROSS EXAMINATION AT THE EVIDENTIARY HEARING FOR CONENTION 8

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323 and the Atomic Safety and Licensing Board's (Board) Order Modifying the Schedule¹ for the evidentiary hearing, the NRC staff (Staff) submits this answer (Answer) to the Intervenor's request for permission to cross-examine witnesses on Contention 8, which was submitted by email to the Presiding Officer on May 15, 2013. The other parties have not seen this filing and are unsure of its nature. To the extent that it merely contains the Intervenor's proposed questions for the presiding officer to consider for propounding to the other parties, the Staff raises no objections. Such a filing is clearly contemplated by 10 C.F.R. Part 2, Subpart L. See 10 C.F.R. 2.1207(a)(3). However, given that the Intervenor's email correspondence cites a regulatory section related to cross-examination by counsel for the parties, the Staff is responding to clarify regulations and precedent related to cross-examination in Subpart L proceedings. For the reasons set forth below, a request for cross-examination by Intervenor's counsel should be denied.

¹ Order (Modifying the Schedule) (Dec. 12, 2012) (unpublished) (ADAMS Accession No. ML12347A050).

BACKGROUND

A thorough recitation of the background of this case is provided in the Staff's Initial Statement of Position on Contention 8. Relevant to this Answer, the Board determined in 2009 that the procedures in Subpart L of 10 C.F.R. Part 2 (i.e. §§ 2.1200-1213) would govern in this proceeding.² The Board's Order Modifying the Schedule provided a milestone calendar for filings leading up to the evidentiary hearing for Contentions 8 and 15. This calendar specified that the deadline for "Motions in Limine, Proposed Questions for Board, and Motions for Cross-Examination for Contentions 8 & 15" was May 15, 2013. On May 15, 2013 Intervenor's counsel Terry Lodge emailed the Presiding Officer the following:

Pursuant to 10 CFR Sect. 2.711, on behalf of Intervenor's, I hereby submit a request to allow Intervenor's to cross-examine witnesses on Contention 8, and attach proposed questions for that purpose. I have not previously been in circumstances where a submittal of this type is permitted, and hope that I have properly submitted the request with questions to you ex parte, in accordance with my reading of the evidentiary rules. If I have sent this to you in error, kindly advise me of the proper procedure.

The following day, Onika Williams, the Board's clerk, responded to Mr. Lodge by email, which included all the parties, instructing that he should refile his request through the EIE's "In-Camera Submission" feature.

DISCUSSION

The Intervenor's emailed request to cross-examine witnesses for Contention 8 is a substantive request that must be made through filing a motion. The Intervenor's referenced 10 C.F.R. § 2.711 in their request, subsection (c) of which relates to requests to cross-examine witnesses in a Subpart G proceeding. However, because this is a Subpart L proceeding, the Intervenor's should have followed the requirements in 10 C.F.R. § 2.1204(b), which provides that

² See Order (Identifying Hearing Procedures and Scheduling Conference Call) (Aug. 12, 2009) (unpublished) (ADAMS Accession No. ML092240384); Order (Establishing Schedule and Procedures to Govern Further Proceedings) (Sept. 11, 2009) (unpublished) (ADAMS Accession No. ML092540392).

requests for cross-examination are to be made by motion. This requirement is also reflected in the milestone in the Board's Order Modifying the Schedule that referred to "Motions in Limine" and "Motions for Cross-Examination for Contentions 8 & 15" as distinct from the "Proposed Questions for Board" that do not require a motion and can just be filed *in camera* with the Board. Therefore, the Staff is responding to the cross-examination request as if it were a motion, despite the fact that the Intervenor failed to style their request as a motion or comply with several of the general procedural requirements for all motions. See 10 C.F.R. §§ 2.323.³

First, section 2.323(a)(2) provides that "all written motions must be filed with the Secretary and served on all parties to the proceeding." Further, section 2.323(b) provides, in relevant part, that a motion must "state with particularity the grounds and the relief sought" and that "[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party" regarding the movant's attempts to contact and resolve the subject issue with other parties.

A motion requesting cross-examination must be accompanied by a cross-examination plan, and that plan "may be submitted only to the presiding officer and must be kept by the presiding officer in confidence until issuance of the initial decision on the issue being litigated." 10 C.F.R. § 2.1204(b)(1)-(2). Thus, the regulations contemplate that motions for cross-examination will be served on all parties, while the cross-examination plan will be filed *in camera* with the Presiding Officer. See *id.* The Intervenor has complied with none of these section 2.323 or section 2.1204(b) requirements for requesting cross-examination, and their request should be denied for this reason alone. *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-08-29, 68 NRC 899, 902 n.12 (2008) (rejecting motion

³ With respect to motions in Subpart L proceedings, 10 C.F.R. § 2.1204(a) provides that "motions and requests and responses to them" are governed by the requirements of § 2.323.

for failing to consult with opposing counsel and state with particularity the grounds for the motion).

But even if their request were to be deemed a properly framed motion under the applicable regulations, it should still be denied because, for the reasons below, the Intervenor has failed to demonstrate that their ability to cross-examine witnesses is “necessary to ensure the development of an adequate record of decision,” as required by 10 C.F.R. § 2.1204(b)(3).

I. Commission rules and precedent do not support granting cross-examination in this case.

The Commission determined in its 2004 revisions to the NRC’s rules of practice that “cross-examination conducted by the parties often is not the most effective means for ensuring that all relevant and material information with respect to a contested issue is efficiently developed for the record of the proceeding.” Changes to Adjudicatory Process, Final Rule, 69 Fed. Reg. 2182, 2195 (Jan. 14, 2004). Because “there is no fundamental right to cross-examination” in NRC proceedings, and the Administrative Procedure Act and due process do not require it, the Commission determined that its use should be curtailed. *Id.* at 2195-96 (citing *Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 120 (1995)). Thus, by promulgating 10 C.F.R. § 2.1204(b)(3), the Commission limited cross-examination to the circumstances in which it would be most useful: where it is necessary to develop an adequate record. *See id.* at 2196.

Since those 2004 revisions to Part 2, there has been just one instance in which a Board granted a motion to allow cross-examination in a Subpart L proceeding.⁴ The *Indian Point* license renewal Board determined that, because “the prefiled testimony and exhibits in this proceeding are voluminous and technical,” granting the State of New York’s request for cross-examination was “necessary to ensure the development of an adequate record for this proceeding.” *Id.* On appeal, the Commission declined to overturn the Board’s decision, but

⁴ Order (Order Granting, in part, New York’s Motion for Cross Examination) at 6 (Sept. 21, 2012) (unpublished) (corrected Sept. 25, 2012) (ADAMS Accession No. ML12265A061).

expressed concern⁵ about the lack of detail in the Board's justification for granting the request.

Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), CLI-12-18, 76 NRC __, __ (slip op. at 5-7) (Oct. 12, 2012) (citations omitted). The Commission also described its view that only in rare circumstances is cross-examination in a Subpart L proceeding justified:

The Commission envisioned a need for cross-examination principally "in circumstances involving disputes over the occurrence of an activity or the credibility of a material witness." Given that the parties provide pre-filed direct testimony in Subpart L cases, and further submit a list of confidential proposed questions for the Board to ask the witnesses, the need for the parties themselves also to conduct questioning should be a "rare circumstance," except where questions of witness credibility, motive, or intent are at issue. Cross-examination, in other words, should be reserved for cases where the Board determines that it is truly necessary to develop a sound record.

Id. at 6. Finally, the Commission indicated that parties requesting cross-examination should provide the bases for their assertion that cross-examination is needed to develop an adequate record. *Id.* at 5 n.19 ("we find troubling that the Board did not base its decision on any specific showing by New York").

The Commission even suggested it would have been inclined to overturn the Board's decision had it not been for additional assurances in statements by the Board at a prehearing teleconference limiting the extent of the cross-examination being granted. In particular, the Board stated that it would permit cross-examination only after thorough questioning by the Board, and only if the intervenors in that case identified an issue that the Board missed. *Id.* at 3-4. The Board further stated that it would cut off any questioning it deemed "repetitive" or "not relevant to the issues." *Id.* at 4. The Commission noted that it expected the Board to "prohibit open-ended, lengthy cross-examination, and to restrict any permitted cross-examination to material inquiries that the Board did not already cover." *Id.* The Commission also noted that it

⁵ In particular, the Commission noted that the "Statements of Consideration for the Subpart L hearing rules even specify that 'the complexity and number of issues' in a proceeding do not 'per se, lead ineluctably to the conclusion that cross-examination is necessary to ensure a fair and adequate hearing.'" *Indian Point*, CLI-12-18, 76 NRC at __ (slip op. at 5-6)

expected the Board to be evenhanded in permitting cross-examination by the other parties, “including taking into consideration any cross-examination opportunities granted to [the intervenors].” *Id.* at 5. Thus, the Commission set out its expectations that, in the rare circumstances in which it is permitted in a Subpart L proceeding, cross-examination should be closely circumscribed by licensing boards.

In this proceeding, the Intervenors have articulated neither the need for nor materiality of cross-examination. They have thus failed to meet the high standard for demonstrating necessity. The Intervenors have not even submitted testimony on technical issues or exhibits not also sponsored by other parties in support of their case. Based on this, it is unlikely that the Intervenors’ cross-examination of other parties’ expert witnesses would contribute meaningfully to the factual record related to this contention.

By any measure set out in the Commission order described above, the Intervenors’ ability to cross-examine witnesses is not “necessary to ensure the development of an adequate record for decision” even if they had attempted to show that it is. 10 C.F.R. § 2.1204(b)(3). There has been no challenge to the credibility of the testimony, or motive for providing it, of any witness for Contention 8, and all testimony in this proceeding for both the NRC Staff and DTE Electric Co. was submitted under oath, affirmation, and penalty of perjury. The subject matter is scientific and technical in nature and does not raise issues of witness credibility, motive, or intent. Moreover, neither the subject matter involved in Contention 8, nor the prefiled testimony, exhibits, or statements of position raise unique adjudicatory challenges that would impede the Board’s development of an adequate record for decision. The routine procedures for the conduct of hearings under Subpart L, including the opportunity to submit proposed questions for the Board to consider asking at the evidentiary hearing, provide sufficient mechanisms to develop an adequate record for decision. Accordingly, the Intervenors’ request should be denied.

II. The Intervenor fail to show that cross-examination of technical witnesses would contribute to the development of a record on a “legal contention” and “contention of omission.”

In their initial Statement of Position, the Intervenor assert that their contention is a “legal contention” and “contention of omission.”⁶ Apparently for this reason, the Intervenor have not submitted any of their own expert testimony in relation to this contention, but instead have relied on unsworn statements by counsel and on the documents referenced in those statements. The Intervenor encourage the Board to refer to the record of the proceeding to date and on materials of which it can take “official notice” in ruling on Contention 8. *Id.* at 3.

Although they style their contention as a “legal contention” and rely on their counsel’s statements, they do not appear to be requesting an opportunity for further legal briefing or oral argument on any legal issue. Rather, they appear to be requesting an opportunity for their counsel to cross-examine the technical witnesses whose testimony has been provided by the other two parties. But given the Intervenor’s approach of raising only legal arguments, there is no evidence that questions promulgated by the Board would be insufficient to develop an adequate record. Thus, for this additional reason, the Intervenor have failed to show that their ability to cross-examine witnesses is necessary to the development of an adequate record for decision. 10 C.F.R. § 2.1204(b)(3).

⁶ Intervenor’s Direct Examination and Case-in-Chief Presentation of Contention 8 (Eastern Fox Snake) at 2-3 (Mar. 29, 2013) (ADAMS Accession No. ML13088A581).

CONCLUSION

For the reasons discussed above, the Staff requests that the Board deny the Intervenor's request to be allowed to conduct cross-examination of witnesses at the evidentiary hearing for Contention 8.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
the 28th Day of May 2013

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DETROIT EDISON CO.)	Docket No. 52-033
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CERTIFICATE OF SERVICE

I hereby certify that the "NRC STAFF ANSWER TO INTERVENORS' REQUEST FOR CROSS EXAMINATION AT THE EVIDENTIARY HEARING FOR CONTENTION 8," has been filed through the E-Filing system this 28th day of May 2013.

/Signed (electronically) by/

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Dated at Rockville, Maryland
This 28th day of May, 2013