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OFFICE OF SECRETARY
REGULATORY & SERVICE
BOARD

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
James P. Gleason, Chairman
Frederick J. Shon
Dr. Oscar H. Paris

_____)	
In the Matter of)	
)	
CONSOLIDATED EDISON COMPANY OF)	Docket Nos.
NEW YORK, INC.)	50-247 SP
(Indian Point, Unit No. 2))	50-286 SP
)	
POWER AUTHORITY OF THE STATE OF)	
NEW YORK)	February 9, 1983
(Indian Point, Unit No. 3))	
_____)	

LICENSEES' MOTION TO STRIKE PRE-FILED TESTIMONY UNDER
COMMISSION QUESTION 1 OF DANIEL N. PISELLO,
RICHARD G. PICCIONI, H. JACK GEIGER, AND VICTOR W. SIDEL,
AND RENEWED MOTION TO STRIKE TESTIMONY
OF BRIAN PALENIK AND JAN BEYEA UNDER
COMMISSION QUESTIONS 3 AND 4

Consolidated Edison Company of New York, Inc. (Con Edison) and the Power Authority of the State of New York (Power Authority), licensees of Indian Point Units 2 and 3, respectively, move to strike the pre-filed testimony of Daniel M. Pisello, Richard G. Piccioni, H. Jack Geiger, and Victor W. Sidel and, additionally, renew their previous motion to strike the testimony of Brian Palenik and Jan Beyea. The basis for the licensees' motion is that, in disregard of the Commission's and the Board's explicit Orders, neither the

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testimony of these witnesses nor any companion testimony offered by the respective sponsoring intervenors discusses the probability at the Indian Point Units of the accidents presumed in these witnesses' testimony.

BACKGROUND

The history of both Board and Commission requirements regarding accident consequence testimony in this proceeding is undisputed. In the Commission's September 18, 1981 Order establishing this proceeding it stated that "a discussion of a release scenario must include a discussion of the probability of such a release for the specific Indian Point plants." Notwithstanding this clear admonition, on June 7, 1982, intervenors FOE/Audubon and the New York State Attorney General offered testimony which purported to address the consequences of a postulated accident at the Indian Point plants, but ignored the probability of the accident occurring at Indian Point. At that time licensees objected to the admission of this testimony based upon the sponsoring intervenors' clear disregard of the Commission Order. Transcript of Proceedings at 2997 (July 8, 1982).

In orders issued on July 27, 1982 and September 17, 1982, the Commission reiterated its prior directive that accident consequence testimony in this proceeding must also address probabilities, and must do so for the specific Indian Point plants. Specifically, the Commission

intended that each party (or each group of parties consolidated by the Board) be required to include in any

direct testimony and related contentions (and underlying bases) that it may choose to file on accident consequences a discussion of the probability of the accidents leading to the alleged consequences. It is clearly not sufficient for a party offering testimony and contentions on consequences to rely on other parties to develop the issue of probability. Each party offering testimony on consequences must offer at least a discussion of the probability for the Indian Point plants. That discussion may be based on information which was developed by another party, including the staff or licensee.

....

There is substantially less controversy over the consequences than the probabilities [of an accident at Indian Point]. Thus, in this hearing, the real focus should be on the probabilities. Since the consequences are a function of what is released, the risk will be directly affected by the probabilities of release.

A party providing testimony on consequences must provide at least some discussion of probability. The probability discussion should be at least as detailed as the consequences discussion so that risk can be discussed in the same level of detail. We would anticipate that the Board would in its discretion give varying weight to testimony depending on its level of detail.

Memorandum and Order at 2-3, 4 (Sept. 17, 1982) (footnotes omitted) (emphasis in original and added).

Following the Commission's September 17, 1982 Order, this Board itself issued two orders directing that parties wishing to offer accident consequence testimony must also incorporate a discussion of the probabilities of such accidents for the Indian Point plants. In its October 29 Mailgram Order, the Board ruled that its Order of

October 1, 1982, directed that each party or group of parties offering testimony on consequences of an accident at Indian Point must offer therein a discussion of the probability of the accidents leading to the alleged consequences. Discussion means the consideration or examination by argument of the probability associated with consequences: i.e., a party must be offer[ing] reasoning or evidence to support its position on probability.

Memorandum and Order at 1 (Oct. 29, 1982) (emphasis added) (Mailgram from Judge Gleason to official service list). In its October 1 Order, the Board had also added in connection with Board Question 1.1 the following requirement:

In answering this question the parties shall address at least the following documents: (a) the Indian Point Probabilistic Safety Study (IPPSS) prepared by the Licensees; (b) any reviews or studies of the IPPSS prepared by or for the Licensees, the NRC Staff, or the Intervenors, or any other document which addresses the accuracy of the IPPSS.

Memorandum and Order (Oct. 1, 1982) at 10 (emphasis in original).

As set forth below, the sponsoring intervenors of the Pisello and Piccioni, Geiger and Sidel, and Palenik and Beyea testimony have ignored these clear instructions from the Commission and the Board, and the proffered accident consequence testimony is in no different posture than that which was found unacceptable in the Commission and Board rulings cited above.

I. Testimony of Daniel M. Pisello, Richard G. Piccioni, H. Jack Geiger, and Victor W. Sidel

The pre-filed testimony of these witnesses is offered by Friends of the Earth, Inc./New York City Audubon Society (FOE/Audubon) on Commission Question 1 and Board Question 1.1. These prospective witnesses have confined their testimony solely to the consequences of a major accident, notwithstanding the fact that at the time this testimony was filed, the licensees and Commission Staff had already filed extensive testimony discussing

the probability of accident sequences at the Indian Point units.*

The testimony of prospective witnesses Drs. Pisello and Piccioni and Drs. Geiger and Sidel does not even attempt to meet the threshold standards clearly delineated by the Board and the Commission. The testimony does not address any of the documents described as the bare minimum necessary to discuss probability, i.e., the IPPSS and the reviews prepared by the licensees and the Commission Staff. Moreover, because the testimony does not even discuss the probability of an accident, it cannot possibly meet the requirement that "[t]he probability discussion should at least be as detailed as the consequences discussion." Commission Memorandum and Order at 4 (Sept. 17, 1982). Nor does the testimony meet the threshold requirement that it address "accidents that substantially contribute to overall risk." Memorandum and Order at 16 (July 27, 1982). Since probabilities of an accident are not discussed, the testimony violates yet another important Commission directive that testimony address the probability of an accident at the Indian Point site. Counsel for FOE/Audubon has conceded that the testimony of Dr. Pisello and Dr. Piccioni does not deal with the issue of probability of an accident. See Deposition of Dr. Pisello and Dr. Piccioni at 26-27 (Dec. 29, 1982) (statement of Mr. Hartzman).

* Therefore, even if FOE/Audubon were assumed not to have the resources to independently determine the probability of the accidents hypothesized in the pre-filed testimony of its prospective witnesses, the failure to include a discussion of the probabilities present by Staff and the licensees remains unexcused. See September 17, 1982 Commission Order quoted above.

The testimony of Dr. Geiger and Dr. Sidel is also devoid of any probability discussion relating to an accident at the Indian Point site, although it is entirely devoted to claims about the health services response to an unspecified postulated accident. The testimony does make a brief reference to the frequency of the wind blowing in the direction of New York City; however, this discussion only encompasses the probability of wind direction and not the probability of the accident itself. See Testimony of Dr. Geiger and Dr. Sidel at 2 (Jan. 31, 1983).*

II. Testimony of Brian Palenik and Jan Beyea

The licensees also renew their previous motion to strike the testimony of Brian Palenik and Jan Beyea. See Transcript of Proceedings at 2997 (July 8, 1982). The sponsoring intervenors FOE/Audubon and New York State Attorney General have completely disregarded the Board's and Commission's orders to supplement the testimony of Mr. Palenik and Dr. Beyea with testimony as to the probability of an accident "for the specific Indian Point

* The testimony of Dr. Geiger and Dr. Sidel makes reference to the testimony of Palenik and Beyea for its assumption that under certain conditions large doses of radioisotopes could be brought to parts of New York City. The Geiger/Sidel testimony therefore suffers from the same defects as Palenik/Beyea. The Board and the Commission have already found that the testimony of Beyea and Palenik addresses only consequences, and have ordered intervenors to supplement this testimony with a discussion of the probabilities of an accident at the Indian Point site that would cause the consequences described. The intervenors have failed to do so.

Plants" which would lead to the consequences they alleged in their previously filed testimony. The Board even went so far as to provide, in its October 1, 1982 Memorandum and Order, Board Question 1.3 which explicitly asks "What are the probabilities associated with the consequences presented in the testimony of Dr. Beyea and Mr. Palenik?" Id. at 10. Yet, the sponsoring intervenors have, incredibly, ignored any presentation of testimony upon the probabilities of the consequences claimed, much less testimony "at least as detailed as the consequences discussion."

III. Legal Standards

The parties are now in the identical circumstances that existed when the Commission issued its Orders in July and September, 1982. There are pending pieces of testimony which discuss consequences but ignore probability. The Commission stated clearly that this was unacceptable, and that such testimony must be supplemented with plant-specific probability testimony at least as detailed. The Board provided similarly on October 1 and 29. Instead of making an attempt to comply, the sponsoring intervenors have flouted the direct orders of both the Board and the Commission. Explicitly ignoring orders that any direct testimony must include plant-specific discussion of probability as well as consequences, intervenors have resorted to "business as usual" by continuing to present testimony that relates only to consequences. As the Commission has repeatedly made

clear, testimony with respect to consequences alone is but a fragment which cannot aid in addressing the central issue of risk. Only an equally detailed discussion of probability and consequences can intelligently speak to the question of overall risk.

10 C.F.R. § 2.707 (1982) empowers Licensing Boards "to dismiss a recalcitrant party for refusing to comply with a direct order to the Board." In re Public Service Electric & Gas Co. (Atlantic Nuclear Generating Station, Units 1 and 2), 2 N.R.C. 702, 705 (1975); accord In re Offshore Power Systems, 2 N.R.C. 813, 817 (1975).^{*} Although reserving their right to do so at a later date, licensees do not now request the dismissal of intervenors FOE/Audubon and New York State Attorney General, but instead move for the less drastic remedy that the testimony of the prospective witnesses referenced herein be stricken. The testimony offered does not meet the minimum standards of relevance to address the

1. 10 C.F.R. § 2.707 (footnote deleted; emphasis added), provides in relevant part:

On failure of a party . . . to comply with any prehearing order entered pursuant to § 2.751a or § 2.752, or to comply with any discovery order entered by the presiding officer pursuant to § 2.740, the Commission or the presiding officer may make such orders in regard to the failure as are just, including among others, the following:

- (a) Without further notice, find the facts as to the matters regarding which the order was made in accordance with the claim of the party obtaining the order, and enter such order as may be appropriate; or
- (b) Proceed without further notice to take proof on the issues specified.

central issue of this proceeding -- the overall risk of the Indian Point nuclear power stations. Accordingly, these submittals must be stricken from the record. This action is necessary because it is "the least severe [of] sanctions consistent with due process for licensee[s] and a reliable evidentiary record." In re Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), 11 N.R.C. 893, 903 (1980).

CONCLUSION

For the foregoing reasons, the testimony of Pisello and Piccioni, Geiger and Sidel, and Palenik and Beyea should be stricken.

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Respectfully submitted,

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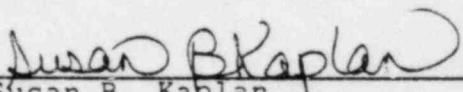
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Dated: February 9, 1983

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February 1983, I caused the foregoing motion to be served upon the parties to this proceeding listed on the Official Service List.



Susan B. Kaplan