11/12/82

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322
	)	(OL)
(Shoreham Nuclear Power Station, Unit 1)	)	

NRC STAFF POSITION ON THE BOARD'S PROPOSED DEPOSITION PROCEDURES

I. INTRODUCTION

On November 2, 1982, the Licensing Board requested each Party to file its position on the Board's authority to conduct a procedure for admitting into evidence selected portions of depositions of witnesses who would later be present at the hearing for further examination.[1/] The Board described its proposed procedure as follows:

> The depositions will be filed. Copies will be marked up in coordination with all of the parties in the margin as to which portion the parties seek to move into evidence, and at the time we are prepared to admit the depositions into evidence the parties can argue as to certain portions that should not be admitted because they had noted objections at the deposition. Tr. 12,565 at line 17.

1/ The depositions to be conducted, at the request of the Baord, encompass two different subjects. First, the County will conduct a deposition on LILCO's independent design verification performed by Torrey Pines. Second, all parties will participate in depositions on the Phase I (Onsite) emergency planning issues.

> And we would allow a short, determined in advance, time period for parties to ask whatever questions they wanted of the witnesses, without having to show that they could have asked it at the deposition. They can ask some of the same questions again if they want to highlight it, if for some reason they don't believe we can read the written word, which we state is incorrect, or if simply they forgot to ask some things or some things occurred after. But they will be very short time frames because we will have read the depositions. Id. at line 6.
>
> We will have had the record compiled. We will read it and then decide what questions we want to ask of the witnesses here. It may be that we have no follow-up questions, in which case we'd still allow the parties a short opportunity. But we are talking about hours, not days, for each party to ask its questions and the follow-up on the deposition. Id. at line 24.

For the reasons set out below, the NRC Staff concludes that the Board does have the necessary authority to carry out the procedure as outlined.

II. DISCUSSION

A. Under the Administrative Procedure Act the Board has the authority to order depositions, to regulate proceedings, and to admit relevant evidence.

Under the Federal Administrative Procedure Act, 5 U.S.C. §§ 551, et seq., a hearing officer is given express authority to:

> 1. Have depositions taken when the ends of justice would be served, 5 U.S.C. § 556(c)(4);
>
> 2. Regulate the course of a hearing, 5 U.S.C. § 556(c)(5);

> 3. Admit any oral or documentary evidence, providing only for the exclusion of irrelevant, immaterial, or unduly repititious evidence, 5 U.S.C. § 556(d).

The NRC's own rules of practice, 10 C.F.R. Part 2, make similar provision for the Board. See 10 C.F.R. §§ 2.718(d), 2.718(e), and 2.743(c). Furthermore, in 10 C.F.R. § 2.756, the Commission adds encouragement to Boards to use informal hearing procedures.

These express provisions provide the basic authorization for the procedure the Licensing Board proposes in this case. The Board has the authority to admit portions of depositions as evidence, with the witnesses available for further examination, as long as the portions are not irrelevant, immaterial, or unduly repetitious. The only evidentiary question that remains is whether admission of testimony in the form of depositions would somehow violate the rule against hearsay evidence.

B. In an administrative proceeding, the admission of depositions into evidence is not precluded by the hearsay rule.

Administrative agencies are not restricted by rigid rules of evidence, and it has long been held that use of hearsay evidence in administrative hearing is generally proper. See F.T.C. v. Cement Institute, 68 S.Ct. 793, 333 U.S. 683 (1948); See also Martin-Mendoza v. Immigration and Naturalization Service, 499 F.2d 918 (9th Cir. 1974), cert. denied 95 S.Ct. 789. The only limit to admissibility of hearsay evidence is its reliability and the fairness of its use. Calhoun v.

Bailar, 626 F.2d 145 (9th Cir. 1980), cert denied 101 S.Ct. 3033. Although the testimony in the depositions could possibly be characterized as hearsay, in the procedures outlined for this case by the Board, the reliability of the hearsay and the fairness in its use are insured by three opportunities for examination of the hearsay witness. First, the witness will be subject to cross-examination at the deposition itself. Second, the Board has provided that the witness will appear again at the hearing for cross-examination. Finally, the Board itself has retained an opportunity to question the witness at the hearing, and to observe his demeanor.

Traditionally, the hearsay rule was intended to insure the reliability of evidence by providing an opportunity for cross-examination of an out of court declarant. However, modern circumstances undercut the rule's utility. McCormick on Evidence § 261 (2d Ed. 1972) recommends improvements in existing hearsay practice.

> The traditional restrictions upon the admission of evidence of former testimony are understandable as the reflections on an earlier era when there were no court reporters, and as logical deductions from the premise that cross-examination is the only substantial safeguard for the reliability of this evidence. But when we view them in comparison with doctrines admitting other types of oral declarations as exceptions to the hearsay rule, such as declarations against interest, declarations of present bodily or mental state, and excited or spontaneous utterances, which seem far less reliable, the restrictions upon declarations in the form of sworn testimony in open court or official hearing, seem fantastically strict. As Morgan said, "Were the same strictness applied to all hearsay, evidence of reported testimony would constitute the only exception to the hearsay rule."
>
> In the light of this broader view, therefore, it seems that the most immediate improvement would

> come from the wider acceptance among the courts of the attitude that the present scheme of admissibility of former testimony should be applied with a reasonable liberality favoring in case of doubt the admission of this type of evidence.

Although McCormick addresses admission of former testimony, the same rationale would apply to admission of depositions. A deposition is reliably recorded, and the witness is under oath and subject to cross-examination at the time of his statements. Therefore there is nothing unreliable or unfair about its use in evidence.

The argument in favor of admission of depositions is even stronger in a case such as the present one, in which the deposed witness will be available at the hearing for further questioning and observation. The American Law Institute's Model Rules of Evidence recognizes this rationale in § 503(b) which states: "Evidence of a hearsay declaration is admissible if the judge finds that the declarant is present and subject to cross-examination."

Similarly the Federal Rules of Evidence would allow the introduction of depositions as evidence of the matters if the deponent is available for further examination in court. Rule 803 provides:

> HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * *
>
> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Where all parties are advised of the procedures in advance, and where the witnesses are under oath at the deposition and subject to further cross-examination at the hearing, no reason appears why depositions may not be used in an administrative proceeding to expedite that hearing.

C. Admission of depositions into evidence does not deny any Party's right to a fair hearing.

Section 189 of the Atomic Energy Act establishes that a "hearing" be held on an application for an operating license. Due process would require that the hearing be conducted not only in accordance with the applicable procedures, but in accordance with fundamental principles of fair play. See e.g., Swift & Co. v. United States, 308 F.2d 849 (7th Cir. 1962). The Board's procedure for admitting depositions into evidence, where those deposed witnesses will also appear at the hearing for cross-examination, does not deny any party of its rights to a full and fair hearing.

The essential elements of a full and fair hearing have been held to be the opportunities to present evidence, conduct thorough cross-examination, and to make arguments. See Boston and Maine Railroad v. United States, 208 F. Supp 661, at 669 (D. Mass. 1962), aff'd. 83 S. Ct. 117 (upholding the denial of a request for oral, in addition to written, argument). The procedures outlined by the Board in this case conform to this mandate. All parties have and will be given their chance to present evidence from depositions and other sources, to cross-examine on the evidence, and to make argument on its relevance and weight. All this will be done (along with the depositions themselves) in a public forum.

The admission of depositions into evidence does not constitute a substitute for the hearing, but rather a means to facilitate and focus that hearing. In this regard the Board's procedure is roughly analagous to the regulation allowing written and prefiled direct testimony. 10 C.F.R. § 2.743. As with prefiled testimony, each party will initially submit the evidence which in their view best addresses the issues. However, at the hearing all other parties are afforded the opportunity to cross-examine on that evidence and to rebut it. These latter opportunities are the essential elements of the full and fair hearing. Because they are provided for in the Board's proposed procedures, the depositions cannot be said to replace the hearing.

III. CONCLUSION

For the reasons set out above, the NRC Staff concludes that the Licensing Board may have depositions taken and admit relevant, material portions thereof into evidence.

Respectfully submitted,

David A. Repka

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Counsel for NRC Staff

Dated at Bethesda, Maryland
this 12th day of November, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that copies of NRC STAFF POSITION ON THE BOARD'S PROPOSED DEPOSITION PROCEDURES in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 12th day of November, 1982.

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