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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
James A. Laurenson, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

In the Matter of	Docket No. 50-322-OL-3
LONG ISLAND LIGHTING COMPANY	(Emergency Planning Proceeding)
(Shoreham Nuclear Power Station, Unit 1)	August 13, 1984

MEMORANDUM AND ORDER
CONCERNING SUFFOLK COUNTY'S OFFER OF PROOF AND
MOTION FOR RECONSIDERATION OF TIME LIMITS ON CROSS-EXAMINATION

I. Procedural History

Pursuant to an agreement among the parties, cross-examination of the panel of FEMA witnesses was scheduled for four days commencing on July 10, 1984. Pursuant to a prior order of the Board, all parties filed cross-examination plans one week earlier on July 3. The parties submitted time estimates for this cross-examination as follows: New York - 1 day; LILCO - 1/2 day; and Suffolk County - 4 to 5 days. On July 10, the Board announced that it had reviewed the direct testimony of the FEMA witnesses, the cross-examination plans and time estimates, and that the Board found Suffolk County's estimate of 4 to 5 days of cross-examination to be "excessive and unreasonable." Accordingly, the Board placed a time limit of 2 days on Suffolk County's questioning of

these witnesses. During the course of the week that amount of time was enlarged to approximately 2½ days. At approximately 5:15 pm on Friday, July 13, the Board indicated that it would allocate another 30 minutes or so if that amount of time would be satisfactory to the County. The County declined this offer.

Pursuant to the procedures announced on July 10, Suffolk County filed an Offer of Proof and Request for Reconsideration of the limitations on the County's cross-examination of the FEMA witness panel. In essence, the County asserts that it did not have an opportunity to question the panel on their testimony on Contentions 21, 61 and 64; that it had begun, but not completed, its interrogation concerning the testimony on the loss of offsite power (Contentions 93-96); and that it was unable to pursue additional lines of questioning on Contention 22.D. The County then submitted approximately five pages, consisting of 33 items, it claims that it would have proved upon further cross-examination on the above testimony. The County's Motion for Reconsideration asserts that its initial estimate of 4 to 5 days of cross-examination was reasonable and that the Board should allow the County to complete its inquiry into the 33 items listed in the Offer of Proof. New York State "fully supports" the County's motion.

FEMA, LILCO, and NRC Staff oppose the County's Request for Reconsideration. FEMA analyzed the record on the testimony of its witnesses on each of the eight contentions listed by Suffolk County and submitted the following: (1) Contention 21 - all three items in the offer of proof were the subject of cross-examination by New York; (2)

Contention 22.D - the County spent 27 pages of testimony exploring aspects of this limited contention and the County's offers of proof were already discussed or constitute argument; (3) Contention 61 - this contention was the subject of New York's cross-examination, there has been a full disclosure, and one offer of proof is beyond the scope of the contention; (4) Contention 64 - this contention was inquired into by New York and by Suffolk County; (5) Contentions 93-96 - certain issues were inquired into by the County, others deal with implementation to be determined during an exercise or with material which has not been received by FEMA, but as to Item 16 concerning FEMA testimony at Question 119, FEMA does not object to further cross-examination. FEMA concludes that the motion should be denied because Suffolk County has not sustained its burden in this matter.

LILCO contends that Suffolk County was afforded ample opportunity to question the FEMA witnesses on the contentions in issue. LILCO states that the County's cross-examination of the FEMA witnesses consumed approximately 600 pages of the 980 pages of transcript generated during the four days of hearing that week. It further asserts that of 27 hearing hours available during those days, the County cross-examined for approximately 22 hours. LILCO notes that even though the Board cautioned the County during its cross-examination of the FEMA witnesses that its questioning was not eliciting material evidence, the County did not attempt to modify its cross-examination. Although the Board initially limited the County to two days of cross-examination, that limit was extended on two occasions by the Board on its own

initiative. LILCO concludes that based upon the cited legal authorities and the above facts, the Board acted properly and did not abuse its discretion to limit the County's cross-examination. LILCO then proceeds to analyze the County's 33 offers of proof and to submit its response. In essence, LILCO asserts that the Offer of Proof raises no area of inquiry which (1) would lead to relevant, probative evidence which is important to a decision in this matter; and (2) has not already been responded to in full by the FEMA witnesses. LILCO's analysis of the Offer of Proof is as follows: (1) Contention 21 - In response to cross-examination by New York, the witnesses discussed in detail their review of this aspect of the LILCO Plan and a foreign language brochure; (2) Contention 22.D - there are 16 pages of FEMA testimony on this matter which disproves the seven items listed by the County and further questioning will not result in probative or material evidence; (3) Contention 61 - the transcript establishes that this single item in the Offer of Proof has been the subject of FEMA testimony in response to cross-examination by New York; (4) Contention 64 - again, in response to New York's cross-examination, the FEMA witnesses testified concerning the necessity of forecasting wind shifts and that LILCO's ability to do so would be investigated during a FEMA exercise; and (5) Contention 93-96 - these items are variously described as argumentative, unknown until a FEMA exercise, irrelevant, already the subject of extensive cross-examination or beyond the scope of the material reviewed by FEMA. As to Item 16, LILCO also asserts that this amounts to a challenge to the planning basis established by NRC regulations.

NRC Staff finds "ample grounds to support the Board's exercise of discretion in limiting the County's cross examination." NRC Response at 2. After reviewing NRC regulations and case law, the Staff finds that the time allotted to the County's cross-examination of the FEMA witnesses was ample and reasonable. It notes the County's failure to demonstrate that additional relevant and material facts would be generated by further questioning. It also notes the County's failure to explain why it did not allocate its time to include the 33 items listed in its Offer of Proof in light of the Board's several admonitions to the County that much of its cross-examination was repetitive, argumentative or unfocused. NRC Staff notes that the Board had three work days to review all of the cross-examination plans and there was no unwarranted delay in announcing the limitation on July 10.

II. APPLICABLE LAW

The only authority cited by Suffolk County in support of its Motion for Reconsideration is the NRC regulation on evidence at 10 C.F.R. § 2.743(a), which provides that a party has the right to "conduct such cross-examination as may be required for a full and true disclosure of the facts."

At the time we announced our limitation on the cross-examination of the FEMA witness panel, we set forth the legal authority upon which we relied. Suffolk County has not challenged or distinguished any of those authorities. Accordingly, we will briefly summarize the legal authorities we relied on.

We begin with the NRC Statement of Policy on the Conduct of Licensing Proceedings, 13 NRC 452 (1981) where it is stated that a licensing board has the duty to "set and adhere to reasonable schedules." Id. at 454. We also looked to the Partial Initial Decision of the licensing board in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2) ____ NRC ____ (June 22, 1984) (Slip. Op. at 8-12).

In MCI Communications Corp. v A.T. & T., 708 F.2d 1081 (7th Cir. 1983), AT&T estimated, prior to trial, that the trial of this antitrust case would take eight to nine months. The District Court reviewed the identity of the witnesses and the time estimates of the parties. The Court thereupon imposed a 26 day time limit on the presentation of each party's case in chief. On appeal, AT&T argued that the imposed time limits were wholly arbitrary and amounted to a denial of due process. The Seventh Circuit Court of Appeals disagreed with AT&T and stated as follows:

> Litigants are not entitled to burden the court with an unending stream of cumulative evidence. [Citations Omitted.] As Wigmore remarked, "it has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment and whim . . . . The rule should merely declare the trial court empowered to enforce a limit when in its discretion the situation justified this. 6 Wigmore, Evidence § 1907 (Chadbourne Rev. 1976). Accordingly, Federal Rule of Evidence 403 provides that evidence, although relevant, may be excluded when its probative value is outweighed by such factors as its cumulative nature, or the "undue delay" and "waste of time" it may cause. Whether the evidence will be excluded is a matter within the district court's sound discretion and will not be reversed absent a clear showing of

abuse. [Citations Omitted.]

> The time limits ordered by Judge Grady had the effect of excluding cumulative testimony, although in setting those limits the district court apparently fixed a period of time for the trial as a whole. This approach is not, per se, an abuse of discretion. This exercise of discretion may be appropriate in protracted litigation provided that witnesses are not excluded on the basis of mere numbers. See Padovani v. Bruchhausen, 293 F.2d 546, 549-50 (2d Cir. 1961). Moreover, where the proffered testimony is presented to the court in the form of a general summary, the time limits should be sufficiently flexible to accommodate adjustment if it appears during trial that the court's initial assessment was too restrictive.

In addition to the foregoing legal authorities cited by the Board at the time of its July 10 ruling, we also note additional legal authorities. NRC Rules of Practice do not authorize unlimited cross-examination. A licensing board is authorized to regulate the course of the proceeding and the conduct of the participants. 10 C.F.R. § 2.718. The Board, in order to prevent unnecessary delay or an unnecessarily large record, may take "necessary and proper measures to prevent argumentative, repetitious or cumulative cross-examination. 10 C.F.R. § 2.757(c).

The NRC Staff's Response to the instant motion cites the additional case of Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2) ALAB-244, 8 AEC 857, 869 (1974). In Prairie Island, the Appeal Board observed that "we have already noted that a licensing board has the power to insure that cross-examination is kept

within proper bounds insofar as scope is concerned." Id. at 868. The Appeal Board went on to add that there was nothing to preclude a licensing board from asking an intervenor to state what the interrogation will attempt to demonstrate. If such an offer did not establish that such questioning would result in valuable development of a full record on the issue, the board was empowered to preclude or limit such interrogation. In footnote 16, the Appeal Board examined the import of Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), which, as pertinent here, is identical to 10 C.F.R. § 2.743 (a) relied on by the County. The Appeal Board concluded "that provision has never been understood to confer on anyone unfettered rights to cross-examine witnesses." Id. at 869 n. 16.

III. ANALYSIS

When we imposed the two day limitation on the County's cross-examination of the FEMA witnesses, we expected that this would allow the County ample time to inquire into all of the areas described in its cross-examination plan. We continue to believe that efficient and effective cross-examination of these witnesses should not have exceeded two days. It follows that we believe that the County wasted much of the time allotted to it. Illustrative of this fact is our admonition to counsel for the County on July 11 as follows:

> JUDGE LAURENSON: Before you go on to the next contention, I want to make an observation for the record, since you had indicated yesterday that the County will be requesting an extension of time.

> I think the three hours that have been spent on the last contention, No. 26, have been illustrative of excessive, cumulative testimony, involving substantial time spent with witnesses, the FEMA witnesses reading into the record various items from the LILCO plan or procedures. Quite frankly, all of this, I think, has been in the record before and that is why I think it is cumulative. I think that you have a right to inquire to a certain extent into what these witnesses know and what went into their background, but much of that was duplicative of what you asked yesterday. I think that since you are going to ask for an extension of time, I want to put on the record that most of the three hours that we just spent, in the Board's view, was a waste of time.

Tr. 12,527-8.

The County has not challenged LILCO's data concerning the relative amount of time spent by the County in cross-examination versus the cross-examination of all other parties. LILCO calculates that 600 out of 980 pages and 22 out of 27 hours during the week in question were taken up by Suffolk County's cross-examination. This controversy illustrates a problem that has permeated this hearing: the lopsided majority of the time spent in hearing has been taken by Suffolk County's cross-examination and much of that interrogation has been pressed to unreasonable lengths in questioning witnesses about minute implementing procedures. The Board believes that it has allowed the County ample leeway, perhaps too much, to develop its case through cross-examination. On only one other occasion during the 73 days of hearing did the Board curtail such examination by setting a time limit. We find that the County has failed to present any legal authority or facts to support its

claim "that the Board erred in arbitrarily limiting the County's ability to pursue this right" or that "the Board's ruling precluded the County from conducting meaningful cross-examination on at least eight contentions." County Offer of Proof at 9. Rather we find that the two days initially given to the County was adequate to conduct the necessary cross-examination. Indeed, we extended that time to approximately 2½ days. Instead of pursuing the matters now asserted in the Offer of Proof, the County elected to spend several hours of its allocated time in asking FEMA witnesses to find and read various provisions of the LILCO Plan and implementing procedures. We must conclude that this election by the County reflected its determination that such cross-examination was more important to its case than the matters now set forth in its Offer of Proof. The County makes no attempt to explain why it elected not to pursue the matters set forth in its Offer of Proof.

In any event, the NRC regulation provides that a party has a right to "conduct such cross-examination as may be required for a full and true disclosure of the facts." 10 C.F.R. § 2.743(a). As noted by FEMA and LILCO, many of the areas listed in the County's Offer of Proof were the subject of cross-examination by New York. The NRC regulation does not give each party the right to duplicate the cross-examination of other parties where such cross-examination has resulted in a "full and true disclosure of the facts." Moreover, as conceded by the County, several areas already have been the subject of the County's cross-examination but such interrogation had not been completed. We see

no need to rule on each of the 33 specific items listed in the Offer of Proof. We agree with the conclusions reached by FEMA and LILCO after their item by item review of the Offer of Proof. The Offer of Proof fails to establish (1) that the questions proffered would lead to relevant, probative evidence which is important to a decision in this proceeding; and (2) that a true and full disclosure of the facts is absent from the record. Thus, on the merits, we deny the County's Motion for Reconsideration in its entirety.

However, as a matter of discretion we have the authority to regulate the course of the hearing. 10 C.F.R. § 2.718. The FEMA testimony at Question 119 asserts that a power failure during an evacuation would be significant in its effect. The County has not inquired into this matter. FEMA states that it has no objection to cross-examination in this area. While we find that the County has established no legal right to this inquiry, we find that it is of a very limited nature and would not significantly affect the completion of the hearing or the size of the record. Accordingly, as a matter of discretion, we grant the County's request to reconsider Item 16 on page 8 of the Offer of Proof. In all other respects the Offer of Proof and Motion for Reconsideration are denied.

ORDER

WHEREFORE IT IS ORDERED that the Suffolk County Offer of Proof and Motion for Reconsideration of the Board's Limitations on

Cross-Examination of the FEMA Witness Panel is DENIED in all respects except Item 16 on page 8 which is GRANTED.

ATOMIC SAFETY AND
LICENSING BOARD

JAMES A. LAURENSON, Chairman
Administrative Law Judge

Bethesda, Maryland