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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence Brenner, Chairman
Dr. George A. Ferguson
Dr. Peter A. Morris

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OL September 7, 1984

MEMORANDUM AND ORDER RULING ON LILCO'S MOTIONS TO STRIKE PORTIONS OF SUFFOLK COUNTY'S TESTIMONY

Introduction and General Rulings

Suffolk County has filed joint testimony of six witnesses on its emergency diesel engine contentions, consisting of 184 pages and exhibits. 1/ Pursuant to the established schedule, on August 7, 1984, LILCO filed a motion to strike large portions of the County's testimony. On August 14, 1984, the County filed its opposition to LILCO's motion. The NRC Staff, in its August 16, 1984 answer, largely opposed LILCO's

1/ It is not clear which exhibits filed by the County, or by LILCO or the Staff, are intended to be moved into evidence, and which ones are intended only to be marked for identification. The parties shall clarify this at the hearing.

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motion to strike, with the exception of limited parts which the Staff agreed should be struck. Pursuant to our order, on August 17, 1984, the County specified which of its witnesses were sponsoring each answer in the testimony. LILCO filed an August 29, 1984 supplemental motion to strike, purportedly based on the County's specification of witnesses. On September 5, 1984, the County and NRC Staff filed separate answers opposing LILCO's supplemental motion.

The Board has considered the above filings. In general, we find LILCO's motion does not demonstrate that the large amount of County evidence it seeks to strike fails to satisfy the requirements for admissibility: that the evidence be relevant, material and reliable and not unduly repetitious. 10 C.F.R. § 2.743(c). We agree with the County and Staff that LILCO's broad objection to large portions of the testimony as being improperly supported by underlying facts does not satisfy the standards for striking testimony where there are expert witnesses who can be cross-examined as to their bases. See Federal Rules of Evidence 702 and 705. The Board does not find the County's testimony to be so conclusionary with such an absence of underlying basis and reasoning to cause us to find that, in effect, there has been a default in the requirement of the NRC's rules (§ 2.743(b)) to provide written direct testimony in advance of trial.

LILCO's citations in its supplemental motion of some general deposition questions and answers by four of the County's witnesses on

the subject of their expertise in finite element analysis and fracture mechanics or stress analysis does not support a motion to strike the witnesses' specific use of these subjects in their testimony. 2/ LILCO can focus specific cross-examination questions on the witnesses' collective or individual expertise to testify to specific statements they make on the use of finite element analysis and fracture mechanics.

While on the subject of LILCO's supplemental motion, we rule that the remainder of it is also denied. Given the witness panel procedure, there is no purpose in deciding whether one or more County witnesses are qualified to participate in an answer, when there would still remain at least one County witness to sponsor the answer whose expertise to so testify is not being challenged by the motion to strike. The only remaining claim in the supplemental motion is that Dr. Anderson, by his deposition and qualifications, has shown he is not qualified to testify "in the area of foundry practices." Supplemental motion, at 10 (para. 4) and 11 (para. 6). Again, the general answers in the deposition, when viewed with other deposition answers on Dr. Anderson's experience in casting problems and his credentials in metallurgy and materials

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2/ Since LILCO is arguing that none of the County's witnesses are qualified to give such testimony, the supplemental motion on this subject (which constitutes the bulk of the motion) is untimely. There was no need for a specification of which witnesses were answering each question for LILCO to be able to file the same motion. Indeed, LILCO's original motion did make the same claim, albeit without the support of the citations to the depositions.

engineering, do not establish that the specific testimony, which may or may not require expertise on a subject which LILCO chooses to label "the area of foundry practices," should be stricken. LILCO may cross-examine Dr. Anderson about what knowledge he has to give the particular answers complained of in LILCO's supplemental motion.

Returning to LILCO's initial motion to strike, we disagree with LILCO's argument that excerpts from depositions of its witnesses and experts who have been retained by LILCO or its agents or vendors should be barred from evidence under F.R.C.P. 32(a). To the extent the deponents are LILCO witnesses (many of them are), even Rule 32(a) read alone would permit this use by the County, which is surely in the nature of contradicting or impeaching the expert conclusions of LILCO's witnesses.

More importantly, Rule 32 must be read with the Federal Rules of Evidence -- the two are cumulative. As indicated by the first phrase of Rule 32(a)(1), use of a deposition may be permitted by the Federal Rules of Evidence even though not specifically permitted by Rule 32. See also 4a J. MOORE, FEDERAL PRACTICE ¶ 32.02[1] and ¶ 32.04 (at 32-22 to 32-23) (2d ed. 1984). Under a combination of Federal Rules of Evidence 801(d)(2) (C) and (D), the deposition statements of the expert witnesses being sponsored by LILCO, and of the experts employed by LILCO or its diesel engine vendor or consultants, are admissions by LILCO, unless and until contradicted or disproved at trial by LILCO. LILCO has the capability to do so, since the deponents are in a contractual or other

relationship with LILCO to provide consulting and other services regarding the diesel engines.

In addition, Federal Rule of Evidence 703 would permit the County's expert witnesses to base an opinion on the statements of LILCO's experts and other experts, even if such relied upon statements themselves would not be admissible in evidence. Of course, the test in Rule 703 is reasonable reliance, which the Board has discretion to judge depending, in part, on our view of the reliability and probative value of deposition statements being relied upon. The only hesitation we have in this regard is with respect to the excerpts from the deposition of the American Bureau of Shipping (ABS) employees, which we discuss in our specific rulings, below.

In summary, the deposition excerpts of LILCO witnesses, consultants or vendor being relied on by the County are admissible based on our above ruling. The deposition excerpts of the ABS witnesses will be ruled on below. The deposition excerpt of an NRC Staff inspector, Mr. Foster, will be excluded below on independent grounds of not being material to or probative of the contentions admitted for litigation.

LILCO also complains that the County should not be permitted to place entire reports, such as FAA and Owners' Group reports, into evidence but must specify only those portions material to the contentions. Again, it is not clear to us that all of these proposed

exhibits are intended to be moved into evidence. See note 1, supra. The parties have a joint obligation to agree on which parts of large reports are material to the fullest extent possible, and to raise disputes before us only about those portions which the parties dispute. As of now, no party has satisfied this obligation to be more specific. The parties shall attempt to jointly satisfy their obligation before evidence is moved into the record. In any event, as has been our practice before in this case, we will not rely in our findings of fact on any controversial matter which is contained in the record only in some large exhibit and was never addressed in either the written or oral testimony.

Rulings Striking Particular Portions of Testimony

Matters not ruled on below have been found by the Board to constitute evidence of sufficient relevance, materiality and reliability in view of the issues in controversy so as to withstand LILCO's motion to strike. The Board hereby strikes the testimony noted below. The references are keyed to the County's July 31, 1984 joint direct testimony.

1. P. 12, last Q & A and note 1. This broad quality assurance testimony lacks any specificity or nexus to the four diesel components at issue and therefore is not material or probative of the specific issues in controversy. If such testimony were allowed, it would lead to

the digressive, broad and unfocused inefficient collateral inquiry into overall quality assurance practices which we rejected in our denial of the County's proposed contention 4.

2. P. 14, lines 3 and 4, ". . . and that additional parts and components of the EDGs will not fail." This is beyond the scope of the contention which is limited to the four components at issue.

3. P. 36, line 15, from "TDI does not use. . . " to p. 37, line 6, ". . . was 'ineffective'," including note 45. The reasons are as stated in paragraph 1, above.

4. P. 42, beginning with the answer "A. For several reasons, . . ." to p. 43, ending with and including note 53. This is insufficiently material and probative of the admitted specific piston issues to allow such a collateral inquiry into the testing and sampling procedures without any evidence in the parts being stricken that the Shoreham operating conditions would cause cracking contrary to the FAA analysis at issue. See our July 17, 1984 order, at 5. The broad quality assurance portion of this testimony is being struck for the reasons stated in paragraph 1, above.

5. P. 74, line 8, from ". . . and the TDI Owners Group. . ." to the end of the answer. The Board strikes this testimony because it is insufficiently reliable hearsay, and therefore not probative. The

quoted remark is unclear and ambiguous and not worth a collateral inquiry to determine what was intended by the declarant. Accordingly, this out of court statement may not be admitted, even under Federal Rule of Evidence 801(d)(2). Nor is it admissible under Rule 703, because it is not reasonable for an expert or this Board to rely on an out of context ambiguous statement.

6. P. 90, line 18, from "As described above. . .," to p. 91, line 14, "defects," including note 115. This broad quality assurance testimony is being struck for the reasons stated in paragraph 1, above.

7. P. 109, lines 12 and 13, "Nippon Kaiji Kyokai ("NKK"), Det Norske Veritas . . .," and p. 122, entire first Q & A. These classification societies are beyond those specified in the crankshaft contention, and therefore beyond the scope of the contention. The related exhibit 42 is also struck.

8. P. 132, last Q, from "Q. Based upon . . .," to p. 133, end of first answer, including note 147. Speculation on what the ABS might do in the future is not reliable evidence. The reference to the ABS deposition does not save this evidence, because the excerpt is merely the abstract truism that if actual information is materially different from the information ABS relied on, then the conclusion of ABS might be something different. Although this is the one example of the reference to the ABS deposition that we can now rule crosses the line of

unreliability, we also have concerns over some of the other references to the deposition of the ABS employees. We warn the parties that we will be hesitant about making findings on any material controversial points that require findings of what the ABS did or intended based on out of court declarations by the ABS deponents.

9. P. 157, first Q, from "Q. Do you have . . .," to the end of the answer on p. 159, line 14, ". . . on the EDGs are 'benign'." No nexus to the Shoreham diesels is shown to justify this collateral inquiry into the cylinder block experience in these marine and other non-nuclear diesel engines. It is not a productive approach, even if generally, but not directly, material to the determination of the merits of the cylinder block issue before us. Indeed, the County testimony being struck is presented for the purpose of trying to argue that we should not rely on the references to these other engines in the FAA cylinder block report (County Diesel Ex. 7). We will not. See p. 6, supra. If there is testimony by LILCO or the Staff which relies on the cylinder block experience at engines which are the subject of the testimony we are here striking, then the County can focus on such specific reliance by cross-examination based on the same references in this excluded testimony. None of the testimony being excluded is given by or requires the County witnesses -- it's all based on external references.

Conclusion

Portions of the County's proposed testimony will not be admitted into evidence, as set forth above. The County shall conform the copy of its testimony to be bound into the transcript with this order. However, the struck testimony shall be marked through in such a way that it is still legible so that it may serve as an offer of proof. Any party wishing to assure itself that the County's markup of the testimony correctly conforms to the ruling in this order may do so in advance of the day the County's testimony is offered into evidence.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Lawrence Brenner

Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
September 7, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COURTESY NOTIFICATION

As circumstances warrant from time to time, the Board will mail a copy of its memoranda and orders directly to each party, petitioner or other interested participant. This is intended solely as a courtesy and convenience to those served to provide extra time. Official service will be separate from the courtesy notification and will continue to be made by the Office of the Secretary of the Commission. Unless otherwise stated, time periods will be computed from the official service.

I hereby certify that I have today mailed copies of the Board's "Memorandum and Order Ruling on LILCO's Motions to Strike Portions of Suffolk County's Testiomny" to the persons designated on the attached Courtesy Notification List.

Valarie M. Lane
Valarie M. Lane
Secretary to Judge Lawrence Brenner
Atomic Safety and Licensing Board

Bethesda, Maryland
September 7, 1984

Attachment

Anthony F. Earley, Jr., Esq.
Darla B. Tarletz, Esq.
Counsel for LILCO
Hunton and Williams
707 East Main Street
P.O. Box 1535
Richmond, VA 23212

Odes L. Stroupe, Jr., Esq.
Counsel for LILCO
Hunton & Williams
BB&T Building
333 Fayetteville Street
P.O. Box 109
Raleigh, North Carolina 27602

E. Milton Farley, III, Esq.
Counsel for LILCO
Hunton & Williams
P.O. Box 19230
2000 Pennsylvania Avenue, N.W.
Washington, DC 20036

Richard J. Goddard, Esq.
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Fabian G. Palomino, Esq.
Special Counsel to the Governor
of the State of New York
Executive Chamber - Room 229
State Capitol
Albany, New York 12224

Alan R. Dynner, Esq.
Douglas J. Scheidt, Esq.
Counsel for Suffolk County
Kirkpatrick, Lockhart, Hill,
Christopher and Phillips
1900 M Street, N.W., 8th Floor
Washington, DC 20036