

DOCKETED
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
COMMONWEALTH EDISON COMPANY
(Braidwood Station, Units 1 and 2

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH
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Docket Nos. 50-456
50-457

MOTION TO REQUIRE INTERVENORS
TO FILE OFFERS OF PROOF

Pursuant to the Commission's rules of practice, 10 C.F.R. § 2.730, Applicant Commonwealth Edison Company ("Applicant" or "Edison") hereby requests the Atomic Safety and Licensing Board ("Licensing Board") to order Intervenor Bridget Little Rorem, et al. ("Intervenors") to identify in writing facts and conclusions which Intervenor intend to prove in the hearing as part of their affirmative case which are neither the subject of Intervenor sponsored direct testimony nor confined to cross examination within the scope of other parties' direct testimony. Specifically, Edison asks that the Licensing Board require Intervenor to file written offers of proof describing expected testimony from witnesses Intervenor consider adverse, i.e., witnesses not preparing written direct testimony for Intervenor, whether such testimony comes in the form of oral direct testimony from a witness not sponsored by

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any party or in the form of "cross examination" outside the scope of direct testimony. Additionally, Intervenor should be required to identify any exhibits not identified in direct testimony which they intend to offer as part of their direct case.

Introduction

On February 3, 1986, the Licensing Board issued its Memorandum (Confirming Ruling Made at Prehearing Conference of January 27, 1986) directing the parties to identify the witnesses whom they intended to examine in the hearing on matters related to Intervenors' Amended Quality Assurance Contention. In their responsive pleading of February 28, 1986, entitled "Intervenors' Identification of QA Witnesses" [hereinafter referred to as "Identification"] Intervenors listed fifty prospective witnesses for the proceeding.

For three expert witnesses listed, Intervenors provide resumes of technical qualifications. Applicant assumes that Intervenors intend to sponsor these witnesses and will proffer written direct testimony for them in accordance with the Licensing Board's schedule.

The Identification, by listing Applicant and Staff witnesses and identifying them as adverse witness, also suggests that Intervenors intend to interrogate these witnesses to develop parts of their affirmative case. Such an approach

would in all likelihood involve questioning beyond the scope of Applicant's or Staff's direct testimony.

Moreover, Intervenors also identify individuals who will not voluntarily testify on Intervenors behalf, and who are not Applicant or Staff witnesses, but whom Intervenors wish to call in this proceeding as adverse witnesses to present part of their affirmative case. Some potential witnesses in this category are employees of Commonwealth Edison Company or its contractors whom Applicant does not intend to call. There appear to be others who are affiliated with the Nuclear Regulatory Commission whom the NRC Staff has not identified as witnesses. In addition, there are other potential witnesses who may be former Braidwood employees or former Nuclear Regulatory Commission employees who are under the control of neither the Applicant or NRC Staff. With respect to these categories of witnesses, Intervenors indicate that "In the event that any such prospective witness (not employed by or under the control of Intervenors) is not called to testify in this proceeding by another party, Intervenors would seek to compel their attendance and testimony by subpoena sought pursuant to 10 C.F.R. § 2.720 or by order of the presiding officer pursuant to 10 C.F.R. § 2.720(h)(2)(i) in the case of NRC personnel." Identification at pp. 1-2.

To the extent that Intervenors intend to use adverse witnesses to put in a portion of their direct case which is

neither the subject of written direct testimony nor of cross examination confined to the scope of Applicant's or Staff's direct testimony, Intervenors should be obliged to put the other parties and the Licensing Board on notice as to the scope of the anticipated testimony and any documents or other exhibits Intervenors expect to sponsor in their direct case. The obligation to give reasonable notification of the subject matter of such affirmative testimony arises from fundamental fairness and from the Commission's policy against conducting hearings by surprise. The appropriate vehicle for giving such notice in the absence of the ability to prepare written direct testimony is a written offer of proof. The Licensing Board should require Intervenors to file such offers of proof sufficiently in advance of the appearance of the particular witness to provide Applicant and Staff adequate time to prepare cross examination and rebuttal. The offers of proof should describe with particularity the expected testimony and should identify any documents which will be used in the examination of the witness.

Argument

The structure of Licensing hearings necessitates that Applicant have reasonable notice of the factual issues to be litigated in the hearing. Applicant has the ultimate burden of proof with respect to all factual issues put into controversy

by Intervenors. On those which are obvious from the Contention, Applicant of course will meet its burden through written direct testimony and exhibits to that testimony. However, Intervenors have indicated that they have their own direct case to present, but have given no hint as to its content. Since there are over 65 separate sub-contention items, Applicant cannot even begin to guess at the content or scope of Intervenors' direct case.

Under these circumstances, it would be absurd to expect Applicant to anticipate all possible factual issues arguably raised by or related to the Contention and prepare direct testimony on them. Given Applicant's duty to carry the burden of persuasion on all factual issues put into controversy by Intervenors, it is fundamentally unfair to subject Applicant to trial by lottery by leaving the identification of important factual issues which Intervenors intend to raise to the day when a particular witness is called to testify orally. Such a procedure simply invites Intervenors to look for targets of opportunity during the hearing.

Intervenors have options regarding presentation of their affirmative case. It is beyond cavil that Intervenors can rest their entire case on cross-examination of Applicant and Staff witnesses if they so desire. Tennessee Valley Authority (Hartville Nuclear Power Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 356 (1978). But if they do so they

are limited to rebutting factual matter put into the record by Applicant and Staff. Id. It is well established in NRC licensing practice that the scope of cross-examination is limited to the scope of direct testimony. Intervenors may attempt to show that Applicant has not met its burden of proof on the issues dealt with in direct testimony by cross-examination of Applicant's and Staff's witnesses within the scope of the direct testimony of those witnesses. However, Intervenors may not broaden the scope of cross examination as a back door method of presenting their direct case.

If, on the other hand, Intervenors undertake to present an affirmative case beyond the scope of the other parties' direct testimony, they assume additional obligations. The basic obligation regarding presentation of a party's affirmative case is contained in 10 C.F.R. § 2.743(b), which states: "The parties shall submit direct testimony of witnesses in written form, unless otherwise ordered by the presiding officer on the basis of objections presented." The word "shall" in this section indicates that this regulation is mandatory and not precatory. 10 C.F.R. Part 2, Appendix A also states in § V(d)(2): "The parties are required to submit direct testimony in written form" Again, this regulation indicates that written direct testimony is mandatory and not optional.

The purpose of having prefiled written direct testimony is "to expedite the hearing process," 10 C.F.R. Part 2, Appendix A Section V (d)(2), by "focus[ing testimony] on that which is really significant and material to the matter in controversy." Long Island Lighting Company (Shoreham Nuclear Power Plant, Unit 1), LBP-82-19, 15 N.R.C. 601, 621 (1982). Trial of factual issues cannot be focused unless the opposing parties have adequate notice of the evidence they will have to defend against or rebut in order to enable them to make reasonable preparation for the hearings. Cf. Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 N.R.C. 1423, 1456 (1982); Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-83-20A, 17 N.R.C. 586, 589 (1983). Indeed, the requirement to give adequate notice of the factual issues to be litigated "is not a mere technicality but an essential ingredient of [an orderly] process." Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 N.R.C. 681,730 (1985). In short, Licensing Board hearings "are not to become the setting for 'trial by surprise'." Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 2), LBP-82-107, 16 N.R.C. 1667, 1670 (1982).

When parties attempt to circumvent the rule requiring prefiling of written direct testimony by broadening cross-examination of other parties' witnesses beyond the scope of

direct testimony, licensing boards have "insist[ed] on some offer of proof or other advance indication of what the cross-examiner hopes to elicit from the witness." Waterford, supra, 17 N.R.C. at 1096. In fact, in a case remarkably like the present one, intervenors, represented by one of the present counsel for Intervenor herein, had initially proposed to call sixty witnesses in a licensing board hearing. In upholding the licensing board's limitations on Intervenor testimony, the Appeal Board noted: "Nor does the record reflect the intervenors' required proffer of testimony setting forth the substance of each witness's proposed testimony." Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 N.R.C. 59, 76 (1985) (emphasis added). See also Houston Lighting & Power Co., (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 376-377 (1985) (finding no error in the Licensing Board's limitation of intervenor's cross-examination due to intervenor's failure to make required offer of proof).

The same considerations which necessitate pre-filing of written direct testimony and offers of proof for cross-examination outside the scope of direct testimony apply, perhaps with even greater force, where a witness is characterized as adverse and preparation of written direct testimony may be impracticable. Intervenor must have a basic outline, gleaned from discovery or interviews of witnesses, of the testimony they expect such adverse witnesses to give. Otherwise the

interrogation of such witnesses is a charade, a fond hoping that "something will turn up." Similarly, given the massive amount of documents that have been produced by Applicant and Staff, pre-notification of the documents on which Intervenors intend to rely is appropriate. Mandatory offers of proof and identification of exhibits which are part of Intervenors' affirmative case will "expedite the hearing process," "focus [testimony] on that which is really significant and material," and prevent "trial by surprise."

Conclusion

If Intervenors intend to use witnesses to present parts of their direct case in circumstances in which preparation of written direct testimony is infeasible, they should inform the other parties of the subject matter of such testimony by a proffer of testimony, preferably in the form of a written offer of proof. Similarly, if documents not identified in direct testimony are to be used, they should be formally identified prior to use. Such offers of proof and identification of documents should be timely enough to give adequate lead time to Applicant and Staff to prepare testimony to meet the issues raised therein. Accordingly, for all of the reasons stated herein, Applicant respectfully requests the Licensing Board to issue an order requiring offers of proof for all witnesses Intervenors intend to use to present evidence not

covered by their own written direct testimony and which will likely be beyond the scope of Applicant's or Staff's direct testimony and to identify documents which they expect to introduce as part of their direct case.

Respectfully submitted,

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