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RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter Of:	)	
	)	
COMMONWEALTH EDISON COMPANY	)	Docket Nos. 50-456
	)	50-457
(Braidwood Station, Units 2 and 2)	)	
	)	

APPLICANT'S RESPONSE TO INTERVENORS' MOTION TO STRIKE CERTAIN PORTIONS OF THE PREFILED DIRECT TESTIMONY OF LARRY SEESE

Pursuant to 10 C.F.R. §2.730(c), Applicant Commonwealth Edison Company ("Applicant" or "Edison") hereby responds to those portions of Intervenors' Motion to Strike Certain Portions of Applicant's Prefiled Testimony ("Intervenors' Motion") served on it on April 29, 1986, which are directed to the prefiled direct testimony of Larry Seese.

In the first part of this response, Applicant sets forth the rules of general applicability which govern issues of admissibility of evidence. This portion of the response is applicable to all aspects of the Intervenors' motion to strike and will not be repeated in memoranda responding to motions to strike the testimony of other witnesses.

In the second part of this response, Applicant analyzes each of Intervenors' specific objections to Mr. Seese's testimony in light of the applicable standards. As demonstrated below, not one of Intervenors' objections to that prefiled testimony is well-founded or supportable. Intervenors' Motion must be denied.

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I. STANDARDS FOR ADMISSIBILITY OF EVIDENCE

The criteria governing the admissibility of evidence in licensing proceedings are found in 10 CFR §2.743(c), which provides:

> (c) Admissibility. Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.

Inexplicably, Intervenors do not make any reference whatsoever to the provisions of §2.743(c). Moreover, with two minor exceptions, Intervenors do not argue that any portion of Applicant's prefiled testimony to which they object is either irrelevant, immaterial, or unreliable.*/ Intervenors' failure to attempt even a threshhold showing under §2.743(c) is itself a sufficient ground for outright denial of their motion.

The majority of the grounds which Intervenors do offer in support of their objections to specified sentences and paragraphs of

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*/ Both exceptions are dealt with in the second portion of Applicant's response. Briefly, the first exception deals with Mr. Anthony Simile's testimony, where Intervenors object to one sentence on a claim of relevancy. The second exception deals with the testimony of J. R. Vannier, who describes his independent evaluation of the test coupons given to Mr. Puckett for his Level III practical examination, and the failing score he would have given to Mr. Puckett on the basis of that evaluation. Intervenors claim that the entirety of Mr. Vannier's testimony is "irrelevant and immaterial." Intervenors' Motion at 7. In view of the relatively superficial and perfunctory nature of Intervenors' Motion as a whole, it may be assumed that Intervenors merely happened upon that phrase as the purported basis for their objection. It does not appear from the face of Intervenors' motion that there was any intent to rely upon the specific provisions of 10 CFR §2.743(c).

Applicant's prefiled testimony fall loosely into one of three categories: (A) "hearsay"; (B) "opinion testimony," which includes objections on the grounds of "speculation" and "opinion as to ultimate fact"; or (C) "compound question." Each category is addressed below.

(A) "Hearsay"

With respect to hearsay Intervenors apparently assume that their mere labelling of a sentence contained in prefiled testimony as "hearsay" should render it inadmissible. That is simply not so.

First, whether evidence is or is not hearsay is significant only insofar as it bears on the question of its reliability. Southern California Edison Company (San Onofre Nuclear Generating Station, Units 2 and 3) ALAB-717, 17 NRC 346, 366 and n. 33 (1983). As this Licensing Board itself has recognized, the presiding officer has more leeway in an administrative proceeding such as this than would a judicial officer in accepting hearsay testimony, if reliable, to shortcut what might otherwise be a laborious process. Memorandum and Order dated April 21, 1986 Rulings on Summary Disposition), ____ NRC ____, Slip. Op. at 5. Notably, not once does Intervenors' Motion suggest than any of Applicant's prefiled testimony is unreliable.

Second, Intervenors' "hearsay" objections simply fail to recognize what is and what is not hearsay. Contrary to Intervenors' apparent position, mere reference by one witness to another person's statement does not constitute hearsay. Instead, hearsay is defined

in Rule 801(c) of the Federal Rules of Evidence (hereafter "Rule _____") as:

> ... a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.*/

As reflected more fully below, most of Intervenors' "hearsay" objections are invalid simply because the statements involved are not being offered to prove the truth of the matter asserted, but rather, as a predicate for setting forth in an understandable fashion why certain action was taken. In fact, most of Intervenors' hearsay objections deal with matters the underlying truth of which Applicant vigorously contests. Intervenors' remaining hearsay objections are generally invalid on the basis of well-recognized exceptions to the hearsay rule, i.e., the business records exception of Rule 803(6), in the form of statements contained in Comstock's, Edison's, and other companies' business records;

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*/ While the Federal Rules of Evidence are not strictly binding, NRC licensing boards often look to these Rules for guidance. See Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346 (1983) (Federal Rule of Evidence standards for authentication of document followed in licensing proceedings); Duke Power Co., (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-699, 15 NRC 453, 475 (1982) (Federal Rules of Evidence standards for qualification of expert witnesses used in Board proceeding); In re Florida Power and Light Co., (St. Lucie Plant No. 2) LBP-79-4, 9 NRC 164, 183-4 (1979) (Policy of Rule 408 of the Federal Rules of Evidence taken into account in licensing proceeding in denial of request for discovery of settlement agreement).

and the public agency records exception of Rule 803(8), in the form of statements contained in NRC memoranda and inspection reports.

(B) "Opinion Testimony"

Intervenors' objections to testimony which contains various types of opinions are similarly unfounded. Of this group of objections, for example, Intervenors' assertion that "opinions on ultimate facts" must be stricken is simply ludicrous. Rule 704(a) specifically abolished the so-called "ultimate issue" objection to the admissibility of evidence. It states that:

> (a) Except as provided in subdivision (b), testimony in the form of an opinion or an inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (emphasis supplied)*/

Thus, whether any of Applicant's witnesses have offered their opinions on what may or may not be "ultimate issues" or "ultimate facts" is irrelevant; opinions on ultimate issues to be decided by the trier of fact are plainly admissible under the provisions of this Rule. As for those opinions which do not go to "ultimate facts," Rule 702 specifically provides for their admission into evidence as well. It prescribes the

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*/ Intervenors cannot conceivably argue that the exception of subdivision (b) might operate in their favor, for it limits itself to excluding certain types of opinions regarding defendants in criminal cases.

types of admissible opinion and other testimony which may be given by experts:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Intervenors do not contest the expertise of any of Applicant's witnesses. Without such a showing, these expert witnesses' opinions and the inferences they have drawn are plainly admissible.

Finally, although Intervenors' Motion raises objections to what is characterized by them as "speculation," closer examination reveals that in fact, certain of Applicant's witnesses have merely offered the inferences they have drawn based on facts and data perceived by them or made known to them. The Federal Rules of Evidence plainly permit the admission of an expert's inferences into evidence: i.e., Rule 705, which recognizes that an expert may testify in terms of opinion or inference; and Rule 703, which addresses the role played by facts underlying an expert's opinion or inference. In sum, and as demonstrated in detail below, Intervenors' objections to what they label as "opinion testimony," "speculation," or "opinion on ultimate fact" reflect nothing more than kneejerk reactions to certain expert opinions and inferences which are unfavorable to Intervenors.

C) "Compound Question"

The third major category of Intervenors' objections to portions of Applicant's testimony is that of "compound questions." While it is true that certain questions are compound in form, Intervenors' mere observation that they are is meaningless and irrelevant. None of the compound questions can be considered confusing to the witnesses, for each witness answered them. Moreover, each witness's answers make clear that he is responding to each aspect of a given compound question. Intervenors do not suggest that any of those answers are unreliable, or that their cross-examination of the witnesses might be hindered by the form of those prefiled questions or answers. Finally, Rule 611 and 10 CFR §2.743(c), respectively, recognize the benefits of avoiding needless consumption of time and undue repetition in stressing proper management of evidentiary proceedings. It is plausible, in fact, that had Applicant not presented such questions in compound form, Intervenors would have objected to the resulting series of sequentials on the grounds of undue repetition or lack of foundation. In any event, should this portion of the motion to strike be granted, Applicant requests leave to reformulate the questions to Mr. Seese.

II. INTERVENORS' SPECIFIC OBJECTIONS TO THE TESTIMONY OF LARRY SEESE

Question 7 and Question/Answer 8

Intervenors object to these questions on grounds of foundation and time frame. Mr. Seese's prior answers reflect that he has held the position of Assistant Quality Control Manager for Comstock at Braidwood from October, 1983 through the present, and that among his duties has been the responsibility to track Comstock's progress. His two immediately preceding answers (Numbers 5 and 6) address in detail the types of records he developed and maintained on the status of work completed and the progress achieved. Accordingly, his earlier answers themselves establish the foundation and time frame for these two questions.

Intervenors additionally object to Answer 8 on the basis that Mr. Seese lacks personal knowledge about alleged terminations/threats of termination for failure to perform a certain number of inspections per day. Since Intervenors have alleged in Contention 2 that Mr. Seese was a purported "harrasser," it is difficult to understand how Intervenors can also suggest that he lacks personal knowledge of the purported harrassment. In any event, in light of his position as the Assistant Quality Control Manager, he plainly has personal knowledge of whether any such employee terminations or threats occurred. Intervenors will, of course, have the opportunity to cross-examine Mr. Seese regarding the parameters of his personal knowledge.

Questions and Answers 9, 10, 12, 17, 18, 19, 21, 26, 28 and 30

Intervenors object to all of these questions and answers on the ground that the questions are compound in form. While it is true that the questions themselves contain several parts, and that their format may thus be characterized as "compound," Intervenors' objection is meaningless and irrelevant. In many of these questions, additional words appear in order to lay the foundation for the questions themselves. None of these questions confused Mr. Seese, since he responds with answers to each aspect of each question. Since Mr. Seese plainly understood them, and since they do not hinder adequate cross-examination by Intervenors, the Board should allow the questions in their present form under Rule 611.

As an additional ground for objection, Intervenors also claim that Questions 18, 19, 21, 26, 28 and 30 are "improper". Without elucidation from Intervenors regarding the respect(s) in which they feel the questions may be "improper", Applicant is at a loss to respond. Review of the questions reveals that each lays a proper foundation, that each contains no hearsay, and that each asks Mr. Seese about a matter within his personal knowledge. Moreover, Mr. Seese's answers to this series of questions constitute highly probative testimony on a key issue -- Mr. Seeders' allegations against Mr. Seese, and Mr. Seese's responses to them. Accordingly, any purported objections to them as "improper" are meritless.

As an additional ground for objecting to Question and Answer 28, Intervenors also claim that Mr. Seese has no personal knowledge because

he admits that he conducted only a limited review, and that his answer is based on that review.

There is nothing objectionable about a witness's statement that he is not omniscient; Intervenors may inquire during cross-examination as to what the limits of his review might have been.

Answer 20

Intervenors object to Mr. Seese's description of what transpired at a meeting he attended on the ground of hearsay. Neither of the two sentences to which they object contain statements offered for the truth of the matter asserted. Thus, for example, whether Mr. Seeders' statement that he wanted to put his story in writing was true is irrelevant. Similarly, whether Mr. Seeders could in fact address a memo to a particular individual as it is reported that Mr. Seltman suggested, is equally irrelevant. The testimony is offered solely to demonstrate Mr. Seese's perception of how Mr. Seeders' concerns were to be reviewed, and the context which caused Mr. Seese to suggest that Mr. Seeders could issue a memo to Mr. DeWald.

Question/Answer 24

Intervenors claim that there is no foundation for this question, and that it is inadmissible "due to form." In light of the two immediately preceding answers, both of which discuss problems Mr. Seese identified regarding the quality of Mr. Seeders' documentation, Intervenors' objections are incomprehensible. The foundation is laid in those answers and the question itself. The form of the question is perfectly acceptable:

it contains no hearsay, it lays a foundation, and Mr. Seese answers it based on his personal knowledge.

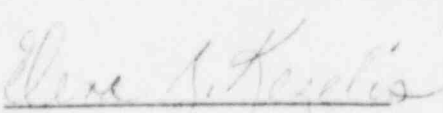
Answer 34

Intervenors object, apparently to the entirety of this answer, on the ground that since Mr. Seese was not responsible for terminations, he is not competent to testify whether they were retaliatory. Whether or not Mr. Seese was ultimately responsible for terminating an employee's employment is irrelevant. First, his testimony reveals that he was a witness at several discharge meetings. Indeed, in his capacity as Assistant Quality Control Manager, he is competent to testify about his observations and opinions reached at those meetings, and any observations and opinions reached at those meetings, and any observations he may have made and opinions he may have reached outside such meetings regarding those and other employees. Intervenors' objection is meritless.

CONCLUSION

For all of these reasons, Applicant respectfully urges the Licensing Board to deny Intervenors' Motion to strike portions of Mr. Larry Seese's testimony.

Respectfully submitted,

BY: 

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May 7, 1986

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CERTIFICATE OF SERVICE

I hereby certify that copies of Applicant's Response to Intervenors' Motion to Strike Certain Portions of the Direct Testimony of Larry Seese have been served personally on the following individuals at the Kankakee City Council Chambers at City Hall, Kankakee, Illinois, this 7th day of May, 1986:

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I hereby certify that copies of Applicant's Response to Intervenors' Motion to Strike Certain Portions of the Prefiled Direct Testimony of Larry Seese was served on the persons listed below by deposit in the United States mail, first-class postage prepaid, this 7th day of May, 1986.

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May 7, 1986