

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD



In the Matter of:
BOSTON EDISON COMPANY, et al.

(Pilgrim Nuclear Generating
Station, Unit 2)

Docket No. 50-471

APPLICANTS' MEMORANDUM
IN SUPPORT OF THE ADMISSION
OF EXPERT OPINION EVIDENCE

I. BACKGROUND

In Seabrook, in responding to one of the several issues raised by intervenors, the Commission concluded that on remand of the case on other grounds, consideration of alternate sites should encompass those sites where other units had been proposed and were postponed, sites where other units already exist and sites where other units are postponed.^{1/} In conjunction with its decision, the Commission declared:

"In so ruling, we do not exclude the possibility that the Licensing Board will find, on the basis of evidence already in the record [i.e. legal and technical barriers] and other relevant factors that a limit on alternate site consideration to the area in or near the lead applicants' service area is appropriate in the context of this application."^{2/}

^{1/} Public Service Company of New Hampshire (Seabrook, Units 1 and 2), CLI-77-8, 5 NRC 503, 536-39, (1977).

^{2/} Id. at 539.

On review of the Licensing Board's findings after remand inter alia that the subject alternate sites "would meet with institutional and legal impediments ...",^{3/} the Appeal Board observed that neither the Applicants nor the Staff has presented any affirmative evidence on this score so as to support the Licensing Board's finding.^{4/} The Appeal Board's search of the record revealed solely, that:

"In this regard, on cross-examination the principal staff witness summed up the uncertainties in terms of an applicant encountering 'more hassle' if it is dealing with State regulators in other than its own jurisdiction."^{5/}

This the Appeal Board understandably found insufficient to support the Licensing Board's findings.

Against the foregoing back-drop, on inquiry by the Staff, the Applicants' sought the opinions of learned counsel in each of the respective sister New England states adjoining Massachusetts as to the feasibility of the Pilgrim Unit 2 joint owners with Boston Edison Company as lead participant, constructing and operating Pilgrim Unit 2 in their respective states of Rhode Island, Connecticut, Vermont and New Hampshire. Counsel in due course rendered opinions on the questions presented. These opinions have been referenced in the NRC Staff's Final FES supplement and were offered in evidence by the Applicant. They

^{3/}Public Service of New Hampshire (Seabrook, Units 1 and 2), LBP-77-43, 6 NRC 134, 138 (1977).

^{4/}ALAB-471, 7 NRC 477 (1978).

^{5/}Id. at 495.

were received in evidence as Applicants' Exhibit 15, as comprising, together with other materials which the Applicants had furnished the Staff during the course of the latter's alternate site review as reflected in its Final FES Supplement.^{6/}

II. THE ISSUE.

Whether the opinions of counsel are admissible in evidence in this proceeding without limitation as the opinions of expert witness on their sponsorship by their respective authors.

III. ARGUMENT.

The Commonwealth as represented by the Attorney General ("Attorney General") objected to the introduction of the subject opinions on the grounds of hearsay, competency and for the reason that the opinions constitute legal conclusions.^{7/} This Memorandum, as does the Memorandum of the Attorney General, dated June 7, 1979, addresses only the last of the referenced grounds for the Attorney General's objection.

The opinions^{8/} in question are each directed to the

^{6/}See, Tr. 9636-37.

^{7/}Tr. 9623. It would appear that the hearsay objection will be overcome by the presentation of the experts as witnesses which the Applicants intend to do. While the question of the witnesses' expertise has not been waived by the Attorney General, this question is not one as to which immediate Board consideration is sought. See Attorney General's Memorandum, dated June 7, 1979.

^{8/}The opinions are found in the third section of Applicants' Exhibit 15 as attachments to Boston Edison's letter to the NRC Staff under the date of August 2, 1978.

question of the feasibility of constructing and operating Pilgrim Unit 2, given its present ownership complement, in the several New England states contiguous to Massachusetts, as of 1973 and 1978. The opinions respond to the questions put and provide the bases for the opinions rendered. There can be no debate that, as the Federal Rules of Evidence provide, the Commission's practice likewise contemplates the receipt of expert opinion testimony in the course of its hearings.^{9/}

The Attorney General, while not contesting the evidentiary use of expert opinions, however, asserts here^{10/} that the opinions to be proffered in evidence are conclusions of law which tell this Board how the case should be decided; citing, McCormick, Evidence 2d.Ed., 1972 Sect. 12 "The Relativity of the Opinion Rule: Opinions on the Ultimate Issue." It appears that the Attorney General misreads the proffered testimony and confuses the Rules of Evidence respecting opinions.

Fed. Rules Evid. Rule 702, 28 U.S.C.A. provides that:

"If scientific, technical, or other specialized knowledge would 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."

Whether it is feasible to construct Pilgrim Unit 2 in states other than Massachusetts is a matter which by analogy to the Seabrook Case supra, is of interest to the Commission in carrying out its NEPA responsibilities. The fact that the opinions rendered here on this question were based in part on

^{9/}See, e.g., 10 CFR §2.733.

^{10/}See Attorney General's Memorandum pp. 2-3.

a review of the statutory framework in the sister states to Massachusetts does not render the opinions on this subject inadmissible.

"The facts or dates in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions ... upon the subject, the facts or data need not be admissible in evidence." Fed. Rules of Evid. Rule 703, 28 U.S.C.A.

What is more "[an] expert may testify in terms of opinion and give his reasons therefor without prior disclosure of the underlying facts or data ..." Fed. Rules of Evid. Rule 705, 28 U.S.C.A.

Finally, the expert opinion rules provide that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. Rules of Evid. Rule 704, 28 U.S.C.A.

What the Attorney General actually takes issue with, if we correctly follow his Memorandum argument, is not with the opinions of counsel rendered with respect to the questions posed, but is rather to certain aspects of the proffered testimony which set forth, in part, the underlying bases for the opinion. To be sure as the Attorney General asserts, conclusions of law are for the Board and not for a witness to make. However, a discussion of the statutory framework existing in the respective sister states when presented in the context of the opinions themselves as in the instant case, simply provides the facts and

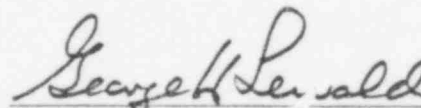
data, among other matters, on which the opinion rests. As is demonstrated by a mere reading of the rules, this material need not itself be admissible in evidence nor need it be disclosed prior to an expert's testimony offered in terms of an opinion. In short, the Attorney General has confused the opinions offered with certain of their underlying bases. Were this proceeding before a judge and jury, the Attorney General's objection, while nevertheless still without merit, would be afforded the color of an argument that the jury might be confused as to law and fact to a party's prejudice. However, this situation is not presented in the instant proceeding, and surely this Board which sits to determine both law and fact is capable of maintaining the distinction and will not be misled by nature of the testimony proffered.

IV. CONCLUSION.

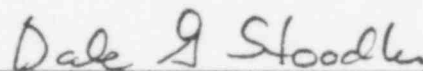
The Attorney General's objection to the proffered evidence on the grounds as set forth in his Memorandum should be overruled.

Respectfully submitted,

Dated June 8, 1979



George H. Lewald
Ropes & Gray
225 Franklin Street
Boston, Massachusetts 02110



Dale G. Stoodley
Assistant General Counsel
Boston Edison Company
300 Boylston Street
Boston, Massachusetts 02119