

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman

Frederick J. Shon

Dr. Oscar H. Paris

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In the Matter of	:	Docket Nos.
CONSOLIDATED EDISON COMPANY OF NEW YORK	:	50-247 SP
INC. (Indian Point, Unit No. 2)	:	50-286 SP
	:	
POWER AUTHORITY OF THE STATE OF NEW YORK,	:	
(Indian Point, Unit No. 3)	:	March 8, 1983
	:	

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MOTION OF CONSOLIDATED EDISON FOR MODIFICATION  
OF THE BOARD'S MARCH 7, 1983 ORDER ADOPTING  
THE RECOMMENDED DECISION OF ALTERNATE  
BOARD MEMBER LAURENSEN

Licensee Consolidated Edison Company of New York, Inc. ("Con Edison") moves the Board for an order modifying its March 7, 1983 Mailgram Memorandum and Order adopting the March 4, 1983 Recommended Decision ("Recommended Decision"). Con Edison believes that the Recommended Decision, for the most part, represents a fair and equitable allocation of the remaining time available to Commission Questions 3 and 4. Recognizing that eighteen (18) hearing days and more than 4500 pages of transcript have already been devoted to this topic (Recommended Decision at 9), Judge Laurenson found that ten additional hearing days would be appropriate, and

recommended allocation as follows:

Licensees - two days.

Intervenors - five days.

NRC Staff - one day.

New York State - one day.

Rockland County - one-half day.

Westchester County - one-half day.

Con Edison respectfully submits that the Order adopting the Recommended Decision should be modified in certain limited respects.

First, Con Edison believes that the Board should clarify its rulings with respect to hearing time to be devoted to further, post-exercise FEMA testimony during the week of April 26. Under the NRC Staff's proposal made before Judge Laurenson at the February 25 conference, licensees understood that Staff and FEMA would share their time (Tr. at 68, 99), and did not understand that FEMA time was to be excluded from the aggregate ten days that were proposed. The four days of hearing time provided in the March 7 Order for receipt of testimony from FEMA concerning the results of the emergency planning exercise is particularly perplexing since FEMA counsel estimated that presentation of its post-exercise testimony would take no longer than a day (Tr. 99)\*

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\* Post-exercise FEMA testimony could not, under the cross-examination limits proposed by the Recommended Decision, exceed 2 and 1/2 hours in any event, see Recommended Decision at 19 (but see below). Thus the Board's March 7 Mailgram Order is inconsistent with the Recommended Decision it purports to adopt, since it provides for four days of post-exercise FEMA testimony.

Second, Con Edison submits that the Board should amend its March 7 Order to make explicit what was evidently implicit in the Recommended Decision, namely that panels of witnesses will be permitted only when the testimony is jointly authored by collaborators. Otherwise, the Recommended Decision would be meaningless, since large numbers of witnesses with independent testimony could be "run through" the hearing and their testimony admitted into the record for the truth of the matters stated under the guise of a panel, and with but an aggregate hour of cross-examination.

The Board has recognized that after-the-fact "panelization" was the reason why past efforts to manage the Questions 3 and 4 phase of the case "broken down" (Transcript of January 26, 1983 at 6938), yet limitation of panel presentation to jointly-authored testimony is not expressly provided in the Recommended Decision or the March 7 Order, and inappropriate panelization would create particularly acute problems with limitations on cross-examination in effect. For example, under intervenors' February 7 proposal, six school administrators (with entirely independent testimony) were proposed as a "panel." Unless panelization abuses were specifically excluded, the testimony of each could theoretically be admitted with but an aggregate of 10 minutes of Licensee cross-examination for each.

Third, the Board should relax the time limitations

on cross-examination for specified witnesses, after either efforts by the parties to agree upon certain witnesses who cannot fairly be cross-examined within the enumerated time period, or failing agreement, a further limited referral to Alternate Judge Laurenson for this purpose. (Judge Laurenson has read all of the testimony and is thus presumably in a position to evaluate which would necessarily require more lengthy cross-examination.)

While the great bulk of witnesses might be subject to cross-examination within the time periods recommended, there are a handful of witnesses offered by various parties who, by the intrinsic nature of their testimony, cannot be cross-examined within such periods. Certainly it is as unrealistic to expect intervenors to complete their cross-examination of post-exercise FEMA witnesses on April 26 in one hour as it is to expect each licensee to complete its cross-examination of such expert intervenor witnesses as Erikson, Lifton and Altschuler within one-half hour.

The "applicable law" cited in the Recommended Decision does not support the gross and inflexible limitations on cross-examination suggested. In each of the cases cited, in Judge Laurenson's words "cross-examination [was limited] to the length of time taken for direct examination." The mere fact that under NRC practice testimony is pre-filed does not prevent this Board from

doing what was obviously done in the court cases upon which its decision relies: make some effort to match the duration of cross-examination with the length and complexity of the affirmative testimony.\*

Licensees emphasize that for the great majority of witnesses, cross-examination can be confined to the suggested duration. However, the Board should modify its March 7 Order to explicitly recognize that there are certain enumerated witnesses who are not subject to those limitations. Since overall cross-examination can in licensees' opinion be limited to the time periods stated in the Recommended Decision, one basis for remaining "on schedule" would be to permit each party to cumulate unused cross-examination time from the majority of "uncomplicated" witnesses, to be

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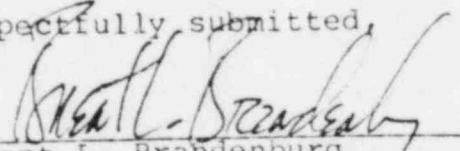
\* Although not directly relevant to the relief sought here, we are constrained to respond to the remark in the Recommended Decision that "I am disappointed that the licensees did not identify testimony which they believe should be eliminated. If they had done so and if intervenors had been given the opportunity to respond, I believe that I could have performed that part of the Board's charge to me to 'recommend elimination of testimony that is argumentative, cumulative, repetitive or irrelevant.'" It would have been presumptuous for licensees to suggest which of ten parents, or which of seven nursery school teachers fit or did not fit the standard of exclusion in the Board's charge to Judge Laurenson. The entire trust of licensees' position is that followed in the court cases cited in the Recommended Decision namely that a fixed period of time should be allocated for testimony from various parties, and those parties should themselves prioritize which witnesses they wish to present within the time allocated.



used for more lengthy cross-examination of witnesses whose testimony actually merits it.

Finally, the Board's Order adopting the Recommended Decision should be modified to insure that all parties be informed as to which of the melange of 140 witnesses intervenors will be presenting in their five days, and the order of presentation of those witnesses. The requirements in the March 7 Order requiring some of this information to be supplied by Friday, March 11 is plainly insufficient advance warning of which of 140 witnesses -- and in which order -- licensees will be required to face four days later. Intervenors should at a minimum be required to specify the schedule for March 15 and 16 by March 9. While it is impossible, of course, to specify the definite times for each of the mass of witnesses, requiring all parties to present an order of witnesses will permit parties to adequately prepare crossexamination. Any failure to provide advance notice of when particular witnesses will take the stand would inevitably adversely affect the pace and progress of the proceeding, as well as prejudice parties who have received inadequate notice.

Respectfully submitted,

  
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Dated: March 8, 1983  
New York, New York

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:  
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CERTIFICATE OF SERVICE

I certify that I have served copies of  
Motion of Consolidated Edison for Modification of the Board's March 7,  
1983 Order Adopting the Recommended Decision of Alternate Board  
Member Laurenson and Notice of Appearance of Bernard L. Sanoff on  
Behalf of Consolidated Edison on the following indicated by asterisk  
by hand and for all others by Express mail this 8th day of March, 1983.

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