

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

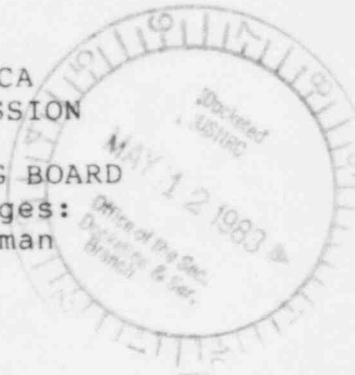
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James P. Gleason, Chairman

Frederick P. Shon

Dr. Oscar H. Paris



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In the Matter of : Docket Nos. 50-247 SP
: 50-286 SP
CONSOLIDATED EDISON COMPANY OF :
NEW YORK, INC. : May 9, 1983
(Indian Point, Unit No. 2) :
POWER AUTHORITY OF THE STATE OF :
NEW YORK :
(Indian Point, Unit No. 3) :
-----X

LICENSEES' MOTION FOR RECONSIDERATION OF RULING ON
ADMISSIBILITY OF DEPOSITION

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Preliminary Statement

Consolidated Edison Company of New York, Inc. ("Con Edison"), licensee of Indian Point Station, Unit No. 2 and Power Authority of the State of New York ("Power Authority"), licensee of Indian Point 3 Nuclear Power Plant, (collectively the "licensees") hereby move the Board:

- (1) for recons. deration of its denial of licensees' motion to receive the transcript of the Examination Before Trial of Donald P. McGuire (the "McGuire deposition") into evidence, together with Mr. McGuire's pre-filed testimony (McGuire deposition exhibit 2); and
- (2) upon such reconsideration, to receive into evidence both the McGuire deposition and exhibit 2 thereto.

Procedural Background

The Board designated April 26-29, 1983 as dates for the hearing of evidence regarding the Indian Point emergency planning exercise conducted on March 9, 1983. This testimony was especially critical with respect to Rockland County. The Federal Emergency Management Agency's ("FEMA") December, 1982 interim findings cited emergency planning in Rockland County as an unresolved issue, as a result of Rockland County's withdrawal from further participation in the coordinated radiological emergency planning effort by the licensees, State of New York, and neighboring counties. The March 9

exercise was to test, inter alia, the State's capability to implement its compensating plan, under which State personnel would direct the commitment of Rockland County resources. Rockland County personnel participated in the exercise until 9:00 a.m., and observed the remainder of the event.

On April 12, 1983, Rockland County served the pre-filed testimony of Donald P. McGuire, Deputy Director of the County's Office of Emergency Services, regarding the exercise. McGuire, the official in day-to-day charge of emergency planning in Rockland County, was among the early participants and subsequent observers at the exercise. His testimony covers two critical areas: 1) Rockland County's official evaluation of the State's capability to replace or direct certain county personnel; and 2) the actual capability of Rockland County to perform the tasks called for by the exercise.¹

On April 25, licensees took the McGuire deposition, on notice, before a notary public. McGuire testified under oath, represented by the County's counsel herein, Eric Ole Thorsen. Amanda Potterfield, Esquire, representing UCS/NYPIRG and Zipporah Fleisher, representing West Branch

¹ In addition, the Board requested that McGuire return to testify on the status of emergency planning for the schools. (T:11233.) (Citations to "T:___" denote references to the official hearing transcript.) In his deposition (at 95-96), McGuire testified about the response procedures utilized for the schools during the March 9 exercise.

Conservation Association, were also present and conducted cross-examination. The deposition was concluded that day, and stenographic transcripts were made available by the reporter. When Mr. McGuire failed to appear at the hearings, despite repeated assurances by Mr. Thorsen that he would so appear, as scheduled, licensees moved for a subpoena. That motion was denied. (T:15190.) Alternatively, the licensees moved the McGuire deposition (identified as Exhibit PA-57) and the pre-filed testimony (exhibit 2 to the deposition and hearing Exhibit PA-56) into evidence. That motion was also denied. (Id.) Licensees herein seek reconsideration of the Board's denial of that latter motion.

The Board Overlooked
the Applicable Law

Licensees respectfully submit that the Board overlooked the applicable law in refusing to admit Exhibits PA-56 and PA-57. Fed. R. Civ. P. 32(a)(2) expressly entitles a party to use the deposition of an adverse party for any purpose:

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

* * *

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

This, of course, is the proper standard in Commission proceedings. As the Board noted in Boston Edison Co. (Pilgrim Nuclear Generating Station, Unit 2), 1 NRC 579, 581 (1975):

The Commission's regulations are based upon and drawn generally from the Federal Rules of Civil Procedure governing discovery, Rules 26 through 33, and, in the main, employ language identical with, or similar to the language of the Federal Rules upon which the process is based. Accordingly, guidance may be had from the legal authorities and court decisions construing the Federal Rules on discovery.

As Exhibit PA-57 makes clear, Mr. McGuire was designated by a governmental agency (Rockland County's Office of Emergency Services) to testify and is, in fact, an official of Rockland County. There is also no doubt that Rockland County is a party adverse to licensees. Accordingly, licensees were entitled to place the McGuire deposition in evidence, and the Board overlooked the applicable law in rejecting our offer of proof.

The McGuire Deposition
Is Highly Material

The McGuire deposition could not be more material to the issues of this proceeding. The current emergency response capabilities of Rockland County are one of the two major emergency planning issues now facing the Board and the Commission. The deposition is highly probative on matters regarding Rockland County's actual capabilities, the demonstration at the exercise of the State compensating plan, and the credibility of FEMA's assessment.

A. Rockland's Actual Emergency
Response Capabilities

McGuire concluded in his pre-filed testimony that "County of Rockland personnel could perform the operations that were required in this exercise." (Ex. PA-56 at 3.) In his deposition, he elaborated on the basis for that conclusion:

Q. Would you tell us, please, what the basis is for your conclusion on page three of your testimony the County of Rockland personnel could perform the operations that were required in the exercise?

A. Well, you know, the scenario called for response by County personnel to set up an EOC, operate an EOC, take information over the REX line, or the radiological emergency communicating system, and to be able to assess that information as to whether or not, you know, what would be recommended, inasmuch as

what our County would actually do as in relation to that information that was being put to us.

I think with, and it's my opinion, that with the training of the Health Department, at this point, except for some communication equipment which is still lacking on their part, that they could have done the field assessment with two teams which was required by the scenario.

Inasmuch as going outside of our own County personnel, and that's what I'm referring to, there is County personnel, not the volunteers, not the police agencies that are in the County, you know, I'm limiting it to that specific relation, you know, as to County personnel, not to staff that belongs to volunteer workers or staff that belongs to the Red Cross or anybody else, and that's why I base that opinion that our County personnel do our assessment, our County personnel do the radiological monitoring in the field, and, of course, our County personnel staff EOC and control operations, and, of course, with our Chairman's office and our public information, I feel that those particular things could have handled by County personnel. (Ex. PA-57 at 18-19.)²

McGuire further testified that training has been accomplished and is continuing (id. at 19, 92-93), and that he believed that volunteers would respond in an actual emergency (id. at 20). He provided details of a recent practical demonstration of the County's response capabilities during

² These statements are not only admissible testimony preserved at a deposition, but are in fact admissions by a party opponent.

the evacuation of hundreds of residents from a chemical fire. (Id. at 102-09.)

Emergency organizations promptly responded county-wide. (In fact, key officials were notified with paging devices purchased with licensees' funds contributed to the radiological planning effort. (Id. at p. 104.)) Despite concern expressed about the imperceptible nature of the chemical hazard, all personnel responded. (Id. at 105.) County officials were able to set up a command and communications center at the scene. (Id. at 108.) The nearby population was alerted, and shelters for evacuees were established on an ad hoc basis. (Id. at 105-106.) McGuire testified that the evacuation was a success. (Id.)

B. Criticism of FEMA

McGuire further testified that he did not believe FEMA was sufficiently aware of Rockland County's actual emergency response capabilities:

Q. You said that in your view, FEMA doesn't know at what preparedness level the County is at?

A. I don't think they do know.

Q. Is that because they haven't really looked at it, or they just haven't gone beyond the fact that there's no written approved plan?

A. I think that's what they're basing it on, there's no written approved plan.

Q. So is it your opinion then that FEMA has not gone beyond the absence of a plan to look at the question of what would the quality of Rockland County's response be, if there were an accident tomorrow?

A. In my opinion, they have not looked at that, right. (Id. 118-19.)

Thus, the McGuire deposition is essential to fill a significant gap in the record left by FEMA's incomplete assessment.³

C. The State Compensating Plan

The McGuire deposition also reveals that the State compensating plan is much more effective than the Post Exercise Assessment suggests. According to McGuire, Rockland County personnel have continued to work with State personnel "[a]lmost on an ongoing basis" to plan a response to a radiological emergency. (Id. at 26.) The State's compensating plan is based on the December, 1982 draft of the plan Rockland is now engaged in finalizing. Hence, both State and Rockland County personnel are well acquainted with the plan that would be implemented in the event of an actual emergency. (Id. at 27-29.)

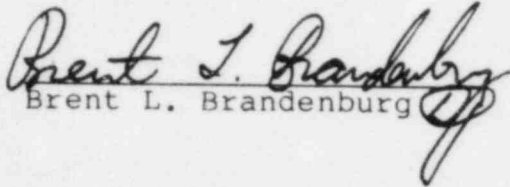
³ McGuire also criticized FEMA's minimal and problematic training activities in the County (id. at 87), and observed that FEMA has maintained a "laissez-faire" attitude toward Rockland County's withdrawal from the four-county planning process, and non-participation in the exercise (id. at 14).

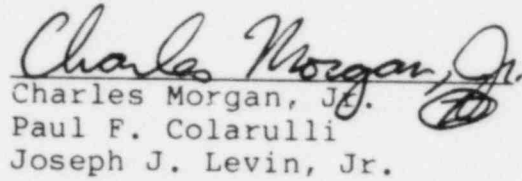
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The Board ruled that an adverse inference can be drawn from McGuire's failure to testify at the hearings. Although such an inference supports licensees' position that offsite emergency planning is adequate in Rockland County, it does not provide the complete evidentiary record that the Commission has requested. The admission of the McGuire deposition would not prejudice Rockland County or intervenors, since those parties were represented by counsel at the deposition.

We respectfully urge the Board to reconsider its prior ruling.

Respectfully submitted,


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Dated: May 9, 1983

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NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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INC. (Indian Point, Unit No. 2))	50-286 SP
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POWER AUTHORITY OF THE STATE OF NEW YORK)	May 9, 1983
(Indian Point, Unit No. 3))	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of LICENSEES' MOTION FOR RECONSIDERATION OF RULING ON ADMISSIBILITY OF DEPOSITION in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, this 9th day of May, 1983.

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