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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

James L. Kelley, Chairman
Dr. James H. Carpenter
Glenn O. Bright

In the Matter of	)	Docket No. 50-400-OL
CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY	)	(ASLBP No. 82-472-03 OL)
(Shearon Harris Nuclear Plant)	)	December 27, 1985

MEMORANDUM

(Concerning Denial of Subpoenas for Intervenor Witnesses)

On November 12, 1985, Mr. Eddleman filed a motion seeking subpoenas for Dr. M. Reada Bassiouni, several of his associates at Acoustic Technology Inc. ("ATI") and two CP&L employees, Bob Black and Ben Furr, to testify with respect to Eddleman Contention 57-C-3. The Applicants and the NRC Staff/FEMA filed oppositions to these motions on November 22, 1985. On that same date, the Attorney General of North Carolina filed a motion essentially in support of Mr. Eddleman's motion. In order to provide guidance to the parties at the earliest possible time, the Board denied these motions in a telephone conference call on

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December 4, 1985. Tr. 10,213. We stated that we would provide reasons for those rulings at a later date. Those reasons follow.[1]

The Board assumes the parties' knowledge of the somewhat complicated circumstances in which these motions arose, as reflected at various places in the record, and therefore will not restate those circumstances in detail. We first discuss Mr. Eddleman's request concerning Dr. Bassiouni and his ATI associates, a request that can be viewed in three different legal contexts. First, these people might be called as Board witnesses, Mr. Eddleman's preferred alternative. Second, they could be subpoenaed on Mr. Eddleman's behalf as late direct case witnesses. Third, they could be viewed as rebuttal witnesses for Mr. Eddleman. As we see it, however, the request for Dr. Bassiouni and his associates as witnesses does not meet the somewhat differing legal requirements applicable to these separate legal contexts. The relevant legal requirements can be summarized as follows.

Board Witnesses. Under the Appeal Board's decision in South Carolina Electric & Gas Company (Virgil C. Summer Nuclear Station), 17 NRC 25, 27-28 (1983), a Licensing Board can call its own expert witnesses ". . . only after (i) giving the parties to the proceeding every fair opportunity to clarify or supplement their previous

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1 Applicants correctly describe the contested subpoena procedure we are following here, as we have in the past, in their footnote 11 at p. 9. Practicalities virtually require that procedure in these circumstances. Cf. Duke Power Co. (Catawba Nuclear Station), 22 NRC 59, 76 (1985).

testimony, and (ii) showing why it cannot reach an informed decision without independent witnesses." This is a stringent standard, higher than the "good cause" test applicable to a late request for a subpoena.

Intervenor Direct Witness. Prefiled Testimony and any requests for subpoenas on Contention 57-C-3 were due on October 18, 1985. The other parties filed their direct cases on that date. Mr. Eddleman's request for a subpoena for Dr. Bassiouni was first advanced on November 4, 1985, the first day of the hearing. Therefore, the subpoena request for Dr. Bassiouni and his ATI associates was late and must be supported by a showing of good cause.

Lack of Good Cause. As the Board sees it, good cause for subpoenaing Dr. Bassiouni and his ATI associates as direct case witnesses has not been shown. It follows a fortiori that the more stringent Summer test for calling a Board witness has not been met. We reason as follows.

Mr. Eddleman contends that he should not be held accountable for calling Dr. Bassiouni earlier than he did because he did not become aware of Dr. Bassiouni's disagreements with the prefiled testimony until the hearing began. He also argues that the Applicants should have disclosed such disagreements in discovery. The Applicants counter that their discovery responses were complete. We need not completely disentangle this discovery dispute, except to say that we find no deliberate concealment of material information. Apart from that, certainly Dr. Bassiouni's existence and knowledge of Shearon Harris were known to all parties, at least since the summary disposition stage, when

he filed an affidavit for the Applicants. Mr. Eddleman was free to contact Dr. Bassiouni, or for that matter any other acoustical expert, about Contention 57-C-3.

In determining good cause in the present circumstances, however, we are less concerned with just when Dr. Bassiouni's views became known to Mr. Eddleman, than with what matters Dr. Bassiouni could be expected to address if he were called. If it were to appear, for example, that Dr. Bassiouni has important information within his area of expertise that raises serious questions about key points in controversy, we would be inclined to subpoena him or call him ourselves, whether or not the lateness of the request were excusable. Conversely, even assuming a solid excuse for lateness, there would be no sufficient justification to reconvene a hearing, with the delay and expense that necessarily entails, just to hear an additional witness whose appearance probably would not add substantially to the record.

In that regard, the Board asked Dr. Bassiouni on the first day of the hearing to review the prefiled testimony and advise us and the parties in a telephone conference call the following day concerning significant respects in which he disagreed with it. Tr. 9555. Dr. Bassiouni and his ATI associates performed an expedited review of the FEMA testimony and provided it to us in a conference call, as

requested.[2] A written copy of that review ("ATI Statement") was subsequently supplied to the Board and parties. Mr. Eddleman argues that the ATI Statement "shows professional disagreements with virtually every major point of FEMA's case in this proceeding." Motion, p. 3. However, Mr. Eddleman provides no analysis to support that assertion. For their part, the Applicants and FEMA analyze each section of the ATI Statement and show that they do not raise any serious questions about the developed record. We turn to a brief discussion of each section of the ATI Statement.

Section I concerns the accuracy of the ATI computer model which is based on daytime measurements. That model came in for some criticism in

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[2] ATI did not review the Applicants prefiled testimony. ATI states that:

> ATI is presently under contract to CP&L for analysis and evaluation of the Shearon Harris Alert and Notification System. Accordingly, we are not providing a review of CP&L's testimony until we have an opportunity to review the measurement data and calculations that were used to generate it. ATI Statement at 1.

The Board does not believe that an ATI review of the Applicant's testimony is needed. As we understand it, the concerns Dr. Bassiouni initially expressed to Mr. Eddleman derived from the FEMA Testimony and those concerns have now been expressed on the record. We accept the Applicants' statements that:

> Applicants do not consider there to be a contractual bar which would prevent ATI personnel from complying with any subpoena issued by the Board. Neither have Applicants acted to direct or to influence ATI personnel in their communications or activities in response to the Board and other parties. Response at 4-5.

the FEMA Testimony, which included a lengthy review of FEMA's standard procedures for reviewing siren systems. However, both FEMA and the Applicants direct cases ultimately focused on nighttime siren sound propagation and both presented separate nighttime computer models in support of their predictions. Accordingly, the Applicants and FEMA are correct in arguing that this section of the ATI Statement (while of general interest) is irrelevant to the contested issues.

Section II of the ATI Statement directs the Board's attention to a 1962 study of nighttime siren alerting conducted by the Institute for Phonetics and Communications Research of the University of Bonn, West Germany. Dr. Bassiouni kindly provided a copy of this study to the Board, which the Staff has caused to be translated. The study appears to be germane to contested issues and, so far as we are aware, it is the only study of its kind -- i.e., the only study of the arousal effects of sirens. While we very much appreciate Dr. Bassiouni's calling our attention to the study, it provides no basis for calling him as a witness, any more than any other acoustical expert. He did not participate in the study and apparently has no specialized knowledge about it.

Section III of the ATI Statement offers several observations about "informal alerting." Qualified expert witnesses for both FEMA and the Applicants testified at some length about that process. In some of its aspects, at least, testimony about the efficacy of informal alerting requires expert background or training in certain social sciences. Dr. Bassiouni is a mechanical engineer, specializing in acoustics. See

resume of Mr. Reada Bassiouni attached to Applicants' Motion for Summary Disposition of Eddleman 57-C-3. It does not appear that he possesses expert qualifications in the area of human behavior in emergency circumstances. We see no reason to convene another hearing session to hear another witness testify on a subject outside his area of primary expertise.

Rebuttal Witnesses. Mr. Eddleman did not explicitly ask that Dr. Bassiouni and his ATI associates be called as rebuttal witnessws. The Applicants and Staff nevertheless argued that the concerns expressed in the ATI Statement would not be proper rebuttal, and the Board agrees. The concerns in Section II and III of the Statement were clearly within the scope of the contention and should have been anticipated. (As we have seen, Section I of the Statement is simply not relevant.) Testimony to that effect should have been prefiled as part of Mr. Eddleman's direct case. The opportunity to call rebuttal witnesses is afforded to consider unexpected evidence; it is not a late second chance to supplement a direct case.

Having denied these motions, we take this opportunity to again express our appreciation to Dr. Bassiouni and his ATI associates for their efforts at this Board's request under tight time constraints. Our denial of these motions implies no criticism of their expertise. On the contrary, Dr. Bassiouni and his associates are obviously knowledgeable in aspects of this controversy and we would have been pleased to hear them as witnesses had they been called in the normal course of the hearing. But the issue before us is whether we should reopen and

convene another hearing based on the ATI Statement. Given the state of the developed record, we believe not.

Subpoenas for CP&L Employees Black and Furr. The request for these subpoenas is based upon allegations made to Mr. Eddleman by an anonymous tipster that --

> FEMA was putting pressure on CP&L not to take additional measures, such as installing additional sirens, to add to the protection of the public and the effectiveness of the EPZ siren (primary) alerting system. Motion at 2.

Mr. Eddleman argues that Black and Furr --

> are in the best position to know whether FEMA in fact was pressuring CP&L not to take additional measures (e.g. install more sirens) to produce better alerting or better nighttime awakening. If such actions were being taken by FEMA, it would cast doubt on the impartiality of FEMA's management and thus on the impartiality of FEMA's entire review of the Harris Off-site Emergency Plan, conducted under that management. This is clearly relevant, not only to this contention, but to numerous others by myself and other parties. Motion at 4.

These allegations are clearly outside the scope of Contention 57-C-3, which concerns whether the Applicants system, as proposed, will meet NRC requirements. Either it does or it doesn't. Even assuming, for the sake of argument, that there may be some basis for these bare allegations, they would have no bearing on the contention. Furthermore, we would in any event require more in the way of a showing than an anonymous hearsay tip as a basis for reopening a record and reconvening a hearing. Finally, as the Applicants point out, the record was left open only in relation to the ATI concerns and motions that might be based upon them. In seeking subpoenas for Black and Furr, Mr. Eddleman does not attempt to meet his burden of moving to reopen the record.

Admission of Documents. The Applicants suggested an alternative approach under which we would admit into the evidentiary record, without hearing or cross-examination, the ATI Statement, the German Study and an article by Dr. Bassiouni from Power Engineering about informal alerting. The only objection to this procedure was voiced by the State of North Carolina, a belated entrant into this litigation whose first formal manifestation of interest came in a petition to intervene on November 22, 1985. Tr. 10,214-10,219. The State objected to admission of the Power Engineering article without calling Dr. Bassiouni because of its concern for unexplained conflicts in the record. The Board rejected that objection because the area of such conflicts would not be in Dr. Bassiouni's primary area of expertise and therefore would not be significant. Tr. 10,224-10,225. The Board admitted the three cited documents into the evidentiary record, as proposed by the Applicants.

Proposed Rebuttal Witness. During the evidentiary hearing on Contention 57-C-3, Mr. Eddleman proposed to call as a rebuttal witness a resident of Apex, N.C., a small town located in the Harris EPZ. Mr. Eddleman described the witness' proposed testimony to the effect that she believed the sound of the Harris sirens and the Apex fire siren to be similar and that she regularly slept through the Apex fire siren. Tr. 9672-9674.

The Applicants, the Staff, and FEMA objected to the proposed rebuttal witness primarily on the ground that her testimony was not proper rebuttal because the point should have been anticipated, and the testimony should have been filed as direct. Tr. 9960-9962.

At that time, the Board rejected Mr. Eddleman's proffer of the rebuttal witness. Tr. 9966. We stated that we would supply our reasons at a later date. Those reasons follow.

We agree with the objecting parties that the proposed testimony is not proper rebuttal. In the context of Contention 57-C-3, any party should have been able to anticipate that an alleged similarity of sounds between the Harris sirens and other sirens in the EPZ might become an issue in the case. Therefore, any party seeking to present a witness on such an alleged similarity should have prefiled testimony as party of their direct case.

Furthermore, we do not believe that testimony from a single witness on that subject would have had any probative value. By and large the parties have elected to try this issue on the basis of expert testimony. We have not attempted to determine who hears the sirens and what they mean by polling the populace of the EPZ. If we had taken that approach, we would have heard many lay witnesses from the EPZ and we would have been concerned with the validity of samples. With these considerations in mind, we fail to see how a single non-expert witness residing in the EPZ can contribute to a resolution of the issues.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

James L. Kelley, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland