

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 05-S-1376 - Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Consolidated Edison Company of New York, Inc. for Steam Service.

PROCEDURAL RULING

(Issued February 3, 2006)

ROBERT R. GARLIN, Administrative Law Judge:

INTRODUCTION

The "Procedural Ruling and Prehearing Conference Report" issued December 23, 2005 set forth, among other things, ten "Rules of Conduct for the Hearing." The Department of Public Service Staff (Staff) has requested that three of the rules be reconsidered.

RE-CROSS-EXAMINATION

The second rule of conduct provides that examination of witnesses will be limited to the direct examination necessary to proffer prepared testimony for admission into the record, cross-examination, and redirect examination. Staff argues that the rule, which generally precludes re-cross-examination and re-redirect examination, "is unreasonable on its face and violates both the requirements of due process and 16 NYCRR §4.5(a)[.]"

The regulation cited by Staff provides only that parties will have the opportunity to conduct direct examination and cross-examination. In proceedings conducted under the 16 NYCRR Subchapter A rules of procedure (both for the Public Service Commission and the Board on Electric Generation Siting and the Environment), it has been customary for the hearing officers to allow redirect examination, but there is no rule of procedure in 16 NYCRR Subchapter A requiring that they do so.

The "customary" conduct of redirect examination that has evolved in Commission and Siting Board proceedings is quite different from what is allowed in court proceedings, and it often (i) results in delays in the hearings, and (ii) encourages parties to attempt to conduct redirect examination that goes beyond the scope of cross-examination. For that reason, the second rule of conduct provides both that redirect examination will be strictly limited to matters brought out on cross-examination, and that attorneys/representatives will not be permitted to confer with their witnesses before engaging in redirect examination.

With that rule in place, I expect that, generally, there would be no need for additional examinations in order to develop a complete record. However, the ruling did provide that requests for waivers of the rules of conduct would be considered on a case-by-case basis, upon a showing that strict adherence to the rules of conduct would be unreasonable. Staff argues that requiring a party to request a waiver of a rule of conduct is tantamount to "[r]equiring a party to prove that it is entitled to due process[.]" I appreciate the concern expressed by Staff, but my expectation is that it would be obvious from the circumstances whether a waiver of the second rule of conduct (or any other) would be necessary in order to acquire information needed to complete the record. If so, I would be inclined to grant that waiver.¹

¹ Staff also expresses a concern that parties might "introduce evidence into the record on redirect examination." However, the second rule of conduct states that "[r]edirect examination will be strictly limited to matters brought out on cross-examination."

FOUNDATION FOR CROSS-EXAMINATION

The fourth rule of conduct set forth in the December 23, 2005 ruling required that "[a]ll questions on cross-examination must begin with a reference to the page(s) and line(s) of the prepared testimony to which the questions pertain." Staff offers two criticisms.

First, Staff observes that "the evidence sought to be introduced by the company may include exhibits, discovery responses, and workpapers, none of which would have testimonial page and line number references." Staff's point is well taken with respect to exhibits. The fourth rule of conduct is revised as follows:

Questions on cross-examination pertaining to prepared testimony shall identify the page(s) and line(s) of passages to which they pertain. Questions pertaining to exhibits shall identify, as applicable, the prefiled exhibit numbers, schedules, pages, lines, etc. to which they pertain.

Cross-examination with respect to discovery responses and workpapers would presumably be conducted in accordance with the sixth rule of conduct, so the foundation would be readily apparent. The foundation for questions about information that has not been included in prepared testimony, exhibits, discovery responses, or workpapers can be established on a case-by-case basis, as is ordinarily done.

Second, Staff argues generally that the fourth rule of conduct would interfere with "the parties' right to conduct cross-examination in the manner they deem appropriate." However, the fourth rule, as modified above, gives the parties advance notification about the manner in which the hearings will be conducted, so that they can prepare their cross-examination accordingly. Were the testimony or exhibit to which a question on cross-examination pertained not made apparent to me at the

outset, I would ask for that information before the questioning continued.²

LIMITATION ON OBJECTIONS

The fifth rule of conduct states that "[n]on-adverse cross-examination will not be permitted," and that "[o]bjections arguing that cross-examinations are non-adverse may be raised by any party." The sixth rule of conduct states that "[o]ther objections to questions posed or documents presented to a witness/panel during cross-examination may be raised only by the representative for the party sponsoring the witness/panel."

Staff contends that "this rule violates the parties' due process rights in that it denies them procedural safeguards that ensure a fair hearing and the introduction into evidence of relevant and non-privileged information." Staff gives, as two examples supporting its contention, the following:

"[I]f Party A seeks to cross-examine Party B's witness on issues that arose during settlement negotiations in the last steam rate case (or in this case, if settlement negotiations occur), neither Staff nor any other party would be permitted to object to such improper questioning."

"[I]f Party A seeks to cross-examine Con Edison on issues wholly unrelated to the issues in this proceeding, but for whatever reason, Con Edison decides not to object, Staff would be precluded from objecting that the line of inquiry is irrelevant."

² Staff expresses a concern that the fourth rule of conduct would result in the parties' being "deprived of the opportunity to establish a flow to their cross[-examination,] since each follow-up question would also have to be preceded with the same demonstration." So long as it is apparent that second and ensuing questions pertain to the same testimony or exhibit (or the same discovery response or workpaper) identified in the first question of the series, repetitive references will not be necessary.

Staff's contention appears to rest on an assumption that the only available form of intervention to prevent an obviously improper line of questioning would be an objection raised by one of the parties. That has not been the case in previous Commission proceedings, nor will it be the case in this proceeding. The sixth rule is subject, of course, to the availability of a waiver if justified on a case-by-case basis.

CONCLUSION

The rules of conduct for the hearing are derived from (but less extensive than) rules of conduct that have been successfully employed by administrative law judges at the Federal Energy Regulatory Commission to manage the hearings in cases involving several parties and/or complex issues.³ These rules will not be applied in any manner that results in the compromising of a party's procedural rights, as doing so would frustrate the objective of developing a complete evidentiary record.

(SIGNED)

ROBERT R. GARLIN

³ See, e.g., FERC Docket No. EL05-71-000, Rules for the Conduct of the Hearing (issued May 17, 2005)