

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station, Unit 1)

)
) DOCKET NO. 50-322-OL-3
) (Emergency Planning Proceeding)
)
)

FEMA RESPONSE
TO SUFFOLK COUNTY MOTION
TO COMPEL DISCOVERY FROM FEMA

Suffolk County on September 7, 1983 filed a motion to compel discovery, which motion was expanded by a subsequent motion dated September 19, 1983. Specifically, the County seeks to depose three FEMA employees 1/ and seeks the production of three documents or series of documents.2/

As noted in the County Motion to Compel FEMA has declined to make these three employees available on the ground that FEMA has already provided its three witnesses 3/ for deposition and the county has not made the requisite showing required by 10 CFR 2.720 (h)(2)(i) as regards the three additional employees which the County seeks to depose.

The County's Motion raises a basic question as to the status of the Federal Emergency Management Agency in this proceeding. Other than presenting testimony on off-site emergency planning and testimony regarding specific contentions, FEMA plays no formal role in the hearing process. For example, FEMA does not sponsor contentions, nor advocate license conditions, nor formally either oppose or support the license application. If FEMA is held not to be a party to this proceeding, it is not subject to inter-party discovery in the form of requests for document production or the service of interrogatories. Similarly, if FEMA is not subject to inter-party document requests as part of the discovery

1/ The three FEMA employees sought to be deposed are Richard Krimm, Assistant Associate Director; Jeffrey Bragg, Executive Deputy Director; and Gary Johnson, Executive Officer in the Office of Natural and Technological Hazards.

2/ a) Letter from Frank P. Petrone, Regional Director to Louis O. Giuffrida, Director FEMA and Jeffrey Bragg, Executive Deputy Director

b) All drafts and draft notes of the cover letter dated June 23, 1983 from Richard W. Krimm to Edward L. Jordan conveying the analysis of the 34 inadequacies of the LILCO Transition Plan.

c) All drafts and draft notes of the letter dated August 29, 1983 from Jeffrey S. Bragg to William J. Dircks.

DESIGNATED ORIGINAL

Certified By

DSOT [Signature]

process, a motion to compel for failure to provide requested documents is similarly invalid. See 10 CFR 2.740 (f). See order dated August 7, 1981 Docket No. JIN 50-483 01 Calloway proceeding.

If FEMA is a party it is only through the relationship established by the FEMA/NRC Memorandum of Understanding wherein "To support its findings and determinations, FEMA will make expert witnesses available before the Commission, NRC hearing boards and administrative law judges, any court actions, and during any related discovery proceedings." Mou III A. emphasis added.

Therefore, no matter whether FEMA is or is not a full party to the proceeding the involvement envisioned by both FEMA and NRC was clearly spelled out in the MOU. It is clear from the MOU that all FEMA has to do is make its expert witnesses available. If this Board wishes to broaden the terms of involvement of FEMA beyond that spelled out in the MOU it should at least afford FEMA the same protection that is afforded to a contractor of NRC from unduly burdensome discovery.

Alternatively, the County still has not attempted to make the showing required by 10 CFR 2.720 (h)(2)(i). According to the County, FEMA is not entitled to the protection of 10 CFR 2.720 (h)(2)(i) since it is not a part of the NRC nor a contractor of the NRC. While neither the Title 2 provision in question or the wording of the "Memorandum of Understanding between NRC and FEMA Relating to Radiological Planning and Preparedness" (MOU) 45 Federal Register 82713 et. seq. explicitly extends the protection of 10 CFR 2.720 (h)(2)(i) in choosing witnesses to FEMA it is clear from a reading of the MOU on the whole that the NRC and FEMA staffs would cooperate in presenting testimony before the Board. At a minimum, under the terms of the Mou FEMA would be afforded the status of consultants.^{4/}

It is the position of the staff of the NRC and of counsel for FEMA that at the minimum the provisions of 2.720 (h)(2)(i) 2.740 (b) and 2.740 apply to FEMA as well as to the NRC.

If we accept the County's interpretation that there is nothing in the MOU to entitle FEMA personnel to the protection of Section 2.720 (h)(2)(i) then FEMA is required to do no more than the MOU requires and that is to make our witnesses available.

In the original filing the County, without benefit of the deposition of the FEMA witnesses stated that "Messrs. Krimm, Bragg and Johnson have each participated personally in the FEMA review of the LILCO Transition Plan." Equally incorrect is County's statement that these three gentlemen have been "reviewers" in this case.

3/ Roger B. Kowleski; RAC Chairman, Region II, Frederick H. Sharrocks, Senior Program manager, Technological Hazards Division; Edward A. Tanzman, Argonne Laboratories.

4/ See generally MOU Section I ("Mutual Efforts"); Section 2 (FEMA is charged by Executive Order with establishing policy for and coordinating all civil emergency planning) and Section 3 (FEMA to provide Support in NRC licensing reviews).

It is clear from the deposition testimony that Mr. Johnson, Mr. Bragg and Mr. Krimm did not review the LILCO Transition Plan against the Criteria of NUREG-0654. It is equally clear from Mr. Tanzman's deposition that except for the addition of a few cross-reference materials in the comments section of the review document FEMA did not direct any changes to the technical review conducted by Argonne on behalf of FEMA.

FEMA in order to assist the Board in the task before it has attempted to respond as fully and expeditiously to all requests from the parties. FEMA has provided documents for which it normally could assert a privilege. FEMA has attempted to provide a full record for the parties as to the material presently reviewed.

All final documents have been produced, FEMA is presently searching its records again to determine if there are any other documents relating to the review of the LILCO transition plan that may not have been identified to the parties. This requires additional time as the County clarified at the deposition that their document request sought not only those documents relating to the review of the LILCO Transition plan but any document that mentioned the Shoreham Nuclear Power Station. It is the understanding of counsel that the hearing before this board is limited to the LILCO Transition Plan but we will attempt to identify these other documents.

Two of the documents specifically requested herein involve the drafts of the letters that were sent by FEMA to NRC in response to a request by NRC. FEMA's policy and position is clearly enunciated in those letters and any attempt to acquire the drafts would be unduly disruptive to the normal proceeding of the agency. An agency has a right to seek its own counsel and to freely discuss its policy relative to a response to another agency without having those discussions examined before a hearing conducted by that other agency.

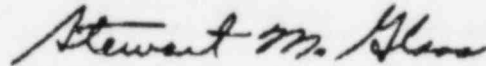
Privilege against disclosure of intragovernmental documents containing advisory opinion recommendations and deliberations is part of broader executive privilege recognized by courts and purpose of privilege is to ensure that decision makers in government are provided with candid and frank advice.

If it is not the intent of this hearing board to review each and every policy decision of FEMA then it is obvious that this line of discovery will not lead to admissible evidence.

The County is not requesting information relating to the actual review of the LILCO/Transition Plan as that material has already been provided. What they are seeking to discover are the thought processes behind clearly enunciated policies. This review of the decision-making process as it relates to cover letters between two agencies may be appropriate for a legislative hearing but another agency's licensing Board is not the proper forum to inquire into the policy decision of another agency.

As the material the County is seeking is not relevant, subject to privilege and in that the County has not made the requisite showings for the production of these additional documents and individuals the County's motion should be denied.

Respectfully submitted

A handwritten signature in cursive script, reading "Stewart M. Glass".

Stewart M. Glass
FEMA Regional Counsel

The NRC staff concurs with the positions taken by FEMA in this filing.

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

Docket No. 50-322-OL-3
(Emergency Planning)

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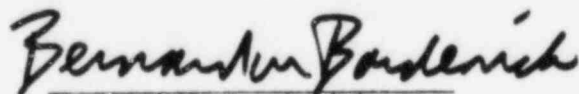
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