

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Board

In the Matter of)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Plant,
Unit 1))

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

SUFFOLK COUNTY REPLY TO LILCO'S OPPOSITION
TO COUNTY MOTION TO CHANGE SCHEDULE

On February 9, 1984, LILCO filed an Opposition to Suffolk County's Motion to Change Schedule (hereinafter "Opposition"). In its Opposition, LILCO makes the following erroneous statements that must be corrected.

First, LILCO suggests at page 2 of its Opposition that the estimate provided by FEMA's counsel concerning how long it will take FEMA to prepare testimony (two weeks), is "a truncated, off-the-record estimate" that is uncertain and, impliedly, not credible or reliable. The County understands, however, that the March 14 testimony filing date provided by FEMA's counsel was, in fact, communicated by FEMA's counsel to the Board (via a telephone conversation with the Board's law clerk), after the Board received notification from the NRC Staff of the new March 1 anticipated release date for the RAC report. Presumably FEMA's counsel considered the pertinent facts before he made such a representation to the Board. Therefore, LILCO has no basis for

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suggesting that FEMA's counsel's best updated estimate, based on the new information available to him concerning the anticipated completion of the RAC review, is uncertain or unreliable. Past changes which FEMA has made in its testimony filing date have always been in response to changes in the circumstances of the RAC review. In some instances, these changes were prompted by LILCO's belated submittal of voluminous revisions of its emergency plan. LILCO's suggestion that the representation made by FEMA's counsel to the Board should be ignored is thus both unfitting and unfounded.

Second, LILCO states that the County has failed to demonstrate that Group II issues "cannot be heard . . . absent the FEMA RAC Review," (see this Board's November 18, 1983 Order Establishing Supplemental Agenda for Conference of Counsel) other than by the statement in the County's Motion that "the FEMA witnesses will constitute the bulk of the Staff's testimony on Group II issues." Opposition at 3. LILCO is totally incorrect. Contrary to the implication in LILCO's Opposition, the statement contained in the County's motion that FEMA's witnesses will provide the bulk of the Staff's testimony is not just an "assertion" by the County. In fact, at the Conference of Counsel which followed the November 18 Order, counsel for the NRC Staff stated that "the bulk of the [Staff's] testimony on Group II will be FEMA's" (Tr. 730), although there might be "a few discrete areas"

where one Staff witness would file testimony on a "very small percentage" of "subparts of contentions," which FEMA's witnesses might also address. (See Tr. at 725-26, 730-31, and 757.)

Moreover, as LILCO knows, the original agreement among the parties to divide offsite emergency planning issues into Group I and Group II was made precisely for the purpose of allowing the litigation of Phase II emergency planning issues to go forward on contentions that would not be affected by the RAC review nor addressed in testimony by FEMA's witnesses. Indeed, a joint pleading (Joint Scheduling Submission Of The Parties On Emergency Planning Matters [hereinafter "Joint Submission"]) filed by the parties, including LILCO, on October 21, 1983 explained to the Board an agreement reached by them at a meeting convened on that date to discuss the division of Phase II emergency planning issues. As stated in the Joint Submission:

During that meeting, it became apparent that, because the FEMA RAC review is scheduled to be completed early in December and because the parties believe that the results of the RAC review will be useful in preparation of testimony on pertinent issues, certain testimony cannot be fruitfully prepared prior to completion of the RAC review.

Accordingly, the parties have agreed upon the attached proposed division of testimony into two groups, with corresponding schedules for the filing of motions and commencement of hearings. All parties at the meeting have indicated their agreement with this schedule
. . . . (Emphasis added).

Joint Submission at 1. Thus, the issues that can proceed to hearing without FEMA input have already been identified jointly by the parties. They are the Group I issues.

In addition, the County explained to the Board in detail during the December 1, 1983 Conference of Counsel why Group II issues cannot be heard absent FEMA's RAC review. (Tr. 728-729, 752-754). Those reasons were reiterated by the County on January 27, 1984 during the Group I hearings. (Tr. 3669-3670). However, as noted in its Motion at 2, for the sake of brevity the County merely cited in its Motion the pertinent transcript pages rather than repeating the arguments made to the Board at that conference concerning the need for scheduling change. For the convenience of the Board, those transcript pages are attached hereto. They further demonstrate that, contrary to LILCO's erroneous assertions, the County has indeed presented detailed arguments as to why the Group II issues should not be heard absent FEMA's review.

Third, LILCO asserts that "to make FEMA's review the centerpiece of this proceeding is to distort its function." (Opposition at 4.) This assertion mischaracterizes the County's position. FEMA's function in this proceeding is to provide testimony for submission to the Board by the NRC Staff, pursuant to the requirement of 10 C.F.R. Section 50.47(a)(2) that:

The NRC will base its finding on a review of the Federal Energy Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that

they can be implemented. . . . In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability. (Emphasis added)

It is precisely because of that function, mandated by the regulations, that the County submits that a change in schedule is necessary.

The County is not attempting to make FEMA's review a "centerpiece" of any kind. Indeed, there is no basis for concluding that the testimony of one of the major parties to this litigation is any more central than that of the others. That is an important reason why it is fundamentally unfair to permit one party to file testimony after all others have done so.

Nevertheless, FEMA's findings, under the NRC's regulations, constitute a rebuttable presumption. Thus, the parties must be permitted the opportunity to address those findings in their direct testimony -- otherwise the NRC regulation would be rendered meaningless. The purpose of this hearing is to evaluate ILCO's Plan, and FEMA's mandated review is thus of critical importance. FEMA's review will focus on the very same issue. FEMA's review also will be based upon the criteria set forth in NUREG 0654 -- the very criteria that will guide this Board's consideration of the contentions presently before it. (Memorandum and Order Denying Suffolk County's Motion To Terminate The Shoreham Operating License Proceeding at 62 (April 20, 1983.) It makes no sense, from a standpoint of efficiency or fairness, to

require the parties to file testimony on the LILCO Plan without the benefit of the results of FEMA's review of the central issue before this Board. To do so would deprive the parties of their right under the Commission's regulations to consider and, if necessary, rebut FEMA's findings in their testimony.^{1/}

Finally, the Board should note that the County is not seeking a substantial change in the Group II schedule. Rather, the County's proposed change in the schedule calls for Group II testimony to be filed only 12 days after the currently scheduled filing date. Given the added efficiency of allowing the parties to consider and address FEMA's findings in their direct testimony, instead of in protracted rebuttal proceedings, the County's proposed change is reasonable and fair.

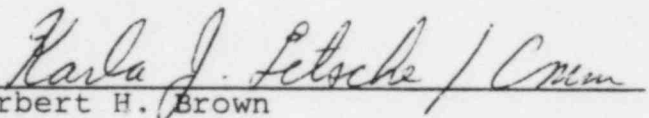
^{1/} LILCO suggests (Opposition at 4-5) that if the County sees the need to rebut FEMA's findings it can always file rebuttal testimony based on a showing of good cause. LILCO, however, has misinterpreted the NRC's regulations. 10 C.F.R. 50.47(a)(2) grants all parties an absolute right to rebut FEMA's findings. Therefore, the County submits that if the Board rules that FEMA may file its testimony after other parties, the remaining hearings will be split into two more phases -- the first based upon all of the parties' direct testimony and the second based upon the parties' rebuttal testimony which may be filed as an absolute right under Section 50.47(a)(2). Since FEMA will presumably be addressing almost every aspect of LILCO's Plan and evaluating the Plan against the criteria and sub-criteria of NUREG 0654, this potential additional rebuttal phase could be quite extensive. Taking into account the additional hearing time that will be required and the time needed for the parties to draft rebuttal testimony, such further bifurcation of the emergency planning proceedings would be inefficient and needlessly time-consuming.

CONCLUSION

For the reasons stated above, the Board should grant Suffolk County's Motion To Change Schedule.

Respectfully submitted,

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Dated: February 13, 1984

Dec. 1, 1983

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1 JUDGE LAURENSEN: What's the County's position on
2 that?

3 MR. LANPHER: Judge Laurenson, a couple of thoughts
4 on that. First, if a major party in this proceeding is going
5 to be exempted from testimony until some later time, but other
6 parties are going to have to forward with testimony, we think
7 that's fundamentally unfair.

8 More important, however, in an emergency planning
9 proceeding, FEMA RAC review -- or the FEMA review -- it's
10 a RAC review in this instance -- constitutes, according to
11 50.47(a)(2), this rebuttable presumption regarding adequacy
12 or inadequacy on the various items of the plan that they review.
13 And they reveal essentially everything.

14 I think Mr. Glass has said before how can a party
15 put in testimony on January 18th -- the present schedule,
16 I believe -- when the so-called rebuttable presumption isn't
17 going to be even filed or made available for several weeks
18 thereafter. I think we are at loggerheads here. I think it
19 would be fundamentally unfair to require parties to file
20 testimony in advance, not only of the FEMA Staff's testimony,
21 but even the RAC review.

22 And so I think it's something we have to confront
23 and no one here necessarily designed this whole proceeding for
24 FEMA to be the pacing item -- I guess the term was. But be
25 that as it may, FEMA does play -- and their RAC review does

1 play a crucial role in emergency planning proceedings. We
2 just can't hide from that. That's a fact of life. And we
3 think that the results of this, we're going to have to defer
4 Group II testimony until after that RAC review is completed.

5 ~~JUDGE LAURENSEN: Let me go back to the Staff for~~
6 ~~a second, and then I'll get to LILCO.~~

7 What is the Staff's view on this? Basically, it's
8 the Staff that granted that 60 day delay. Was it your
9 assumption that that was going to cause a 60 day slip in the
10 schedule, as you understood it at that time?

11 MR. BORDENICK: No. That really didn't enter into
12 the picture, as Mr. Reis earlier said. Based on the wording
13 of the FEMA request, frankly we felt we had no choice but to
14 grant the extension. And Mr. Glass says he would like to
15 respond to that, but having answered the first part of your
16 question, it's the Staff's position that the hearing can go
17 ahead in the absense of the completion of the RAC review.

18 I think we have a situation somewhat analogous to
19 what we had. I hate to keep referring back to previous
20 experience in this Shoreham proceeding, but last year --
21 again in the QA contentions, we had a situation where part of
22 the County's contentions involved operational Quality Assurance.
23 The Staff, on the same schedule as the other parties, did
24 file testimony. That testimony was divided -- or consisted
25 of a panel that included people from the Office of Nuclear

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1 JUDGE LAURENSEN: Back on the record now.

2 I assume everything has been resolved during
3 the recess?

4 (Laughter)

5 At least there are no bodies laying on the floor.

6 I think we had recessed at the point where the
7 Board had called upon parties to submit their suggestions as to
8 what ought to be done. Mr. Lanpher is about to tell us.

9 MR. LANPHER: I want to start off with one thing,
10 Judge Laurenson. Earlier today I stated that the County was
11 not going to object to stipulating the admissibility of the
12 Emergency Response Plan of LILCO. I can't hold to that any
13 longer, given -- up to Revision 2, fine.

14 If we have got this constantly moving target, we
15 are just going to have to reevaluate when we see what comes
16 in on that. That is an aside, but I didn't want to forget
17 it.

18 In terms of what we should do, given the RAC
19 situation and Revision 3, we start from the premise that you
20 raised also, Judge Laurenson, the waste of time, or the
21 potential waste of time that the parties incur in doing work
22 that subsequently gets superceded and that sort of thing is
23 a very serious concern.

24 Right now, particularly Suffolk County Police
25 Department witnesses who sponsor testimony, are spending

mm2 1 a lot of time redoing their Group I traffic testimony,
2 instead of preparing for cross-examination on that, or more
3 important, working on Group II testimony.

4 We have other witnesses who are in the process of
5 working on Group II testimony based on Revision 2 of the
6 Emergency Plan, and we now have a concern that some of the
7 work that they are doing is going to be superceded in whole
8 or at least in part, by whatever may come out in Revision 3.

9 Same problems can arise, of course, with
10 Summary Disposition Motions.

11 The other proposition that we start with, we
12 think that it is just fundamentally unfair for several parties
13 in this proceeding to go forward with testimony on one day,
14 and for other parties, and major parties -- especially FEMA --
15 the FEMA and NRC together -- to go forward with testimony
16 at a significantly later date, or at any later date.

17 If we were not talking about needs for everything to
18 get going and all this kind of stuff, I think the only
19 rational thing that anyone could conclude is that we should
20 key the filing of testimony and summary disposition motions
21 on the completion of the RAC Review, and the filing and
22 review of Revision 3. And that is the ideal situation.
23 That puts us into February sometime. I recognize that.

24 There is work that would be done in the meantime.
25 I can imagine maybe some of the Board's proposals regarding

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1 proposed findings would have more time to bear fruition;
2 some of the discovery matters that LILCO has raised might be
3 able to be fit in a little more easily, some of the
4 discovery needs that we may have on Revision 2, and who
5 knows, Revision 3 would also be fit in.

6 That is the ideal solution, Judge Laurenson,
7 those two fundamental facts, Revision 3 and RAC, they
8 ought to get done before we go forward with this other
9 stuff.

10 At a minimum -- I mean, if you have to have
11 a fallback position, I really don't like to because you have
12 asked me my views -- it seems to me at a minimum we need
13 to avoid wasted work by people on Revision 2, if Revision
14 3 is going to change it in any way. I'm very worried
15 about our people continuing to prepare testimony in this
16 on Revision 2, when we know that in the near future some
17 additional materials are going to come out that could
18 certainly change some of their testimony.

19 So I think that at a minimum we would have to
20 key the submittal of testimony and motions on an opportunity
21 to review Revision 3 of the Emergency Response Plan.

22 In addition, you know my views regarding RAC.
23 There has to be -- that there has to be an opportunity to
24 rebut that rebuttable presumption or to confront it. If
25 the Board feels that people should -- that LILCO and

mm41 Suffolk County should be singled out to be required to
2 file testimony before the Staff and FEMA, we think that
3 is fundamentally wrong. We believe there has to be an
4 absolute right -- not just a discretionary one -- but an
5 absolute right after the RAC Review comes in for the
6 County -- and the FEMA testimony -- for us to file
7 additional testimony, bring back our witnesses. And
8 perhaps, if we have gone forward with some cross-examination
9 for instance of LILCO's panels on Group II issues, we
10 might want to call them back in light of some of the RAC
11 material.

12 I don't think any of that is efficient. But
13 if you are going to require us to go forward with
14 testimony sometime prior to FEMA and the Staff going
15 forward with testimony, we think you have to build in that
16 absolute right to come back and present new evidence.
17 Of LILCO's, I don't mean just Suffolk County, but anyone
18 who is forced to file testimony that earlier time.

19 I'm afraid I will get just redundant if I keep
20 going. I think you understand the County's position,
21 Judge Laurenson.

22 JUDGE LAURENSEN: Okay.

23 ~~Mr. Irwin?~~

24 ~~MR. IRWIN: -- One of Mr. Lanpher's remarks~~
25 ~~illustrates one of the difficulties we face in this process,~~

Jan. 27, 1984

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~~1 of business would be the report from Mr. Glass on behalf
2 of FEMA concerning the time scheduled for the completion of
3 the RAC Review, along with FEMA's estimate of when their
4 testimony will be available to be filed.~~

5 MR. GLASS: Number one, as we have said all along,
6 we expected on or about February 1st, we have been talking
7 about for a number of weeks, February 7. And I think it's
8 safe to report that the NRC will receive by February 7th,
9 the RAC Review assuming that the Board has ruled on the
10 revised contentions.

11 FEMA will need at least three weeks from the
12 filing of the RAC Review in order to complete its testimony.

13 JUDGE LAURENSEN: Now, the schedule that is
14 currently in effect says that all parties shall file their
15 testimony on Group II issues on February 14th. So what
16 you're telling us then is that you need a two-week extension
17 of time. Is that correct?

18 MR. GLASS: That is correct.

19 JUDGE LAURENSEN: That's your position?

20 MR. GLASS: That is my position.

21 JUDGE LAURENSEN: What does that do to the other
22 parties and your schedule for Group II?

23 MS. LETSCHE: Well, Judge Laurenson, the schedule
24 that the county would propose in light of all the additional
25 discovery in Group I things that are also going to be going

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1 on, clearly before or during the currently scheduled filing
2 date for Group II testimony, is that all parties file
3 Group II testimony on March 2nd.

4 That is a three-week slippage. Two of the weeks
5 have been requested by FEMA. The county's position with
6 respect to the simultaneous filing of testimony has been
7 stated before and I'll state it again. That all parties
8 in this proceeding should be filing testimony at the same
9 time. There should be no favoritism shown.

10 If one party is going to have trouble making the
11 deadline, the deadline should be moved for all parties. If
12 FEMA needs three weeks after the submission of the RAC
13 Review to review that review and incorporate in its testimony,
14 I think it's only fair that the other parties in the
15 proceeding who have to address the contents of that RAC
16 Review, since it is a rebuttable presumption in this
17 proceeding, should have an equal amount of time to do so,
18 and address it in their testimony.

19 ~~More fundamentally, or in addition to that, I~~
20 ~~guess, the practical considerations are that we're now~~
21 ~~talking about having two weeks of depositions from February~~
22 ~~6th to the 17th, additional depositions of the state's~~
23 ~~Group I witnesses. Next week, the filing of additional~~
24 ~~testimony by LILCO. The opportunity for all parties to~~
25 ~~file motions to strike LILCO's supplemental testimony. All~~

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
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LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Station,)
Unit 1))
_____)

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

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY REPLY TO LILCO'S OPPOSITION TO COUNTY MOTION TO CHANGE SCHEDULE, dated February 13, 1984, have been served to the following this 13th day of February 1984 by U.S. mail, first class, except as otherwise noted.

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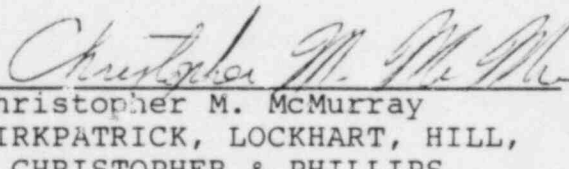
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