

246

RELATED CORRESPONDENCE

LILCO, May 17, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'84 MAY 21 A10:59

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Before the Atomic Safety and Licensing Board

In the Matter of)
)
LONG ISLAND LIGHTING COMPANY) Docket No. 50-322-OL-3
) (Emergency Planning Proceeding)
(Shoreham Nuclear Power Station,)
Unit 1))

LILCO'S RESPONSE IN SUPPORT OF
FEMA'S RESPONSE TO SUFFOLK COUNTY
REQUEST FOR PRODUCTION OF DOCUMENTS

LILCO supports FEMA's opposition to the production of certain documents associated with the RAC review process, numbered as items 1-37 at pages 5-6 of "FEMA's Response to Suffolk County Request for Production of Documents" dated May 14, 1984, 1/ and, in support thereof, states as follows:

1. The executive privilege, clearly recognized in general federal law and NRC case law, has already been applied in this proceeding by both this Board and the Brenner Board. See Memorandum and Order Ruling upon LILCO's Motion to Compel

1/ The Suffolk County Request for Production was filed on April 20. Suffolk County subsequently (May 8, 1984) filed a "Motion to Compel Response to Request for Production of Documents." That May 8 paper does not add any new issues to the pending discovery dispute, though its characterization of the context of this dispute should be clarified, and is, in paragraph 3 of this Response.

Production of Documents and Objections of Governor Mario Cuomo (March 7, 1984); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144 (1982). Assuming that the 37 documents that FEMA seeks to protect are characterized correctly in the FEMA Response and in the accompanying affidavit of FEMA Director Guiffrida, 2/ they fall clearly within the category of deliberative documents and therefore should be protected to preserve the integrity of the deliberative process.

2. That conclusion is buttressed in this case by two additional circumstances relating to the function of the RAC review and the structure of the RAC. The basic issue in this proceeding is the adequacy of the LILCO Transition Plan, not that of the RAC review. The RAC review has been provided to the NRC as an advisory document at NRC request pursuant to the FEMA-NRC Memorandum of Understanding. 45 Fed. Reg. 82713, 82714 (December 16, 1980). It becomes a part of the record of the case, but does not define the issues in it (the contentions do);3/ nor is it, unlike testimony, dispositive of those issues

2/ A finding by the agency head that production of certain documents would be contrary to the public interest is entitled to "great weight." See Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701, 706 (1971).

3/ The County, in fact, eschewed recently any intent that the RAC review serve as the basis for redefinition of issues in

legitimately in controversy to which it relates. See, e.g., Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163, 1251 (1982). It serves a function closely analogous to that of the letter placed in each licensing docket by the NRC's Advisory Committee on Reactor Safeguards (ACRS), which becomes part of the record of the proceeding, 10 C.F.R. § 50.58, but is not subject to cross-examination, see Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 7 AEC 331, 340 (1973). Deliberations and advisory opinions in preparation of the ACRS report are protected by executive privilege. Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974) and Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-33, 4 AEC 701 (1971), aff'd ALAB-123, 6 AEC 331 (1973). See also Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-81-4, 13 NRC 216 (1981) and Consumers Power Co. (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117 (1980).

Further, the structure and functioning of the RAC itself -- a collegial, advisory body of experts in their

(Footnote continued)

this proceeding. See LILCO's Motion to Set Deadline for Submission of New Contentions Relating to RAC Review (April 13, 1984), Suffolk County Response to LILCO's Motion to Set Deadline for Submission of New Contentions Relating to RAC Review (April 23, 1984), and LILCO's withdrawal of its motion at the hearing on April 24, 1984, Tr. 6647-6651.

subject-areas, not all of whom are employees of the parent agency -- are closely analogous to that of the ACRS. As the Commission's regulations, practice and applicable case law indicate, the deliberations and records of the ACRS are protected by executive privilege. Id. The RAC's deliberations and records and, a fortiori, the records of its individual members and consultants, should be given protection analogous to that given the closely comparable ACRS.

3. While the executive privilege can be overcome by a showing of "compelling need," see Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221 (1983), or "exceptional circumstances," see Consumers Power Co. (Palisades Nuclear Power Facility), ALJ-80-1, 12 NRC 117 (1980), nothing advanced in either of Suffolk County's papers to date attempts to meet these high standards. Nor do the circumstances suggest that the requisite showing could be made. The County argues that the requested documents are necessary to conduct depositions of individual RAC members and consultants. This argument overlooks the fact that the relevance of the RAC report to issues in this proceeding is simply as an exhibit to FEMA's testimony; LILCO's plan, and the contentions concerning it, and not the RAC review, are the subject matter of this proceeding.

Additionally, the RAC Review is a collective document. If the individual RAC members and consultants hold a spectrum of

views on any given issue, that fact does not vitiate the validity of the consensus expressed in the report. Resolution of divergent individual views is an inherent part of the committee process and the privacy of that process has been consistently recognized as being entitled to protection. In short, disclosure of the materials sought to be protected is unlikely to produce or to lead to the production of relevant information and would chill the conduct of the committee deliberations process.

The County's motion also omits reference to the fact that it has already obtained major document discovery regarding FEMA's review of the LILCO Transition Plan pursuant to a separate FOIA request. The County complains (Motion to Compel Response, note 2, at pp. 2-3) that FEMA withheld a seven-page list of documents in its response to the County's FOIA request. It does not state that the documents turned over by FEMA in response to the FOIA request consist of a six-inch-high stack of papers including memoranda, letters, notes and documents of varying degrees of formality, covering a wide range of FEMA's review of the LILCO Transition Plan. As is noted in FEMA's Response at 2-4, forty of these documents relate to the RAC review. Given these documents, and the further documents provided with FEMA's Response (id. at 4-5), Suffolk County will hardly be without background documentary support to prepare for its two days of depositions of FEMA personnel. There is, on

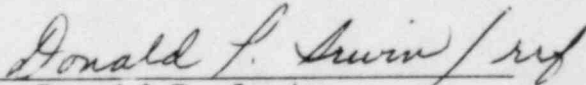
this record, no compelling need, sufficient to overcome executive privilege, to warrant compulsory disclosure of the additional documents the County seeks.

Nor do there appear to be any "exceptional circumstances" surrounding the process or results of the RAC review that could overcome the presumption of regularity in its proceeding in this case; LILCO is aware of none, and Suffolk County has not alleged any.

For the above reasons, if the Board finds upon examination that the documents sought by Suffolk County are within the scope of the executive privilege, the Board should protect them against compulsory disclosure.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY


Donald P. Irwin
Renee R. Falzone

HUNTON & WILLIAMS
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

DATED: May 17, 1984

LILCO, May 17, 1984

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
(Emergency Planning Proceeding) Docket No. 50-322-OL-3

I hereby certify that copies of LILCO'S RESPONSE IN SUPPORT OF FEMA'S RESPONSE TO SUFFOLK COUNTY'S REQUEST FOR PRODUCTION OF DOCUMENTS were served this date upon the following by first-class mail, postage prepaid, or by hand (one asterisk), or by Federal Express (two asterisks), or by telecopy (three asterisks).

James A. Laurenson,*
Chairman
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
East-West Tower, Rm. 402A
4350 East-West Hwy.
Bethesda, MD 20814

Dr. Jerry R. Kline*
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
East-West Tower, Rm. 427
4350 East-West Hwy.
Bethesda, MD 20814

Mr. Frederick J. Shon*
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
East-West Tower, Rm. 430
4350 East-West Hwy.
Bethesda, MD 20814

Eleanor L. Frucci, Esq.*
Attorney
Atomic Safety and Licensing
Board Panel
U. S. Nuclear Regulatory
Commission
East-West Tower, North Tower
4350 East-West Highway
Bethesda, MD 20814

Secretary of the Commission
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Bernard M. Bordenick, Esq.*
David A. Repka, Esq.
Edwin J. Reis, Esq.
U. S. Nuclear Regulatory
Commission
7735 Old Georgetown Road
(to mailroom)
Bethesda, MD 20814

Stewart M. Glass, Esq.**
Regional Counsel
Federal Emergency Management
Agency
26 Federal Plaza, Room 1349
New York, New York 10278

Stephen B. Latham, Esq.**
Twomey, Latham & Shea
33 West Second Street
Post Office Box 398
Riverhead, NY 11901

Fabian G. Palomino, Esq.**
Special Counsel to the
Governor
Executive Chamber
Room 229
State Capitol
Albany, New York 12224

Herbert H. Brown, Esq.***
Lawrence Coe Lanpher, Esq.
Christopher M. McMurray, Esq.
Kirkpatrick, Lockhart, Hill
Christopher & Phillips
8th Floor
1900 M Street, N.W.
Washington, D.C. 20036

Mr. Marc W. Goldsmith
Energy Research Group
4001 Totten Pond Road
Waltham, Massachusetts 02154

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

Mr. Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Gerald C. Crotty, Esq.
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Ralph Shapiro, Esq.**
Cammer & Shapiro, P.C.
9 East 40th Street
New York, New York 10016

James B. Dougherty, Esq.**
3045 Porter Street
Washington, D.C. 20008

Jonathan D. Feinberg, Esq.
New York State Public Service
Commission, Staff Counsel
3 Rockefeller Plaza
Albany, New York 12223

Spence W. Perry, Esq.**
Associate General Counsel
Federal Emergency Management
Agency
500 C Street, S.W., Rm. 840
Washington, D.C. 20472

Ms. Nora Bredes
Executive Coordinator
Shoreham Opponents' Coalition
195 East Main Street
Smithtown, New York 11787

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788


Renee R. Falzone

Hunton & Williams
707 East Main Street
Post Office Box 1535
Richmond, Virginia 23212

DATED: May 17, 1984