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USNRCUNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 MAY 21 10:55

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)SUFFOLK COUNTY MOTION TO COMPEL
PRODUCTION OF DOCUMENTS IDENTIFIED
BY FEMA ON MAY 14 AND 15

Pursuant to the agreed upon schedule discussed by the Board and parties on May 9, 1984, and pursuant to 10 C.F.R. § 2.740(f), Suffolk County hereby moves the Board to issue an order compelling FEMA to produce the thirty seven documents identified, but withheld from production, on pages 5-8 of FEMA's Response to Suffolk County Request for Production of Documents (hereinafter "FEMA Response"). The bases for this Motion are set forth in parts B-F below.

A. FEMA's Response is Still Not Complete

As a preliminary matter, the County notes that it is filing this Motion on May 17, in order to obtain a Board ruling on FEMA's withholding of documents. The County's filing, however,

is of necessity incomplete as a result of FEMA's inability or unwillingness to provide the information upon which the County's Motion is necessarily premised on a timely basis as contemplated by the May 9 agreement among the parties which was adopted by the Board. Thus, despite the requirement that "on Monday, May 14th, FEMA will file a list of all the documents which meet the [County's document] requests and a list of its objections to the request for documents," (Tr. 8752 (Laurenson)), on May 14 the County received only pages 1-7 of the FEMA Response. Those pages did not contain a complete listing of the responsive documents, and they contained no objections or bases for withholding any documents. The County did not receive the full eleven page document entitled "FEMA Response to Suffolk County Request for Production of Documents" until shortly before noon on May 15.

In addition, at approximately 4:00 p.m. on May 15, the County received a letter from FEMA Counsel (Attachment A hereto) which purportedly "supplements" the FEMA Response. The letter states that documents responsive to the County's document request -- apparently in addition to those identified in the FEMA Response -- have been "requested" from RAC members, but apparently not yet received by FEMA counsel or included in the listing contained in the FEMA Response. The May 15 letter

also states that "two or three additional items that may be responsive" to the request "have been forwarded" to FEMA counsel but have not yet been received. As of May 17, 1984, the County has still not received a complete response to its April 20 document request.^{1/}

Thus, although the entire schedule leading to a Board ruling by May 18 was premised on the representation of FEMA counsel that he could file a complete response by May 14 and provide by May 17 all the withheld documents to the Board (with duplicates available for production to the County pending the Board's ruling), it is clear that a complete response has yet to be provided by FEMA: FEMA counsel has not even located, much less received or reviewed all the responsive documents. The County submits that in light of FEMA's continuing non-compliance with the timetables set in this proceeding, and the scheduled depositions of the FEMA witnesses during the week of May 21, the Board should order FEMA to turn over all

^{1/} Furthermore, despite the representation at page 4 of the FEMA Response, as of May 15, 1984, the 8 documents listed on pages 4-5 of the FEMA Response had not yet been provided to the County. They were received after noon on May 16. Similarly, despite the representations in the May 15, 1984 letter from Mr. Glass, the FEMA employees' Anticipated Workload Forms relating to Shoreham, were also not provided to the County until May 16, 1984.

remaining responsive documents to the County, regardless of whether FEMA objects to their production, no later than Monday, May 20.

The County's Motion addresses only the 37 documents identified in the FEMA Response, since the remaining documents have not yet been identified by FEMA counsel.

B. FEMA has Failed to Satisfy the Threshold
Standards for a Proper Assertion of the
Executive Privilege

In its November 1, 1983 Memorandum and Order Ruling on Suffolk County Motion to Compel FEMA to Produce Documents (hereinafter, "November Order") which is relied upon by FEMA at page 8 of its Response, this Board identified four requirements for properly invoking the executive privilege. See November Order at 2. FEMA has not satisfied at least two of those requirements.

The County received late on May 14 an unexecuted Affidavit drafted for the signature of Louis O. Guiffrida, Director of FEMA. The County assumes that the Board will have in hand an executed copy of that Affidavit before it makes any ruling upholding any of the FEMA privilege claims. The County also assumes that copies of the documents which have been identified

and withheld will be provided for the Board's in camera inspection by May 17. Thus, the County does not at this time contest FEMA's satisfaction of the first and fourth requirements set forth on page 2 of the Board's November Order. The documents submitted by FEMA, however, do not satisfy either the second or third requirements identified by the Board, and this failure alone requires the granting of the County's motion to compel.

The two requirements in question are:

(2) the claim must specifically describe and designate the documents sought to be withheld;

(3) the claim must state the precise reasons for preserving the confidentiality of the documents

November Order at 2.

Neither the FEMA Response nor the Guiffrida Affidavit specifically describes all the documents sought to be withheld, even limiting those documents to the 37 listed in the FEMA Response. First, at least four of those documents (items 20, 21, 22 and 23) have not even been seen by either FEMA Counsel (see FEMA Response at 8-9) or by Mr. Guiffrida (see Affidavit at paragraph 6.) Although these documents are described as "individual personal notes," clearly, neither FEMA Counsel nor

Mr. Guiffrida have any basis for assuming such description is accurate. More importantly, the description "personal notes" does not constitute a meaningful or useful description of the documents at issue that could enable either the Board, or Suffolk County, to evaluate the applicability of the asserted privilege. "Personal notes" clearly could comprise purely factual statements to which the asserted privilege does not apply. The County cannot file an informed response to the FEMA privilege claim, nor can this Board rule, based on the limited so-called "description" of these documents that has been provided by FEMA.

This deficiency also applies to most of the other documents identified and withheld by FEMA. The FEMA designations of the following items fail to "specifically describe" them:

- Items 1-19 (each described only as "comments")
- Item 27 ("Transmittal Memorandum")
- Item 28 ("Memorandum," "Subject: Shoreham Plan and Review")
- Items 29 and 30 ("Discussion Points" and "Q's and A's" "on the FEMA finding of 3/15/84 for Shoreham")
- Item 31 ("annotated notes")
- Item 32 ("Notes and Option Paper on Strategies for Handling Shoreham Offsite Emergency Preparedness Problem")

- Item 33 ("Memorandum" "Subject: Federal Emergency Management Agency Support for Nuclear Regulatory Commission Licensing of Shoreham Nuclear Station")
- Item 34 ("Memorandum" "Subject: Legal Issues Identified During the RAC Review of LILCO Transition Plan for Shoreham")
- Item 37 ("pages of a flip chart" of RAC "comments")

The FEMA Response and Guiffrida Affidavit also fail to state "precise reasons for preserving the confidentiality of the documents" being withheld. The only "reasons" contained in the FEMA Response are the following unexplained or conclusory assertions:

It is the position of [FEMA] that the above thirty-seven (37) documents are privileged, that they are subject to the protection of the executive privilege (sic). (At 8.)

* * *

FEMA objects to the discovery of any advisory memoranda, predecisional deliberations related to the RAC review, or the input of the individual RAC members to the final FEMA RAC report. (At 9.)

* * *

It is obvious . . . that [Suffolk County is] seeking to ascertain the predecisional thoughts and opinions of the individual RAC members. Executive privilege is meant to protect these very thought processes, advisory opinion recommendations and deliberations. (At 9.)

* * *

These documents fall squarely within the scope of executive privilege (At 10.)

These assertions are insufficient to support a claim of privilege. First, they are not related in any way to the actual documents at issue (e.g., why are memoranda concerning "FEMA Support for NRC Licensing of Shoreham," or "legal issues identified in the RAC Review," or RAC comments on Revision 1 (Items 33, 34 and 37) subject to executive privilege?) Second, there is no "reason" given to support the asserted conclusion that individuals' thoughts and opinions -- which are supposedly in the notes and comments of RAC members -- are covered by executive privilege. Clearly, every document containing written words also reflects some individual's thoughts. That alone does not make a document privileged, particularly when the individual is a witness or when that individual's thoughts and opinions have been submitted into evidence, which is the case here. Third, even if some of the documents at one point may have been subject to a privilege of some sort, the FEMA Response is totally silent concerning any need to preserve the confidentiality of any of the documents, given the fact that FEMA is a party to this proceeding, has submitted testimony by several of the authors of documents being withheld, and has

submitted into evidence, and its witnesses rely upon the very report which is the subject of the documents being withheld. As we explain further in part D below, FEMA has not stated any basis for a continuing privilege -- if one ever applied -- with respect to the documents at issue.

The Guiffrida Affidavit is similarly deficient. Although it does assert that production of the documents "would be contrary to public interest," "will have a chilling effect on this agency to receive in written format the comments, concerns and opinions of our staff," (sic) and "will also adversely affect the ability of our RAC Chairman to receive in written format the comments, concerns and opinions of" the RAC members, there is again no stated relationship between these conclusions and the particular documents at issue. There is also no recognition, much less discussion, of the fact that many of these documents have been authored by individuals designated as witnesses by FEMA, and that they all involve a document -- the RAC Report -- that FEMA will be submitting into evidence in this proceeding.

Finally, the October 12, 1983 FEMA Response to Suffolk County Motion to Compel Discovery which is referenced in the FEMA Response (at 8), is as incomprehensible and inapposite now

as it was in October. In addition, it of course fails to address any of the documents now at issue. (The matters at issue in October primarily involved FEMA's internal policy and proposed response to the NRC's requests for a review of the LILCO Plan.) It provides no additional information which could support a claim of privilege.

In short, FEMA has failed to make even the threshold showings necessary to support a claim of privilege and need for confidentiality with respect to the 37 documents it has identified and withheld.

C. The Executive Privilege Does Not Apply to the Documents at Issue

Although for the reasons noted above it is difficult to discuss in any detail the documents being withheld because the descriptions provided by FEMA are so uninformative, it nonetheless seems clear that given their subject matter, most if not all of them, are not subject to the executive privilege. It is well established that the privilege "does not attach to purely factual communications, or to severable factual portions of communications, the disclosure of which would not compromise military or state secrets." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC

1114, 1164 (1982), citing EPA v. Mink, 410 U.S. 73 at 87-88. See also Brand v. Phillips Petroleum Co., 628 F.2d 873 (5th Cir. 1981), cited in the November Order, at 7, and this Board's Memorandum and Order Ruling Upon LILCO's Motion to Compel Production of Documents and Objections of Governor Mario Cuomo, dated March 6, 1984 (hereinafter "March Order") at 7. The documents at issue all relate to the RAC Review or the RAC Report which is attached to the testimony of the FEMA witnesses. That review, and the resulting report, consists of purely factual material -- that is, whether or not the LILCO Plan contains or does not contain various elements identified in NUREG 0654. Indeed, many of the documents being withheld appear to be nothing more than the particular findings of fact by RAC members -- labeled "comments" in the FEMA document listing -- that eventually became the RAC Report that is relied upon by the FEMA witnesses in their testimony. Such factual material is not subject to executive privilege.

Furthermore, the executive privilege is designed to protect the internal policy formulation or decision-making process in a governmental agency. Despite the incantation of the words "pre-decisional," "thought processes," and "deliberations" in the FEMA Response and the Guiffrida Affidavit, there is no indication either in those documents, or in the

description of the withheld documents, that the findings or notes of RAC members, drafts of the RAC Report, or the identified memoranda have anything to do with FEMA policy or decisions or deliberations about FEMA policies.

As stated in the FEMA Response, the RAC members engaged in "a technical review" of the LILCO Plan. FEMA Response at 9. Their purpose was to make findings of fact, not set FEMA policy or make decisions for that agency. Indeed, the RAC members except the Chairman, are not even FEMA employees. The "comments" of the RAC members are technical factual findings, having nothing to do with any internal FEMA policy formulation or decisionmaking. They are not protected by the executive privilege. Unlike the documents involved in the Fall 1983 discovery dispute, which at least arguably dealt with internal FEMA policy and decision making deliberations (see November Order at 9),^{2/} the documents at issue here appear to deal with nothing but the technical findings of the RAC concerning the contents of the LILCO Plan. FEMA has failed to demonstrate that any of the documents deal with the type of nonfactual, policy, or decision-making matters that the executive privilege is designed to protect.

^{2/} At issue in November were items such as draft memoranda and correspondence apparently setting forth the agency's policy, position, or intended response to the request from NRC that certain actions be undertaken.

D. Even if a Privilege at One Time Attached
to the Documents, the Privilege Has Been
Waived

Even assuming for the sake of argument that the executive privilege could have attached at one time to some of the documents at issue, it is clear that by its own subsequent actions FEMA has waived such privilege. FEMA intends to introduce the RAC Report into evidence in this proceeding. The FEMA witnesses have attached the report to their prefiled testimony. In addition, those witnesses state throughout their testimony that their opinions and conclusions concerning the LILCO Plan are based upon the RAC findings. In addition, at least three of the FEMA witnesses (Messrs. Keller, Baldwin, and Kowieski) participated in the RAC review, and authored several of the documents being withheld.

Clearly, the County, the Board, and the other parties are entitled to probe the bases for the opinions and conclusions stated by the FEMA witnesses in their testimony, both for impeachment purposes and otherwise to develop a full and complete record. See the March Order at 7-8. Since the FEMA witnesses rely on the findings of the RAC, inquiry into the bases of the RAC findings is clearly not only proper, but essential. The FEMA position -- that no one is permitted to see or inquire

into anything other than the bare conclusions stated in the final RAC Report -- flies in the face of logic as well as the rules of procedure.

FEMA, in effect, attempts to use the executive privilege to bar any inquiry into the bases for the opinions of its witnesses. Clearly, once FEMA submits testimony, and relies upon factual findings in that testimony, it has waived any pre-existing rights to keep confidential the processes or means by which those findings and the conclusions of its witnesses were developed. See e.g., Houston Light and Power Co. (South Texas Project, Units 1 and 2), LBP-79-30, 10 NRC 594, 595 (1979). See also, March Order at 8. Given the circumstances of this case, to permit FEMA to abuse the executive privilege as it attempts to do, would be improper.

Sustaining FEMA's executive privilege claim with respect to the documents now at issue would accord a special "untouchable" status to the FEMA witnesses; such status has not been accorded any other parties' witnesses in this proceeding -- the parties and the Board have had or will have the opportunity to probe the bases for the opinions of every other witness. It would also improperly deprive all parties of their right under 10 C.F.R § 2.743(a) to conduct "such cross-examination as may

be required for full and true disclosure of the facts." Finally, it would violate 10 CFR § 50.47(a)(2) because the parties would be unable to rebut the FEMA findings, having been barred from even determining the bases for those findings.

Thus, even if a privilege at one time may have attached to some of the documents at issue, FEMA's subsequent reliance upon the RAC review in the testimony submitted in this proceeding, constitutes a waiver of the privilege.

E. In Any Event, the Alleged "Chilling Effect" of Releasing the Documents is Outweighed Here by the County's Need to Obtain the Documents

This Board has stated in both its November and March Orders that a balancing test must be applied to determine whether the qualified executive privilege is overcome by the need of a litigant for the particular documents at issue. See November Order at 10, and March Order at 3-5. In this case, as demonstrated in parts B and C above, FEMA has failed to document or even explain the basis for its "chilling effect" assertion with respect to the documents at issue. Those documents appear to contain only factual, technical, non-policy material having nothing to do with any internal FEMA decision-making. On the other hand, the County's need for these documents is substantial and compelling.

As noted in part D above, the documents at issue are the factual findings which underlie and form the basis for the RAC findings upon which the FEMA witnesses rely for the opinions and conclusions stated in their testimony. Without access to these documents, the County would be unable to cross-examine the FEMA witnesses, to probe, challenge, or impeach their conclusions, or otherwise to present on the record of this proceeding all the relevant facts pertaining to the opinions of the FEMA witnesses. As noted in part D above, to deny the County access to these documents would constitute a violation of the County's rights under 10 C.F.R. §§2.743(a) and 50.47(a)(2) and would, in effect, accord special preferential treatment to one party's witnesses by shielding those witnesses from any meaningful inquiry or challenge.

Indeed, the County's need for these FEMA documents is even more substantial than that of LILCO with respect to the State of New York documents which were the subject of the Board's March Order. There, the Board held that LILCO's need for documents concerning a so-called "review" by certain New York employees (who were not witnesses in this proceeding), of a draft plan different from the LILCO Plan at issue in this proceeding, outweighed the State's interest in confidentiality. The Board stated:

At the present time, New York has become an active participant in opposition to LILCO. New York expects to present witnesses who will testify concerning deficiencies or inadequacies in LILCO's current plan. We, therefore, conclude that fairness dictates that LILCO should be given access to prior assessments of LILCO's earlier evacuation plan in order to determine whether it can impeach New York's witnesses with prior inconsistent statements about the same or similar provisions of the plan. Obviously this information is not available to LILCO through any other means. We find that LILCO has a compelling need to see these documents. On the other hand, New York's fear of a "chilling effect on the ability of the DPC to receive written comments, concerns, and opinions of its staff" is less compelling. . . . Frankly, New York is not entitled to have its cake and to eat it too. As an active participant in the proceeding, its interests in preserving secrecy are outweighed by LILCO's need to have these documents to effectively cross-examine New York's witnesses.

March Order at 7-8 (emphasis added).

The documents at issue here involve: (1) the very witnesses chosen by FEMA to submit testimony, (2) the very Plan at issue in this proceeding, (3) the actual RAC review and findings which are attached to and are a part of the testimony to be submitted into evidence by FEMA, (4) the findings upon which the FEMA witnesses expressly rely for the opinions and conclusions contained in their testimony, and (5) the "FEMA findings and determinations" which are a rebuttable presumption in this proceeding. Thus, the nexus between the FEMA documents

and the matters at issue, as well as the County's need for those documents, are substantially greater than that presented by LILCO in March. The County submits that, assuming any of the FEMA documents are properly subject to a claim of privilege, the Board's March Order, which required New York to turn over privileged documents to LILCO, is controlling here. Accordingly, the County's Motion to Compel should be granted.

F. FEMA's Other Arguments are Without Basis

The FEMA Response contains two assertions which require a response and correction.

First, the FEMA Response states at page 9 "The County's document request to FEMA makes absolutely no showing of any circumstances requiring disclosure of the requested documents." Clearly, no such "showing" is required in a Request for Production of Documents. See 10 CFR § 2.741. This motion sets forth in as much detail as possible, given the limited information provided by FEMA, the circumstances which require disclosure of the documents.

Second, FEMA asserts on page 10 of its Response that the requested documents "are irrelevant and will not lead to the production of admissible relevant evidence." The apparent

basis for this assertion is the argument that: "the FEMA RAC review is not being litigated in this proceeding and the inputs of the various members of the RAC Committee have absolutely no probative value. The RAC submitted its final report which reflects the collegial judgment of the RAC." FEMA Response at 10.


This FEMA argument ignores the applicable relevancy standard for discovery, which is whether "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 10 CFR § 2.740(b)(1). FEMA Counsel's opinion that the findings of individual RAC members, which form the basis for the "collegial" RAC findings "have absolutely no probative value" also ignores reality. As the very next sentence of the FEMA Response acknowledges, the RAC findings are included in FEMA's testimony on the contentions in this proceeding. The FEMA witnesses also expressly rely on the RAC findings in their testimony. FEMA counsel's suggestion that documents relating to the findings which constitute the bases for his own witnesses' testimony are irrelevant, is inexplicable and should be rejected out of hand. The requested discovery clearly is reasonably calculated to lead to the discovery of admissible evidence.

Conclusion

For the foregoing reasons, the County's Motion to Compel should be granted.

Respectfully submitted,

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Dated: May 17, 1984



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May 15, 1984

Karla Letsche, Esq.
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Dear Ms. Letsche:

This letter supplements our response to Suffolk County's Discovery Request. FEMA has identified all items within the Regional and Headquarters office that is responsive to your request. In addition we have requested information that may be in the offices of the Regional Assistance Committee members.

Attached please find a Briefing Sheet supplied by the Environmental Protection Agency which is responsive to the third item in your request.

We understand that two or three additional items that may be responsive to your request have been forwarded to our office from the Department of Transportation RAC member but we have not yet received this information.

I am also enclosing copies of a FEMA employee's Anticipated Workload Forms as they relate to Shoreham activities.

If you have any further questions please do not hesitate to contact this office.

Very truly yours,

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

Stewart M. Glass
Regional Counsel

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 (O.L.)
(Emergency Planning)

CERTIFICATE OF SERVICE

I hereby certify that copies of Suffolk County Motion to Compel Production of Documents Identified by FEMA on May 14 and 15 have been served on the following this 17th day of May 1984, by U.S. mail, first class, except as otherwise noted.

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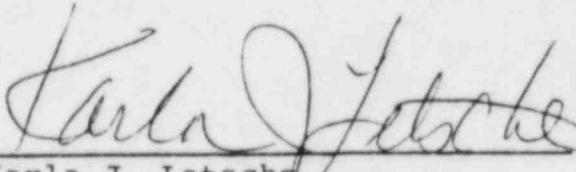
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DATE: May 17, 1984