

LILCO, March 24, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONOFFICE OF SECRETARY
DOCKETING & SERVICE
CHANCEBefore 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 MOTION TO STRIKE DIRECT TESTIMONY OF
CHARLES V. FAILLA ON BEHALF OF NEW YORK STATE
REGARDING CONTENTION 24.F.2

I. INTRODUCTION

LILCO moves to strike in entirety the proffered "Direct Testimony of Charles V. Failla on Behalf of New York State Regarding [Group II.B] Contention 24.F.2," filed March 21, 1984. The grounds for this motion are that this testimony is outside the scope of New York State's stipulated direct testimonial participation in the Group II hearings in violation of its Board-ratified agreement with LILCO and without notice to LILCO, resulting in unfair and prejudicial surprise to LILCO and needless disruption and complication of this hearing's progress. If LILCO had known that New York State intended to file this testimony it would have timely undertaken discovery of New York State concerning it, and would have factored that discovery into its own direct testimony.

If this testimony is admitted, LILCO will have to undertake discovery after the fact and perhaps seek to file responsive testimony, unfairly burdening it with a totally unjustified diversion from the business of preparing issues for trial at this hearing, and this Board with ruling on disputes enroute. Consequently, LILCO is filing this motion before the deadline of March 27 in the hope of gaining an early decision on it and thus saving it the time, expense and burden of undertaking the discovery of Mr. Failla which will otherwise have to be undertaken. This motion must be ruled on well before Contention 24.F.2 is tried in order to avoid LILCO's having to conduct discovery and consider whether to file responsive testimony potentially needlessly.

II. ARGUMENT

When New York State became an active participant in this proceeding on January 17, its counsel, Mr. Palomino, stated that the State intended to designate approximately 20 witnesses and that the State would designate these witnesses soon enough to permit discovery to be taken of them prior to the filing of testimony. These matters were discussed on the hearing record on January 27 (Tr. 3638-48, esp. 3643-44) as well as off the record among counsel. Included in the discussions was the recognition of the need for discovery to be taken prior to the filing of testimony, in order to avoid the surprise and attendant burdens and complications stemming from filing testimony without discovery. See Tr. 3641.

New York State's commitment at that time to make its witnesses available for discovery before the filing of its intended testimony was a material and integral element in LILCO's agreement, at the January 27 discussion, to postpone the filing date for Group II issues, which at that point had been set for February 14 (see Tr. 3646 line 20 through 3648 line 9). In fulfillment of that agreement, New York State, by letter to LILCO counsel dated February 6, designated 16 witnesses to testify on 22 principal contentions and 11 additional specified portions thereof. Contention 24.F.2 was not among the contentions as to which New York State indicated an intent to file testimony. Nor was Charles V. Failla designated as a witness.

Depositions of New York State's designated witnesses began on February 9 pursuant to agreement among counsel. On February 10, New York State counsel, by letter (Attachment 1) contracted the scope of the State's intended testimony to two issues, Contentions 67 and 97; this was confirmed by letter from LILCO counsel on February 13 (Attachment 2), and further clarified by New York State the same day to include a third issue, Contention 73 (Attachment 3). None of these letters mentioned anything about Contention 24.F.2. None of them hinted that New York State would later seek to re-expand its intended scope of participation to encompass Contention 24.F.2, or indeed any other contention beyond Nos. 67, 73 and 97.

LILCO conducted depositions and document discovery of each of New York State's witnesses on Contentions 67, 73 and 97 prior to the preparation and filing of testimony on them. LILCO would have promptly conducted the same discovery of any additional New York State witnesses on additional issues if New York State had designated any. However, New York State gave no notice whatever of its intent to file testimony on Contention 24.F.2 until the actual filing on March 21.

In a letter to LILCO counsel accompanying Mr. Failla's testimony (Attachment 4) counsel for New York State stated that the State "determined for the first time on March 20, 1984 that it would submit Group II-B testimony concerning Contention 24.F.2 (prior commitments by bus companies to provide buses to school districts)." (emphasis supplied). This statement is inherently incredible: the State's testimony involves a detailed review of LILCO discovery answers and New York State records. These were not only available long before March 20, 1984, but would have to have been researched well before March 20. The State should have timely notified LILCO of its desire to change the commitments it had made on February 10 and 13, so that LILCO could have conducted necessary discovery prior to filing its testimony.

New York's participation on Group II issues was based on a structure, arrived at on the record and implemented in detail by the parties, that witnesses and their intended scope of

testimony would be provided in advance, with the opportunity for needed deposition and document discovery provided to other parties prior to the filing of testimony. New York State has not attempted to justify its violation of this structure; indeed it has utterly ignored it. This is not the first time the State, rather than taking the proceeding as it finds it, has tried to take the proceeding where it wants it to go. The State's initial testimony on Contention 65, filed on January 24, was reluctantly permitted by this Board to be filed even though it was several weeks out of time, because the State had just recently made the public decision to enter this case actively. No such excuse is available this time, however. New York State has simply ignored the arrangement under which it was permitted to enter the proceeding at the eleventh hour and delay the entire process of getting to hearings on Group II issues. For the basic order and integrity of the proceeding, this flouting of important and specific understandings should not be permitted.

There is a second important reason why this testimony should not be permitted to be filed: unfair and unnecessary burden and surprise to LILCO. If this testimony is permitted to be filed LILCO will have to depose Mr. Failla and review the New York State documentation underlying his testimony. It may well turn out that if LILCO had had Mr. Failla's information in a timely manner LILCO could have written its direct testimony

to address Mr. Fialla's arguments squarely; but of course LILCO lacked this information. If the testimony is admitted, LILCO will also have to determine whether to file supplemental testimony. Taking after-the-fact discovery and perhaps write additional testimony not only diverts LILCO's resources from proceeding toward hearing on this and other issues, but it ties up the Board with having to rule on any disputes which may arise along the way, as well as running the risk of again seeing issues broadened, unnecessarily, in mid-litigation. This should not be permitted to happen, particularly without justification by New York.

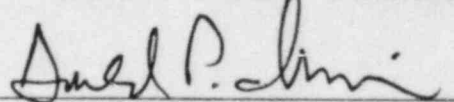
III. CONCLUSION

This "Direct Testimony of Charles V. Failla on Behalf of New York State Regarding Contention 24.F.2" should be struck in entirety for failure to comply with the agreement regarding notice of and discovery on intended testimony, and because that failure is both prejudicial to LILCO and disruptive of this hearing's progress.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

By



Donald P. Irwin

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

DATED: March 24, 1984



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

February 10, 1984

Donald P. Irwin, Esquire
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, Virginia 23212

Dear Don:

In light of the current direction of this case, as well as scheduling conflicts, limitation on resources, and the scope of the NRC proceeding, the State of New York has determined that it will not submit testimony on Group II contentions other than by Messrs. Acquario, Knighton, Gibbon and Albertin on Contentions 67 and 97. Accordingly, the depositions scheduled for February 13, 15 and 17 are cancelled.

Let me reiterate, however, that New York State fully supports the position of Suffolk County and each of Intervenor's contentions in this proceeding and that the State will participate in the litigation of the Group II issues.

Sincerely,

A handwritten signature in cursive script, reading "Fabian G. Palomino".

Fabian G. Palomino

HUNTON & WILLIAMS

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FILE NO. 24566.000003

DIRECT DIAL NO. 804-788- 8357

February 13, 1984

Fabian G. Palomino, Esq.
Special Counsel to the Governor
Executive Chamber, Room 299
State Capitol
Albany, New York 12224

BY TELECOPIER

Dear Fabian:

Thank you for your letter of February 10 regarding sponsorship of direct testimony by New York State witnesses. As I understand that letter, the only Group II contentions on which the State is sponsoring testimony are 67 and 97. In reliance on that representation, LILCO is willing to cancel the depositions now scheduled on the other Group II contentions.

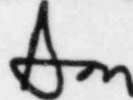
Since the deposition on Contention 97 (snow removal) was already taken on February 9, I believe that the only contention on which a deposition remains is Contention 67 (evacuation of persons without access to automobiles), with Messrs. Acquario, Albertin and Knighton on February 14. Thus, in addition to cancellation of the depositions on February 13, 15, and 17, as proposed in your letter, I think we can cancel the deposition scheduled for the 16th.

HUNTON & WILLIAMS

I look forward to seeing you and Messrs. Acquario, Albertin and Knighton at 10:00 tomorrow at the Governor's offices at Two World Trade Center.

By copy of this letter I'm notifying the other parties of the change in schedule.

Sincerely yours,



Donald P. Irwin

91/730

cc By Telecopier:

Bernard M. Bordenick, Esq.
Stewart M. Glass, Esq.
Christopher M. McMurray, Esq.

P.S. As this letter was going out, Rick Zahnleuter telephoned to say that he believed that Messrs. Acquario, et al. would also be sponsoring testimony on Contention 73, as well as 67. I asked him to confirm the matter in writing. In any event, even if your letter of Friday omitted mention of Contention 73, the deposition schedule will not need to be revised further since Messrs. Acquario, et al. are already scheduled for tomorrow.



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

FABIAN PALOMINO
Special Counsel to the Governor

February 13, 1984

BY TELECOPIER

Donald P. Irwin, Esq.
Hunton & Williams
707 East Main Street
P. O. Box 1535
Richmond, Virginia 23212

Re: Docket No. 50-322-OL-3

Dear Don:

This is in response to the post script in your letter of February 13, 1984 to Mr. Palomino.

Please be advised that at this time the State intends to sponsor testimony on Contention 73, as originally specified in Mr. Palomino's letter to you of February 6, 1984.

Sincerely,

A handwritten signature in cursive script, reading "Richard J. Zahnleuter".

Richard J. Zahnleuter, Esq.
Assistant to the Special Counsel
to the Governor of the State
of New York

cc: ALL BY TELECOPIER
Bernard Bordenick, Esq.
Christopher McMurray, Esq.
Stewart Glass, Esq.



STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

March 21, 1984

Mr. Donald P. Irwin, Esq.
Hunton & Williams
707 East Main Street
Richmond, Virginia 23219

Dear Don:

The State of New York determined for the first time on March 20, 1984 that it would submit Group II-B testimony concerning Contention 24.F.2 (prior commitments by bus companies to provide buses to school districts). The testimony consists of a concise discussion of certain official records of the New York State Department of Transportation. These records describe the number and type of buses bus companies on Long Island currently have in service.

The testimony is sponsored by Mr. Charles Failla. Mr. Failla is the State employee who is the custodian of the official records mentioned above. The records are located at the State Office Building in Hauppauge, New York. Should you wish to inspect these records, please contact me and I will make them available to you. In addition, Mr. Failla is stationed at the State Office Building in Hauppauge, New York. Should you wish to depose him, please contact me and I will endeavor to accommodate your schedule.

Sincerely,

A handwritten signature in cursive script that reads "Richard J. Zahnleuter".

RICHARD J. ZAHNLEUTER
Assistant to the Special Counsel
to the Governor

cc: Mr. Glass
Mr. McMurray
Mr. Repka

LILCO, March 24, 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 MOTION TO STRIKE DIRECT TESTIMONY OF CHARLES V. FAILLA ON BEHALF OF NEW YORK STATE REGARDING CONTENTION 24.F.2 were served this date upon the following by first-class mail, postage prepaid, or by Federal Express (as indicated by an asterisk).

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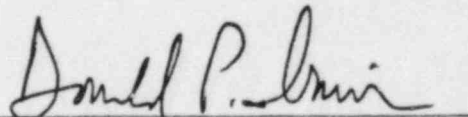
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DATED: March 24, 1984