

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Appeal Board

'84 MAY 23 AM 10:05

In the Matter of)	
)	Docket No. 52-322-OL-3
Long Island Lighting Company)	(Emergency Planning)
)	
(Shoreham Nuclear Power Station,)	
Unit 1))	

MEMORANDUM IN SUPPORT OF FEMA'S APPEAL
OF AN ORDER OF THE ATOMIC SAFETY AND
LICENSING BOARD AND REQUEST FOR A STAY

Introduction

On April 20, 1984, Suffolk County filed a Request for Production of Documents by FEMA. The broadly worded request sought "All documents that were produced in connection with, or in any relate to the FEMA Regional Assistance Committee ("RAC") review of the LILCO Transition Plan for the Shoreham Nuclear Power Station, including, but not limited to..." all memoranda, correspondence, questions, comments, reports, evaluations, ratings, summaries, notes, drafts, and transcripts, minutes, summaries or notes of meetings, discussions or conferences including telephone conferences among RAC members or others relating to the RAC review.

On May 8, 1984 Suffolk County, seeking to expedite its document discovery request, filed a Motion to Compel Response to the Request for Production of Documents by FEMA. On May 9, 1984, the Licensing Board held an off-the-record conference to discuss this discovery dispute. FEMA reported that it

would object to disclosure and would assert a privilege with respect to a number of the documents within the scope of the County's discovery request. At the Conference, the Board set a schedule for the parties to file their respective papers (Tr. 8751-8754). The schedule did not provide for a Response by FEMA to the County's Motion to Compel.

As the initial item on that schedule, FEMA filed on May 15, 1984, its full list of documents responsive to the Suffolk County discovery request. FEMA identified and released approximately 50 documents that complied with the rather broad and ambiguous discovery request from the County. This following closely upon Suffolk County's counsel's voluminous Freedom of Information Request to FEMA, NRC and DOE. FEMA also identified 37 other documents consisting of drafts, personal notes, predecisional advisory memoranda etc. that it asserted were irrelevant to this proceeding and protected by the doctrine of "executive privilege".

On May 17, 1984 Suffolk County filed its Motion to Compel the Production of Documents. LILCO and the NRC Staff both filed Responses supportive of FEMA's position. On Friday, May 18, 1984 at approximately 3:30 P.M. the Atomic Safety and Licensing Board by conference call orally ruled on Suffolk County's Motion to Compel Production of Documents from the Federal Emergency Management Agency.^{1/}

^{1/}Due to the need for an expedited decision the Board agreed to rule orally on the County's Motion to Compel with a written order to be distributed on Monday, May 21, 1984.

This Licensing Board has previously discussed procedures for ruling on motions to compel FEMA to produce documents. See "Memorandum and Order Ruling on Suffolk County Motion to Compel FEMA to Produce Documents", November 1, 1983 (Memorandum and Order, LBP-83-72, 18 NRC 1221 (1983)).

No party has contested the procedural requirements for asserting executive privilege or the standards utilized by this Board to determine if executive privilege applies. The Board ruled that FEMA complied in the present matter with all the procedural requirements for asserting executive privilege.

The Board indicated that the privilege is a qualified one and does not absolutely bar discovery. The ASLB has held that it may be necessary for the Board to conduct an in camera inspection of the disputed documents in order to "balance the need for the privilege against the need of the County to have the documents". The Board indicated in its oral order of May 18th the various factors that it considered in its ruling as to whether the documents should be compelled to be produced.

The Board indicated that the following factors called for release of these documents 1) importance of documents, 2) unavailability of documents, 3) philosophy of broad discovery, 4) outweighing of harm, 5) RAC members not subordinates of FEMA.

The Board indicated the following factors called for the protection of these documents from disclosure 1) concern for future RAC participation, 2) curtailment of activities, 3) relevant information could be tested by cross-examination of the FEMA panel, 4) documents not relevant, 5) what one individual RAC member feels is not relevant, 6) the upholding of executive privilege.

The Board determined to protect seven (7) documents as they relate to the advisory opinion of FEMA staff and policy decisions.

The Board determined to order the production of thirty other documents relating to the activities of the Regional Assistance Committee. The Board ordered FEMA to provide to the County the individual review comments of the individual RAC members, consultants and staff of FEMA as provided to the RAC Chairman (items 1-19); the individual personal notes of the RAC members of a RAC meeting held on January 20, 1984 (items 20-23) it should be noted that the only document in this group that had been seen by other than the original author was item 23 which was reviewed by counsel to determine the relevancy to this discovery request; a draft of definitions and categories as proposed by the RAC Chairman and distributed to the RAC members (item 25); a sample of four draft pages of February 1984 Consolidated RAC Review (item 26); a FEMA employees notes and impressions of the RAC

Review (item 31); a confidential memorandum to the RAC members from the RAC Chairman concerning the Legal Issues Identified during the RAC Review of the LILCO Transition Plan for Shoreham, Rev. 3 (item 34); three drafts of the Consolidated RAC Review dated January 20, 1984 annotated with the individual notes of FEMA employees and contractors (item 35); draft of LILCO Plan Review of LILCO Transition Plan, Revision 1 (item 36); and 26 pages of a flip chart of the LILCO Transition Plan titled Shoreham Review Compilation of RAC Comments with the RAC members' individual comments clearly identifiable as such

The Atomic Safety and Licensing Board rejected FEMA's oral motion for reconsideration of its ruling but granted FEMA's motion for a stay of its order to produce until Monday, May 21, 1984 at 5:00 P.M. in order to allow FEMA time to Appeal its decision.

FEMA respectfully requests a continued stay of the ASLB's order until such time as this body can rule on FEMA's appeal of the Order to Produce.

The individual opinions of the RAC members are irrelevant to this proceeding. The RAC submitted its final report which reflects the collegial judgment of the RAC. The RAC review is included as a portion of the testimony which further addresses the specific contentions which are the issues in litigation before the ASLB. The FEMA witnesses have indicated

that the purpose of their testimony is to address the contentions relating to offsite preparedness at the Shoreham Nuclear Power Station which are properly the matter before the ASLB. Further, the FEMA witness panel has indicated that their testimony (p.11, ques. 8 FEMA Testimony) represents the current FEMA evaluation of the LILCO Transition Plan, Revision 3.

The Director of the Federal Emergency Management Agency expressed his concern as to the ramifications the release of these documents would have on the functioning of FEMA and its Regional Assistance Committee. 2/

Both the Commission and the Atomic Safety and Licensing Board in the Matter of Consolidated Edison Company of New York et. al (Indian Point) addressed a similar compelling issue as it related to the discovery of the individual impressions of observers at an Exercise. (It should be noted a substantial number of these observers were contractors or employees of government agencies other than FEMA). The Commission, in particular Commissioners Roberts and Ahearne raised very serious concerns as to the chilling effect of releasing individual exercit forms (exercise critique forms utilized to record individual observations, evaluations and comments relating to an exercise of a Radiological Emergency Preparedness Plan). (Memorandum dated 20th August, 1982, Roberts concurring on p.4).

2/ Affidavit Attached

The issue raised here as it relates to the RAC's deliberative comments and notes carries with it the same pitfalls identified in the Commissions memorandum. The confidentiality of the comments and concerns of the RAC members is important to their ability to carry out their assigned task. The RAC members in their review of plans and in the observation of exercises carry out their assigned duties in a highly professional manner often in an atmosphere of hostility and strong opposing philosophies. Their review necessitates their making comments that are at times quite critical. There are many situations when in their other duties they have to interact with the people whose work or actions they have subjected to criticism. In addition, their evaluations may at times not conform with the policies of their particular agency. The Indian Point ASLB (Tr. 12206-12227) recognized the chilling effect that disclosure of their individual comments would have and limited the scope of discovery to a team exercit in order to balance the needs of the intervenors while still insuring that the individual observations would not be disclosed.

FEMA contends that after the Appeals Board considers all of the facts in this particular case as well as the prior decisions of the ASLBs and the Commission, FEMA's position on the merits will prevail.

If a Stay is not granted and the material is released there is no relief that could be granted that would remedy the damage caused by the release, not only in this matter but in other Radiological Emergency Preparedness proceedings in which FEMA and/or the RAC is requested by the NRC to review and comment on emergency plans, exercises or preparedness. 3/

The issuance of a stay will not result in substantial hardship to any party. The parties will just adjourn the deposition of the FEMA witnesses. This deposition has been previously adjourned by the unilateral action of the County, so they certainly can not assert prejudice at this time. All parties understand that this may result in the postponement of the appearance of the FEMA witnesses before the ASLB. But this is not the first time the hearing witness schedule has been adjusted nor will it be the last. With over a week before the resumption of hearings and with over half the contentions relating to offsite preparedness to be heard there is no lack of material. The substitution of witnesses at this time can be accomplished with a minimum of disruption. The one party that would have the most to lose by any delay, the applicant, indicated in the conference call that they could arrange for other witnesses to proceed when the hearings resume and that they would not object to the postponement of FEMA's witnesses if necessary to resolve this important issue.

3/McIntire affidavit attached

The public interest requires a full, detailed, sometimes critical review of emergency plans, exercises and preparedness around nuclear plants. They need the individuals who are conducting that review to be able to function fully, without reservations or handicap. Therefore, the public interest is best served by the full adjudication of this issue and the protection of the integrity of the Regional Assistance Committee process.

The Atomic Safety and Licensing Board does not contend that executive privilege was improperly asserted. To the contrary, the Board stated in its ruling that the procedural requirements to assert executive privilege were met. The only issue for this body to determine is if the County's claim to access to the thoughts, personal notes, and individual comments of the RAC members outweigh the policy concerns of preserving those thoughts, opinions and the whole RAC process.

FEMA has provided to Suffolk County documents outlining the assumptions made in order to allow the RAC members to proceed with a technical review and has released copies of changes and clarifications to the Review after its submittal to FEMA headquarters. The County will have the opportunity to depose the FEMA witnesses as well as subject them to cross-examination at hearing. The County's documents make no showing of any circumstances requiring overriding the policy considerations of executive privilege.

The individual opinions of the RAC members are irrelevant to this proceeding. The RAC submitted its final report which reflects the collegial judgment of the RAC. The Board was unable to distinguish to the satisfaction of this party the difference to be afforded the pre-decisional deliberations and advisory opinions of the RAC from those of the NRC's Advisory Committee on Reactor Safeguards (ACRS). 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 & 2), CLI-74-16, 7 AEC 313 (1974) and Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-33, 4 AEC 701 (1971) aff'd ALAB-123, 6 AEC 331 (1973). See also Consumers Power Co. (Midland Plan, Units 1 & 2), 1BP-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 (see 44 CFR 351.10, 351.20 through 351.28) — a collegial, advisory body of experts in their subject areas, not all of whom are employees of the parent agency --- are closely analogous to that of the ACRS. As the Commissions regulations, practice and records of the ACRS are protected by executive privilege 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.

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 would not vitiate the validity of the consensus expressed in the report. Resolution of the 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.

It is obvious from recent developments that the role played by FEMA in the various hearings before the Atomic Safety and Licensing Boards has been expanding while the NRC in its proposed regulations 10 CFR 2 and 50 propose to reduce the role of its own staff in these proceedings. If the NRC expects to receive full cooperation of FEMA and the RAC it should be willing to afford to FEMA the same protection that it feels is necessary for its own ACRS to function.

All parties to this proceeding have been informed that the NRC will shortly receive revision four (4) to the LILCO Transition Plan for Shoreham. It is expected that NRC will transmit this revision to FEMA for review by the RAC. The RAC

Chairman has indicated (affidavit attached) that the recent ruling of the ASLB if left to stand will adversely affect the ability of the RAC Chairman to receive in written format the comments, concerns and opinions of the Regional Assistance Committee. The chilling effect caused by the release of this material will undoubtedly result in a delay in the review of revision 4. Considering the continuing nature of the discovery requests in this proceeding FEMA will have no alternative but to turn over to the County the individual RAC members comments as received, drafts as produced, notes as made. This is not a conducive atmosphere for the frank exchange of ideas and views that was envisioned when Executive Order 12148 and 10 CFR 350 and 351 were promulgated.

CONCLUSION

For the foregoing reasons, the Federal Emergency Management Agency's Appeal and Request for a Stay should be granted.

Respectfully submitted,



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

Dated: May 21, 1984

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))
_____)

AFFIDAVIT OF
LOUIS O. GIUFFRIDA
Director, Federal
Emergency Management
Agency

LOUIS O. GIUFFRIDA, hereby declares:

1. I am the Director of the Federal Emergency Management Agency (FEMA), an agency of the executive branch of the Federal government. I make this declaration in support of the Agency's Response to Suffolk County's Discovery Request.

2. Executive Order 12148 charges the Director, FEMA, with establishing policy for and coordinating all civil emergency planning and assistance functions for Executive agencies. On December 7, 1979, the President, directed that FEMA assume lead responsibility for all offsite nuclear emergency planning and response.

Notwithstanding the procedures which may be set forth in 44 CFR 350 for requesting and reaching a FEMA administrative approval of State and local plans, findings and determinations on the current status of emergency preparedness around particular sites may be requested by the NRC/FEMA Steering Committee and provided by FEMA for use as needed in the NRC licensing process. These findings and determinations may be based upon plans currently available to FEMA or furnished to FEMA by the NRC.

3. Regional Assistance Committees were established in each region pursuant to 44 CFR 351.10. They consist of representatives from the Nuclear Regulatory Commission, Environmental Protection Agency, Department of Health & Human Services, Department of Energy, Department of Transportation, U.S. Department of Agriculture, Department of Commerce and other Federal departments as appropriate. It is chaired by the FEMA regional representative.

Pursuant to 44 CFR 351.10 and 351.20 through 351.28 each federal agency member of the RAC supports the RAC and has a specific assignment which includes the review of plans.

4. Pursuant to a request from the NRC, FEMA arranged for a review of the LILCO Transition Plan by the Regional Assistance Committee and transmitted the results of that review to the NRC on March 15, 1984.

5. FEMA has identified eighty-five (85) documents that appear to be responsive to Suffolk County's Discovery Request. FEMA has provided copies to Suffolk County of all but the following documents.

1. Letter dated November 3, 1983 conveying NRC RAC member, Craig Z. Gordon's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
2. Memorandum dated November 2, 1983 conveying DOE RAC member, Herb G. Fish's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
3. Letter dated October 21, 1983 conveying FDA (HHS) RAC member, Ronald E. Bernacki's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
4. Memorandum dated November 3, 1983 conveying DOT RAC member, Paul Lutz's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.

5. Letter dated October 14, 1983 conveying USDA RAC member, Cheryl Malina's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
6. Submission dated November 1, 1983 conveying FEMA employee, Robert L. Acerno's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
7. Letter dated November 2, 1983 conveying INEL RAC consultant, Joe H. Keller's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
8. Memorandum dated November 4, 1983 conveying ANL RAC consultant, Thomas E. Baldwin's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
9. Letter dated December 5, 1983 conveying EPA RAC member, Linda Olmer's, comments on the LILCO Transition Plan, Revision 1 for Shoreham.
10. Letter dated January 12, 1984 conveying NRC RAC member, Robert J. Bores's, comments on the LILCO Transition Plan, Revision 3 for Shoreham.
11. Memorandum dated January 6, 1984 conveying DOE RAC member, Herbert Fish's, comments on the LILCO Transition Plan, Revision 3 for Shoreham.
12. Letter dated January 6, 1984 conveying FDA RAC member, Ronald E. Bernacki's, comments on the LILCO Transition Plan. Revision 3 for Shoreham.
13. Memorandum dated January 10, 1984 conveying DOT RAC member, Paul Lutz's, comments on the LILCO Transition Plan, Revision 3 for Shoreham.
14. Letter dated January 6, 1984 conveying USDA RAC member, Cheryl Malina's, comments on the LILCO Transition Plan, Revision 3 for Shoreham.
15. Submission dated January 9, 1984 written directly on copy of preliminary draft conveying FEMA staff member, Robert L. Acerno's, comments on the LILCO Transition Plan, Revision 3 for Shoreham.
16. FEMA Plan Review Form - dated January 12, 1984 conveying EPA RAC member, Joyce Feldman's, comments on the LILCO Transition Plan, Revision 3 for Shoreham.
17. Letter dated January 10, 1984 conveying INEL RAC consultant Joe H. Keller's, comments on the LILCO Transition Plan, Revision 3 for Shoreham.

18. Memorandum dated January 9, 1984 conveying FEMA member, Marianne C. Jackson's, comments on the LILCO Transition Plan Revision 3 for Shoreham.
19. Submission dated January 9, 1984 written directly on Preliminary Draft conveying ANL RAC consultant, Thomas E. Baldwin's, comments on the review of the LILCO Transition Plan, Revision 3 for Shoreham.
20. Preliminary Draft of Consolidated RAC Review dated January 20, 1984 with individual notes of Cheryl Malina of RAC meeting of January 20, 1984.
21. Preliminary Draft of Consolidated RAC Review dated January 20, 1984 with individual notes of Robert Bores of RAC meeting of January 20, 1984.
22. Preliminary Draft of Consolidated RAC Review dated January 20, 1984 with individual notes of Joyce Feldman of RAC meeting of January 20, 1984.
23. Preliminary Draft of Consolidated RAC Review dated January 20, 1984 with individual notes of Paul Lutz of RAC meeting of January 20, 1984.
24. Pre-Decisional Drafts of March 15, 1984, Letter Transmitting FEMA Finding to NRC.
25. Pre-Decisional Draft of Definitions of Categories, etc., for February, 1984, Consolidated RAC Review of the LILCO Transition Plan.
26. Sample of Four Random Draft Pages of February, 1984, Consolidated RAC Review of LILCO Transition Plan.
27. Pre-Decisional Drafts of the 2/21/84 Region II Transmittal Memorandum to Headquarters for the RAC review of the LILCO Transition
28. Pre-Decisional Drafts of the 2/3/84 Memorandum to Frank P. Petrone, Regional Director, Region II, From Samuel W. Speck, Associate Director, State and Local Programs and Support, Federal Emergency Management Agency, Subject: Shoreham Plan Review.
29. Pre-Decisional Draft of Discussion Points, for Richard W. Krimm and Joseph Winkle for Press Conference (not held) on the FEMA finding of 3/15/84 for Shoreham.

30. Pre-Decisional Sets of Q's and A's for Press Conference (not held) on the FEMA Finding of 3/15/84 on Shoreham.
31. Margaret Lawless' copy of Region II RAC findings with her annotated notes.
32. Pre-Decisional Notes and Option Paper on Strategies for Handling Shoreham Offsite Emergency Preparedness Problem.
33. Draft Telefax Header and Pre-decisional draft of FEMA 10/27/83 Memorandum to: Edward L. Jordan, Director, Division of Emergency Preparedness and Engineering Response, Office of Inspection and Enforcement, Nuclear Regulatory Commission, From: Richard W. Krimm, Assistant Associate Director, Office of Natural and Technological Hazards Programs, Subject: Federal Emergency Management Agency Support for Nuclear Regulatory Commission Licensing of Shoreham Nuclear Station.
34. Memorandum to Regional Assistance Committee members from Roger Kowieski, Subject: Legal Issues Identified During the RAC Review of LILCO Transition Plan for Shoreham (Revision 3).
35. Three (3) Drafts of Consolidated RAC Review of LILCO Transition Plan for Shoreham - Revision 3, (1/20/84)-Annotated with notes of FEMA employees and contractors
36. Draft LILCO Plan Review (LILCO Transition Plan Revision 1) consolidated RAC review.
37. 26 pages of a flip chart of Regional Assistance Committee members' individual comments on LILCO Transition Plan titled Shoreham Review Compilation of RAC Comments.

6. I have personally examined all of the above documents except for items twenty (20) through twenty-three (23). As to items twenty (20) through twenty-three (23), I am familiar with the underlying document and understand that the notes appended thereto are the individual notes of the Regional Assistance Committee members of a RAC meeting. I have concluded that the production of the above enumerated documents would be contrary to the public interest. These documents are being withheld from discovery at my direction as they consist of intra-departmental and inter-departmental memoranda and communications containing opinions, recommendations and deliberations pertaining to decisions that the Federal Emergency Management Agency was required to make in response to requests from the Nuclear Regulatory Commission.

As the executive in charge of the overall operations of the agency, I assert that these documents are subject to the protection of executive privilege. The production of these documents will have a chilling effect on this agency's ability to receive in written format the comments, concerns and opinions of our staff. It will also adversely affect the ability of our RAC Chairman to receive in written format the comments, concerns and opinions of the representatives to the Regional Assistance Committee.

Louis O. Giuffrida, Director
Federal Emergency Management Agency