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LILCO, June 1, 1984



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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| 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 MEMORANDUM IN SUPPORT OF FEMA'S APPEAL FROM LICENSING BOARD DISCOVERY ORDER OF MAY 18, 1984

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

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## I. BACKGROUND

The principal question presented by this appeal is whether the Atomic Safety and Licensing Board properly formulated and applied the test for determining whether Suffolk County had demonstrated a need sufficiently compelling to overcome an assertion by the Federal Emergency Management Agency (FEMA) of executive privilege with respect to 37 documents relating to the deliberations of its Regional Assistance Committee (RAC) in its review of the emergency plan for the Shoreham Nuclear Power Station.1/ The Licensing Board, after in camera review of these documents and over Suffolk County's opposition in its papers, had held each of the 37 documents to be subject to a valid claim of executive privilege. Licensing Board, Memorandum and Order Ruling on Suffolk County Motion to Compel Production of Documents by FEMA, May 18, 1984

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1/ As permitted by the Appeal Board's Order of May 30, LILCO will address issues relating to one agency's directing another to disclose documents in a separate paper to be filed next Tuesday, June 5.

(hereinafter "Licensing Board Order"), at 6.2/

The Licensing Board went on to hold, however, that as to 30 of the documents, Suffolk County's asserted need for them outweighed FEMA's asserted need to preserve their confidentiality. Licensing Board Order at 7-8. The Licensing Board's rationale for its finding of need, Licensing Board Order at 6-8, devolves from the facts that its emergency planning findings for Shoreham under 10 CFR § 50.47(a)(1) and -(2) of the Commission's regulations depend in part on FEMA's review; that that review, relative to the

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2/ Suffolk County had contended, without examining the documents, that they contained purely factual information and were not subject to executive privilege. The Licensing Board rejected this argument, stating:

> Suffolk County next asserts that these documents are not privileged because they all relate to the RAC Review or the RAC Report which is attached to the FEMA testimony. Suffolk County asserts that this material consists of purely factual material. We disagree. While there are obviously facts contained in the documents, the thrust of these documents is that they contain evaluations, advisory opinions, recommendations and deliberations which fall within "executive privilege." We also find that the FEMA findings herein, as adopted from the RAC Report, involve the decision making process of government which is protected by executive privilege. Therefore, we find that FEMA has made a prima facie showing of executive privilege.

Suffolk County may choose to contest that determination before this Appeal Board. However, without access to these documents neither LILCO nor any other party has substantive basis to do anything other than accept the validity of the Licensing Board's determination that the documents are subject to a valid claim of privilege, and this memorandum proceeds on that premise.

consistency of LILCO's Shoreham Transition Plan with the provisions of NUREG-0654, is embodied in the RAC Report, which FEMA intends to place in evidence along with its prefiled direct testimony; that the materials being sought provide "access to the underlying documents and processes by which the RAC Report achieved its final form"; that Suffolk County's contentions principally claim that the LILCO Transition Plan does not comply with NUREG-0654; and that "cross-examination alone" at hearing of the four FEMA witnesses, three of whom worked on the RAC Report, will not be "equivalent" to the material set forth in these documents. The Licensing Board therefore ordered their production.

Following issuance of a stay by the Licensing Board and its continuation by this Board, the matter is ripe for briefing on the merits. LILCO participates in this appeal not because it has knowledge of any of the documents currently in dispute -- it has neither -- but because FEMA's efficient and effective review of the Shoreham Transition Emergency Plan is highly important, if not indispensable, to the successful resolution of emergency planning issues at Shoreham. The Director of FEMA, Louis O. Giuffrida, supported in detail before this Board by high-ranking FEMA regional officials, Philip H. McIntire and Roger B. Kowieski (the latter of whom is Chairman of the RAC), have all strenuously asserted that disclosure of the documents in question would severely disrupt the collegial evaluation process of the RAC, impairing if not destroying its further functioning.

The RAC has not finished its work at Shoreham: LILCO must amend its Transition Plan to address, to the satisfaction of the RAC, the deficiencies noted in the RAC Report; thereafter, an emergency planning exercise will be planned, held and graded under the auspices of FEMA and the RAC; and under the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in Union of Concerned Scientists v. NRC, No. 82-2053, ___ F.2d ____ (May 25, 1984), it appears that an opportunity must be provided for litigation of the results of that exercise before a full power operating license can be granted. Thus LILCO, while having neither custody nor knowledge of the contents of the documents immediately at issue, is seriously concerned about the harm which their compelled release could have on the licensing of Shoreham.

## II. DISCUSSION

Assuming necessarily that a proper claim of privilege has been asserted with respect to the documents at issue, the only relevant questions are (1) whether a compelling need has been established to warrant production, and (2) whether that need is great enough to overcome the agency's asserted need to preserve confidentiality. Long Island Lighting Company (Shoreham Nuclear Power Station), LBP-83-72, 18 NRC 1221, 1227-28 (1983). The burden is on the party seeking discovery to overcome the privilege. U.S. v. American Telephone & Telegraph Co., 86 F.R.D. 603 (D.D.C. 1975). Moreover, the showing of necessity must be a definite one,

not merely relying on asserted deficiencies in the government's need for secrecy; and the government is not obligated to refute all possible need for the documents before the opposing party is required to object. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (1966) (D.D.C. 1966) aff'd mem. sub nom. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C. Cir. 1967) cert. denied 389 U.S. 952, 885 S.Ct. 334, 19 L.Ed.2d 361 (1967). Kaiser Aluminum & Chemical Corp. v. U.S., 157 F.Supp. 939 (U.S.C.Cl. 1958).

In assessing assertions of need, both the availability of other sources of information and the importance of the information are recognized as relevant by both the Commission's licensing boards and federal courts. Long Island Lighting Company (Shoreham Nuclear Power Station), LBP-82-82, 16 NRC 1144, 1164-65 (1982).

1. Other Sources of Information on the Results and Basis of the RAC Report Exist

In this case, the 37 documents being sought by Suffolk County do not exist in a vacuum. FEMA has already produced over 1100 pages of documents relative to its review of Shoreham in response to an FOIA request by Suffolk County; forty of these documents have been identified by FEMA as bearing on the RAC Review. FEMA's Response to Suffolk County Request for Production of Documents, May 14, 1984, at 1-4. In addition, FEMA has agreed to make its four witnesses, three of whom participated in the RAC process, available for two days of depositions (Suffolk County was offered

its choice of deposing these witnesses together or separately; it has chosen to do so separately). Suffolk County's papers to date do not assert that these additional avenues of discovery are insufficient for probing the basis of the RAC's findings; they ignore them. The Licensing Board's opinion similarly views the 37 contested documents in isolation.3/

The results of federal court cases dealing with assertions of executive privilege show a sensitivity to the results available from other means of discovery. In Black v. Sheraton Corporation of America, 50 F.R.D. 130 (D.D.C. 1970), an FBI agent was not required to answer questions on deposition concerning the extent of a wire tapping investigation or leads developed as a result, since plaintiff had access to documents in FBI files and the ability to depose agents involved which provided adequate information. In Kinoy v. Mitchell, 67 F.R.D. 7 (S.D.N.Y. 1975), however, plaintiff obtained access to wire tap records because no other less sensitive source was available. Similarly, the need for access to agency reports is greater when witnesses who gave those reports refuse to testify. Mitchell v. Bogg, 252 F.2d 513 (8th Cir. 1958).

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3/ The Licensing Board's Opinion does not specifically treat the other documents released pursuant to the FOIA or the depositions; indeed, its reference to "cross-examination alone," as at a hearing, id. at 9, suggests further that it was considering the 37 documents in isolation.

All of the analyses in the cases above militate against compelled production of the privileged RAC documents. Other, less sensitive documentary discovery is available; deposition discovery is available. No showing has been made or even asserted to date that such discovery is inadequate to permit a probing of the bases for the RAC's collegial conclusions and whether they are tenable. At least until these other bases have been explored, Suffolk County's motion is, at best, premature.

2. The Documents Are Not Necessary to Understanding the RAC Review

Similarly, the necessity of the documents sought is a relevant consideration. Since the rationale of the privilege is to prevent interference with the operation of the deliberative process, the need for secrecy is diminished when the material is incorporated by reference into the final decision. Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967 (7th Cir. 1977) (memos within § 5 of FOIA subject to disclosure when within final opinion). Similarly, if documents serve as justification for a decision of the agency affecting regulated parties, they should be revealed even if it was originally prepared for pre-decisional consultation. Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F.2d 710 (D.C. Cir. 1973) (reports that explain Board's decision as to whether companies accrued excess profits subject to discovery).

In this case, however, the documents sought are not incorporated into or used as an explicit justification for the RAC's views. Of the documents being sought, the majority (nos. 1-21) contain the individual preliminary observations of individual members of the RAC. It is clear beyond argument that the RAC Report is not simply a collation or compilation of individual views. Rather, it is the result of an extended collegial process in which the individual comments of RAC participants on matters within their specific areas of expertise, as well as their more general views, are submitted for review by other participants; and that these comments and views both shape, and are shaped by, those of the other members is a process of comment and discussion. McIntire Affidavit; Kowieski Affidavit. The documents sought are but individual threads in a complex collegial fabric. Their relationship to the findings of the final product, the RAC Report, and to its bases, is not linear. They are only tangentially relevant to the actual matter at issue, namely, the assertions and conclusions of the RAC Report and their bases. The alternative method of discovery offered by FEMA -- two days of depositions of the agency's proposed witnesses, including the RAC Chairman and the two RAC consultants who actually drafted most of the RAC Report -- affords a more direct and more efficient means of probing those bases than the documents being withheld.

3. The Harm From Compelled Disclosure is Real and Substantial

The degree of harm expected to be suffered as a result of release of the privileged information is to be weighed against the asserted need for compelled production. If incentives exist so that the information will still be obtainable, the adverse impact from disclosure is diminished, and with it the strength of any claim for protection. City of Burlington, Vt. v. Westinghouse Electric Corp., 246 F.Supp. 839 (D.D.C. 1965) (anonymity for informers in antitrust cases not as important if it is in informer's self-interest to reveal the information). Thus, the mere assertion of a chilling effect cannot rebut all claims of necessity of disclosure. By contrast, in the present case FEMA's assertions of harm are not "mere claims", nor do other incentives exist to induce RAC members to participate. Specific, emphatic assertions under oath by the Chairman of the RAC, Mr. Kowieski, and by a ranking Regional officer, Mr. McIntire, indicate that disclosure (1) will affect the integrity and candor of the collective RAC deliberative process, (2) will make RAC members, particularly non-FEMA personnel, reluctant and perhaps unwilling to serve on the RAC, and (3) will in all probability lead to more informal means of doing business under which the quality of the work product may suffer and significant delays will in any event be experienced. McIntire Affidavit; Kowieski Affidavit. Unless these assertions are rejected, the resulting harm is real; it jeopardizes

the RAC process, and to that extent, the Commission's ability to make necessary licensing filings under § 50.47(a)(1) and -(2).4/

4. The Licensing Board Misapplied the Tests for Determining Whether the Overcome Executive Privilege

There is little if any disagreement abcut the Licensing Board's statements of the tests either for determining the eligibility of material for protection under the executive privilege, or for determining whether it has been overcome. The difficulty in this case arises in the application of the tests. As the discussion above illustrates, the following factors are determinative:

1. The availability of other means of obtaining the same or equivalent information. The relevant information here is not the melange of individual RAC members' preliminary views, but the substance and basis for the collegial RAC conclusions expressed in the RAC Report. That substance and basis exists, or does not, apart from the individual members' preliminary views; and it can be sought both through the other documents already produced and,

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4/ Two additional factors, though not themselves dispositive, also weigh against compelled disclosure. The first is the fact that FEMA is not a party to this litigation but rather NRC's consultant, see Machin v. Zucker, 316 F.2d 336 (D.C. Cir. 1963). Secondly, the fact that the RAC's work is still ongoing intensifies the harm to be suffered from disclosure: the chilling effect of disclosure would not only impair its future functioning in other cases, but also its ability to complete its evaluation of Shoreham, cf. Firestone Tire and Rubber Co., v. Coleman, 432 F.Supp. 1359 (N.D. Ohio 1976).

at least equally importantly, by deposition. Both Suffolk County's papers to date and the Licensing Board's Opinion fail to view the 37 disputed documents in this context, which cannot be neglected and which diminishes any assertion of need.

2. The importance of the information sought. The relevant information to be obtained covers the collective RAC findings and their basis, not the dynamics of the RAC process or the preliminary individual views of individual members.5/ Thus the only unique content of the RAC documents is, in essence, irrelevant to inquiry into the bases for the RAC's conclusions, at least in the absence of substantial allegations of irregularities in the RAC process. Neither Suffolk County's papers to date nor the Licensing Board's Opinion distinguish between these two types of information and, to that extent, are incorrect.

3. The Licensing Board's Opinion recites a series of factors weighing in favor of, and against, disclosure, id. at 4-5. Of the five factors considered to favor disclosure, id. at 4, the first two -- the importance of the information being sought and its availability elsewhere -- are consistent with other authority. Of the other three, one is not relevant and two are misapplied by the Licensing Board.

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5/ This might change if a substantial and substantiated allegation were made of irregularities in the RAC process; however, no such allegation has been made here.

a. The third factor mentioned by the Licensing Board -- a philosophy of broad discovery prevailing under NRC rules -- applies to discovery generally, but not to a specific-case determination whether to overcome a privilege. Broad discovery is part of the general federal discovery philosophy, but no authority was cited by the Licensing Board, nor has any been separately found, to suggest that this general philosophy should undermine or affect specific determinations on privilege, which are definitionally exceptions to he general discovery rules.

b. The fourth factor referred to by the Licensing Board is its March 6, 1984 Memorandum and Order in this case, providing LILCO with certain New York State documents over claims of executive privilege by the State. Though the Board's passing reference to this earlier, detailed ruling does not reveal it, that decision upheld numerous of New York State's claims of executive privilege, as well as overruling several of them. Similarly, an earlier Licensing Board in this case upheld numerous claims of executive privilege asserted by Suffolk County in this case. Long Island Lighting Company (Shoreham Nuclear Power Station), LBP-82-82, supra. Thus, governmental claims of executive privilege have been both upheld and overcome on specific facts already in this case, and citation to these earlier opinions generally does not argue per se in favor of disclosure of documents on the facts here.

c. The Licensing Board's fifth enumerated factor is that the RAC members are not FEMA employees and therefore

presumably not subject to discipline or retribution by FEMA. While the Board's observation may be accurate, it is not dispositive. If these employees' views expressed in the RAC process do not mirror those of their "home" agency, they may be subject to discipline by that agency. Further, personnel who are not FEMA employees may simply be unwilling to participate in RAC work under conditions of contentiousness if their preliminary individual views are going to be subject to fishbowl scrutiny. Unless FEMA possesses the power to coerce these independent personnel, the RAC process may be aborted at the front end, as the McIntire and Kowieski affidavits show. Thus this factor also does not weigh in favor of disclosure.

## CONCLUSION

The Licensing Board sustained FEMA's assertion that all of the 37 documents in contention are protected by executive privilege. No other party is in a position to challenge this determination on the merits.

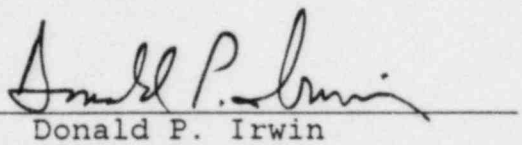
To overcome the privilege as to these documents, compelling need for the information contained in them must be shown, and must outweigh the government's interest in preserving confidentiality. Other means besides these documents are available for probing the basis for the RAC's conclusions; the only unique information in the disputed documents apparently relates exclusively or predominantly to essentially irrelevant unspecified issues concerning the dynamics of the RAC process and individual members' preliminary

individual views. Against this weak assertion of need is a vigorous demonstration by FEMA of harm from release (unfortunately, not fully developed before the Licensing Board), intensified by the ongoing nature of the RAC's work at Shoreham.

The documents should not be compelled to be released.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



Donald P. Irwin
Lee B. Zeugin

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

DATED: June 1, 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 BRIEF IN SUPPORT OF FEMA'S APPEAL FROM LICENSING BOARD DISCOVERY ORDER OF MAY 18, 1984 were served this date upon the following by first-class mail, postage prepaid, or by hand (one asterisk).

Alan S. Rosenthal, Esq.,*
Chairman
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
East-West Tower, 3rd Floor
4350 East-West Highway
Washington, D.C. 20555

Howard A. Wilber*
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
East-West Tower, 3rd Floor
4350 East-West Highway
Washington, D.C. 20555

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

Gary J. Edles, Esq.*
Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory
Commission
East-West Tower, 3rd Floor
4350 East-West Highway
Washington, D.C. 20555

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)
Bethesday, MD 20814

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

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

Fabian G. Palomino, Esq.
Special Counsel to the
3045 Porter Street
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

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

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

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

Johnathan D. Feinberg, Esq.
New York State Public Service
Commission, Staff Counsel
3 Rockerfeller 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

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

Donald P. Irwin

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

DATED: June 1, 1984