

LILCO, July 27, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONDOCKETED
USNRCBefore the Atomic Safety and Licensing Board

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In the Matter of)
LONG ISLAND LIGHTING COMPANY) Docket No. 50-322-OL-4
(Shoreham Nuclear Power Station,) (Low Power)
Unit 1))

LILCO'S MOTION TO STRIKE THE
DIRECT TESTIMONY OF DALE G. BRIDENBAUGH AND
RICHARD B. HUBBARD ON BEHALF OF SUFFOLK COUNTY

Pursuant to 10 CFR § 2.743(c), the Long Island Lighting Company ("LILCO") moves to strike the "Direct Testimony of Dale G. Bridenbaugh and Richard B. Hubbard on Behalf of Suffolk County" (hereinafter "County Testimony") on the grounds that the testimony is irrelevant, that it is barred by the Partial Initial Decision in this case, and that the witnesses are not qualified to give the testimony offered.

I. The Testimony Is Irrelevant
to the Issue of "Public Interest"

The testimony and attachments offered by Dale G. Bridenbaugh and Richard B. Hubbard purport to be directed to whether it is in the public interest to grant LILCO an exemption from GDC 17. The County's testimony attempts to show that the granting of an exemption is not in the public interest by alleging that LILCO did not

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take reasonable steps to assure reliable diesels for the Shoreham Nuclear Power Station. County Testimony at 4. In essence, the County argues that LILCO made mistakes in its procurement, installation and testing of the Delaval diesel generators, that LILCO should have discovered problems with the Delaval diesel generators at an earlier date, and that LILCO should have replaced the Delaval diesel generators with Colt diesel generators at an earlier date. In short, the County states that LILCO should be denied an exemption for GDC 17 because it is LILCO's own fault that it needs an exemption and, therefore, such an exemption is not in the public interest.

As indicated in the Commission's Order of May 16, 1984, a relevant inquiry in this proceeding is LILCO's "good faith efforts to comply with the regulations from which an exemption is sought." Order at 2-3, n.3. The testimony offered by Suffolk County erroneously confuses the concepts of prudence or negligence with the concept of good faith. For example, the County's assertion that "the need for LILCO now to seek an exemption is a direct result of LILCO's failure to detect and remedy in a timely manner the broad pattern of deficiencies in the design and manufacturer of the Delaval diesels" clearly demonstrates that the sole basis of the County's argument is that LILCO has been imprudent or negligent, that negligence or imprudence is equivalent to a lack of good faith, and that LILCO should be denied an exemption from GDC 17

because of that alleged negligence. Even if Suffolk County could demonstrate negligence on the part of LILCO (which LILCO maintains the County cannot), negligence does not demonstrate a lack of good faith.

A. The Testimony Is Irrelevant Because
It Does Not Address "Good Faith"

Black's Law Dictionary defines good faith as encompassing "among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. . ." Black's Law Dictionary 624 (5th ed. 1979). Applying this definition to the present case would require LILCO to demonstrate an honest belief that it was intending to comply with the requirements of GDC 17. The testimony submitted by Suffolk County makes no attempt to show that LILCO did not have the intention to comply with GDC 17. Demonstration of a lack of good faith effort requires more than a showing that, in hindsight, more could have been done to avoid the problems discovered with the Delaval generators.

The conceptual distinction between negligence and a lack of good faith is well recognized in the case law. Good faith is measured by the actual state of mind of the party, not the objective "reasonable person" standard of negligence. See, e.g., Eldon's Sup. Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, 296 Minn. 130, 207 N.W.2d 282, 287 (1973); Snook v. Netherby, 124 Cal. App. 2d 797, 269 P.2d 195, 198 (1954).

Conversely, bad faith^{1/}

is not simply bad judgment or negligence, but. . . implies conscious doing of wrong, and means a breach of known duty through some motive of interest or ill will. . . [It] differs from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will.

Vickers v. Motte, 109 Ga. App. 615, 137 S.E.2d 77, 80 (1964).

Courts have consistently distinguished a lack of good faith from negligence in many different legal contexts.^{2/} In particular, a failure to inquire, even upon reasonably suspicious circumstances, does not demonstrate a lack of good faith. "[A party's] state of mind and motives must be judged according to what he knew rather than by what he might have learned if he had made inquiry."

Appel v. Morford, 62 Cal. App. 2d 36, 144 P.2d 95, 97 (1943).

Only a purposeful or intentional attempt to evade knowledge would show a lack of good faith. See, e.g., Fenner v. American Surety Co. of New York, 156 S.W.2d 279, 182 (Tex. Ct. Civ. App. 1941).

^{1/} Bad faith is the lack of good faith. E.g., Fenner v. American Surety Co. of New York, 156 S.W.2d 279, (Tex. Ct. Civ. App. 1941).

^{2/} See, e.g., Wooley v. Standard Oil Co., 230 F.2d 97, 104 (5th Cir. 1956) (good faith effort at payment for oil and gas leases found without regard to whether negligence involved); National Casualty Co. v. Caswell, 317 Ill. App. 66, 45 N.E.2d 698, 699 (1942) ("A thing is done in good faith when it is done in fact honestly whether it be done negligently or not" (quoting Uniform Fiduciary Act)); Moore v. Comm. of Internal Revenue, 101 F.2d 704, 706 (2d Cir. 1939) (good faith requirement satisfied so long as act not taken with a view toward defeating purpose of the law).

NRC decisions recognize the fundamental distinction between negligence and a lack of good faith. In Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), LBP-82-56, 16 NRC 281 (1982), a supervisor responsible for grading an examination changed several answers on the key, to the benefit of employees taking the test. Although the changes were incorrect and unwarranted, they did not demonstrate an absence of good faith. Id. at 332-33. Nor is an "honest error in judgment" ground for a finding of bad faith. Matter of Washington Public Power Supply System (WPPSS Nuclear Project No. 3) ALAB-747, 18 NRC 1167 (1983).

As the case law demonstrates, both the Commission and the courts have consistently distinguished lack of good faith from negligence. Neither the written testimony submitted by Messrs. Bridenbaugh and Hubbard nor the depositions of those witnesses demonstrate any consideration of a difference between negligence or imprudence and good faith. In fact, the County's witnesses admitted in their depositions that they did not see a distinction between whether LILCO had exhibited good faith in its efforts to comply with GDC 17 and whether LILCO had been imprudent or negligent in its conduct.^{3/} To the contrary the witnesses admitted in

^{3/} During his deposition, Mr. Hubbard made the following statement regarding the difference between good faith and prudence or negligence.

Q. Do you agree with me that there is a differ-

(footnote continued)

their depositions that they had no evidence that LILCO had any intention to evade NRC regulations.4/

(footnote continued)

ence between good faith and diligence?

- A. (Hubbard) I am reminded of Charles Brown, "How can these things be happening when I'm trying so hard?"

There may be some difference, but I think the bottom line is what was the result of that; could it have been foreseen at an earlier time that there might have been problems, and could these problems have been avoided.

Deposition of Dale G. Bridenbaugh and Richard B. Hubbard at 64-65. Similarly, Mr. Bridenbaugh was unable to distinguish between the two concepts:

- Q. My question is do you have an opinion as to whether the lack of diligence was as a result of a lack of good faith on LILCO's part or whether it was merely negligence, in your opinion?

- A. (Bridenbaugh) I haven't really thought about that, the difference between those two, and I'm not -- I haven't attempted to figure out what the term "good faith" means in the order that you just cited. I don't have an opinion on that at this time.

Deposition at 65

- Q. Well, do you intend to assess whether LILCO was acting in good faith or bad faith in handling the TDI diesel situation?

- A. (Hubbard) I guess I would prefer to say what I said before. We would be more looking at the diligence. But that is something I understand technically.

- Q. So if I understand it, you intend to express the opinions that you expressed in the prudence proceeding as updated by any recent defense [sic] [events] since you updated that

(footnote continued)

Based on the foregoing discussion of the legal standard for

(footnote continued)

testimony, and you don't know whether you intend to evaluate LILCO's handling with respect to whether they acted in good faith or bad faith. You perceive now that you will stick to the question of whether they acted diligently and properly in your view.

A. (Hubbard) That was surely my understanding as of today, which doesn't preclude we might expand that; but certainly, the emphasis today has been on diligence.

Q. Mr. Bridenbaugh, is that your understanding also?

A. (Bridenbaugh) Yes.

Deposition at 75.

4/ Q. Do you know whether the specification for the TDI diesels as originally ordered complied with GDC-17 at the time?

A. (Bridenbaugh) I think the intent of the specification probably was to comply. Whether they did or not I don't know.

Q. Do you have any knowledge that LILCO intentionally disregarded any of the TDI diesel problems?

A. (Bridenbaugh) I do not.

Deposition at 65-66.

Q. As far as you know, are those [Colt] diesel generators intended to comply with GDC-17?

A. (Hubbard) I believe so.

Deposition at 70.

good faith, the County's testimony and the deposition of the witnesses proffering the County's testimony, LILCO moves to strike the testimony of Bridenbaugh and Hubbard, including the attachments, on the ground that it is irrelevant.

II. Testimony on LILCO's Quality
Assurance Program Is Barred by Res Judicata

The County's testimony concerning LILCO's alleged imprudence or negligence with respect to the TDI diesels hinges on allegations concerning the adequacy of LILCO's quality assurance program. In particular, the testimony attacks LILCO and Stone & Webster's efforts to monitor the work done by TDI in the design, manufacture and installation of the TDI diesel engines at Shoreham. See, e.g., Testimony at 12 (LILCO did not institute a stringent audit program); 13 (S&W and LILCO should have been alerted to monitor TDI closely); 14-15 (S&W conducted untimely audits); 25 (inadequate response to determine root causes in QA/QC program implementation).^{5/} This testimony should be stricken

^{5/} The similarity between the types of allegations made in this testimony and the allegations made about LILCO's QA program during ASLB hearings is striking. In essence, the County now argues that the discovery of deficiencies by QA audits should have suggested fundamental QA problems with the TDI diesels. In the licensing proceeding the County suggested that each and every surveillance finding was a "breakdown" of the QA/QC program. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 574-81 (1983). The ASLB categorically rejected this notion:

because the adequacy of the LILCO's QA program has been litigated and found to be acceptable.

In the Shoreham operating licensing case, the Atomic Safety and Licensing Board chaired by Judge Brenner determined that LILCO's quality assurance/quality control program for safety related equipment is in compliance with the NRC regulations. As the Brenner Board noted:

[o]nce again, the Board, in reaching its conclusions on these contentions, is faced with a massive record, based on 55 days of hearings, extensive written testimony and exhibits, and voluminous proposed findings of fact and opinion by the parties that are disparate, at least. The difficulty of our task, trying to be objective in consideration of each of the parties' submissions, is further compounded by the County's misrepresentation of the complete record -- by omission, selective citations and distortion of recorded testimony.

18 NRC at 579 (footnote omitted).

(footnote continued)

This Board is not about to become involved in a "numbers game" of counting beans of different colors in viewing the examples of QA failures relied upon by the County.

18 NRC at 579. Instead, the Board insisted on looking at the significance of the findings in individual terms and in terms of the overall QA program. *Id.* at 582. Admitting this testimony would result in relitigation of these principles established by the Brenner Board.

Based on that voluminous record, the Board noted that quality assurance failures had been identified during the course of the construction of Shoreham, but concluded that:

Stepping back from the details of errors made, we have focused on the overall performance of LILCO and the Staff at Shoreham. Our perception is that neither has been perfect, nor could it have been with realistic use of resources. Nor is perfect performance expected by the Commission. We do conclude, however, that both LILCO and the Staff have had effective programs for identifying and correcting deficiencies. We also conclude that LILCO's and the Staff's programs for operation of Shoreham meet the Commission's requirements and will provide adequate protection of the health and safety of the public. We have found LILCO's and the Staff's testimony credible and persuasive. The County's testimony and cross-examination have not controverted our conclusions and opinion.

18 NRC at 581. LILCO recognizes that the specifics of the quality assurance program applied to the diesel generators were not directly the subject of the quality assurance/quality control litigation on which the Brenner Board rendered its decision. However, the quality assurance/quality control program on which the Brenner Board's decision was based did include reviews of work performed by contractors and vendors such as TDI. See 18 NRC at 585-86; Partial Initial Decision, Findings K-19, K-55 to K-60, K-68 to K-73, K-284 to K-291. Moreover, the County had access to LILCO's audit reports, including those of LILCO's contractors and vendors. The County was repeatedly admonished by the Licensing Board to use its best examples in the quality assurance litigation

to demonstrate that, as the County contended, the quality assurance/quality control program was ineffective for identifying and correcting deficiencies. E.g. Tr. 10,261-62, 11,320-21. The County chose not raise the issue of the quality assurance/ quality control program applied to the Transamerican Delaval diesel generators in the quality assurance hearings.

The County should not now be permitted to argue, with hindsight, that LILCO should have known of the problems with the TDI diesel generators at an earlier date and have applied some more stringent quality assurance program to the TDI diesels. LILCO's QA program has already been put to the test and found acceptable. Thus, testimony should be stricken as unduly repetitious and irrelevant to the issue of whether LILCO exercised good faith in its efforts to comply with GDC 17, and barred by the Licensing Board's Partial Initial Decision of September 21, 1993.

III. County Witnesses Are Not
Qualified to Give the Testimony Offered

The testimony offered by Bridenbaugh and Hubbard focuses on a number of technical failures of the TDI diesel generators and whether early problems with the TDI diesels should have put LILCO on notice that something was fundamentally wrong with the diesel generators. See, e.g., County Testimony at p. 10. The testimony of Bridenbaugh and Hubbard should be stricken on the ground that they do not have the expertise to testify on the adequacy of

LILCO's efforts to ensure reliable operation of the Transamerica Delaval diesel generators.

Much of the testimony offered by Bridenbaugh and Hubbard focuses on technical failures of the TDI diesel generators, whether such failures should have prompted LILCO to take certain corrective and preventative actions with respect to the TDI diesel generators and, ultimately, whether such failures should have prompted LILCO to purchase the Colt diesels at an earlier date. Neither Bridenbaugh nor Hubbard have any experience in designing, operating or maintaining a diesel generator that would permit them to reach the conclusions contained in the testimony on design failures, the type of equipment failures that should have prompted an investigation and the point at which LILCO should have purchased the Colt diesel.^{6/} For example, the County's witnesses are

^{6/} Q. Mr. Hubbard, have you have any experience in the operation of diesel generators?

A. (Hubbard) No, other than my general experience at General Electric where the diesels were involved in all of the General Electric plants that I had engineers involved in, and also the diesels are an electromechanical component. . . .

Deposition at 29-30.

Q. Mr. Bridenbaugh, do you have any experience in the operation of diesel generators?

A. (Bridenbaugh) I don't have any hands-on experience in the operation of diesel genera-

(footnote continued)

not qualified to reach the conclusion that failure of the crankshaft of one of the TDI diesels can be traced directly to failures that occurred in the design and manufacturing process. County Testimony at 9. Similarly, Bridenbaugh and Hubbard are not qualified to reach conclusions concerning the design failures such as "a relatively simple calculation [leads to the conclusion], that TDI has misdesigned the crankshaft, leading to insufficient capacity to withstand anticipated loads." County Testimony at 9. In order to offer testimony which reaches conclusions concerning whether failures experienced with the TDI diesel generators are the type that should have been detected by reasonably prudent

(footnote continued)

tors. I have never operated one myself that I can recall

Q. Have you ever designed a diesel generator?

A. (Bridenbaugh) No, I have not.

Q. Have you ever had responsibility for maintaining a diesel generator?

A. (Bridenbaugh) In the general sense that I described in the service responsibility, I would say yes. But from a detailed supervisory standpoint, no.

Q. Have you ever assessed the reliability of a diesel generator?

A. (Bridenbaugh) No.

Deposition at 34-35.

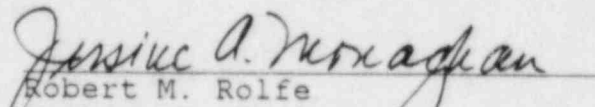
investigation prior to the time they were discovered, the Suffolk County witnesses must be experts in the field of diesel generators. Neither the witnesses' professional qualifications attached to their testimony, nor their depositions reveal any expertise. Thus, they cannot give expert opinions to the effect that the early problems with the TDI diesel generators were of the type that could have been predicted early, that a reasonable person with knowledge of diesel generators would have investigated more thoroughly, and that such reasonable person would have predicted that such early problems would have caused later failures with the Delaval diesels. Consequently, Bridenbaugh and Hubbard's testimony should be stricken.

IV. Conclusion

For the reasons stated above, the Direct Testimony of Dale G. Budenbaugh and Richard B. Hubbard on Behalf of Suffolk County should be stricken in its entirety.^{7/}

Respectfully submitted,

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^{7/} In the interest of efficiency, this motion to strike is submitted in advance of Messrs. Bridenbaugh and Hubbard taking the witness stand. It is based on the prefiled and deposition testimony of the witnesses. If the Board denies the motion and permits the witnesses to testify, LILCO may raise additional grounds to strike this testimony following voir dire and cross-examination.