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UNITED STATES OF AMERICA '84 AGO-6 P3:15
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-OL-3
) (Emergency Planning)
)
)
)

SUFFOLK COUNTY'S MOTION FOR RECONSIDERATION
OF BOARD'S JULY 24 ORDER REGARDING
SCHEDULE FOR HEARING AND PROHIBITING
WRITTEN TESTIMONY ON THE STRIKE ISSUES

On July 24, 1984, the Board issued a Memorandum and Order Determining That a Serious Safety Matter Exists (hereinafter, "Order"). In its Order, the Board stated that it finds "that the issue of whether the current strike [by LILCO's union employees] and the potential for further strikes by union members of LERO impair the ability of [LILCO] to implement a response to a radiological emergency is a serious question affecting the public

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health and safety." Order, at 2.^{1/} Consequently, the Board admitted sua sponte the following three issues:

1. Whether LILCO's ability to implement its offsite emergency preparedness plan would be impaired by a strike involving the majority of its LERO workers.
2. Whether LILCO should be required to place the reactor in cold shutdown in the event of a strike by LERO workers.
3. Whether placing the reactor in cold shutdown during a strike by LERO workers, after the reactor has operated at full power, would give "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency."

Order, at 3. The Board's Order stated that no written testimony shall be filed by the parties on the strike issues (id., at 3-4) and directed the parties to be prepared "to present oral testimony on this matter beginning on Tuesday, August 28, 1984." Id., at 4.

On July 31, 1984, the County informed the Board and the parties that the schedule established by the Board might be too rigorous for the County to meet, and that a full and fair hearing

1/ The Board noted in its Order that, according to counsel for LILCO and Suffolk County, "approximately one-half to two-thirds of the 1800 LERO workers are union employees of LILCO," that, since July 10, 1984, "all union employees of LILCO have been on strike," and that, during the strike, "all union members of LERO have either withdrawn or resigned from LERO." Order, at 2. To make the record clear, it is the County's understanding that, of the approximately 1800 members of LERO, approximately 1200 were union employees who are now on strike and have withdrawn or resigned from LERO. Tr. 13,289-90. At this time, the strike has not been settled. It must be understood, however, that in the County's view, the serious safety concerns raised by the Board in its July 24 Order would not be alleviated or mitigated in any way even should the present strike settle.

of the important issues raised by the Board would likely require a more realistic and flexible schedule. See Suffolk County's Notice to Board Regarding Schedule for Hearing the Strike Issues, dated July 31, 1984 (hereinafter, "Notice"). We will not repeat here the reasons underlying the County's filing and the concerns held by the County regarding the Board's proposed schedule at the time that filing was made; they are set forth in the County's Notice and are incorporated herein by reference. However, since July 31, the County's concerns regarding the Board's proposed schedule and the impact of that schedule on the County's ability to present its case on the strike issues have increased. Indeed, at this time it would appear that the County would be essentially precluded from presenting any case on the strike issues under the Board's proposed schedule.

Therefore, the County requests that the Board reconsider the hearing schedule proposed in the Board's July 24 Order and that the Board establish a schedule under which hearing on the strike issues would commence no earlier than Tuesday, September 18. This three-week extension of the Board's proposed hearing schedule would permit the County sufficient time to prepare its case, including the preparation of written testimony on the issues -- an essential element of the hearing process, for which the County is also seeking reconsideration. Moreover, as discussed below, the September 18 date proposed by the County is the earliest time that the County can present its case on the strike issues, due to the availability of the witnesses the

County presently intends to rely upon for testimony and the need to work with and prepare such witnesses prior to the time they testify.

It must be understood that where, as here, the facts are evolving, the adjudicatory process by its very nature requires that sufficient time be built into the hearing schedule. This fact was recognized by the Licensing Board in the Indian Point proceeding:

[If] a Board determines that it is desirable to hear testimony on a new issue (or on a new factual development), it must anticipate a delay on the order of months. The parties must be permitted to find and prepare witnesses; discovery may be necessary; the testimony must be prefiled (10 CFR § 2.743(b)); arrangements for the hearing facilities must be made; the actual testimony and cross-examination must be heard; and finally, supplemental proposed findings may be desirable . . .

Consolidated Edison Company (Indian Point), LRP-83-68, 18 NRC 811, 845, n. 12 (1983). In this case, of course, some of the factors listed by the Licensing Board in the Indian Point proceeding may not be applicable. For example, arrangements for the hearing facilities have presumably been made and supplemental proposed findings will not be necessary, since, at this time, proposed findings of fact have not been filed. Indeed, at this time, the evidentiary hearings have not concluded and the record therefore has not been closed. Nevertheless, most of the factors listed by the Indian Point Board must be taken into account by this Board in determining a schedule for the strike issues, since those issues have been raised by this Board on the basis of a new

factual development, i.e., the LILCO strike. Viewed in this context, it must be concluded that the schedule suggested by the Board in its July 24 Order does not permit sufficient time for the parties, among other things, to find and prepare witnesses and take discovery. Therefore, the County requests that the Board modify its July 24 Order by extending the hearing date for the strike issues from August 28 until September 18. The need for the extension requested by the County is based on the following facts.

First, the County can now advise the Board that it has identified and presently intends to rely upon at least four witnesses for testimony on the strike issues. These witnesses are as follows: Deputy Inspector Peter F. Cosgrove, Lieutenant John L. Fakler, Professor David J. Olson and Mr. Gregory C. Minor. All these witnesses have previously testified before the Board on other matters. At this time, the County intends to present testimony from Deputy Inspector Cosgrove, Lieutenant Fakler, and Professor Olson on the first issue admitted by the Board's July 24 Order. Mr. Minor will address primarily the second and third issues admitted by the Board.

While the County is continuing its efforts to obtain the services of other witnesses to testify on the strike issues,^{2/}

^{2/} These other witnesses include experts in the field of labor psychology and sociology and would present testimony critical to the Board's resolution of the strike issues. However, such witnesses would not eliminate or mitigate in any way the need for testimony on the issues admitted by the Board from the witnesses identified above.

the witnesses identified above will form an integral and essential part of the County's case. They offer considerable experience and expertise in areas concerning and directly relating to the strike issues present in this case, and their participation at trial will, in the County's view, significantly contribute to any determination of the issues which have been raised by the Board. However, because of prior commitments and scheduling conflicts, none of these individuals are available to testify during the week of August 28. Most are also unavailable for discovery purposes within the time frame contemplated by the Board's July 24 Order -- that is, between now and August 14. Indeed, the first week that the County's prospective witnesses are all available is the week of September 10. Because the County would need some time to work with the witnesses and to prepare for the hearing contemplated by the Board's Order, the County proposes that the Board extend the August 28 hearing date until Tuesday, September 18.

Second, the September 18 extension requested by the County is necessary in order to permit sufficient time for the parties to conduct discovery on the strike issues. Thus far, almost two weeks of the time allotted by the Board for discovery has elapsed. Despite a request by counsel for the County to counsel for LILCO on July 27 that LILCO identify the witnesses it intends to present on the strike issues, LILCO, as of this time, has failed to identify any witnesses or potential witnesses. On August 2, the County informed LILCO of the witnesses the County

presently intends to rely upon for testimony on the strike issues (the same witnesses identified herein). Further, on August 1, New York State and the County jointly requested LILCO to furnish information pertaining to the strike issues. However, at this time, the County has received no response by LILCO to the August 1 request. With only one week remaining before the discovery period contemplated by the Board in its July 24 Order expires, it would appear that additional time for discovery needs to be built into the schedule on the strike issues admitted by the Board.

Finally, the extension of time requested by the Board is necessary in order to permit sufficient time for the County to prepare written testimony on the strike issues, should this Board grant the County's request and decide to permit written testimony to be filed by the parties. The County is aware that the Board's July 24 Order precludes the filing of written testimony. The County assumes that the Board's decision in this regard was based on the Board's proposed hearing date of August 28 and its desire, previously stated on the record and in the Board's Order (see, e.g., Order, at 3) to finish the emergency planning hearings by August 31. The interests of a fair hearing process, however, should not be subordinated to a desire to finish these hearings by the arbitrary date of August 31. Thus, the Board should reconsider its ruling prohibiting the filing of written testimony.

In fact, under the Commission's Rules of Practice, the parties to a licensing proceeding are required to submit the direct testimony of witnesses in written form, unless otherwise ordered by the presiding officer on the basis of objections presented. 10 CFR 2.743(b). Here, none of the parties has objected to the submission of written testimony on the strike issues admitted by the Board. Rather, the Board, sua sponte, has prohibited the filing of written testimony. The County submits that the Board's action in this regard was error.

In addition to the fact that prefiled direct testimony is explicitly contemplated by the Commission's regulations, such testimony is essential to both the Board and the parties in preparing for hearing and serves as a means to facilitate and focus the hearing process. For this reason, Licensing Boards have previously denied requests by parties to present oral direct testimony. For example, when confronted by an intervenor's request to "submit concise direct testimony on [its] contentions at the public hearings -- extemporaneously," the Licensing Board in the Susquehanna licensing proceeding made clear its disapproval:

This approach is not only inconsistent with the general thrust of NRC rules (10 CFR Section 2.743(b)) but with our previously expressed goal of avoiding "trial by surprise." It would make it most difficult for the Board to formulate informed questions for the witnesses and hence to be adequately prepared for hearing. Clearly it raises a question whether that Intervenor, at least, looks upon a licensing proceeding as a forum for resolving technical questions in the

fairest and most comprehensive manner, or alternatively, whether it views this proceeding merely in terms of a podium for soapbox oratory. We need scarcely add that this latter approach is intolerable and will not be countenanced by this Board.

Pennsylvania Power and Light Company (Susquehanna), LBP-79-31, 10 NRC 597, 602 (1979).

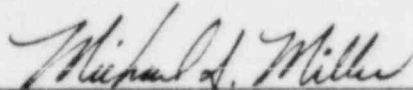
Under the circumstances of this case, the Board's prohibition against prefiled written testimony will almost certainly lead to the "trial by surprise" which the Commission's Rules of Practice seek to avoid. One of the purposes underlying written testimony is to enable the Board and the parties, prior to hearing, to become aware of the positions that will be advocated at the hearing on the various issues in controversy. The issues in controversy here are complex and significant. In fact, as this Board has recognized, the offsite response plan for Shoreham is "significantly different from that of any other operating nuclear plant" in this country, with LILCO relying primarily upon its employees to perform offsite emergency response functions. Order, at 1.

Thus, the Board should reconsider whether to permit the parties to file written testimony. Should the Board decide that the Commission's explicit requirement regarding prefiled direct testimony is to be followed (see 10 CFR 2.743(b)), the September 18 hearing date proposed by the County would provide adequate time for submission of such testimony; in this regard, the County would suggest that written testimony by all parties be filed on

September 11, with motions to strike such testimony, if any,
argued orally at the commencement of the hearing on September 18.

Respectfully submitted,

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Date: August 3, 1984

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NUCLEAR REGULATORY COMMISSION

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LONG ISLAND LIGHTING COMPANY)

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OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Docket No. 50-322-OL-3
(Emergency Planning)

CERTIFICATE OF SERVICE

I hereby certify that copies of Suffolk County's Motion for Reconsideration of Board's July 24 Order Regarding Schedule for Hearing And Prohibiting Written Testimony on the Strike Issues have been served to the following this 3rd day of August, 1984 by U.S. mail, first class, except as otherwise noted.

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Dated: August 3, 1984

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