

RELATED CORRESPONDENCE

UNITED STATES OF AMERICAN
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD APPEAL BOARD

In the Matter of)
)
LONG ISLAND LIGHTING COMPANY) Docket No. 50-322-OL-3
) (Emergency Planning)
(Shoreham Nuclear Power Station,)
Unit 1)

OFFICE OF SECRETARY
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FEMA'S RESPONSE TO SUFFOLK COUNTY'S MOTION FOR
DIRECTED CERTIFICATION OF THE ATOMIC SAFETY &
LICENSING BOARD'S ORDER OF JULY 10, 1984

The matter before the Board presents a limited question of whether the criteria for granting directed certification of a July 10, 1984 order issued by the Atomic Safety and Licensing Board (ASLB) has been met. The ASLB's order of July 10, 1984 denied Suffolk County's request for 1) the production of the thirty documents previously dealt with in the Atomic Safety and Licensing Appeal Board's (ALAB) order of June 13, 1984 (ALAB-773), 2) the personal notes of Roger B. Kowieski, 3) the issuance of subpoenas to the RAC members and 4) postponement of the scheduled (August 14-17) appearance of the FEMA witness panel before the ASLB.

The instant issue before this Board is whether the criteria for granting directed certification of the Licensing Board order is met. Suffolk County has not sustained its burden in this matter.

add.
J. G. Gann
OCA

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Discussion

The regulations of the Nuclear Regulatory indicate there is no right of appeal of an interlocutory ruling by the ASLB to the Appeal Board (10 CFR 2.730(f) and 10 CFR 2.785(a)(1). In extraordinary circumstances the ALAB does have the power to review interlocutory rulings by a petition for directed certification of legal issues raised in proceedings still pending before the ASLB (10 CFR 2.718(i) and 10 CFR 2.785(b)(i)). Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-541, 9 NRC 436, 437 (1979).

There might be warrant for treating in a 10 CFR § 2.730 motion for interlocutory appeal filed by a lay person unfamiliar with the Rules of Practice alternatively as a petition seeking directed certification under 10 CFR § 2.718(i). Pennsylvania Power and Light Company and Allegheny Electric Cooperative, Inc. (Susquehanna Steam Electric Station, Units 1&2), ALAB-563, 10 NRC 449 (1979).

Directed certification "is to be resorted to only in exceptional circumstances." Consumers Power Co. (Midland Plant, Units 1&2), ALAB-382, 5 NRC 603 (1977) and is granted by Appeal Boards "most sparingly". Pacific G&E Co. (Diablo Canyon Nuclear Power Plant, Units 1&2), ALAB-514, 8 NRC 697, 698 (1978); Pacific G&E Co. (Diablo Canyon Nuclear Power Plant, Units 1&2), ALAB-504, 8 NRC 406, 410 (1978).

A party seeking directed certification must, at a minimum, establish that a referral under 10 CFR § 2.730(f) would have been proper i.e., that failing a resolution of the problem the public interest will suffer or unusual delay or expense will be encountered. P.S. Co. of N.H. (Seabrook Station, Units 1&2), ALAB-271, 1 NRC 478, 483 (1975); Toledo Edison Co. (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752, 759 (1975).

Almost without exception in recent times, the Appeals Board's have undertaken discretionary interlocutory review only sparingly, and then only when the licensing board's action either (1) threatened the party adversely affected by it with immediate and serious irreparable harm which, as a practical matter, could not be alleviated by later appeal or (2) affected the basic structure of the proceeding in a pervasive or unusual manner. Public Service Electric & Gas Co. (Salem Nuclear Generating Station Unit 1), ALAB-588, 11 NRC 533, 536 (1980). P.S. Co. of Ind., Inc. (Marble Hill Nuclear Generating Station), ALAB-405, 5 NRC 1190, 1192 (1977); Accord, S.C.E.&G. Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-663, 14 NRC 1140, 1162 (1981); Houston Lighting and Power Co. (Allen's Creek Nuclear Generating Station), ALAB-635, 13 NRC 309, 310 (1981); Houston Lighting & Power Co. (South Texas Project, Units 1&2), ALAB-608, 12 NRC 168, 170 (1980); Id., ALAB-637, 13 NRC 367, 370 (1981). Offshore Power Systems (Floating Nuclear Power Plants), ALAB-517, 9 NRC 8, 11 (1979); P.S. E&G Co. (Salem Nuclear Generating Station, Unit 1), ALAB-588, 11 NRC 533, 536 (1980); Pa. P&L Co. (Susquehanna Steam Electric Station, Units 1&2), ALAB-593, 11 NRC 761 (1980); Puget Sound P&L Co. (Skagit Nuclear Power Project, Units 1&2), ALAB-572, 10 NRC 693, 694 (1979). Indeed, it has been

repeatedly stated that discovery orders will only very rarely merit directed certification. Houston Lighting & Power Co. (South Texas Project, Units 1&2), ALAB-608, 12 NRC 168, 170 (1980); Houston Lighting & Power Co. (Allen's Creek Generating Station Unit 1), ALAB-609, 12 NRC 172 (1980); Consumers Power Co. (Midland Plant, Units 1&2), ALAB-634, 13 NRC 96, 99 (1981).

The aggrieved party must make a strong showing that the impact of the discovery order upon that party or upon the public interest is indeed unusual. Consumers Power Company (Midland Plant, Units 1&2), ALAB-438, 6 NRC 638 (1977). Suffolk County has not sustained its burden in this matter.

Suffolk County contends it is entitled to 1) the production of the thirty documents previously dealt with in the Atomic Safety and Licensing Appeal Board's (ALAB) order of June 13, 1984 (ALAB-773), 2) the personal notes of Roger Kowieski, 3) the issuance of subpoenas to the RAC members and 4) postponement of the scheduled (August 14-17) appearance of the FEMA witness panel before the ASLB. In support of this contention it alleges that it did not have an opportunity to ascertain the reasons for and the substance of the various RAC members "dissenting" opinions on specific findings (Suffolk County Brief, at 10).

Though, a full argument on the facts is premature at this time, a number of factual issues do need to be clarified. FEMA voluntarily made its witnesses available for deposition pursuant to agreements with Suffolk County. Suffolk County clearly admits in its pleadings that FEMA's witnesses created personal notes in preparation of their depositions (Suffolk County Brief, at 9&10).

Though FEMA was under no obligation to create these notes, it did so in order to be able to be fully responsive to the legitimate concerns of the parties and to facilitate the conduct of the depositions. These notes contain a listing by NUREG element (108 Elements) of a) the number of individuals (RAC members & two support contractors) who submitted preliminary ratings on each element, b) the number of individuals whose preliminary ratings were the same as those contained in the final RAC report (the basis for those ratings are contained in the final RAC report), c) the number of individuals whose preliminary comments differed from those contained in the final RAC report, d) notations as to the comments submitted in support of those preliminary ratings which differed from those contained in the final RAC report. In addition these notes contain the preliminary ratings of the two witnesses Mr. Baldwin & Mr. Keller.

Mr. Keller was questioned extensively on these notes (Keller, Tr. 25-56, 67, 70, 99-102) as was Mr. Baldwin (Baldwin, Tr. 119, 131-152) and they clearly explained each notation. They also were questioned as to the NUREG standards reviewed (Keller, Tr. 28), the number of comments received (Keller, Tr. 28), Baldwin, Tr. 123), the number of preliminary comments in agreement with the final RAC report (Keller, Tr. 29-30) (Baldwin, Tr. 123) the number of preliminary comments which differed from those contained in the final RAC report (Keller, Tr. 30, 34-35), (Baldwin Tr. 123), the basis for those ratings submitted but not adopted at the RAC meeting of January 20, 1984. (Keller, Tr. 45 L.7-9, 48 L.1-2, 50-51, 92, 99-102). (Baldwin Tr. 133, 138-139, 140-142).

It is obvious from a review of the depositions and even the County's pleadings that FEMA's witnesses offered to and did provide information as to the basis of preliminary differences in ratings. The only issue which the witnesses declined to respond to were requests to identify the individual RAC members associated with each preliminary rating.

The witnesses who submitted preliminary comments (Keller & Baldwin) provided their own preliminary ratings to Suffolk County (Keller, Tr. 39,44,54) (Baldwin, Tr. 151)*

The County alleges it is entitled to know why the preliminary opinions of some of the RAC members were not contained in the final RAC report (Suffolk County, p.11). It is obvious why these preliminary opinions were not included, and this fact was explored with the witnesses. The witnesses explained the RAC process (Keller, Tr. 53) (Baldwin, Tr.68-80, 84-88, 88-96, 159-163) (Kowieski, Tr. 76-97), the fact that the RAC reached consensus (Keller, Tr. 65) (Baldwin, Tr. 157-158,159-163, 164-165, 170) (Kowieski, Tr. 91, 93-96) that no RAC member was intimidated (Keller, Tr. 105-106) (Baldwin Tr. 158-159) (Kowieski, Tr. 95-96), and that the witness panel could collectively "describe significant, substantive information that was discussed among the RAC members" (Keller, Tr. 127) (Baldwin, Tr. 149) in reaching their conclusions.

Even the citation selected by Suffolk County in Support of its motion clearly reflects that the only information it did not receive was the names of the individual RAC member providing each comment (Suffolk County, p.11, p.12-14).

*Mr. Kowieski did not submit preliminary evaluation comments (Kowieski, Tr. 26).

In denying the County's July 6 Motion, the ASLB found that the County's desire to identify the dissenting RAC members and the reasons for their dissenting views represented a "complete about-face from the County's position before the Appeal Board" since, according to the Appeal Board's opinion (ALAB-773, slip op., at 17) "[c]ounsel for the County [had] disavow[ed] any particular interest in the names of individuals putting forth specific views . . . [but sought] only the basis of the RAC conclusions." Tr. 12,128. The ASLB also concluded that the County had not explained why it had become important to have such information.

Further, the ASLB, following the guidelines set forth by the Appeal Board in its June 13 Order (ALAB-773, slip op., at 25), decided that the County had failed to show a compelling need for the documents withheld by FEMA. Specifically, the Board held:

Suffolk County has not established 'significant differences of opinion among members of the RAC on important issues affecting the adequacy of LILCO's [P]lan.'

Moreover, the County has not established that these FEMA witnesses are unable to defend and explain adequately the FEMA findings or that the witnesses view[s] were inordinately derivative of other views. Unless the County makes such a showing, the executive privilege precludes probing the individual views of individual RAC members.

The ALAB did provide guidelines to the ASLB when such an inquiry may be appropriate; when there may be

- (1) significant differences of opinion among members of the RAC on important issues affecting the adequacy of LILCO's plan;
- (2) witnesses are unable to defend or explain adequately the underlying basis for FEMA's determinations;
- (3) witnesses reveal that they have relied to an inordinate degree on the views of others.

In such circumstances...the County may be able to establish a sufficiently compelling need.

The facts in this case clearly show that 1) all RAC members agreed with the final RAC report, 2) that the witnesses were able to adequately explain the basis for FEMA's determinations, and 3) that the witnesses did not rely to an inordinate degree on the views of others.

The County has not established facts sufficient to convince the ASLB that such a compelling need exists (Tr. 12,128-12,129).

As to Mr. Kowieski's notes it should be noted that FEMA does not deny that it did not voluntarily produce Mr. Kowieski's notes.

Pursuant to Rule 26(b)(3) of the Federal rules of Evidence a party may obtain discovery of documents otherwise discoverable under (b)(i) and prepared in anticipation of litigation only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Mr. Kowieski was able to answer Suffolk County's questions without utilizing his own notes (Kowieski, Tr.103-104). The availability and production of the notes of Mr. Keller and Mr. Baldwin obviated the need for the production of Mr Kowieski's notes. Counsel for FEMA repeatedly explained that no foundation had been laid for the production of these notes, (Kowieski, Tr.103).

A careful reading of the deposition transcripts reveals very clearly that Suffolk County basis its whole appeal on a request for the comments of the individual reviewers by name. (see Suffolk County Pleadings p. 28) The competing concerns as to executive privilege have already been more than adequately addressed in the previous filings before the ASLB and this Board.

The limited issue at this stage of the proceeding is whether Suffolk County has met the criteria for direct certification as outlined in Marble Hill. There is no indication that the ASLB's present ruling would cause an immediate and serious irreparable impact which could not be alleviated by a later appeal nor does Suffolk County show how the present ruling of the ASLB affects the basic structure of the present proceeding in a pervasive or unusual manner.

The County basically argues that it is being denied all the discovery it has requested. This is not an issue of law. The issue of law have already been disposed of by the Appeal Board in ALAB-773. Nor is it a novel issue. All that remains is a question of fact, whether the ASLB properly applied the standards provided by the Appeal Board.

The only issue of law, is a simple application of The Federal Rules of Evidence to the production of Mr. Kowieski notes.

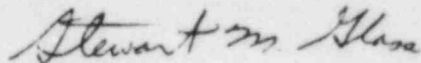
The ALAB provided guidance to the ASLB (ALAB-773, slip. op. at 25) as to the necessary facts that would entitle the County to the relief it seeks. The ASLB has determined that such factual circumstances do not exist (ASLB order Tr. 12, 128-29).

Therefore, directed certification of the ASLB's determination should not be granted.

Conclusion

For the foregoing reasons, Suffolk County has not met the criteria for directed certification of the Licensing Boards July 10, 1984 order to the Appeal Board.

Respectfully submitted,

A handwritten signature in cursive script that reads "Stewart M. Glass".

Stewart M. Glass
Regional Counsel
Federal Emergency Management Agency

Dated: New York, New York
this 10th day of August, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Federal Emergency Management Agency's Response To Suffolk County's Motion For Directed Certification Of The Atomic Safety and Licensing Board's Order of August 10, 1984 has been served on the following by deposit in the United States mail, first class or where indicated by an asterisk by Telecopier this 10th day of August 1984.

James A. Laurenson, Esq.*
Administrative Judge, 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*
Administrative Judge
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*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
East-West Tower, Rm. 430
4350 East-West Hwy.
Bethesda, MD 20814

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Howard L. Blau, Esq.
217 Newbridge Road
Hicksville, NY 11801

W. Taylor Reveley III, Esq.*
Hunton & Williams
707 East Main Street
Richmond, VA 23212

Cherif Sedkey, Esq.
Kirkpatrick, Lockhart, Johnson
& Hutchison
1500 Oliver Building
Pittsburgh, PA 15222

Stephen B. Latham, Esq.
John F. Shea, III, Esq.
Twomey, Latham & Shea
Attorneys at Law
P.O. Box 398
33 West Second Street
Riverhead, NY 11901

Atomic Safety and Licensing
Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Spence Perry, Esq.
Associate General Counsel
Federal Emergency Management Agency
Room 840
500 C. Street, S.W.
Washington, D.C. 20472

Herbert H. Brown, Esq.*
Lawrence Coe Lanpher, Esq.
Karla J. Letsche, Esq.
Kirkpatrick, Lockhart, Hill
Christopher & Phillips
1900 M Street, N.W.
8th Floor
Washington, D.C. 20036

Eleanor L. Frucci, Esq.*
Attorney
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Bethesda, MD 20814

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

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

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

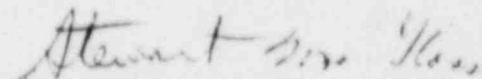
Secretary of the Commission
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Bernard M. Bordenick, Esq.*
Oreste Russ Pirfo
Edwin J. Reis, Esq.
U.S. Nuclear Regulatory
Commission
7735 Old Georgetown Road
(to mailroom)
Bethesda, MD 20814

Fabian G. Palomino, Esq.
Richard J. Zahnleute, Esq.
Special Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Ben Wiles, Esq.
Assistant Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Jonathan D. Feinberg, Esq.
Staff Counsel
New York State Department of
Public Service
3 Empire State Plaza
Albany, New York 12223



Stewart M. Glass
Regional Counsel for
Federal Emergency Management Agency

COURTESY COPY LIST

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old County Road
Mineola, NY 11501

Marc W. Goldsmith
Energy Research Group, Inc.
400-1 Totten Pond Road
Waltham, MA 02154

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Bldg.
Veteran's Memorial Highway
Hauppauge, NY 11788

Ken Robinson, Esq.
N.Y. State Dept. of Law
2 World Trade Center
Room 4615
New York, NY 10047

Mr. Brain R. McCaffrey
Long Island Lighting Company
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road
Wading River, NY 11792

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, CA 95125

Hon. Peter Cohalan
Suffolk County Executive
County Executive/Legislative Bldg.
Veteran's Memorial Highway
Hauppauge, NY 11788

Mr. Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, NY 12223

Ms. Nora Bredes
Shoreham Opponents Coalition
195 East Main Street
Smithtown, NY 11787

Leon Friedman, Esq.
Costigan, Hyman & Hyman
1301 Franklin Avenue
Garden City, New York 11530