UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

LILCO'S REPLY TO INTERVENORS' SCHEDULING PROPOSAL OF MARCH 1, 1988

Yesterday all parties filed proposed schedules for resolving the remaining remand issues. The Intervenors' proposal, entitled Governments' Response to Board Request for Schedule Proposals and Motion to Reconsider Discovery Orders (March 1, 1988) ("Response"), ignores the Board's February 24 Orders and instead proposes 60-75 days for discovery on EBS and Hospitals (instead of the 15 days ordered by the Board) and recommends that none of the issues go to trial until an unspecified time when the legal authority issues are ready. LILCO disagrees with the Intervenors' proposal and therefore asks permission to file this Reply.[1/] LILCO makes three points herein, as follows.

I. Intervenors' Demands for More Time Are Unreasonable

The Intervenors' various proposals all suffer from a particular flaw: they ignore the fact that these are limited, remand issues. The Board would be justified in

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1/ Construed in its most favorable light, Intervenors "Response" is a motion to this Board to reconsider its existing Orders on discovery for the hospital ETE and EBS coverage issues. This Reply is in the nature of a response to such a motion.

presuming conclusively that all parties were ready to go to trial on these issues four years ago when they were in fact tried. Moreover, in this particular case LILCO laid out its most current case in summary disposition motions filed months ago (school bus drivers on October 22, 1987; EBS on November 6, 1987; hospital evacuation time estimates on December 18, 1987; and legal authority on December 18, 1987).

The fact of the matter is that LILCO's and the NRC Staff's proposed schedules, while brisk, are reasonable in light of the limited nature of the remanded issues. The Intervenors' proposed schedule would be excessive even if these issues were brand new ones; but given the substantial amount of time the Intervenors have been on notice of LILCO's case, the amount of time they seek is clearly excessive.

A. Resources

Intervenors, as is customary, allege their own limited resources. Response at 15-16, 18-19. In doing so they challenge the clear NRC policy that "the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 73 NRC 452, 454 (1981). In any event, where one party is the State of New York and another is a major county that has had at least a dozen lawyers assigned to the case over the years, one must doubt that the parties in truth "possess fewer resources."

B. Extent of Needed Discovery

Intervenors exaggerate discovery needs. They suggest that the amount of time spent on discovery on the bus driver issue is indicative of the amount that must be available for discovery on other issues. This argument is wrong in logic and misleading in fact. Discovery does not have to proceed with the deliberate pace and majesty of an

18th century artillery engagement; indeed, the discovery deadlines written into the Commission's rules of practice are expressly modifiable at the direction of a Presiding Officer. Good cause to modify them -- as the Board has implicitly done -- exists where, as here, the issues are narrow, familiar and already well developed by summary disposition pleadings (reviewed and decided by this Board) over the past several months. In this context, Intervenors' failure to have, for instance, designated witnesses yet may have consequences for them but should not prejudice other parties which have not rested on their oars.

The now-completed discovery on school bus drivers illustrates these points. Much of the need to extend the discovery period at all was occasioned by Intervenors' failure even to designate what has turned out to be a large witness panel until, in most cases, after the close of original discovery period.[2/] Much of the written discovery whose length Suffolk County now touts resulted from needless obfuscation by Intervenors, particularly New York State.[3/]

The initial discovery on the hospital ETE and EBS coverage issues also illustrates this matter. Intervenors complain about LILCO's being forthcoming in voluntary document production,[4/] but simultaneously seek through their own initial discovery to

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2/ LILCO's depositions of these putative expert witnesses has revealed that in the vast majority of cases, they had not even been initially contacted by their attorneys until after the start (and in some cases, the close) of the initial discovery period.

3/ Intervenors argue misleadingly that LILCO has caused their problems by filing "last minute" discovery requests. Response at 11 n.7. This argument refers to LILCO's second request for admissions to New York State. When New York refused to produce its head of radiological planning for deposition on February 18, LILCO offered to settle the dispute if New York would convert two of its interrogatory answers into admissions. All LILCO did was to copy down New York's own words (82 such words, to be precise) and ask the State to admit them. It should take New York all of about five minutes to do this, and doing it would relieve LILCO of having to seek, and New York of having to resist, a subpoena. In truth, the pace of this discovery process has been set by the Intervenors' witness designations.

4/ Intervenors complain about the many days or weeks it would take them to replicate LILCO's hospital evacuation time calculations, furnished in a "six-inch stack" of

(footnote continued)

broaden the issues in contention.[5/] This argument seeks to have it both ways.

C. The "FEMA Factor"

The Intervenors cite FEMA's pending review of Revision 9 of the emergency plan as a reason for delay. Response at 4, 17-18. The truth is that FEMA is presenting no

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(footnote continued)

papers by LILCO. This "stack," while actually little more than half of the size alleged by Intervenors, consists almost entirely of very mechanical calculations for the hospitals and special facilities whose evacuation is contemplated. These calculations apply the assumptions detailed on pages IV-176 to -187 of Appendix A to the LILCO Plan and use no mathematical computations more complicated than multiplication and division, and no factual information more arcane than road-link lengths. Thus, Intervenors' distress is overblown. In any event, neither logic nor law suggests a right to literally replicate another party's discovery work from scratch, as distinguished from the far briefer task of reviewing it.

5/ The only issues raised in the admitted EBS contentions, as limited by the Board's February 24 Memorandum and Order, concern the adequacy of the broadcast signal of WPLR and other EBS stations to provide coverage to the 10-mile EPZ. But in their first set of interrogatories, dated February 29 and served on March 1, Intervenors seek information about extraneous matters such as all drills, exercises and training sessions relating to the EBS (Interrogatory 8), the identity of all facilities or organizations that have received or will receive tone alert radios (Interrogatory 11), the equipment purchased by or provided to each radio station (Interrogatory 20), all persons who have reviewed LILCO's EBS proposal (Interrogatory 22), and station WEZN, which Intervenors admit "is not a participating station in LILCO's EBS" (Interrogatory 26). These matters are outside the scope of the narrow coverage issues admitted by the Board.

With regard to the hospital ETE issue also, Intervenors seek to use discovery to broaden issues beyond the "narrow confines" defined by the Board: "the bases and the accuracy of the evacuation time estimates presented in Revision 9." Memorandum and Order (Ruling on LILCO's Motion for Summary Disposition of the Hospital Evacuation Issue), ASLBP No. 86-529-02-OLR, (Feb. 24, 1988) at 12. In their first set of interrogatories and requests for production, Intervenors request that LILCO provide information on such matters as drills, tabletop exercises, and classroom training "relating to LILCO's new hospital evacuation proposal" (No. 8); any contacts which LILCO has had with any hospital (No. 9); and, the capacity of reception hospitals (No. 21). This last is a particularly egregious example of Intervenors' attempt to expand the issue, since the Board, in accepting as a reasonable planning basis LILCO's estimate of 14% availability of space in the reception hospitals, explicitly stated that "[p]ursuing another significant figure with the full panoply of an administrative hearing seems to us a waste of resources." Memorandum and Order (Feb. 24, 1988) at 11.

While LILCO intends to refuse promptly to answer these questions, LILCO cannot compel Intervenors to preserve or drop them on any given schedule.

witnesses on "role conflict" and that the procedure on school bus drivers is only three pages long;[6/] that the NRC Staff witness Dr. Urbanik (who is available for deposition this Friday) will be the federal government's witness on hospital evacuation time estimates; and that the coverage of the EBS radio stations is a narrow technical issue that can easily be prepared for trial in advance of FEMA's review. As to all these issues, the parties other than FEMA can prepare for trial. If anyone (and the risk is as great for LILCO as for the Intervenors) is surprised by the outcome of FEMA's Revision 9 review, necessary discovery can be had for good cause.

The sad truth is that in litigation a variant of Parkinson's Law prevails: large law firms will expand discovery to fill the time available, no matter what the time is and regardless of the marginal benefit of each successive round. That does not mean that this Law has to be institutionalized either in NRC practice or in due process.

II. There is No Need to Make All the Issues Wait for the Slowest Issue

The Intervenors insist that all the remaining issues should be tried in one continuous hearing, which necessarily must await the readiness for trial of the slowest issue. In this case the slowest issue is likely to be legal authority. The Intervenors have little reason for recommending a single hearing, save an unsupported appeal to "efficient" discovery and trial. See Response at 3, 8.

LILCO submits that efficiency is served better by resolving the issues that are ready for trial sooner rather than later. Otherwise the delay of a hearing on all the issues has the effect of "damming up" the proceeding and leading inevitably to delay later on, once the hearings have been completed.

6/ OPIP 3.6.5 Att. 14. The bus driver arrangement is also discussed on four pages in Appendix A to the emergency plan. App. A at II-19 through II-21.

In this case the remand issues rather clearly fall into two categories, one of them the legal authority issues and the other the bus drivers, EBS, and hospital time estimates issues. The parties are ready to write testimony on the school bus driver issue and, given the discovery schedule the Board has set, should be ready to write testimony on the other two issues in a matter of two weeks or so. LILCO does not propose four different hearings. But having two hearings, in the interest of getting the less complicated remand issues out of the way early, is clearly sensible.

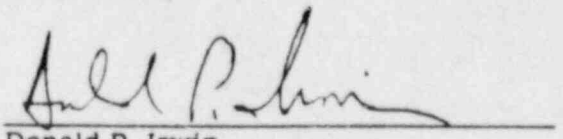
III. The Intervenors' Frequent Claims of Denial of Due Process are Unfounded

The Intervenors threaten to have the federal courts reverse the Board, citing as they have so often a 1984 temporary restraining order they obtained in the low-power proceeding. Response at 15, citing Cuomo v. NRC, CCH Nuc. Reg. Rptr. ¶ 20,304 (D.D.C. 1984). The present situation is entirely different. At issue in 1984 was a major, new technical proposal (involving various measures to protect against loss of offsite power, given pending questions about the back-up emergency diesel generators) that was the last step in allowing the power plant to go critical. What are at issue now are old, well-defined issues that have already been argued at length; the two situations are not remotely similar.

LILCO submits that no federal court in the country would reverse an agency for limiting discovery to 15 days on remand issues that have been in dispute since 1983-84 and that have already been fleshed out on remand by summary disposition. And no federal court would accept the argument that Suffolk County and the State of New York lack the resources to go forward with issues they themselves have raised.

In short, LILCO urges the Board to adopt a schedule like those proposed by LILCO and the NRC Staff.

Respectfully submitted,



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LILCO, March 2, 1988

CERTIFICATE OF SERVICE

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(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-3

I hereby certify that copies of LILCO's REPLY TO INTERVENORS' SCHEDULING PROPOSAL OF MARCH 1, 1988 were served this date upon the following by telecopier as indicated by one asterisk or by first-class mail, postage prepaid.

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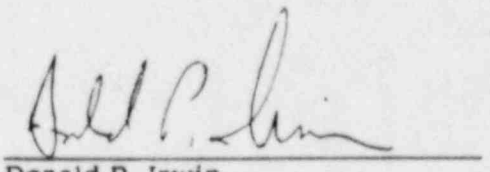

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