

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges  
James A. Laurenson, Chairman  
Dr. Jerry R. Kline  
Dr. M. Stanley Livingston



In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,  
Unit 1)

Docket No. 50-322-OL-3

(Emergency Planning Proceeding)

August 5, 1983

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MEMORANDUM AND ORDER  
DENYING SUFFOLK COUNTY MOTION FOR LEAVE TO FILE  
CONTENTIONS REGARDING ONSITE EMERGENCY PLANNING

On June 27, 1983, Suffolk County ("County") filed with this Board its "Motion for Leave to File Contentions Regarding Onsite Emergency Preparedness." Responses in opposition to the County's motion were filed by the Applicant Long Island Lighting Company ("LILCO") and by the NRC Staff on July 8 and 13, respectively, and the County submitted its responses thereto on July 20. This Board has carefully considered the arguments advanced by each party. For reasons discussed hereunder, the subject motion is DENIED.

PROCEDURAL HISTORY

In its unpublished "Prehearing Conference Order (Phase I--Emergency Planning)" of July 27, 1982, the Board presiding over Phase I of this proceeding stated that it intended to go forward with

"those emergency planning matters which are currently capable of final resolution . . . to proceed with matters based on the LILCO plan, dealing primarily but not exclusively with onsite matters, rather than waiting for final submission of Suffolk County's radiological emergency plan before doing anything . . . ."

(at 1-2). In a footnote, the Board noted that recent changes in the Commission's emergency planning regulations would permit the issuance of a low-power license prior to final resolution of offsite matters. The Board indicated that it wished to litigate, at that stage of the proceeding, those emergency planning issues whose resolution could permit the Applicant to obtain a license for low-power operation if it were otherwise qualified, should it choose to apply for such a license.

Suffolk County and other intervenors filed contentions encompassing LILCO's onsite emergency plan and other emergency planning matters on August 20, 1982. ("Phase I Consolidated Emergency Planning Contentions"). The Board ruled on these proffered contentions, settlement negotiations began, and during October 1982, the parties entered into stipulations which settled and provided for termination of litigation on several of them. Then, in November 1982, due to the intentional failure of the intervenors to comply with certain procedural orders, the Board dismissed with prejudice the intervenors' remaining

Phase I emergency planning contentions. (See "Memorandum and Order Confirming Ruling on Sanctions for Intervenor's Refusal to Comply with Order to Participate in Prehearing Examinations," LBP-82-115, 16 NRC \_\_\_\_\_, December 22, 1982.) Hence, by the end of 1982, all Phase I emergency planning contentions had been disposed of by way of settlement or dismissal.

Then on February 17, 1983, the Suffolk County Legislature adopted Resolution No. 111-1983, in which the County declared that it would neither adopt nor implement any emergency response plan for a serious nuclear accident at Shoreham. On the basis of this resolution, the County filed the "Suffolk County Motion to Terminate the Shoreham Operating License Proceeding" on February 23, 1983. By "Memorandum and Order Denying Suffolk County's Motion to Terminate . . .," LBP-83-22, 17 NRC \_\_\_\_\_, the Board on April 20, 1983 denied the County's motion. Included therein was a discussion of the scope of contentions to be admitted in Phase II:

"We will not consider any contention addressed to Phase I emergency planning matters. While we have at times described the scope of Phase I matters using such shorthand terms as 'onsite matters' or 'LILCO's actions under its onsite plan,' we consistently noted that we wished to litigate during Phase I all matters which were at that time capable of final resolution in advance of the then pending preparation of a local offsite plan by Suffolk County . . . . We will not consider any contention addressing LILCO's onsite plan or other matters which either were the subject of a previously admitted Phase I emergency planning contention or clearly were within the permissible scope of the Phase I emergency planning litigation."

(at 63-64). The proceeding continued, and the County and other intervenors have now filed 97 revised Phase II emergency planning contentions.

LIST OF INSTANT CONTENTIONS AND  
THOSE ADMITTED IN PHASE I

I. Revised Suffolk County Contentions Regarding Offsite  
Elements of LILCO's Onsite Emergency Plan

- (a) Notification to the public
- (b) Notification of and communications with State and local response organizations
- (c) Training (deleted)
- (d) Emergency operations center
- (e) Notification of and communications with emergency personnel
- (f) Failure to identify offsite response organizations

II. Phase I Contentions Admitted on September 7, 1982

- EP 1 - Prompt notification system
- EP 3 - Federal resources
- EP 5 - Offsite response organization and onsite response augmentation
- EP 6 - Training
- EP 7 - Onsite response organizations
- EP 8 - Emergency operations facility
- EP 9 - Radiological exposure
- EP 10 - Accident assessment and monitoring
- EP 11 - Communication with offsite response organizations
- EP 12 - Personnel assignments to communication/notification

SUMMARY OF ARGUMENTS

Suffolk County asserts that its five proposed contentions herein are Phase II contentions because they were not capable of resolution in Phase I. The County bases this argument upon the fact that it was not until after Phase I was terminated that it became known that the County would not play a role in emergency planning and upon the further assertion that the contentions all relate to LILCO's onsite emergency plan, which was revised in May 1983. Thus, the County contends that the instant contentions are timely. The County states that all of these contentions involve or depend upon offsite elements. The contentions are said to arise from LILCO's failure to provide adequate measures to compensate for the fact that the County will not adopt or implement a radiological emergency response plan. Finally, the County alleges that each of these contentions asserts misstatements of fact in LILCO's onsite plan and, therefore, constitute onsite planning issues.

LILCO contends that the real purpose of the instant motion is to place an additional obstacle in the way of a low-power testing license. LILCO goes on to assert five reasons for not admitting these contentions as follows: (1) they are about offsite matters not onsite ones; (2) the Suffolk County motion is really akin to a motion to reopen the record for new information; (3) the motion is untimely; (4) the circumstances relied upon as justification, e.g., refusal to participate in emergency planning, are a challenge to NRC regulations; and (5) individually, the contentions are not admissible for a lack of specificity or basis, and

others could have been litigated in Phase I or are covered by the settlement agreement.

NRC Staff also opposes the admission of the contentions for the reasons that they involve matters dismissed from and stipulated out of this proceeding, are untimely and do not involve onsite emergency planning.

#### SCOPE OF SUBJECT MATTER OF PHASE I

The scope of the subject matter of Phase I emergency planning contentions was described by the Board to be those emergency planning issues which would permit LILCO to obtain a license for low-power operation and those other emergency planning matters which were then capable of final resolution. Hence, any contention which was admitted or which could have been admitted in Phase I, is barred from being raised at this time by the principle of the "law of the case." LBP-83-22, supra, at 64. The "law of the case" doctrine is the practice of courts and adjudicatory agencies to generally refuse to reopen what has been decided. See Black's Law Dictionary, 1030 (4th Ed. 1968). It should also be noted that we are not asked to reopen the Phase I record. Suffolk County emphatically states that, "the County is not seeking to reopen the record . . . ." (Suffolk County Response at 14). Suffolk County acknowledges that its proposed contentions here concern LILCO's onsite emergency plan and that such contentions must be resolved prior to issuance of any NRC license for low-power operation. Faced with the fact that the termination of Phase I appears to preclude further

litigation of this subject matter, the County attempts to circumvent the final resolution of Phase I by alleging that the instant contentions were not capable of final resolution during that phase. This argument is premised upon the assertion that the County's unilateral decision of February 17, 1983, that it will not adopt or implement a radiological emergency response plan, renders all references to Suffolk County participation in emergency planning to be "misstatements of fact" in the LILCO plan.

We disagree with Suffolk County. The subject matter of the five Suffolk County contentions raised herein was before the Board in Phase I. If Suffolk County was, in fact, concerned about these offsite elements (whether Suffolk County's or LILCO's), it had every opportunity to litigate them to a conclusion. After many of its Phase I emergency planning contentions were admitted, Suffolk County refused to comply with a Board ordered procedure for taking testimony. Instead, it accepted dismissal of these contentions as a sanction, without pursuing an appeal which the Board invited. The County settled other contentions by stipulation. It will not now be heard to complain that its five proffered revised contentions were not subject to final resolution during Phase I.

We find that the action of Suffolk County on February 17, 1983, did not retroactively render the previously disposed of Phase I contentions incapable of final termination in 1982; Suffolk County has failed to establish that those contentions were not capable of being resolved during that phase. Further, the County has not alleged any change in



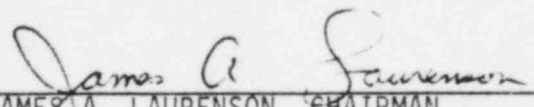
LILCO's Revised Onsite Plan of May 1983, which caused it to submit the contentions it seeks to raise here. The contentions proffered in Suffolk County's Motion for Leave to File Contentions Regarding Onsite Emergency Planning are thus barred by the Board's Order of Dismissal, LBP-82-115, 16 NRC \_\_\_\_ (December 22, 1982).

In light of our determination that the subject matter of all of Suffolk County's proposed contentions was foreclosed by termination of Phase I, there is no need to analyze or discuss the arguments concerning the dichotomy between onsite and offsite contentions, timeliness, or whether the contentions constitute a challenge to NRC regulations.

ORDER

WHEREFORE, IT IS ORDERED that "Suffolk County's Motion for Leave to File Contentions Regarding Onsite Emergency Preparedness" is DENIED

FOR THE ATOMIC SAFETY AND  
LICENSING BOARD

  
JAMES A. LAURENSEN, CHAIRMAN

  
DR. JERRY R. KLINE

DR. M. STANLEY LIVINGSTON concurs in this Memorandum and Order but was unavailable to sign it.

August 5, 1983  
Bethesda, Maryland