LILCO, August 17, 1982

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)
	)	
(Shoreham Nuclear Power Station, Unit 1)	)	

LILCO'S MOTION FOR PROTECTIVE ORDER
OR, IN THE ALTERNATIVE, TO QUASH SUBPOENA

Counsel for Suffolk County has filed an Application for Issuance of Subpoena dated August 13, 1982, to require LILCO to produce, by August 23, 1982, 49 categories of documents that the County apparently believes it needs to litigate the quality assurance contentions.

LILCO hereby moves the Atomic Safety and Licensing Board for a protective order, pursuant to 10 C.F.R. § 2.740(c), ordering that the discovery sought by the County not be had. In support of this motion for protective order, LILCO hereby states as follows:

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I. The Document Requests Are Overbroad and Out of Time

A. Overbreadth

In the first place, the County's document requests are objectionable because they are overbroad. A blanket request for "all documents" relevant to the subject matter of an examination is not favored. Illinois Power Co. (Clinton Power Station, Unit Nos. 1 and 2), ALAB-230, 4 NRC 27, 34 (1976).

All of the County's document requests are of this blanket type; as a mere glance at them will reveal, they are of truly extravagant proportions. What is more, the County's proposed subpoena is somewhat misleading about the basis for requesting the documents. Part B asks for documents "referred to" in LILCO's testimony. Yet the first request in Part B (no. 5) is for all documents "identifying the individuals in the LILCO QA Department, referred to at pages 5 and 6 of the LILCO Testimony, all documents describing the background, experience and qualifications of each such individual, and all documents describing the position, job, duties, and responsibilities of each such individual." Thus, no documents at all responsive to the request are referred to at pages 5 and 6; people are referred to, and the County has simply asked for all documents relating to those people. In a similar vein, request no. 13 asks for all documents "supporting the contention" at page 41 . . . that "Shoreham's performance is better than other BWR plants." Many other examples could be given; requests 5, 6, 7,

8, 9, 10, 12, 13, 14, 20, 22, 23, 24, 25, 26, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, 45, 48, and 49 appear to be, in whole or in part, requests not for documents referred to in LILCO's testimony but rather for documents related to subjects discussed in the testimony.

Even where the County really has found a reference in LILCO's testimony to a document (as opposed to a program, activity, or person about which there may be documents), the County has not limited itself to requesting merely the document itself but has instead asked for all documents "constituting, describing, and/or commenting upon" the document, or words to that effect.

B. Untimeliness

The County has already had extensive discovery against LILCO on QA/QC. In its Confirmatory Order Regarding Suffolk County and SOC Motions to Compel Discovery from LILCO, dated March 30, 1982, the Board permitted discovery, despite the fact that the County's discovery requests were greatly out of time, but imposed a cut-off date:

> All the foregoing documents and responses shall be received or made available to the County by no later than Friday, March 26, 1982, unless the parties agree otherwise. To the extent that documents are made available at LILCO, their inspection shall end by April 2, 1982, unless the parties agree otherwise.

Confirmatory Order Regarding Suffolk County and SOC Motions to Compel Discovery from LILCO at 3, ¶6 (March 30, 1982)

(unpublished). As a result, LILCO produced many thousands of pages of documents, of which something in excess of 14,000 pages were copied for the County.

Section 2.740 (b)(1) of 10 C.F.R. provides in part:

> [N]o discovery shall be had after the beginning of the prehearing conference held pursuant to §2.752 except upon leave of the presiding officer upon good cause shown.

The § 2.752 prehearing conference has long since been held, and yet the County has not shown "good cause" for additional discovery.

1. There is no "good cause" for the lateness of the County's Part A requests

Part A of the proposed subpoena lists four categories of documents, each category being "all documents" describing, constituting, or listing matters referenced in a LILCO letter to the NRC dated June 21, 1982. The June 21 letter in turn covered matters dealt with in the NRC's Systematic Assessment of Licensee Performance (SALP) report, which was forwarded to LILCO by letter of May 19, 1982. The matters covered are

(1) LILCO's Shoreham Plant Configuration Review (SPCR) program,

(2) LILCO's survey of the location of containment valves,

(3) LILCO's operating QA quarterly surveillance review of the Startup Manuals and the monthly review of plant panels, and

(4) 219 open items from I&E reviews.

The County does not say why it waited until almost 4 1/2 months after the close of discovery and almost three months after the SALP report to request these documents. On its face, at least document request no. 1 (SPCR) looks as though it could have been made during the discovery period.

2. There is no "good cause" for the lateness of the County's Part B requests

Although the County's Part B requests are allegedly prompted by an event since discovery (namely the filing of LILCO's testimony), since most of the requests simply ask for background and supporting material on subjects discussed in the testimony1/ (for example, QA personnel or various types of audits), there is no apparent reason why the County couldn't have asked for the same information during discovery. For example, several of the requests ask for "all documents" showing the results of various audits (see request nos. 8, 9, 10, 23 and 25, for example). The County requested, and got, a great many audit reports during discovery.

1/ We know of no authority that the filing of written testimony starts the discovery process afresh. To the contrary, 10 C.F.R. § 2.743(b) provides that written testimony is to be served no less than 15 days before the hearing; indeed, the presiding officer may permit written testimony not so served if the parties have had a "reasonable opportunity to examine it." In light of this, and of § 2.740(b)(1), cited above, the draftsmen of the rules cannot have contemplated that there would be major discovery efforts between the service of testimony and the hearing.

We believe that at this late date, over four months after the close of discovery on QA, the County should at the least have to bear a heavy burden of showing that (1) precisely described information is (2) relevant and (3) necessary to the County's case and (4) could not have been requested during the discovery period. The County has not even attempted to show these things.

II. The Date By Which the County Requests the Documents Is Unreasonable

The first four of the County's requests were stated in the County's letter of July 26, 1982. The remaining 45 were served on LILCO Friday afternoon, August 13, 1982. The County's proposed subpoena would require all the documents to be produced by August 23, 1982, giving LILCO 28 days to produce the first four requests and 10 days for the other 45.

Under 10 C.F.R. §2.741(d), 30 days are allowed to respond to a request for the production of documents.

With respect to the first four requests, the County took approximately a month (from the LILCO's June 21, 1982 letter until the County's July 26 letter) just to formulate its requests (assuming it had no reason to know of the NRC's SALP report earlier).

With respect to the last 45 requests, the County took 45 days (from when LILCO's QA testimony was filed, by hand, on June 29, 1982, until the County's Application for Issuance of

Subpoena on August 13). Yet the County demands production of the 45 sets of documents within 10 days.

Even if the Board orders LILCO to respond to the County's first four requests, the date for production should be no earlier than August 25 (30 days after July 26). If the Board orders LILCO to respond to the County's last 45 requests for documents, in light of the extraordinary breadth of the requests the date for production should be no earlier than 45 days after the request was made, the same amount of time the County required to list the documents after receiving LILCO's testimony.

III. The County Has Not Made Sufficient Showing of Relevance

The subpoena rule, 10 C.F.R. §2.720, permits the presiding officer to require a showing of "general relevance". The discovery rule, 10 C.F.R. §2.740, says that discovery may be had of matters "relevant to the subject matter involved in the proceeding."

For the first four requests, the County has made no showing of relevance to the QA contentions at all. It merely asserts that (1) categories of the documents requested refer to something in LILCO's response to the SALP report and (2) they are "plainly relevant." With respect to the Part B requests, the County has done little more than say that they relate to subjects in LILCO's testimony.

LILCO agrees with the licensing board that said that a party seeking discovery after the discovery period is over must meet a higher-than-usual standard of probative value. Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2, and 3), LBP-76-8, 3 NRC 199, 201 (1976). The County has made no attempt to show probative value.

IV. The County Should Have Requested Discovery Under 10 C.F.R. ² 2.740

It appears that the County has chosen the wrong procedural vehicle, and for that reason alone its Application for Issuance of Subpoena should be denied.

Section 2.720 of 10 C.F.R. contemplates that a subpoena will be used for nonparties. As the Appeal Board has said:

> These alterations [in the NRC's Rules of Practice] taken in combination strongly suggest to us that the Commission intended that inter-party discovery be initiated by motion and that subpoenas be utilized to obtain discovery of non-parties (who could not be reached other than by subpoena).

Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 689 (1979); see also id. 690. The subpoena in question is directed to LILCO; LILCO is a party. Accordingly, the County should have proceeded under 10 C.F.R. § 2.740 and § 2.741 instead of §2.720.

This might seem a hypertechnical point, but it really is of some importance. Presumably the County proceeded under §2.720 instead of §2.741 in order to avoid (1) the 30-day

response time allowed by §2.741 and (2) the provision of §2.740 that no discovery may be had after the prehearing conference absent a showing of "good cause." As to the second of these, the County evidently hoped to take advantage of Illinois Power Co. (Clinton Power Station, Unit Nos. 1 and 2), ALAB-340, 4 NRC 27, 33 (1976), which says that a subpoena for the production of documents at trial may not be denied simply because the requesting party had not earlier sought the same document during discovery,2/ and perhaps of Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683 (1979), which makes it fairly difficult to have a subpoena quashed on the ground of burdensomeness. The Rules of Practice do not contemplate, and the Board should not allow, that the discovery regulations will be evaded by resort to subpoenas.

V. Conclusion and Relief Sought

The subpoena rule, 10 C.F.R. §2.720(f), allows the presiding officer to quash or modify a subpoena if it is unreasonable or requires evidence not relevant to any matter in issue or to condition denial of the motion to quash on just and reasonable terms. The general discovery rule, 10 C.F.R. § 2.740(c), allows the presiding officer, for good cause shown,

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2/ In a larger sense, however, Clinton does not really help the County. In Clinton the Appeal Board affirmed the licensing board's refusal to allow discovery where the request for documents was "extensive" (though not nearly so extensive as Suffolk County's demands) and would have caused delay.

to make any order which justice requires to protect a party from "annoyance, . . . oppression, or undue burden or expense."

No subpoena should issue in this instance. Moreover, treating the County's application as a request for production of documents, a protective order should be issued. It should provide that LILCO need not produce any of the documents sought by the County.

Alternatively, the Board should issue a protective order with one of the following provisions (in decreasing order of desirability):

1. That before the Board makes a decision on the requests the County must narrow its requests by specifying precisely which documents it needs, why it needs them to conduct cross-examination, why they will have significant probative value, and why the County could not have asked for essentially the same information during discovery; that the County must drop at least the requests that ask for "every 30th document" and the like (see nos. 19 and 20), which make it evident that the County is on a fishing expedition.

2. That the documents, or such of them as the Board orders to be produced, be produced no earlier than August 25 for the Part A documents and no earlier than September 27 (45 days after the August 13 Application for Issuance of Subpoena) for the Part B documents. This schedule should not alter the hearing schedule in any way. Moreover, the County should pay all LILCO's costs (not just copying costs) of producing the documents. Going through discovery is doubtless "directly related to the cost of doing business," see Stanislaus, 9 NRC at 702, but going through discovery twice is not.

In any event, whether or not the County is allowed to reopen discovery at this point, it should be ordered to specify, two weeks before hearing, which documents it plans to use in cross-examination. Otherwise, given the enormous number of documents the County has already received from LILCO's files, it would simply waste time to allow the County to pull out one document after another from among the thousands and expect the witnesses to answer questions about them.

Respectfully submitted,

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DATED: August 17, 1982

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S MOTION FOR PROTECTIVE ORDER OR, IN THE ALTERNATIVE, TO QUASH SUBPOENA were served upon the following by first-class mail, postage prepaid, or by hand (as indicated by an asterisk), on August 17, 1982:

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