

LILCO, July 9, 1982

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LILCO

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 TO COMPEL
DISCOVERY ON EMERGENCY PLANNING

In accordance with 10 C.F.R. § 2.740(f), the applicant, Long Island Lighting Company (LILCO), hereby moves the presiding officer in this proceeding for an order compelling Suffolk County (the County) to produce the documents requested in "LILCO'S First Request to Suffolk County for Production of Emergency Planning Documents." In support of this motion LILCO hereby states as follows:

1. On June 2, 1982, LILCO served on intervenor Suffolk County a request for documents entitled "LILCO's First Request to Suffolk County for Production of Emergency Planning Documents."

2. On July 1, 1982, the County served "Suffolk County's Response to LILCO's First Request to Suffolk County for Production of Emergency Planning Documents" (Response). The County objected to LILCO Requests 1, 6-39, and, in part, 41. The County's position is that it is not required to respond to any discovery request regarding the County's

emergency response plan,^{*} as distinguished from LILCO's plan. The County did not seek a protective order under 10 C.F.R. § 2.740(c).

3. The County's reasoning is that during the prehearing conference on April 14, 1982, and in the Board's April 20, 1982, prehearing conference order, the Board divided emergency planning issues into two categories, those about the LILCO plan and those about the County plan; set up a discovery schedule for the first category; and thereby forbade discovery on the second category. LILCO submits that the County's reasoning is wrong and that discovery on the County plan is proper now.

4. In the first place, neither the transcript pages cited by the County (Tr. 744-46, 748-750, 760, 770-775, 794, 795-802, 809-810) nor the April 20 prehearing conference order prohibits discovery on the County plan. The County's argument rests entirely on the proposition that the Board, by setting a discovery schedule for the LILCO plan issues, impliedly prohibited discovery on the County plan issues. LILCO does not believe such an implication exists. To the

* The County says on page 1 of its Response that the Board has recognized that there is no County radiological emergency response plan in existence. LILCO acknowledges that the County's position is that no County plan exists. LILCO is in disagreement with the County on this point, but LILCO has no objection to the County's repeating that no plan exists at every convenient opportunity, so long as it is understood that LILCO is not acquiescing in the County's view of things just because we do not always recite a ritual "a plan exists" every time the County says "no plan exists."

contrary, at the conference of the parties on March 10, 1982, the Board determined that the County planning documents then in existence should be turned over to the other parties (Tr. 393, 396-98).

5. In the second place, 10 C.F.R. § 2.740(b)(1) contemplates that discovery will take place once "matters in controversy" are identified by the Board in a § 2.751a prehearing conference order. Section 2.740(b)(1) reads in part as follows:

(b) Scope of Discovery. Unless otherwise limited by order of the presiding officer in accordance with this section, the scope of discovery is as follows:

(1) In general . . . In a proceeding on an application for a construction permit or an operating license for a production or utilization facility, discovery shall begin only after the prehearing conference provided for in § 2.751(a) and shall relate only to those matters in controversy which have been identified by the Commission or the presiding officer in the prehearing order entered at the conclusion of that prehearing conference. In such a proceeding, no 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

10 C.F.R. § 2.740(b)(1) (1982). The question, then, is whether the County plan has been identified as a "matter in controversy" as contemplated by § 2.740(b)(1). LILCO

believes that it has been.

6. It has long been recognized that the County plan is a matter in controversy. Following a prehearing conference on October 11, 1977, in an Order Relative to Requests for Clarification and Reconsideration of the Board Order of January 27, 1978, dated March 8, 1978, the ASLB recognized certain issues involving the adequacy of federal, state, and local agreements and plans. Also, the Board's § 2.752 Prehearing Conference Order of April 20, 1982, by dividing emergency planning issues into LILCO plan and County plan categories and observing that the latter cannot be decided by the Board until later, recognizes the latter as matters in controversy.

7. It is true that the County plan issues have not been reduced to contentions, but that is immaterial. The County cannot claim that discovery must await the writing of contentions, because the treatment of discovery on the LILCO plan issues was otherwise. Document requests on the LILCO plan issues had to be completed by June 22, the same date that contentions on the LILCO plan were to be received. Thus discovery on LILCO plan issues began well before contentions were filed.

8. Besides the objection that LILCO's discovery requests are "not within the scope of the issues defined by the Board," the County objects to Requests 32-39 on grounds of "undue burden and expense" (Response at 5) and to Requests 7 and 13-19 on the ground that the documents

requested are "intra-governmental correspondence (and other documents) regarding County policymaking decisions" and therefore privileged and not subject to discovery (id. 7, 9).

9. It is not possible to evaluate these claims of privilege and undue burden because the County provides no details. With respect to privilege, for example, the County cites no legal authority, nor does it list the documents for which it claims the privilege, even though LILCO's Request at page 2 asked the County to provide a list of any documents considered to be privileged from production. With respect to burdensomeness, the County again gives no details by which one can judge how burdensome production would be. Nor did the County ask for a protective order on these grounds.

10. Accordingly, it does not appear that the County is very serious about its claims of privilege and undue burden, and the real issue is the claim that discovery on the County plan is outside the scope of the issues identified by the Board. LILCO therefore believes the Board should rule against the County's claims of privilege and undue burden. Alternatively, the Board could rule on the "outside the scope" objection and then, assuming that the ruling is that discovery on the County plan is proper, require the County to detail the bases for its claims of privilege and undue burden so that a ruling can be made.

11. As noted above, the County has not applied for a protective order. The NRC regulations, 10 C.F.R. § 2.740(f), say that "Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person or party failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section."

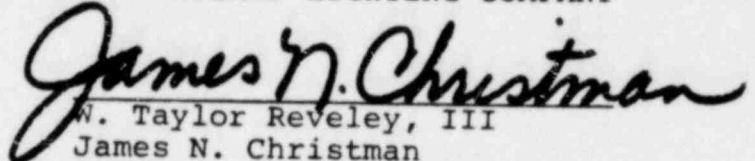
12. LILCO remains willing to try and reach agreement with the County on discovery matters, particularly with respect to avoiding undue burdens on the County. Indeed, in the letter from LILCO's counsel attached to the County's Response (Attachment B to the Response), LILCO offered to discuss and "try to find a solution" to any burdensomeness the County might be experiencing. But from the exchange of letters attached to the County's Response and from several phone calls with County counsel at about the same time those letters were written, it is apparent that a fundamental disagreement about the scope of discovery exists and cannot be resolved by negotiation between the parties.

13. For the above reasons, LILCO moves the presiding officer to issue an order compelling the County to

respond fully to LILCO's First Request to Suffolk County for
Production of Emergency Planning Documents. A form of order
is attached.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



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DATED: July 9, 1982

LILCO, July 9, 1982

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

CERTIFICATE OF SERVICE

I hereby certify that copies of LILCO'S MOTION TO COMPEL DISCOVERY ON EMERGENCY PLANNING were served upon the following people by first-class mail, postage prepaid, or by Federal Express (as indicated by an asterisk), on July 9, 1982.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Lawrence Brenner, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

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

ORDER COMPELLING A RESPONSE TO LILCO'S
FIRST REQUEST FOR PRODUCTION OF
EMERGENCY PLANNING DOCUMENTS TO SUFFOLK COUNTY

Upon consideration of the July 9, 1982, LILCO motion to compel Suffolk County to produce documents and the County's response of July __, 1982, it is this __th day of July 1982:

ORDERED:

1. The Board's order of April 20, 1982, does not preclude discovery on the County emergency response planning documents, either the County planning document that has already been prepared or the work that the County now has in progress.

2. The County plan is a "matter in controversy" within the meaning of 10 C.F.R. § 2.740(b)(1).

3. Suffolk County shall respond fully to LILCO's First Request to Suffolk County for Production of Emergency Planning Documents, particularly nos. 1, 6-39, and 41, within 15 days. The response shall include a list of any

documents that the County regards as privileged and the other information requested on page 2 of LILCO's Request.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

_____, Chairman
Lawrence Brenner
ADMINISTRATIVE JUDGE

Bethesda, Maryland
July __, 1982