LILCO, August 30, 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 BRIEF ON WORK PRODUCT DOCTRINE AS APPLIED TO QA TESTIMONY PREPARATION MEMORANDUM

Suffolk County has asked the Board to order LILCO to produce the document that provides the basis for this statement at page 166 of LILCO'S QA testimony:

> [A]n independent sample of N&D's has been taken and analyzed to determine if significant trends or abnormal quality occurred. This analysis indicates that the Shoreham N&D's are consistent with other sites' N&D's for similar activities.

LILCO testimony 166-67.1/ LILCO responded by claiming that the document is "work product" and therefore exempt from discovery.

1/ Testimony of John F. Alexander, T. Tracy Arrington, Frederick B. Baldwin, Robert G. Burns, William F. Eifert, T. Frank Gerecke, Joseph M. Kelly, Donald G. Long, Arthur R. Muller, William J. Museler, and Edward J. Youngling for the Long Island Lighting Company Regarding Suffolk County and Shoreham Opponents Coalition Contention 12 and Suffolk County Contentions 13, 14, and 15, June 29, 1982.

D503

At the oral argument on August 24, 1982, the Board directed LILCO to submit a brief on the question. This is that brief.

The Document

The above-quoted statement from pages 166-67 of LILCO's testimony refers to a three-page memorandum, dated April 26, 1982, with 24 pages of supporting material. It was prepared by Stone & Webster for the precise and sole purpose of preparing for the hearing in this proceeding. What the preparer of the document did was to examine the Nonconformance & Disposition Reports (N&D's) supplied to Suffolk County during pretrial discovery and attempt to determine if any "major trends" were apparent from this sample of N&D's. The document was not prepared by lawyers. It was prepared by people who work for the Stone & Webster witnesses who are testifying to the statement in question.

The Work-Product Doctrine

The leading case on the work-product doctrine is Hickman v. Taylor, 329 U.S. 495 (1947). In the Federal Rules of Civil Procedure, the doctrine is embodied in Rule 26(b)(3):

> (3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant,

> surety, indemnitor, insurer, or agent) 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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. . . .

The corresponding passage in the NRC Rules of Practice is 10 C.F.R. § 2.740(b)(2),2/ which reads as follows:

> (2) Trial prepration materials. A party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (1) of this paragraph and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such

---

2/ The Appeal Board has recognized that 10 C.F.R. § 2.740 is patterned after and parallels Rule 26 of the Federal Rules of Civil Procedure. Commonwealth Edison Company (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 460 (1974). Accordingly, the legal authorities in federal court decisions involving Rule 26 illuminate, and provide appropriate guidelines for interpreting, the discovery standards set forth in the Commission's rules. Boston Edison Company (Pilgrim Nuclear Generating Station, Unit 2), LBP-75-30, 1 NRC 579, 581 (June 6, 1975), cited in Allied-General Nuclear Services (Barnwell Fuel Receiving and Storage Station), LBP-77-13, 5 NRC 489, 492 (1977).

> materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

NRC Caselaw

There appears to be little NRC precedent on the work-product doctrine. The two cases LILCO counsel has found (both of them licensing board orders) go opposite ways. In Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), LBP-75-28, 1 NRC 513, 514 (1975), the licensing board denied a request for a draft of question-and-answer testimony prepared by an economic consultant on the subject of the demand for electricity. The Board denied the request since the document appeared to be "in the form of trial preparation material of counsel." The Board indicated that the substantive information that might be contained in any study performed by the consultant could be secured by the intervenor through the use of interrogatories or appropriate discovery methods. To the extent that the Seabrook board was influenced by the "form" of the document, the case is not helpful here; the Stone & Webster memorandum is not in Q-and-A form.

In an order in Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-30, 10 NRC 594 (1979), the licensing board ordered the Department of Justice to produce drafts of testimony prepared by the Department's expert engineering witness. The board was influenced by the fact that an expert witness was involved and that experts are "almost unique" in being permitted to testify as to their opinions and said that "all factors which could condition or affect these opinions are properly the subject of cross-examination, and hence discovery in advance of trial." Id. 595. The South Texas order does not address the standards for discovery of trial preparation materials ("substantial need" and "undue hardship") addressed below and does not therefore appear to be very helpful here.

"Trial Preparation Materials"

We are left, then, to the words of 10 C.F.R. § 2.740(b)(2) itself. Under that regulation, two questions need to be asked. First, is the Stone & Webster memorandum "trial preparation materials"? Second, has the County shown that it has "substantial need of the materials in the preparation of [its] case" and that it is "unable without undue hardship to obtain the substantial equivalent of the materials by other means"?

To the first question the answer is yes. The memorandum was prepared specifically "in anticipation of or for the hearing" in this proceeding. It was prepared by Stone & Webster personnel, who are LILCO's "representatives" in this context.3/

"Substantial Need" and "Undue Hardship"

The second question is whether the County has shown "substantial need" and "undue hardship." The County has not made this showing. Since the memorandum simply analyzes the N&D's that the County itself chose to copy during discovery, the County can itself analyze the N&D's to see if any "trends" exist.

Conclusion

For the reasons stated above, the Stone & Webster memorandum of April 26, 1982, constitutes "trial preparation materials" and is exempt from discovery under 10 C.F.R. § 2.740(b)(2). The memorandum merely looks for "trends" in N&D's that Suffolk County had copied during pretrial discovery, and the County can itself look for trends in the same way. Therefore, the County has not showed, and cannot show, that it

---

3/ It appears that Stone & Webster anticipated the need to analyze the N&D's copied for the County during discovery and began the work for the purpose of trial preparation but without being requested to do so by counsel. Counsel later concurred in the value of the work for trial purposes.

has substantial need for the memorandum or that it cannot get substantially equivalent material without "undue hardship." LILCO should not be ordered to provide the memorandum to the County.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

James N. Christman

James N. Christman
Kathy E. B. McCleskey

Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

DATED: August 30, 1982

LILCO, August 30, 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 Brief on Work Product Doctrine As Applied to QA Testimony Preparation Memorandum was served upon the following by first-class mail, postage prepaid, by Federal Express (as indicated by an asterisk), or by hand (as indicated by two asterisks), on August 30, 1982:

Lawrence Brenner, Esq.**
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. Peter A. Morris**
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

Dr. James H. Carpenter**
Administrative Judge
Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

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

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory
Commission
Washington, D.C. 2055

Bernard M. Bordenick, Esq.**
David A. Repka, Esq.
U.S. Nuclear Regulatory
Commission
Washington, D.C. 20555

David J. Gilmartin, Esq.
Attn: Patricia A. Dempsey, Esq.
County Attorney
Suffolk County Department of Law
Veterans Memorial Highway
Hauppauge, New York 11787

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

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

Mr. Mark W. Goldsmith
Energy Research Group
4001 Totten Pond Road
Waltham, Massachusetts 02154

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

Stephen B. Latham, Esq.*
Twomey, Latham & Shea
33 West Second Street
P. O. Box 398
Riverhead, New York 11901

Ralph Shapiro, Esq.*
Cammer and Shapiro, P.C.
9 East 40th Street
New York, New York 11901

Howard L. Balu, Esq.
217 Newbridge Road
Hicksville, New York 11801

Matthew J. Kelly, Esq.
State of New York
Department of Public Service
Three Empire State Plaza
Albany, New York 12223

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

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

James N. Christman

James N. Christman

Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

DATED: August 30, 1982