

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

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Before Administrative Judges

James A. Laurenson, Chairman
Dr. Walter H. Jordan
Dr. Jerry Harbour

SERVED SEP 17 1982

In the Matter of)	Docket No. 50-322-0L-2
)	ASLBP No. 82-478-05-0L
LONG ISLAND LIGHTING COMPANY)	(Security Proceeding)
)	
(Shoreham Nuclear Power Station, Unit 1))	September 16, 1982

MEMORANDUM, ORDER AND NOTICE OF SECOND IN CAMERA CONFERENCE OF COUNSEL

I. Suffolk County Request for Access by Its Security

Experts/Consultants to Appeal Board Decision in Diablo Canyon (Security)

ALAB-653.

A. Procedural History

On July 25, 1982, counsel for Long Island Lighting Company (hereinafter "LILCO") requested that two of LILCO's attorneys be given access to portions of the Appeal Board's opinion in Diablo Canyon, ALAB-653 (1981) (Restricted) dealing with the definition of the design basis threat and the interpretation of the Commission's regulations regarding the appropriate number of armed responders. Counsel for Suffolk County agreed with this request and further requested that

security experts for the parties be granted, inter alia, access to the same parts of the opinion. On July 30, 1982, the Commission directed that certain attorneys for LILCO and Suffolk County be given access to the parts of the opinion specified above. The Commission further stated:

"Intervenor Suffolk County's request for access by its consultants is referred to the Licensing Board. Such access should be granted only if Suffolk County demonstrates the requisite need to know. 10 CFR 73.21(c)(vi). See 46 Fed. Reg. 51718, 51719-20 (October 22, 1981). PG&E is to be provided an opportunity to make a special appearance on the request if it so desires." Long Island Lighting Co., (Shoreham Nuclear Power Station, Unit 1), CLI-82-17 (July 30, 1982).

On July 30, 1982, the Commission also released a "version of ALAB-653 with all protected information deleted." Pacific Gas and Electric Co. (Diablo Canyon nuclear Power Plant, Units 1 and 2), (Physical Security), CLI-82-19 (July 30, 1982).

On August 6, 1982, Suffolk County filed a request with the Licensing Board for access by its security experts/consultants to the above-mentioned portions of the restricted opinion. On August 13, 1982, Pacific Gas and Electric Company (hereinafter "PG&E") opposed the County's request. On August 20, 1982, the NRC Staff also opposed the request but conceded that the County made a prima facie showing of the requisite need to know. LILCO did not respond to the County's request. However, at a Conference of Counsel held on September 13, 1982, counsel for LILCO opposed the County's request. At that time, PG&E and all of the parties herein were represented by counsel and presented oral arguments concerning the request.

B. Ruling of Board on Suffolk County Request

We note that the initial request to the Commission for access to portions of the Appeal Board decision in Diablo Canyon, ALAB-653 (Restricted), was made by counsel for LILCO. Curiously, after the Commission granted that request, LILCO's counsel have chosen not to examine the material to which they requested access.

As noted above, the instant request was remanded to the Board by the Commission with instructions that "such access should be granted only if Suffolk County demonstrates the requisite need to know." PG&E, LILCO, and the Staff oppose the County's request for different reasons. No one contends that the County has not established at least a prima facie showing of "the requisite need to know." PG&E is the principal opponent of this request for the following reason: if this request is granted, the material will be released in each and every plant security proceeding hereafter thereby increasing the risk of improper release or disclosure of the details of the Diablo Canyon security plan. On the other hand, Suffolk County contends that its experts/consultants need this information to intelligently evaluate LILCO's security plan for Shoreham. The County's experts, Brian M. Jenkins and Marc W. Goldsmith, have already filed their testimony in this proceeding concerning contentions dealing with the design basis threat and the required number of armed responders.

The test to be applied to a request like the one before us was first articulated by the Appeal Board in Pacific Gas and Electric

Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398 (1977). There PG&E also argued that "the greater the number of individuals who know the details of the [security] plan the greater the risk that the details will become public knowledge." Id at 1401. The Appeal Board rejected this argument, held that plant security plans are "deemed to be commercial or financial information" pursuant to 10 CFR § 2.790(d), and applied a "balancing of the interests" test to the disclosure of the security plan to counsel and expert witnesses. Id. at 1402. The Appeal Board went on to limit disclosure to portions of the security plan which were relevant to the contentions and subject to a protective order. The after, when the Appeal Board was conducting its hearing concerning the security plan at Diablo Canyon, it issued a second prehearing conference order authorizing release of protected information in the physical security plan to intervenor's counsel and expert witnesses upon execution of an affidavit of non-disclosure.

Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 746 (1980). Finally, the Commission reviewed PG&E's contention and the Appeal Board decisions above and affirmed those decisions, as pertinent here, as follows:

In its petition for review PG&E argues that the physical security plan should not be made available to petitioners because the best method of preventing public disclosure of this sensitive document is to make it available to the fewest number of individuals possible. The Commission recognizes PG&E's concern, but emphasizes that intervenors in Commission proceedings may raise

contentions relating to the adequacy of the applicant's proposed physical security arrangements, and that the Commission's regulations, 10 CFR 2.790, contemplate that sensitive information may be turned over to intervenors in NRC proceedings under appropriate protective orders. In this proceeding the Appeal Board in ALAB-410, 5 NRC 1398 (1977) and in its Second Prehearing Conference Order of April 11, 1980 (ALAB-592), has set forth guidelines on when and under what conditions physical security plans may be made available to intervenors. The Commission has reviewed these orders, and with the one exception noted below, endorses the guidelines developed by the Appeal Board. We believe that the Board has done a commendable job of interpreting the law and balancing competing policy interests, and has handled the sensitive issues raised by requests for access to the Diablo Canyon physical security plan wisely. (Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980)).

Applying the above law to the instant controversy, we conclude that we should also apply a "balancing of interests" test to the request as hand. PG&E is correct in its assertion that the portions of ALAB-653 in question contain information about the Diablo Canyon security plan and that the possibility of an unauthorized disclosure of security information increases as the number of people who have that information increases. On the other hand, we have a request to release the material to two expert witnesses who will testify for the County on the contentions dealing with the design basis threat and the number of armed responders needed at Shoreham. Thus, the portions of ALAB-653 are directly relevant to their testimony. Moreover, the Commission has already authorized release of the same material to counsel for the County. In essence, LILCO and Staff object to the release of the

material at this time because the security contentions may be settled before hearing. However, we find that the county's experts may need this information in assessing offers of settlement and that any further delay in the release of this material may result in a postponement of the hearing and a possible delay in licensing the plant. To postpone the release of this material in the hope or expectation that the case may be settled would be to chart a dangerous course. If the case did not settle, a delay in the commencement of the hearing could be anticipated because the experts/consultants would have to revise their testimony in light of the Appeal Board decision in Diablo Canyon.

The Board reviewed the version of ALAB-653 released by the Commission on July 30, 1982. That version, with all protected information deleted, is insufficient for the purposes of expert witnesses who will be testifying in the instant proceeding. Moreover, the amount of specific information concerning the Diablo Canyon security plan contained in the requested portions of ALAB-653 is minimal. Thus, after balancing the interest of all those concerned, we find that Suffolk County has established a requisite need for its experts/consultants to know the Appeal Board's definition of the design basis threat and interpretation of the Commission's regulations regarding the appropriate number of armed responders. The other parties and PG&E failed to rebut the County's showing of a need to know. The release of this material is pursuant to 10 CFR § 73.21(c)(vi); 10 CFR § 2.790; and 10 CFR § 2.744(e).

Thus, the County's request for access by its consultants, Brian M. Jenkins and Marc W. Goldsmith, "to those portions of ALAB-653 dealing with the definition of the design basis threat and the interpretation of the Commission's regulations regarding the inappropriate number of armed responders" is granted subject to the following restrictions: (1) Messrs. Jenkins and Goldsmith must execute new affidavits of non-disclosure applicable to the Diablo Canyon physical security information similar to the affidavits previously executed by counsel pursuant to CLI-82-17; and (2) this information will be made available to the consultants ten (10) days after the date of this Order.

II. Stipulation of Expanded Security Contention

At the Conference of Counsel on September 13, 1982, the parties stated that they would file a stipulation regarding a revised and expanded Security Contention No. 7. This stipulation will encompass a previous Suffolk County health and safety contention dealing with "human factors." This stipulation shall be filed with the Board on or before October 1, 1982.

III. Supplemented Status Report Concerning Settlement

Pursuant to agreement among the parties, the Board will permit the parties to continue their settlement negotiations herein without imposing any additional requirements until October 1, 1982. On that date the parties shall supplement and update their most recent status report of settlement dated September 7, 1982. The Supplemental Status Report shall be delivered to the Board by Friday, October 1, 1982.

IV. Notice of Second In Camera Conference of Counsel

Pursuant to agreement among the parties, a second in camera Conference of Counsel will be held on Tuesday, October 5, 1982 commencing at 9:30 a.m. at the Nuclear Regulatory Commission Hearing Room located at 4350 East West Highway, 5th Floor, Bethesda, Maryland. That Conference of Counsel will be held to discuss and consider the following:

1. Status of settlement
2. Date and place of hearing.
3. Date of Board visit to Shoreham prior to hearing.
4. Last day for filing Motions for Summary Disposition and responses.
5. Any other matter raised by the Board or parties.

WHEREFORE, IT IS ORDERED this 16th day of September, 1982 that Suffolk County's request for access to certain portions of ALAB-653 is GRANTED pursuant to 10 CFR § 2.744(e) and subject to the conditions stated herein;

IT IS FURTHER ORDERED that on or before October 1, 1982 the parties shall file a stipulation concerning a revised and expanded security contention 7 and a supplemental updated status report of settlement.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

James A. Laurensen, Chairman
ADMINISTRATIVE LAW JUDGE