

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'82 NOV -8 A11:40

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station, )  
Unit 1) )

) Docket No. 50-322 (O.L.)

SUFFOLK COUNTY RESPONSE TO  
LICENSING BOARD PROPOSAL OF NOVEMBER 2, 1982

This filing responds to the Board's request that the parties present their views on the Board's authority to utilize private question-and-answer sessions ("evidentiary depositions") in lieu of the public hearing normally held in licensing proceedings. Tr. 12,586. Suffolk County's position is (1) that the Board's proposed procedure is unlawful, and (2) that the County's experts and consultants have been instructed by the County Executive not to participate in the Board's proposal.

I. The Board's Ruling

On November 2, 1982, the Licensing Board tentatively ruled that Phase I emergency planning issues will not be adjudicated in a customary public hearing before the Licensing Board. Instead, citing "efficiency" as its reason, the Board ruled that the

emergency planning issues will be examined through "evidentiary depositions" taken privately among the parties. The Licensing Board will not be present at these sessions. Appearance before the Board on Phase I emergency planning issues will be conducted at a later date, with the hearing scope restricted to Board questions (if any) and to limited questions by the parties. Tr. 12,565-617. Such an appearance will be brief, perhaps lasting only one day. Tr. 12,542, 12,566, 12,577-79. The Board has ordered a similar procedure for considering the quality assurance issues addressed in the recent Torrey Pines report. Tr. 12,559.

## II. The County's Position

On November 2, the Board was informed by County counsel that County officials, when informed of the Board's proposal, would likely be highly dissatisfied. Tr. 12,582. That is the case. The Suffolk County Executive, Peter F. Cohalan, has written to Chairman Palladino and the Commissioners to express the County's view. A copy of Mr. Cohalan's letter is attached hereto. It informs the Commission of Mr. Cohalan's instruction that the County's experts and counsel not participate in the Board's proposed procedures.

Section 189 of the Atomic Energy Act provides parties with an opportunity for a "hearing" in any proceeding for a license to operate a nuclear power plant. The NRC has consistently implemented Section 189 to require adjudication of evidentiary disputes in public hearings before the Commission or the Boards

to which it has delegated its authority. Depositions are used in NRC practice, just as they are in Federal court practice, as proper pre-trial discovery devices. To the County's knowledge, depositions have never been used as a substitute, in whole or in part, for a public adjudicatory hearing before a Licensing Board.

The Licensing Board's proposal is at odds with the norm and practice of NRC licensing proceedings. The Licensing Board has no authority in this proceeding to depart from the settled adjudicatory practice of the NRC. If a change is to be made in the adjudicatory process, that change can be effected only by the Commission through a properly noticed rulemaking proceeding or, if necessary, by Congress through legislation.

The Board made clear on November 2 that it believes it has authority to order its proposed change in procedure. Surprisingly, the Board declined to provide its reasoning for this position.<sup>1/</sup>

Suffolk County Counsel: Judge Brenner, it would be very helpful from our standpoint if we were to understand the Board's reasoning.

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<sup>1/</sup> The Board suggested that the use of prefiled testimony provides an analogy for the "evidentiary depositions" proposed in this case. Tr. 12,582. The County disagrees. First, the prefiled testimony approach is explicitly authorized by Section 2.743(b). Second, even with prefiled testimony, cross-examination is conducted before the Board in a public hearing. Obviously, in nuclear licensing cases -- where the vast complexity and weight of the direct testimony requires extensive preparation by counsel before the public hearing -- counsel and their experts have to receive the testimony before coming before the Board. Similarly, the Board needs it to prepare for trial.

From our perspective, we don't understand how a discovery tool can become a substitute for a hearing, and we might be ourselves persuaded not to pursue the argument if we understood where the Board was coming from. So if that were possible, we would appreciate the Board's reasoning prior to the time we were asked to put forth our own analysis.

Judge Brenner: No, sir. You're telling us we can't do it and we're telling you we can. You tell us why we can't. It's that simple.

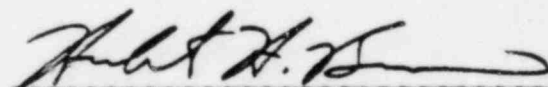
We stated our reasons. It is for efficiency.  
Tr. 12,564-65.

The County acknowledges that the Board has broad discretion to control the course of a proceeding. See 10 C.F.R. §2.718. The Board's discretion, however, does not embrace the power to eliminate in substance and effect the very public hearing it is charged by law to conduct.

For the foregoing reasons, Suffolk County urges this Board to rescind its November 2 ruling.

Respectfully submitted,

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November 8, 1982

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
NSNRC

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Before the Atomic Safety and Licensing Board

OFFICE OF SECRETARY  
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In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station, )  
Unit 1) )

Docket No. 50-322 (OL)  
(Emergency Planning  
Proceedings)

CERTIFICATE OF SERVICE

I hereby certify that copies of "Suffolk County Response To Licensing Board Proposal of November 2, 1982" were sent on November 8, 1982 by first class mail, except where otherwise noted, to the following:

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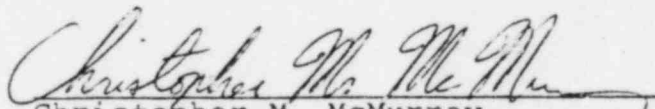
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OFFICE OF THE COUNTY EXECUTIVE

PETER F. CONALAN  
SUFFOLK COUNTY EXECUTIVE

JOHN C. GALLAGHER  
CHIEF DEPUTY

November 8, 1982

The Honorable Nunzio J. Palladino  
The Honorable Victor Gilinsky  
The Honorable James K. Asselstine  
The Honorable John F. Ahearne  
The Honorable Thomas Roberts  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Messrs. Chairman and Commissioners:

On behalf of the citizens of Suffolk County, I am writing to inform you that the hearing on the safety of the Shoreham nuclear power plant is being marred by the procedural irregularity of your Licensing Board. I ask that you promptly intercede to exercise the Commission's supervisory authority over the conduct of the hearing.

Last week, the Licensing Board tentatively decided to discard normal hearing procedures on certain critical issues of emergency preparedness and quality assurance. The Board stated its intention not to preside over the cross-examination of expert witnesses and, thus, in effect not to exercise its important role of helping to shape the development of probative evidence in the adversarial framework established by law.

Instead, the Board directed the parties to schedule questioning among themselves by the invention of so-called "evidentiary depositions," outside the public hearing room and in the absence of the Board Members. The Board indicated that it would later rule on the admissibility of portions of the parties' question-and-answer transcripts at a brief public session and ask the witnesses any questions the Board might then have.

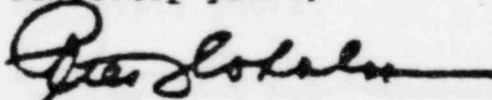
The Board's proposal displays either ignorance of or indifference to the meaning and importance of a public hearing. The proposal is a gross departure from the norm and is unacceptable to Suffolk County. Accordingly, I am instructing the County's counsel and expert consultants not to participate in the Board's proposed procedures.

By joining the NRC's Shoreham hearing, Suffolk County assumed and accepted the applicability of established rules and customary procedures. We now insist that your Licensing Board apply those rules and procedures. In Suffolk County, a "public hearing" means just that, nothing more and nothing less. A hearing is a form of right and privilege in which to develop facts. The personal involvement of attentive adjudicators is indispensable. Your Licensing Board's invention of so-called "evidentiary depositions" as a substitute for the normal hearing procedures not only does violence to the settled adjudicatory framework of the NRC, but it cheapens the roles of both the Board and the parties to the proceeding.

To the residents of this County who are affected by Shoreham's safety, the issues being heard by the Licensing Board are serious matters. We hold the Board accountable to perform its judicial functions with care, temperament, and maturity befitting the high public responsibility with which it has been entrusted. The Board's proposal to discard normal hearing procedures in this case is an insult -- a suggestion that the NRC does not consider the public's safety concerns at Shoreham to be important enough to justify following the ordinary course.

I ask that you promptly act to terminate this potentially divisive controversy by instructing the Licensing Board to use normal public hearing procedures in the Shoreham proceeding. Suffolk County is not willing to permit the Shoreham safety hearing to become a laboratory for experiments in regulatory procedure.

Sincerely yours,



PETER F. COHALAN  
SUFFOLK COUNTY EXECUTIVE

cc: Lawrence Brenner, Esq.  
Dr. Peter A. Morris  
Dr. James L. Carpenter