[RELATED] CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

'82 NOV 22 P2:01

OFFICE OF SECRETARY
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BRANCH

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

NSC'S MEMORANDUM IN OPPOSITION TO BOARD PROPOSAL TO REQUIRE DEPOSITIONS ON PHASE I EMERGENCY PLANNING CONTENTIONS

1. The Proposal Denies NSC Procedural and Substantive Due Process

Atomic Energy Act §189 require the Commission to grant a "hearing" in a licensing proceeding. The guarantees of due process mandate a "hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 313, 94 L. Ed. 865 (1950), cited approvingly in United States v. Raddatz, 447 U.S. 667, 677, 65 L. Ed. 2d 424 (1980) and agency orders have been vacated for failure to observe procedures "required by law and due process." Hoffman-LaRoche, Inc. v. Kleindienst, 478 F. 2d 1 (3rd Cir. 1973).

The "hearing appropriate to the nature of [this] case" is one before the Board or other duly designated administrative tribunal and not before a court reporter or public stenographer.

From Morgan v. U.S. 298 U.S. 468, 80 L.ed. 1288 (1936) to U.S. v. Raddatz, supra, the courts unanimously approve a hearing only before a administrative law judge, board,

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hearing officer or the like and not before a lay person, such as a court reporter or public stenographer. NLRB v. McKay Radio & Telegraph Co., 304 U.S. 333, 82 L. Ed. 1381, 1938, held that the NLRB could rely upon the transcript and oral arguments without a report by the hearing officer, because the Board had conducted a hearing before a duly designated quasi-administrative or quasi-tribunal officer, and not a court reporter or a public stenographer. Guerrero v. New Jersey, 643 F. 2d 148 (3rd Cir. 1981), and cases cited therein.

U.S v. Raddatz, supra, sustained the authority of a District Court to order a hearing before a Federal Magistrate because the District Court reviewed the testimony prior to rendering a decision. Again, it must be noted, that a hearing was held before a judicial officer and not before a lay person.

See also: U.S. v. Nugent, 346 U.S. 1, 6, 97 L. Ed. 2d 1417, (1953), Simmons v. U.S. 348 U.S. 39,7 99 L. Ed. 453 (1955) and Gonzalez v. U.S. 348 U.S. 407, 99 L. Ed. 467 (1955).

Moreover, under 10 CFR §2.740(j), a witness at a deposition may be "accompanied, represented, and advised by legal counsel." This sets a deposition apart from a hearing where a witness cannot step down for a moment to consult with counsel. This difference alone underlines the critical distinction between a hearing and a deposition.

2. <u>The Board's Proposal Violates the Administrative Procedure Act</u>

Assuming, arguendo, that the Board has the power to give testimonial weight to depositions, such a course cannot be taken without complying with the rulemaking procedures of the Administrative Procedure Act (5 U.S. 552, 553 et. seq.).

Although 10 CFR §2.718(d) provides that a presiding officer can "order depositions to be taken", this regulation in no way permits a presiding officer to give testimonial weight to these depositions or order that an evidentiary "hearing" be conducted in the absence of the Board. Depositions are only as a discovery tool (10 CFR §2.740), not a means of by-passing a hearing. See <u>U.S.</u> v. <u>Wilbur</u> 427 F. 2d 947, cert. den. 400 U.S. 945 (1970) and <u>Schatten</u> v. <u>U. S.</u> 419 F. 2d 187 (5th Cir., (1969).

Thus the Board's proposal to require that depositions be conducted "as if the parties were examining on pre-filed direct testimony at the evidentiary hearing", amounts to an amendment to the rules promulgated by the Commission. Such a change cannot be made without following the rulemaking procedures of the Administrative Procedure Act.

3. <u>The Board's Proposal Will Impose An Unconstitutional Financial Burden on NSC</u>

The Board's proposal strikingly ignores the fact that the deposition route will require NSC to bear the concededly high cost of recording and transcribing a deposition in order to have access to the Board and NRC for the ultimate disposition of their contentions in Phase I. The Board may

take administrative notice of the fact that the fees to court reporters are approximately three to three and one half dollars a page. NSC is a volunteer public interest group with severely limited financial resources and its intervention in this proceeding is financed by dues and contributions.

Conditioning access to the court upon financial ability violates due process. Boddie v. Connecticut, 401 U.S. 371, 28 L. Ed. 2d 113 (1971); Windsor v. McVeigh, 93 U.S. 274, 23 L. Ed. 914 (1876); Hovey v. Elliott 167 U.S. 409, 42 L. Ed. 215 (1897).

Boddie, supra, held that Connecticut could not condition access to the courts upon payment of a filing fee which plaintiffs, indigent welfare clients, could not afford to pay. After analyzing the various considerations implicated in this decision, the Court concluded that

> . . . a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized; rather, the State owes to each individual that process which in the light of the values of a free society, can be characterized as due.

Boddie v. Connecticut, supra, at 380.

This principle applies with equal force to the Board's proposal. It effectively deprives NSC of the opportunity properly to litigate contentions which this Board has found meritorious. Erecting this financial barrier is especially improper and invalid where, as here, NSC is not vindicating

personal rights but that of a community interested in the safe operation of the Shoreham plant. The right to a hearing, a fundamental of due process, cannot be permitted to rest on the fragile foundation of ability to pay.

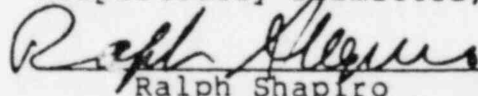
We anticipate that proponents of the Board's proposal may urge that the purchase of transcript of a hearing is equally expensive. The analogy falls for two reasons. In the first place, the testimony is before the Board whether or not NSC pays for it. Secondly, if NSC should choose not to pay for it, it is accessible to it as a matter of public record.

> Prior cases establish first, that due process requires, at a minimum, that absent a counter vailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Earlier in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in its person or its property, there he may defend,' [citations omitted].

Boddie v. Connecticut, supra, at 377.

We therefore urge the Board to reject its illegal proposal. If it does not do so, NSC must respectfully decline to participate in the implementation of the Board's proposal.

Respectfully Submitted,



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Dated: New York, N. Y.
November 18, 1982

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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 NSC'S Memordum in opposition to Board Proposal to Require Depositions on Phase I Emergency Planning Contentions was duly served today upon the following by first-class mail, postage prepaid, by Federal Express (as indicated by an asterisk).

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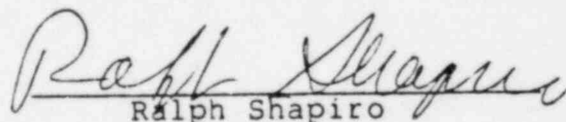

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Dated: November 18, 1982