November 11, 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 MEMORANDUM ON THE USE OF DEPOSITIONS TO INCREASE HEARING EFFICIENCY

I. BACKGROUND AND CONCLUSION

A. The Proposed Procedure

Unless persuaded that the procedure would be impermissible, and notwithstanding the objection of Suffolk County, the Board plans to direct the use of "depositions as an efficiency to then follow up on at a hearing . . . ." Tr. 12,563. As Judge Brenner explained:

> . . . It is for efficiency. There is no need for us to sit here while each and every question and answer is asked. We can read the deposition and then bring the witnesses in to follow up with our questions.
>
> And we would allow a short, determined in advance, time period for parties to ask whatever questions they wanted of the witnesses, without having to show that they could have asked it at the deposition. They can ask some of the same questions again if they want to highlight it, if for some reason they don't believe we can read the written word, which we state is incorrect, or if

simply they forgot to ask some things or some things occurred after. But they will be very short time frames because we will have read the depositions.

The depositions will be filed. Copies will be marked up in coordination with all of the parties in the margin as to which portion the parties seek to move into evidence, and at the time we are prepared to admit the depositions into evidence the parties can argue as to certain portions that should not be admitted because they had noted objections at the deposition.

We will have had the record compiled. We will read it and then decide what questions we want to ask of the witnesses here. It may be that we have no follow-up questions, in which case we'd still allow the parties a short opportunity. But we are talking about hours, not days, for each party to ask its questions and the follow-up on the deposition.

B. The Need for Expediting Procedures in Complex Cases Such as Shoreham

The Board made the remarks just quoted on November 2nd -- the 61st day of hearings in this proceeding. The Transcript had then passed 12,500 pages. Over 100 exhibits had then been marked and/or received into evidence. Almost 7,000 pages of written direct testimony had then been served.1/ Eighty-seven witnesses had already testified or were then on the stand.2/

1/ The page totals include the testimony itself, attachments to it, and witnesses' qualifications. Some of this written testimony has become the predicate for settlement negotiations rather than hearings.

2/ The witnesses totals include each witness who testified on each contention. Thus, if a person testified on more than one

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The great bulk of the hearing time has gone to cross-examination by County counsel of LILCO and Staff witnesses. On November 2nd, the County was in its fifth week of examining LILCO's panel on quality assurance. The County projected that at least another two weeks would be required for its QA examination of the Staff panel, and was insistent on further examination at some later time of witnesses knowledgeable about the Torrey Pines and Teledyne inspections of Shoreham.

It was clear on November 2nd that, even with the completion of the QA testimony, there would remain a number of contentions still to be litigated. While various opinions exist as to the length of the road yet to be traveled, all agree that it will take months. Months will be required despite the fact that numerous contentions regarding plant security have been spun off by the Board to another ASLB, because the Board lacked the time to deal with security issues and all other Shoreham matters.

The Manual for Administrative Law Judges (rev'd ed. 1982) distinguishes between "two basic types of formal administrative cases -- 'simple' cases and 'complex' cases." Id. 19. The Manual describes the latter in these terms:

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contention, he has been counted more than once. In addition to witnesses at the hearings, 33 people have been deposed to date in this case.

> Complex cases require hearings lasting from a few days to a month or more, have many parties and many issues, and involve few credibility questions. Typically, much of the testimony is highly technical and lengthy, and is submitted in written form prior to the hearings.

Id. The Manual notes that "Judges hearing complex cases may hear only 10 to 25 cases per year." Id. 20. Obviously the Shoreham proceeding is an exceptionally "complex" case. It will very likely prove to be one of the most complex cases in this country's administrative history.

To return to the Manual, "for the complex case the Judge should be diligent in expediting the proceeding while developing a fair and complete record." Id.; see also pages 8-10 below. The Manual does not squarely address the proposed use of depositions as a means of increasing the efficiency of hearings. But neither does the Manual consider cases of Shoreham's immense complexity.

C. Conclusion

We believe that the procedure proposed by the Board is permissible and desirable. To state our conclusion in more ultimate terms, we think it very unlikely that a U.S. Court of Appeals would find reversible error in the use of depositions to focus, narrow and thus expedite hearings in this immensely complex and protracted proceeding. Quite to the contrary, we

think any reviewing court would hold such a use of depositions to be legal and prudent under the circumstances.

II. THE PROPOSED PROCEDURE SIMPLY EXTENDS EXISTING RELIANCE ON WRITTEN TESTIMONY

A. Further Articulation of the Proposed Procedure

We assume that the procedure envisaged by the Board involves elements such as these:

(1) The depositions will examine (a) prefiled written direct testimony on pertinent contentions (to the extent such prefiled testimony has not been struck or otherwise disposed of by prior Board rulings) and (b) any other matters that parties may wish to pursue that are relevant to the contentions and known to the sponsors of the prefiled written testimony.

(2) Unless the parties and Board agree to another procedure, each of the witnesses just identified will appear before the Board and orally attest to the truth of his (a) prefiled written direct testimony and (b) those portions of his examination during depositions that, following designation and argument by the parties, the Board has decided to admit into evidence.

(3) The Board will orally question such witnesses during hearings if, based upon its review of their prefiled written direct testimony and of the written transcript of their examination during depositions, the Board concludes that further testimony by these witnesses is necessary to produce a fair and complete record.

(4) By the same token, the parties may question these witnesses orally during hearings before the Board regarding any matters relevant to the pertinent contentions, even if that examination repeats questioning conducted during the depositions.

(5) It is anticipated, however, that the depositions will narrow, focus and thus expedite the oral testimony needed during hearings before the Board; indeed, the depositions may lay a factual predicate for settling, in whole or part, certain contentions without the need for hearings.

(6) Based on its review of the prefiled direct testimony, deposition transcripts, and arguments of counsel, the Board will determine how much time to allow for post-deposition hearings on particular contentions.

B. No Prejudice to Parties

The proposed use of depositions simply extends present reliance on prefiled written testimony "as an efficiency to then following up on at a hearing." In both instances, the Board receives testimony in writing in advance of hearings, reads and studies it, hears and resolves any objections to its admissibility into evidence, and admits it into evidence after the sponsoring witnesses attest orally to its accuracy (unless the Board and parties agree on a different process for admission); the parties and Board then orally examine the witnesses during hearings within whatever constraints the Board finds appropriate, given all that has gone before.

The proposed use of depositions, when compared to a requirement for prefiled written testimony, burdens the parties less, offers them greater opportunity for follow up, and affords them more flexibility. In both instances, the parties are producing written testimony for the Board's and their use "as an efficiency to then follow up on at a hearing." But with the depositions, the parties may proceed orally -- a far less demanding way of going forward than asking and answering questions in writing. Oral rather than written examination also permits far more sharply focused, intense follow-up of answers in areas of interest to counsel. As to flexibility, while it is rare that the Board would permit oral repetition during hearings of prefiled written direct testimony, the Board's proposed procedure for use of depositions "as an efficiency to then follow up on at a hearing" expressly permits some repetition of deposition examination during the hearings.

In short, the proposed procedure allows all oral examination before the Board that is actually necessary for full and true disclosure of the facts. The parties are free to probe during hearings any crucial or soft areas of the deposition testimony -- and, indeed, to go beyond that testimony into areas not covered during the depositions. It bears emphasis that any party which believes oral examination during hearings is central to the Board's understanding of the testimony (e.g., because demeanor of a witness is alleged to be crucial) may

examine witnesses already deposed even if the testimony so elicited tracks written testimony available to the Board in the depositions. If anything, the proposed procedure increases the likelihood of discrediting unsound representations because the opposing party has two opportunities on the record to shake the testimony of hostile experts.

C. Basis for Using Written Testimony to Expedite Hearings

The use of written evidence available to the Board and parties prior to hearings as a means of expediting the hearings is well established in NRC and other administrative practice. Thus, there is no dispute that the Board may require direct testimony to be submitted "in written form," that "[t]he use of such advance written testimony is expected to expedite the hearing process," and that "[t]here is ordinarily no need for oral recital of prepared testimony unless the Board considers that some useful purpose will be served."3/ See 10 CFR Part 2, App. A, at V(c)(2) & (3); 10 CFR § 2.743(b).

3/ The Administrative Procedure Act (APA) allows, in proper circumstances, submission of all evidence in an "on the record" hearing in written form. 5 U.S.C. § 556(d). This flexibility evidences congressional recognition that the record in an "on the record hearing" need not be made in "the traditional manner." Long Island R.R. v. United States, 318 F. Supp. 490, 498 (E.D.N.Y. 1970); see also, e.g., United States Steel Corp. v. Train, 556 F.2d 822, 834 (7th Cir. 1977).

Nor can there be any dispute that the Board is expected to take those steps necessary to focus and expedite the hearings so long as the steps are "consistent with the development of an adequate decisional record." Thus:

> The board should use its powers under §§ 2.718 and 2.757 to assure that the hearing is focused upon the matters in controversy among the parties and that the hearing process for the resolution of controverted matters is conducted as expeditiously as possible, consistent with the development of an adequate decisional record.

10 CFR Part 2, App. A, at V (1st paragraph). Accordingly, the Board may, under § 2.718(d), "[o]rder depositions to be taken," under § 2.718(e), "[r]egulate the course of the hearing and the conduct of the participants," under § 2.756, employ "informal procedures," under § 2.757(c), "[t]ake necessary and proper measures to prevent . . . repetitious, or cumulative cross-examination," and under § 2.757(d), "[i]mpose such time limitations on arguments as [it] determines appropriate, having regard for the volume of the evidence and the importance and complexity of the issues involved."4/

4/ The steps that a Board may take to focus and expedite the hearings are not limited by the more formal procedural rules followed by the federal courts. See, e.g., Consumers Power Company (Midland Plant, Units and 2), ALAB-379, 5 NRC 565, 568 n.13, 568-69 (1977). To the contrary, administrative practice encourages procedural flexibility in appropriate circumstances.

American Fruit Purveyors, Inc., 30 Ad. L. 2d 584 (Dept. of Agriculture 1971), involved the review of a decision by a hearing examiner allowing the taking of depositions for use during

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Moreover, pursuant to § 2.760(b), "Where the public interest so requires, the Commission may direct that the [Board] certify the record to it without an initial decision, and may: (1) Prepare its own initial decision . . . ."

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hearings. The depositions were taken by written interrogatories, propounded to the witnesses on direct examination by notaries public. The respondent was given the opportunity to file "cross-questions," propounded in the same manner, prior to the time of the examination. 30 Ad. L. 2d at 586. The respondent did not file any cross-questions. Id.

On appeal, the respondent argued that it was denied procedural due process -- "there was not adequate opportunity to cross-examine [those] who gave depositions." Id. 588. Although the only opportunity to cross-examine the deponents was by written questions, with no opportunity to cross-examine orally, the claim of procedural due process was denied. Id. 588-90. Recognizing that the "hearing examiner had wide latitude as to all phases of the conduct of the hearing," id. 590, the opinion states:

> Procedural due process of law "has never been a term of fixed and invariable content." Federal Communications Comm'n. v. WJR, 337 US 265, 275. "No particular form of procedure is required to constitute due process in administrative hearings." National Labor Relations Board v. Prettyman, 117 F2d 786, 790 (CA 6). . . .
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> . . . .
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> . . . "One of the purposes of administrative law is to permit a more elastic and informal procedure than is possible before our more formal courts." Lambros v. Young, 145 F2d 343 (CA DC).

Id. 589-90; see also NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 351 (1938) ("Fifth Amendment guarantees no particular form of procedure; it protects substantial rights").

(Emphasis added). In that event, the decision is made by Commissioners relying wholly on written testimony and other documentary evidence -- that is, by persons who have never seen or heard the witnesses.5/

In summary, we see no reason why use of the proposed procedure would violate any party's right, under 10 CFR § 2.743 and APA § 556(d), "to present such oral or documentary evidence and rebuttal evidence and conduct such cross-examination as may be required for full and true disclosure of the facts." No ban is imposed on any party's placing evidence before the Board by direct testimony, cross-examination, redirect and re-cross. No ban is imposed on any party's oral (a) cross-examination of

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5/ Cf. K. C. Davis, 3 Administrative Law Treatise § 17.14, at 322 (2d ed. 1980):

> According to § 557(b) of the APA, the power of an ALJ with respect to the decision of a case is in essence the power to recommend, not the power to decide, because § 557(b) provides: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." That provision applies to "the initial decision" and is not limited to what the APA calls a "recommended decision." All decisions by ALJs, whether they are called "initial" or "recommended," are in the nature of recommendations, since the agency normally has "all the powers which it would have in making the initial decision."

Accord, id. § 17.17, at 337; see also note 3 above and accompanying text.

other parties' witnesses and (b) oral re-direct examination of its own witnesses. The only limitation is that most of the examination will be placed before the Board, in writing, either by prefiled written testimony or by deposition transcripts, unless there is good reason for extensive oral testimony before the Board. Use of written testimony is well established in NRC practice as a means of developing a fair and complete record -- in particular, as a means of focusing and narrowing the issues for hearings in complex, protracted cases such as Shoreham. Under some circumstances, indeed, the Commission may decide cases relying wholly on written evidence. The proposed use of depositions "as an efficiency to be followed up on at a hearing" fits comfortably within sound administrative practice.

III. PUBLIC HEARINGS

The hearings to be held under the proposed procedure will be in public and on Long Island, beginning on January 4, 1983. In our judgment, they will suffice to meet the "public" aspect of the NRC hearing requirement.6/

The Company assumes that the proposed depositions will also be taken in public on Long Island. The only essential

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6/ There is no express requirement in the Atomic Energy Act that NRC hearings be "public." See 42 U.S.C. § 2239. But see 10 CFR § 2.751; cf. Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 879-80 (1st Cir.), cert. denied, 439 U.S. 824 (1978).

conditions for doing so are (1) adequate security for the participants and (2) an understanding among counsel that, in the event of disturbances (e.g., fish thrown at the participants, whistles blown by people in the audience, or passages read by them), the disrupted disposition will be immediately adjourned, the Board informed, and the deposition resumed as promptly as possible in a prearranged place not subject to disruption.

Respectfully submitted,

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