

LILCO, February 6, 1984

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-3
) (Emergency Planning
(Shoreham Nuclear Power Station,) Proceeding)
Unit 1))

LILCO'S MOTION TO COMPEL EXPEDITED
PRODUCTION OF DOCUMENTS BY NEW YORK STATE

LILCO has recently become aware of the existence of a document listing, prepared pursuant to a request by the Town of Southampton under the New York Freedom of Information Act, for documents relating to New York State's review of the offsite radiological emergency response plan for the Shoreham Nuclear Power Station. This listing was prepared at some time shortly prior to August 23, 1983. Pages 1 through 5 of the listing (down to paragraph 3 near the bottom of page 5) apparently describe documents released pursuant to the Town of Southampton's New York FOIA request. Documents listed thereafter were withheld under various exemptions to the New York FOIA. LILCO possesses only pages 5 through 9 of the listing; the attached Request for Production of Documents and covering letter to

8402090163 840206
PDR ADOCK 05000322
G PDR

Richard J. Zahnleuter, Esq., both served today on the State of New York, attach the listing and describe its background in more detail.

These documents concern New York State's review of the Shoreham offsite emergency response plan. As such, they are obviously central to an understanding of New York State's position on all aspects of that plan, and thus central to the preparation by March 2, 1984 of testimony responsive to matters raised by New York State witnesses and to fruitful deposition discovery of New York State's witnesses scheduled for the period February 6-17.^{1/}

^{1/} The documents, which are apparently from the period between the spring of 1982 and the summer of 1983, relate to New York State's review of the version of the Shoreham offsite emergency plan prepared and submitted by LILCO to the New York DPC after Suffolk County withdrew from cooperation on emergency planning matters in the spring of 1982. In some respects this version of the plan is identical to Rev. 0 of the plan which was submitted to this Board in the spring of 1983. In others, it is the direct lineal predecessor of Rev. 0. Documents memorializing New York State's substantive review of this plan are unquestionably relevant to its view of issues in this case. They more than satisfy the requirement of § 2.740(a)(1) that "It is not ground for objection [to discovery] that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." In addition, under circumstances similar to those now obtaining vis-a-vis New York State, the prior Licensing Board granted LILCO, in the summer of 1982, extensive document and deposition discovery of Suffolk County's Shoreham emergency planning review process from the period during and before the spring of 1982. Suffolk County had objected to this discovery on a variety of grounds including attorney-client and attorney work product privileges, which the Board overruled. Long Island Lighting Company (Shoreham Nuclear Power Station), LBP-82-82, 16 NRC 1144 (1982).

LILCO became aware of this listing of documents, which was filed in a New York State administrative proceeding and is not a matter of record before the NRC, only within the last few weeks; and there would have been no purpose to pursuing it prior to New York State's entry into this proceeding. When counsel for LILCO requested a copy of the listing and of all documents contained in it of New York State counsel, Mr. Zahnleuter, last Friday, February 3, Mr. Zahnleuter stated that he had been the New York State attorney who had prepared the listing and indicated that he would not be willing to take any action with respect to it except pursuant to a written request. He also indicated that New York State would not be inclined to turn over, voluntarily, any documents previously claimed to be exempted under the terms of the New York State Freedom of Information Act. The letter and request for production served this morning on the Staff of New York are attached.

On the basis of the February 3 conversation with Mr. Zahnleuter, LILCO believes that New York State will not promptly provide voluntarily the listing and the documents referred to in it. These documents are, as stated above, central to an understanding of the substantive merits of New York State's position on the merits of the LILCO offsite emergency plan. LILCO therefore requests that this Board enter an Order requiring New York State to provide LILCO forthwith with a copy

of the complete listing of documents and a copy of each and every document in it, copying expenses to be borne by LILCO.

There should be no controversy about production of documents preceding paragraph 3 on page 5 of the listing, since they have already been produced under the NY FOIA.

With respect to the documents not released under the NY FOIA, the listing excerpt to which LILCO has gained access described, at the bottom of page 5 and top of page 6, the coding system used by the State of New York for withholding the various documents not released. Each withheld document listed on pages 6 through 9 is labeled by one or more of these exemption classifications. For the Board's convenience, these classifications are repeated here:

- 1) "A" refers to inter-agency materials which are not:
 - (i) statistical or factual tabulations or data;
 - (ii) instructions to staff that affect the public, or
 - (iii) final agency policy or determinations;
- 2) "B" refers to intra-agency material which are not:
 - (i) statistical or factual tabulations or data;
 - (ii) instructions to staff that affect the public, or
 - (iii) final agency policy or determinations;
- 3) "C" refers to material prepared for litigation;
- 4) "D" refers to attorney work product;
- 5) "E" refers to materials protected by attorney-client privilege.

Documents which were withheld under either categories "A" or "B" do not fall within any recognizable category of exemption or privilege under the Commission's Rules of Practice, and any documents marked only as withheld subject to those two categories should be ordered to be turned over forthwith.

Documents withheld on the basis of exemptions "C" (material prepared in contemplation for litigation), "D" (attorney work product), and "E" (attorney-client privilege) also should be turned over immediately unless withholding is justified on a document-by-document basis by New York State. LILCO requests that the Board require the State to provide it, forthwith, with any copies of documents which it wishes to withhold pursuant to categories "C", "D" or "E", along with a showing of good cause, as to each of them, why they should not be produced.

Accordingly, LILCO moves that this Board require New York State to provide LILCO with copies, forthwith, of the following:

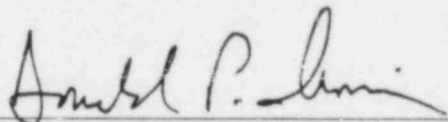
1. The complete document listing of which pages 5 through 9 have been obtained by LILCO;
2. All documents already produced for any person in response to the NY FOIA request to which the document listing responds;
3. All documents withheld pursuant to the FOIA request only on the basis of categories "A" and/or "B"; and

4. All documents withheld by New York State pursuant to categories "C", "D" and "E", except those as to which New York State makes a document-by-document justification, sustained upon review by this Board, of the basis for the claimed privilege or exemption.

Because of the obvious importance of time in this matter, LILCO requests that the Board give this motion expedited consideration.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

By 
Donald P. Irwin

HUNTON & WILLIAMS
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

DATED: February 6, 1984

Attachments:

1. Letter, Donald P. Irwin to Richard J. Zahnleuter, February 6, 1984.
2. LILCO's Request for Expedited Production of Documents by New York State, February 6, 1984.

LILCO, February 6, 1984

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-3
(Emergency Planning Proceeding)

I hereby certify that copies of a letter from Donald P. Irwin to Richard J. Zahnleuter, Esq., LILCO'S MOTION FOR EXPEDITED PRODUCTION OF DOCUMENTS and LILCO'S MOTION TO COMPEL EXPEDITED PRODUCTION OF DOCUMENTS BY NEW YORK STATE, all dated February 6, 1984, were served this date upon the following by first-class mail, postage prepaid, or (as indicated by one asterisk) by hand, or (as indicated by two asterisks) by telecopier, or (as indicated by three asterisks) by Federal Express.

James A. Laurenson,*
Chairman
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
East-West Tower, Rm. 402A
4350 East-West Hwy.
Bethesda, MD 20814

Dr. Jerry R. Kline*
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
East-West Tower, Rm. 427
4350 East-West Hwy.
Bethesda, MD 20814

Mr. Frederick J. Shon*
Atomic Safety and Licensing
Board
U.S. Nuclear Regulatory
Commission
East-West Tower, Rm. 430
4350 East-West Hwy.
Bethesda, MD 20814

Secretary of the Commission
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. 20555

Bernard M. Bordenick, Esq.*
David A. Repka, Esq.
Edwin J. Reis, Esq.
U. S. Nuclear Regulatory
Commission
7735 Old Georgetown Road
(to mailroom)
Bethesda, MD 20814

Gerald C. Crotty, Esq.
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Eleanor L. Frucci, Esq.*
Attorney
Atomic Safety and Licensing
Board Panel
U. S. Nuclear Regulatory
Commission
East-West Tower, North Tower
4350 East-West Highway
Bethesda, MD 20814

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

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

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

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

Ben Wiles, Esq.
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Stewart M. Glass, Esq.***
Regional Counsel
Federal Emergency Management
Agency
26 Federal Plaza, Room 1349
New York, New York 10278

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

Ralph Shapiro, Esq.***
Cammer & Shapiro, P.C.
9 East 40th Street
New York, New York 10016

James Dougherty, Esq.***
3045 Porter Street
Washington, D.C. 20008

Howard L. Blau
217 Newbridge Road
Hicksville, New York 11801

Jonathan D. Feinberg, Esq.
New York State
Department of Public Service
Three Empire State Plaza
Albany, New York 12223

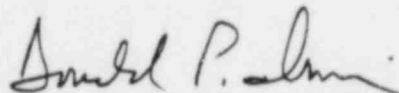
Spence W. Perry, Esq.***
Associate General Counsel
Federal Emergency Management
Agency
500 C Street, S.W.
Room 840
Washington, D.C. 20472

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

Fabian G. Palomino, Esq.**
Special Counsel to the
Governor
Executive Chamber, Room 299
State Capitol
Albany, New York 12224

Ms. Nora Bredes
Executive Coordinator
Shoreham Opponents' Coalition
195 East Main Street
Smithtown, New York 11787

Richard J. Zahnleuter, Esq.**
Assistant to Special Counsel
to the Governor
State Capitol
Albany, New York 12224



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

DATED: February 6, 1984