DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'84 FEB 28 P3:25

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
James A. Laurenson, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

SERVED FEB 29 1984

In the Matter of	Docket No. 50-322-OL-3
LONG ISLAND LIGHTING COMPANY	(Emergency Planning Proceeding)
(Shoreham Nuclear Power Station, Unit 1)	February 28, 1984

MEMORANDUM AND ORDER DENYING
SUFFOLK COUNTY'S MOTION TO CHANGE SCHEDULE

Once again, we are called upon to revisit the issue of scheduling in this proceeding. The most recent round of motions and countermotions began on about February 1, 1984, when the Federal Emergency Management Agency (FEMA) indicated that the findings and determinations in its "RAC review" of the LILCO Offsite Emergency Plan for the Shoreham facility would not be available until March 1, 1984. This was an additional three weeks beyond the February 7, 1984 date upon which the RAC review had heretofore been expected. (See Tr. 3639).

On February 8, 1984, we received the "Suffolk County Motion to Change Schedule" (hereinafter the "Motion"). These were followed by "LILCO's Opposition to Suffolk County's Motion to Change Schedule," February 9, 1984, (the "Opposition") "New York State's Response to

8402290092 840228
PDR ADOCK 05000322
G PDR

D502

Suffolk County Motion to Change Schedule," February 10, and "Shoreham Opposition Coalition's Response in Support of Suffolk County's Motion to Change Schedule," February 13. Following these were "LILCO's Motion for Leave to Reply and Reply to New York State's Response in Support of Suffolk County's Motion to Change Schedule," on February 14. We also received an unauthorized filing, "Suffolk County Reply to LILCO's Opposition to County Motion to Change Schedule," February 13, 1984, and "LILCO's Motion to Strike Unauthorized Pleading by Suffolk County," February 14, 1984.

After carefully considering the arguments advanced by all the parties in this matter, we announced our ruling during a telephone conference call on the afternoon of Wednesday, February 15, 1984. This Memorandum and Order will confirm and explain our ruling.

Procedural History

Suffolk County's Motion to Change Schedule ("Motion") asks that we move the currently scheduled date for the filing of Group II testimony ahead by two weeks, and likewise change the dates for motions to strike testimony, responses thereto, cross-examination plans and for the commencement of the hearing. Thus, all Group II testimony would be filed on March 14, 1984, the date by which the County tells us FEMA expects to have its testimony completed, rather than on the currently scheduled date of March 2. (The County says FEMA now expects to take approximately two weeks after the completion of its RAC review to

complete its testimony.) Under the County's proposed new schedule, the hearing on Group II issues would commence on April 3, 1984.

The County's Motion provides two reasons for seeking the schedule change:

1. A "basic fairness" argument: that all parties should be required to file their testimony at the same time, and that with FEMA's announcement that its RAC review will not be available in February, it is apparent that the testimony of FEMA witnesses will not be filed on March 2, 1984.

2. The "real need" for all the parties other than FEMA to have the opportunity to review FEMA's findings and determinations prior to submittal of their testimony: to be in a position to support or rebut FEMA's findings, which have the status of a "rebuttable presumption" in NRC proceedings.

New York State and the Shoreham Opponents Coalition each responded in support of the County's motion. New York specifically points to the nature of FEMA's findings as rebuttable presumptions under 10 C.F.R. § 50.47(a)(2). "To the extent the FEMA findings bear upon the contentions each party will have to consider FEMA's acceptance as a disavowal of its position. The filing of testimony that addresses the RAC review is the simplest means to respond to that review." (New York's Response at 1.)

LILCO's Opposition notes that "it is the Shoreham Emergency Plan which is being appraised here, not FEMA's review of it." (at 4.) LILCO argues that the County has failed to adequately particularize how it

w.ll be hurt by being required to file its direct testimony prior to the availability of the RAC review; the County has not shown how the unavailability of the RAC review impairs its ability to file direct testimony in support of its contentions, nor has it specified any individual contentions as to which that ability is so impaired. LILCO also argues that the prior unreliability of FEMA's time estimates in this proceeding suggests that its March 1 estimate may be likewise unreliable. Further, LILCO characterizes the County's "fundamental fairness" argument as an indirect way of claiming an automatic right of rebuttal to FEMA's testimony, without the requisite showing of good cause.

Analysis

The purposes of this proceeding are to determine the adequacy and implementability of the LILCO Emergency Plan. To that end, FEMA has a specific role: 10 C.F.R. § 50.47(a)(2) says

> [t]he NRC will base its finding [that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency] on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether state and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented . . . . In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability.

Suffolk County and New York State argue that, by requiring them to file their direct testimony prior to the availability of the FEMA RAC review,

they are being deprived of their right to specifically rebut in their direct testimony the presumptions raised by the FEMA findings.

In our "Order Establishing Supplemental Agenda for Conference of Counsel of November 18, 1983," we required a particularized showing as to the precise impact of a tardy FEMA-RAC review

> the parties are advised that if they intend to request a delay in the schedule of Group II issues [because of a delay in the projected availability date of FEMA's findings], they must be prepared to show why each particular contention cannot be heard on the present schedule absent the FEMA RAC review (at 5).

Neither Suffolk County nor New York State have made the appropriate showing.

In its Motion, Suffolk County gave us two reasons (to which New York State and the Shoreham Opponents Coalition agreed) why the schedule in this proceeding should, once again, be changed. Yet, Suffolk County has not supported its "basic fairness" argument by showing us how permitting the NRC Staff's direct FEMA testimony to come in subsequent to the other parties' direct testimony would be prejudicially unfair to anyone. The County has also failed to bolster its argument that the parties have a "real need" to have the opportunity to examine the FEMA findings prior to submission of their direct testimony by a satisfactory explanation of exactly what that "real need" is, and how anyone will be harmed if the need is not fulfilled. The Suffolk County Motion to Change Schedule is DENIED.

LILCO's Motion for Leave to Reply and Reply

On February 13, 1984, LILCO filed a motion for leave to reply, and reply to the New York State response in this matter. LILCO's grounds for asking leave to reply pursuant to 10 C.F.R. § 2.230(c) was, apparently, a "changed circumstances" argument prompted by New York State's decision to put on many fewer witnesses then it had previously intended. "To the extent that any consideration of the desirability of extending the date for filing Group II testimony from March 2 to March 12 may have hinged on the complexity of coordinated presentation of issues and a resulting need to provide the parties additional time to prepare their direct cases" LILCO felt that issue had been mooted by New York's truncation of the scope of its direct participation (at 2). Suffolk County responded on February 14 by pointing out that "the complexity of coordinated presentation of issues" had never been raised by any party as a reason for schedule revision, and that LILCO's filing was, therefore, irrelevant.

This Board is not necessarily adverse to notification regarding any material changes in the parties' intentions as to the scope of their participation in this proceeding. However, submitting such notification in the guise of a reply to a motion and response to which it is not clearly relevant is not an appropriate way to place such information before us. LILCO's Motion for Leave to Reply is DENIED.

Suffolk County's Reply

We received Suffolk County's Reply to LILCO's Opposition to its motion to change schedule on February 13, 1984. This Reply alleges that its purpose is to correct "erroneous statements" in the LILCO Opposition to its first Motion; it then proceeds to reiterate, in a much lengthier fashion, the argument it had already presented in the Motion. On February 14, LILCO attempted to file a Motion to Strike this pleading because the County has no right of reply in this circumstance.

10 C.F.R. § 2.730(c) says a "moving party shall have no right to reply [to a response to its motion], except as permitted by the presiding officer or the Secretary or the Assistant Secretary." Suffolk County's filing is essentially a reply by the County to a response which LILCO made to a motion that the County had made. It was submitted without leave to reply, in direct contravention of our rules. Even absent a motion to strike, we would have stricken the County's reply sua sponte. Unauthorized filings will not be ertertained by this Board. See Detroit Edison Co. (Enrico Fermi Atomic Plant, Unite 2) ALAB-269, 7 NRC 470, 471 (1978).

WHEREFORE IT IS ORDERED that the "Suffolk County Motion to Change Schedule" is DENIED.

ATOMIC SAFETY AND
LICENSING BOARD

JAMES A. LAURENSON, Chairman
Administrative Law Judge

Bethesda, Maryland