

313.
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

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In the Matter of)
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LONG ISLAND LIGHTING COMPANY)
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(Shoreham Nuclear Power Station,)
Unit 1))
)

Docket No. 50-322 OL
(Emergency Planning)

Stewart M. Glass, New York, New York, for the
Federal Emergency Management Agency.

Karla J. Letsche, Washington, D.C. (with whom
Herbert H. Brown and Lawrence Coe Lanpher,
Washington, D.C., and Martin Bradley Ashare,
Hauppauge, New York, were on the brief) for
Suffolk County, New York.

Donald P. Irwin, Richmond, Virginia, for the Long
Island Lighting Company.

David A. Repka for the Nuclear Regulatory
Commission staff.

MEMORANDUM AND ORDER

The Federal Emergency Management Agency (FEMA) has asked us to stay a Licensing Board decision ordering production of various documents in connection with the ongoing litigation of emergency planning issues in this operating license proceeding involving the Shoreham nuclear facility of the Long Island Lighting Company (LILCO). As explained below, we grant the stay pending disposition of the merits of FEMA's appeal from the Board's decision.

Background

Under Commission regulations, no full-power operating license for a nuclear power reactor can issue unless the NRC finds that there is reasonable assurance that adequate protective measures both on and off the facility site can and will be taken in the event of a radiological emergency. 10 C.F.R. § 50.47(a)(1).¹ With regard to the adequacy of offsite emergency measures, the NRC must "base its findings 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." 10 C.F.R. § 50.47(a)(2).²

¹By virtue of 10 C.F.R. § 50.47(d), a license authorizing fuel loading and low-power testing may be issued in the absence of an approved offsite emergency plan. See CLI-83-17, 17 NRC 1032 (1983).

² Section 50.47(a)(2) reads in full as follows:
 The NRC will base its finding 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, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and whether there is reasonable assurance that they can be implemented. A FEMA finding will primarily be based on a review of the plans. Any other information already available to FEMA may be considered in assessing whether there is reasonable assurance that the plans can be implemented. In any NRC licensing proceeding, a
 (Footnote Continued)

Generally speaking, the NRC asks FEMA to review emergency plans and provide its findings and determinations for use in licensing proceedings. In this connection, FEMA relies on Regional Assistance Committees (RACs) to review emergency plans. These committees are set up in each region essentially to assist State and local officials in the development of emergency plans, and consist of representatives from the NRC, the Environmental Protection Agency, the Departments of Health and Human Services, Energy, Transportation, Agriculture, and Commerce, and other Federal departments or agencies as appropriate.³ The RAC is chaired by the FEMA Regional Representative. Each federal agency member reviews the emergency plans.

Pursuant to a request from the NRC, FEMA arranged for a RAC to review the LILCO emergency plan, referred to as the LILCO Transition Plan.⁴ Representatives from six federal

(Footnote Continued)

FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability. Emergency preparedness exercises (required by paragraph (b) (4) of this section and Appendix E, Section F of this part) are part of the operational inspection process and are not required for any initial licensing decision.

³ See 44 C.F.R. § 351.10 (1983).

⁴ See Memorandum in Support of FEMA's Appeal of an Order of the Atomic Safety and Licensing Board and Request for a Stay (May 21, 1984) (affidavit of Louis O. Giuffrida at 2-3).

agencies, plus two FEMA consultants, conducted the review of Revisions I and III of the plan. Their individual comments were consolidated into a single plan review document and the document was the subject of a RAC meeting at the FEMA offices in New York City on January 20, 1984.⁵ The final review document was submitted to the NRC on March 15, 1984.⁶

FEMA filed its testimony on April 18. It consisted of textual material prepared by four witnesses, including the RAC Chairman, plus several attachments, including the RAC Final Report. Two days later, intervenor Suffolk County served on FEMA a request that it produce various documents.

The County requested:

All documents that were produced in connection with, or in any way relate to the FEMA Regional Assistance Committee ("RAC") review of the Lilco Transition Plan for the Shoreham Nuclear Power Station, including, but not limited to . . . "[a]ll memoranda, correspondence, questions, comments, reports, evaluations, ratings, summaries, notes, . . . drafts, . . . and transcripts, minutes, summaries or notes of meetings, discussions or conferences including telephone conferences, among RAC members or others relating to the RAC review"

⁵ Id. (affidavit of Roger B. Kowieski at 6).

⁶ Id. (affidavit of Louis O. Giuffrida at 2).

⁷ See Suffolk County Request for Production of Documents by FEMA (April 20, 1984) at 2.

On May 8, Suffolk County filed with the Licensing Board a motion to compel a response to its request for the production of documents. Informal discussions led to the release of various documents but during a conference among the parties and the Licensing Board on May 9, FEMA indicated that it would assert the so-called executive or deliberative process privilege with respect to thirty-seven documents. This privilege protects from public disclosure intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.⁸ The privilege may be invoked in NRC proceedings.⁹

The Licensing Board established a schedule for the filing of a list of the documents, the submission of briefs, and in camera submission of the documents themselves. Following the receipt of all materials, the Licensing Board,⁴ during a telephone conference call on the afternoon of May 18, announced its ruling ordering the release of thirty of

⁸ Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967).

⁹ Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974); Consumers Power Co. (Midland Plant, Units No. 1 & 2), ALAB-33, 4 AEC 701 (1971).

the thirty-seven documents. The Board followed up its oral ruling with a memorandum and order issued later that day.¹⁰ By companion order, the Board nonetheless stayed its decision briefly in order to permit FEMA to seek a stay pending appeal from us. Absent our grant of such a stay, the documents were to be tendered to Suffolk County no later than 5 p.m. on Monday, May 21.

On the afternoon of May 21, FEMA filed an appeal from the Licensing Board's order accompanied by a motion for a stay of the Board's decision. Later that afternoon, we entered an ex parte emergency stay to protect our jurisdiction, called for the submission of written responses to the FEMA motion by no later than 9 a.m. on Wednesday, May 23, and set the motion for oral argument to be held later that morning in Bethesda, Maryland. Oral argument was limited to the question of whether the emergency stay should be continued pending full consideration and disposition of FEMA's appeal from the Licensing Board's decision.

Immediately following the argument, we orally announced our intention to continue the stay pending disposition of the merits of FEMA's appeal on an expedited basis. This order briefly explains our decision and establishes an

¹⁰ Memorandum and Order Ruling on Suffolk County Motion to Compel Production of Documents by FEMA (May 18, 1984) (unpublished).

expedited schedule for consideration of the merits of the appeal.

Discussion

In determining whether a stay should be granted we apply 10 C.F.R. § 2.788(e), which calls upon us to consider:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

On the basis of the papers before us and the oral argument, it appears that the FEMA appeal presents serious legal issues on which that agency may well be entitled to prevail, at least in part. Further, the stay motion was accompanied by the sworn statements of the FEMA Director, the Chief of its Natural and Technological Hazards Division, and the Chairman of the RAC concerned with the LILCO Transition Plan.¹¹ Each of those officials maintain that public disclosure of the documents in question would adversely affect the discharge of the functions assigned to the RACs. For present purposes, we must accept that

¹¹ Affidavits of Louis O. Giuffrida, Philip McIntire and Roger B. Kowieski.

avermment. In the circumstances, then, FEMA clearly would suffer irreparable harm were the stay not continued to await our decision on the merits of its appeal. For a termination of the stay at this juncture would mean that the documents would have to be released immediately, with the consequence that the controversy would become moot and, thus, FEMA would be deprived of appellate consideration of its claim that it has a legal right to withhold disclosure.

We need add only that the overall public interest, including the interest of the parties to the proceeding, would not be injured by continuing the stay. During the time necessary for resolving the issues, the hearing before the Licensing Board can continue with other witnesses, so very little delay should result. At oral argument, we indicated that we would suggest that the Licensing Board defer the presentation by FEMA witnesses until we have been able to resolve this appeal, and we understand that the Licensing Board has done so.¹²

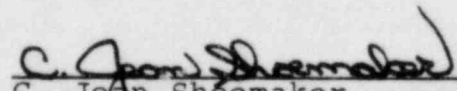
Briefs from all parties addressing the merits of the appeal shall be filed simultaneously. They must be in our

¹² FEMA witnesses were scheduled to testify beginning May 29 but also will be available for additional testimony in early July. We anticipate determining this appeal in sufficient time for Suffolk County to depose FEMA's witnesses (with or without prior release of the documents, depending on our decision) in advance of their July scheduled appearance.

hands, and in the hands of other parties, no later than the close of business on Friday, June 1, 1984. Oral argument will be held at 10 a.m. on Thursday, June 7, 1984, in the NRC Public Hearing Room, Fifth Floor, East-West Towers Building, 4350 East-West Highway, Bethesda, Maryland. Each side will have one hour for the presentation of oral argument. The names of counsel intending to participate in the argument are to be supplied to the Secretary to this Board by letter mailed no later than June 1, 1984.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board